



THE ARMY LAWYER

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Lore of the Corps

Thirty Years of Service to the Regiment: Philip Byrd Eastham Jr. (1950-2016)

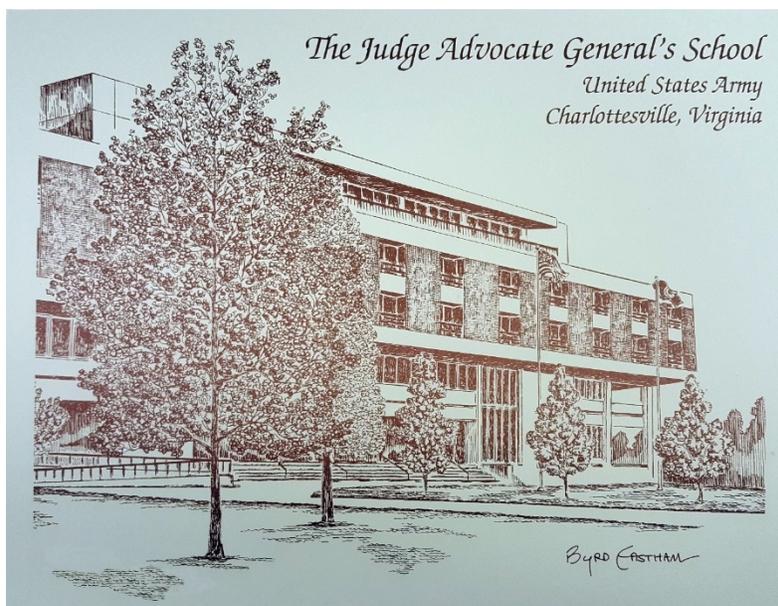
Fred L. Borch
Regimental Historian

For thirty years, Philip Byrd Eastham, Jr. was a constant presence at The Judge Advocate General's Legal Center and School (TJAGLCS), and his contributions to our Regiment during those years were remarkable. This is his story.

Born in December 1950, Byrd grew up in rural Fauquier County, Va. He came from a long line of native Virginians, as his ancestors first arrived in what was then a British colony in 1629. In 1973, Mr. Eastham graduated Phi Beta Kappa from the College of William and Mary with a Bachelor of Arts. William and Mary also honored him with the Lord Botetourt Medal.¹ Byrd then studied in the United Kingdom, where he obtained a second Bachelor of Arts and also Master of Arts in Art History from Trinity College, Cambridge University.²

In 1976, then First Lieutenant Eastham, Adjutant General's Corps, was assigned to The Judge Advocate General's School, U.S. Army (TJAGSA), where he served as the Chief of the Visitor's Bureau. That same year, 1LT Eastham made his first long-lasting contribution to our Corps when he revived the TJAGSA Alumni Association's *Newsletter*. This publication (subsequently published as the *Regimental Reporter* after the Corps received 'Regimental' status in 1986),³ had fallen into a long hiatus. Byrd's revival of it ensured that alumni, and especially retirees, received news about both TJAGSA and the Corps.⁴

While serving in the Visitor's Bureau, 1LT Eastham "would occasionally be seen sketching at his desk" and, since his artistic skills were admired by TJAGSA's leadership, Byrd was hired as an artist/illustrator when he left active duty in 1981.⁵



From the beginning of his long tenure as an Army civilian employee, Mr. Eastham worked "closely with the faculty in developing a broad range of graphic arts products," including textbook and lecture program covers.⁶ Over the years, Byrd also designed a number of t-shirt logos celebrating the annual conferences held at TJAGSA (today's World Wide Continuing Legal

Education conference). He also did some of the artwork for the Regimental Distinctive Insignia adopted by the Corps in 1986,⁷ and developed the logo of the U.S. Army Claims Service. Finally, Mr. Eastham worked with faculty and visual media personnel to develop artwork incorporated into instructional videos.⁸

Mr. Eastham also was in charge of the design and layout of the School's "Annual Bulletin," which contained the Commandant's annual report, resident and non-resident course catalogues, and information about various academic

¹ The Lord Botetourt Medal is presented each year to the undergraduate student "who has most distinguished him- or herself in scholarship." *THE LORD BOTETOURT MEDAL, COLLEGE OF WILLIAM & MARY*, <http://www.wm.edu/sites/commencement/awards/lord-botetourt-medal/index.php> (last visited November 4, 2016). During the spring semester, academic department chairs are notified of undergraduate students whose academic records merit their consideration for the Botetourt Medal. *Id.* Those department chairs are asked to submit letters of recommendation on behalf of eligible students whom they wish to see considered for this singular honor. *Id.*

² *The Byrd-Man of TJAGSA*, REGIMENTAL REPORTER, Fall 1989, at 7.

³ For more on the Corps' status as a Regiment, see Fred L. Borch, *The Origin of the Corps Distinctive Insignia*, THE ARMY LAWYER, Oct. 2012, 1-3.

⁴ REGIMENTAL REPORTER, *supra* note 2.

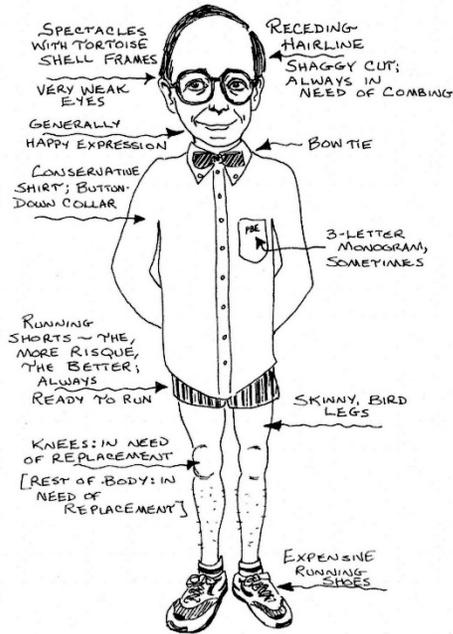
⁵ *Id.*

⁶ *Id.*

⁷ Borch, *supra* note 3.

⁸ REGIMENTAL REPORTER, *supra* note 2.

"THE BYRD MAN OF TJAGSA"
[A BYRD'S-EYE VIEW]



programs.⁹ This bulletin is still published on a yearly basis, although it now contains additional information on the activities of the Legal Center.

Byrd was an avid historian, especially when it involved the Charlottesville community and the University of Virginia. In 1987, he was commissioned by a New York publisher to develop a series of drawings for a book titled *Mr. Jefferson's Last Act*. Mr. Eastham's graphics have been used in promotional and educational materials for a variety of local sights, including: Ash Lawn, the home of President James Monroe; Monticello, the home of President Thomas Jefferson; and the University of Virginia's Bayly Museum of Art (renamed the Fralin Museum of Art in 2012).¹⁰

During the 1980s, Byrd's talents also were on display when his drawing of the building housing TJAGSA was reproduced and given as a gift to each departing member of the faculty and staff. Occasionally, Byrd also produced "an original sketch" that depicted the departing person "in a humorous manner." Accompanying this Lore of the Corps are both the drawing of the building and a self-portrait of Byrd. The latter exemplifies Mr. Eastham's self-deprecating sense of humor and drawing talents.¹¹

As the self-portrait suggests, Byrd was an avid runner. He ran two Marine Corps marathons and participated in the

"Run for Your Life" program in which individuals at TJAGSA kept records of their weekly running mileage and then were recognized with a certificate signed by the TJAGSA commandant when they achieved certain running mileage goals. The accompanying photograph shows Byrd receiving a certificate attesting to his running abilities from Colonel Paul Jackson "Jack" Rice, about 1986.

Mr. Eastham retired in the summer of 2006, after a combined thirty years of military and civilian Federal Service. A few months later, in recognition of his many contributions to our Corps, Byrd Eastham was made an Honorary Member of the Regiment. This is an honor accorded very few men and women in history.¹²

In retirement, Byrd began a new career in the antiques business as the co-owner (with Ms. Jane deButts) of the Eternal Attic, a consignment shop located on Ivy Road in Charlottesville, Va. He left that business in 2011.¹³

After a long battle with Myeloma (cancer), Philip Byrd Eastham Jr. died at his home in Charlottesville on July 23, 2016. He was 65 years old. Byrd was survived by his spouse James Wootton; two brothers, and three nieces and a nephew. But he is not forgotten by those in the Corps who knew him, if for no other reason than Byrd was universally liked and admired by all.¹⁴



Byrd receives Running Award from Colonel Jack Rice

⁹ *Id.*

¹⁰ *Id.* Waldo Jaquith, *UVA Art Museum Renamed*, CVILLENEWS, <https://cvillenews.com/2012/05/22/uva-museum-renamed/> (last visited Nov. 3, 2016)

¹¹ REGIMENTAL REPORTER, *supra* note 2.

¹² Philip Byrd Eastham, Jr., DAILY PROGRESS, Aug. 1, 2016, B6.

¹³ *Id.*

¹⁴ *Id.*

The Military Lending Act Part II: The Department of Defense Strikes Back!

Major Moises A. Castillo*

The current rules under the Military Lending Act are akin to sending a soldier into battle with a flak jacket but no helmet. To give our troops full-cover protection, the rules need to be expanded . . . The Department of Defense's proposed revisions will go a long way toward better shielding our military from high-cost credit products.¹

I. Introduction

It is Halloween 2016, and Sergeant (SGT) Estoye Enquiebra walks into your office. He pulls out a contract that looks like a payday loan transaction. Before you get an opportunity to fully review it, he says, "Sir, they are going to take my car, and I don't know what to do!" As a legal assistance attorney, you have read about the Military Lending Act (MLA) and have helped a few Soldiers with payday loan lenders, but this one is different: this is a vehicle title loan.² You notice that the loan has a repayment term of 190 days. From what you remember, these types of loans are covered by the MLA. As you continue to interview your client, you find out he is struggling to pay his bills. Your initial research shocks you: the MLA covers vehicle title loans but only if the term is 181 days or less. Nothing promising appears in your initial research. You ask him, "SGT Enquiebra, have you thought about going to the Army Emergency Relief³ (AER) office for financial assistance?" Your client frowns and says, "So, there is nothing that can be done about my car?" Before you answer that question, you remember someone mentioning that there is a new MLA.

On October 1, 2015, the new and improved 2015 MLA went into effect.⁴ The MLA was amended after the Department of Defense (DoD) and consumer advocates recognized that the original MLA was too narrow in scope

and failed to protect Soldiers as intended.⁵ The 2015 MLA broadened the definition of consumer credit and closes the loopholes that allowed lenders to sidestep the rules meant to protect servicemembers.⁶ As a result, many credit transactions that were not covered by the 2007 MLA are now covered. The 2015 MLA also strengthened servicemembers' consumer protections by extending MLA coverage to a broader range of credit products.⁷

This article is laid out in three parts. Part II of this article explains the history of the MLA and why Congress had to act and declare war on predatory lenders. That section of the article also examines the 2007 MLA's effectiveness in protecting servicemembers. Part III discusses the recent changes to the MLA and its added protection to servicemembers. Part IV provides legal assistance attorneys with useful tips to help Soldiers navigate the 2015 MLA protections. Lastly, the conclusion offers some final thoughts about the 2015 MLA and its impact on servicemembers.

II. Background

A. Truth in Lending Act: How We Got Here.

After World War II, consumer credit transactions grew exponentially.⁸ Consumers began to borrow more in order

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¹ *Consumer Financial Protection Bureau Report Finds Loopholes in Military Lending Act Rules Rack up Costs for Servicemembers*, COMMUNITY BANK INSIGHT (Dec. 29, 2014), <https://www.cbinsight.com/press-release/consumer-financial-protection-bureau-report-finds-loopholes-in-military-lending-act-rules-rack-up-costs-for-servicemembers> (quoting CFPB Director Richard Cordray).

² A vehicle title loan, also known as car title loans, is a loan that is secured by the title of a vehicle owned by the borrower that is free and clear. U.S.

DEPT OF DEF., REPORT ON PREDATORY LENDING PRACTICES DIRECTED AT MEMBERS OF THE ARMED FORCES AND THEIR DEPENDENTS 16 (Aug. 9, 2006), http://archive.defense.gov/pubs/pdfs/Report_to_Congress_final.pdf.

³ See *infra* Appendix C, Army Emergency Relief (AER) for new updates to the AER.

⁴ Limitations on Terms of Consumer Credit Extended to Service Members and Dependents, 32 C.F.R. pt. 232 (2015) [hereinafter 2015 MLA]; see also 10 U.S.C. 987 (2015). The enforcement provisions became effective on October 3, 2016. 32 C.F.R. § 232.12 (2015).

⁵ Jean Ann Fox, *The Military Lending Act Five Years Later, Impact on Servicemembers, the High-Cost Small Dollar Loan Market, and the Campaign Against Predatory Lending*, CONSUMER FED'N AM. 19, 97, 100 (May 29, 2012), <http://www.consumerfed.org/pdfs/Studies.MilitaryLendingAct.5.29.12.pdf>.

⁶ 2015 MLA, 80 Fed. Reg. 43,606.

⁷ *Id.* at 43,560 (explaining that the 2015 MLA redefines credit transaction to better align itself with Truth in Lending Act; as a result, the 2015 MLA covers almost every credit transaction within the marketplace).

⁸ Christopher L. Peterson, *Truth, Understanding, And High-Cost Consumer Credit: The Historical Context of the Truth in Lending Act*, 55 FLA. L. REV. 864, 875 (Jul. 2003).

“to finance personal goods” such as “home furnishings, jewelry, pianos,” and “automobiles.”⁹ Former Senator Paul H. Douglas of Illinois recognized that the lack of transparency in the marketplace made it almost impossible for consumers to evaluate the cost of credit.¹⁰ He believed “meaningful credit disclosure” was the solution because it would apprise consumers of the true cost of credit and facilitate informed “credit shopping.”¹¹

Congress enacted the Truth in Lending Act (TILA) in 1968 to level the playing field between consumers and creditors.¹² Prior to TILA’s enactment, consumers were at the mercy of creditors’ honesty and good faith.¹³ Predatory creditors would charge consumers unconscionable interest rates because most consumers did not understand the true cost of credit.¹⁴ For example, a 1964 survey showed that families underestimated the average interest rate on consumer debt by 16 percent.¹⁵

After an intense battle against the credit industry, Congress passed legislation that required creditors to disclose the true cost of credit in a standard uniform approach.¹⁶ The most critical “disclosures were the finance charge and the annual percentage rate.”¹⁷ These disclosures helped fill the information gap between consumers and creditors. However, disclosure requirements alone could not protect the most vulnerable consumers, such as young and inexperienced servicemembers. These consumers continued to be targeted by predatory lenders.¹⁸

B. MLA: Protecting Our Servicemembers

1. DoD Report on Predatory Lending Practices

In 2006, the DoD issued a report on predatory lending practices directed at servicemembers.¹⁹ In the report, the DoD acknowledged that personal finance education alone could not combat predatory lending.²⁰ In addition, the DoD found that traditional tools such as the Armed Forces Disciplinary Control Board (AFDCB), were not suited to curb predatory lending: The AFDCB was not designed to deal with the high concentration of predatory lenders near military installations whose business practices fall within state legal limits.²¹ The report also found that “young and inexperienced” servicemembers were targets for predatory lenders and highlighted the unscrupulous practices creditors engaged in to squeeze money out of them.²² These practices included aggressively marketing short-term loans with exorbitant interest rates.²³ If the servicemembers could not repay the loan within the term of the loan contract, the lender persuaded the servicemembers to roll-over the loan for additional fees.²⁴ As a result, the servicemember became trapped in a cycle of debt with little hope of escape. The report also identified specific forms of predatory loans.²⁵

2. Types of Predatory Loans

The DoD’s report to Congress found six forms of credit transactions that were financially devastating to servicemembers.²⁶ These credit transactions were internet lending, military installment loans, car title lending, rent-to-own programs, tax refund anticipation, and payday loans.²⁷ All of these credit transactions have several commonalities: “Lending without regard to the borrower’s ability to repay the

⁹ *Id.* at 864.

¹⁰ Matthew A. Edwards, *Empirical and Behavioral Critiques of Mandatory Disclosure: Socio-Economics and the Quest for Truth in Lending*, 14 CORNELL J.L. PUB. POL’Y 207 (Summer 2005).

¹¹ *Id.* at 211.

¹² NATIONAL CONSUMER LAW CENTER, TRUTH IN LENDING 31 (9th ed. 2015).

¹³ Edwards, *supra* note 10, at 207.

¹⁴ *Id.*

¹⁵ NATIONAL CONSUMER LAW CENTER, *supra* note 12, at 1. Families believed that consumer debt was 8 percent when in reality it was closer to 24 percent. *Id.*

¹⁶ *Id.*

¹⁷ Peterson, *supra* note 8, at 880.

¹⁸ U.S. DEP’T OF DEF., REPORT ON PREDATORY LENDING PRACTICES DIRECTED AT MEMBERS OF THE ARMED FORCES AND THEIR DEPENDENTS, 4 (Aug. 9, 2006) [hereinafter DOD REPORT 2006], http://archive.defense.gov/pubs/pdfs/Report_to_Congress_final.pdf.

¹⁹ *Id.* at 4.

²⁰ DOD REPORT 2006, *supra* note 18, at 27. The Department of Defense (DoD) emphasized that financial readiness is critical to mission readiness within the military. Limitations on Terms of Consumer Credit Extended to Service Members and Dependents, 72 Fed. Reg. 50, 581 (Aug. 31, 2007) (codified at 32 C.F.R. pt. 232, Oct. 1, 2007) [hereinafter 2007 MLA]. As such, the DoD made finance education a priority for all new inductees and institutes personal finance training for all servicemembers. DOD REPORT 2006, *supra* note 18, at 27.

²¹ DOD REPORT 2006, *supra* note 18, at 28. The Armed Forces Disciplinary Control Board (AFDCB) can recommend that a business whose practices is contrary to Soldier morale and discipline be made off limits to servicemembers. U.S. DEP’T OF ARMY, REG. 190-24, ARMED FORCES DISCIPLINARY CONTROL BOARDS AND OFF-INSTALLATIONS AND OPERATIONS para. 2-1 (27 July 2006). The AFDCB is suited to take on one business at a time rather than an industry of lenders. DOD REPORT 2006, *supra* note 18, at 28.

²² DOD REPORT 2006, *supra* note 18, at 4.

²³ *Id.* at 4, 63.

²⁴ *Id.* at 45.

²⁵ *Id.* The risky loans listed in the DoD report are discussed in more detail *infra* in section II.B.2 of this article, Types of Predatory Loans.

²⁶ *Id.* at 10-20.

²⁷ *Id.*

loan; excessive fees and excessive interest rates; balloon payments with unrealistic repayment terms; wealth stripping associated with repeat rollovers/financing; and fraud and deception.”²⁸

These lenders typically use military-friendly advertising techniques to attract servicemembers such as placing banners that say “support our troops” outside the storefront.²⁹ For example, prior to the 2007 MLA, a young Marine took out a total of eight payday loans and two military installment loans within the first five months after arriving to his first duty station and accrued more than \$4,800 in debt to predatory lenders.³⁰

Internet lending is especially harmful. Internet lending companies offer short-term loans that are similar to payday loans, but the credit transaction is generally initiated and closed in the “virtual marketplace.”³¹ The companies aggressively market the loans to military customers and promise quick and easy money regardless of credit history.³² They collect the consumer’s “social security number and checking account information” through lead generators and sell it to lenders in exchange for a fee.³³ The fact that the transactions are online means that servicemembers have access to these loans anywhere in the world.³⁴

For example, if SGT Enquebra goes online and types in the words military loans, he will find numerous links to companies that claim to provide quick and easy loans. If SGT Enquebra clicks one of these websites and initiates an application, he will be asked to provide his personal information to include his social security number and email address. Lenders will have enough information to reach out to SGT Enquebra in order to offer him risky financial products. These financial transactions will most likely send him into a debt spiral. In response to this study, Congress acted swiftly to protect servicemembers and directed the

Secretary of Defense to prescribe regulations that would curtail predatory lending within the military community.³⁵

3. Congressional Response

In 2007, Congress passed the John Warner National Defense Authorization Act for Fiscal Year (FY) 2007 otherwise known as the 2007 Military Lending Act (MLA).³⁶ Under 10 U.S.C. 987, Congress directed the Secretary of Defense to establish and implement regulations to protect servicemembers from predatory lenders.³⁷ At the time, the DoD made the decision to only regulate three credit products that were initially listed in its 2006 report.³⁸ The decision was based upon the short timetable the DoD was given to issue the implementing regulation and the belief that “only certain credit products posed the most severe risk to servicemembers.”³⁹

4. Credit Products Covered by the 2007 MLA

The 2007 MLA only covered three types of financial products: (1) payday loans, (2) refund anticipation loans, and (3) vehicle title loans.⁴⁰ At the time, consumer advocates argued against the decision to regulate only a narrow group of credit products because they did not believe it would curb predatory lending.⁴¹ However, the DoD accepted this risk in order to prevent unintended consequences on servicemembers’ access to consumer credit.⁴²

a. Payday Loans

The 2007 MLA defined payday loans as a closed credit loan with a financed amount of “\$2,000 or less.”⁴³ The loan “term must be for 91 days or less,” and be “based on a check held for future deposit or electronic access” to a covered

²⁸ 2007 MLA, 72 Fed. Reg. 50, 581.

²⁹ DOD REPORT 2006, *supra* note 18, at 22.

³⁰ *Id.* at 41. Military installment loans are long-term unsecured loans products offered exclusively to military members. Fox, *supra* note 5, at 61. These loans can be used for almost any purpose, to include managing everyday finances. PIONEER SERVICES DIVISION MIDCOUNTRY BANK, <https://www.pioneeremilitaryloans.com/military-loans/who-can-apply> (last visited Feb. 24, 2016).

³¹ DOD REPORT 2006, *supra* note 18, at 15-16. A virtual marketplace is “a simulation of the real marketplace where buyers and sellers meet to negotiate transactions.” *What is Virtual Marketplace*, IGI GLOBAL, DISSEMINATOR OF KNOWLEDGE, <http://www.igi-global.com/dictionary/virtual-marketplace/31721> (last visited Feb. 4, 2016).

³² DOD REPORT 2006, *supra* note 18, at 15-16; See Jean Ann Fox & Anna Petriani, *Internet Payday Lending: How High-priced Lenders Use the Internet to Mire Borrowers in Debt and Evade State Consumer Protections*, CONSUMER FED’N AM. 14 (Nov. 30, 2014), http://www.consumerfed.org/pdfs/Internet_Payday_Lending113004.PDF.

³³ DOD REPORT 2006, *supra* note 18, at 15; CONSUMER FIN. PROT. BUR., (Nov. 6, 2013), <http://www.consumerfinance.gov/askcfpb/1577/applying-payday-loan-online-safe.html>.

³⁴ DOD REPORT 2006, *supra* note 18, at 15.

³⁵ John Warner Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, 120 Stat. 2083 (2006); 2007 MLA, 72 Fed. Reg. 50, 584. The Act was codified at 10 U.S.C. 987. *Id.*

³⁶ *Id.*; see also Fox, *supra* note 5, at 4.

³⁷ 2007 MLA, 72 Fed. Reg. 50, 584.

³⁸ *Id.* at 50, 582.

³⁹ 2015 MLA, 80 Fed. Reg. 43,567. DoD had a short timetable because “[t]he 2006 Act, enacted on October 17, 2006, was scheduled to take effect in less than one year” *Id.*

⁴⁰ Fox, *supra* note 5, at 5.

⁴¹ 2007 MLA, 72 Fed. Reg. 50, 585.

⁴² *Id.* at 50,584. The unintended consequences refer to the reduction of the “availability of credit that is benign or beneficial to servicemembers and their families.” *Id.*

⁴³ Fox, *supra* note 5, at 5.

borrower's account for future payment.⁴⁴ These loans contributed to the cycle of debt because the business model relied on a borrower's inability to afford the loan, thus requiring frequent roll overs with high interest fees.⁴⁵

b. Tax Refund Anticipation Loans

This loan was defined as a closed end credit transaction in which the covered borrower grants the lender the right to receive a part of all of the covered borrower's tax refund or agrees to pay the loan back with the proceeds of the covered borrower's tax refund.⁴⁶ These loans are very expensive credit transactions where lenders might charge between "40 to 700 percent annual interest for ten-day loans."⁴⁷

c. Vehicle Title Loans

The 2007 MLA defined vehicle title loans as "closed end credit transactions with a term of 181 days or less that are secured by the title to the vehicle owned by the covered borrower."⁴⁸ Vehicle title loans are designed to work like payday loans and are "structured to be unaffordable."⁴⁹ According to the President of TitleMax in a deposition, "Customer loans are typically renewed at the end of each month and thereby generate significant additional interest payments."⁵⁰

The passage of the 2007 MLA was a significant step to curb these risky loans.⁵¹ For example, the 2007 MLA was credited with significantly reducing the number of payday loan store fronts near military installations.⁵² Despite the law's success, consumer advocates and the DoD recognized more needed to be done.⁵³

5. The Effect of the 2007 MLA

The narrow scope of the 2007 MLA allowed lenders to develop business practices to avoid the MLA requirements.⁵⁴ In order to sidestep the regulation, predatory lenders offered Soldiers loans that were greater than \$2,000 or with terms of ninety-two days or more.⁵⁵ Soldiers falling prey to these new financial products were no longer protected by the 2007 MLA. The result was that predatory lenders continued to charge Soldiers triple-digit interest rates and required them to sign mandatory arbitration clauses.⁵⁶ For advocacy groups seeking to protect servicemembers from predatory lenders, this outcome was untenable and highlighted the need for changes to the 2007 MLA.⁵⁷

6. Change Was Necessary

In April 2014, the DoD issued a report to Congress on the 2007 MLA concluding that changes to the MLA were essential.⁵⁸ In particular, the DoD—in consultation with the Consumer Financial Protection Bureau (CFPB), consumer advocacy groups, states' attorneys general, and other interested parties—concluded that the MLA required a more comprehensive approach to deal with the changing market place.⁵⁹ Despite the hard work put into the legislation, it was clear that the MLA's current scope was insufficient to deal with most predatory lending.⁶⁰ More importantly, the DoD's financial literacy campaign in combination with the 2007 MLA could not dissuade vulnerable servicemembers from engaging in financially risky behavior.⁶¹ In order to combat predatory lenders' "aggressive credit marketing campaigns," the DoD determined that it was necessary to limit servicemembers' high-cost options.⁶² The goal was to limit

⁴⁴ *Id.*

⁴⁵ Center for Responsible Lending, *The State of Lending in America & its impact on U.S. Households: Payday Lending Abuses and Predatory practices*, CENTER FOR RESPONSIBLE LENDING 160 (Dec. 2012), <http://www.responsiblelending.org/state-of-lending/State-of-Lending-report-1.pdf>.

⁴⁶ Fox, *supra* note 5, at 5.

⁴⁷ DoD REPORT 2006, *supra* note 18, at 20.

⁴⁸ *Id.* at 5.

⁴⁹ Center for Responsible Lending, *supra* note 45, at 122.

⁵⁰ *Id.* at 120. In 2013, class action car-title data showed that the median annual percentage rate (APR) for car-title borrowers was 300 percent. *Id.* at 119. In addition, "60% of 2008 New Mexico car-title borrowers lost their car that year to repossession." *Id.* at 120.

⁵¹ Fox, *supra* note 5, at 21.

⁵² *Id.* at 9.

⁵³ 2015 MLA, 80 Fed. Reg. 43,563.

⁵⁴ Tammy Duckworth, *Military Lending Act Speech*, YOUTUBE (May 8, 2015), <https://www.youtube.com/watch?v=zY1L0PmkfJQ> [hereinafter Duckworth Speech]. House Committee on Armed Services archives all

hearings and markups on their official bipartisan youtube page. <http://armedservices.house.gov/index.cfm/hearing-video-and-archive>. Congresswoman Tammy Duckworth is a U.S. Representative for Illinois's 8th Congressional District. <http://duckworth.house.gov/>; see also National Defense Authorization Act FY 16, H.R. 1735, 114th Cong. § 594, Log 143 (as reported by H. Comm. On Armed Serv., Apr. 30, 2015).

⁵⁵ Duckworth Speech, *supra* note 54.

⁵⁶ *Id.*

⁵⁷ Fox, *supra* note 5, at 16, 19, 60.

⁵⁸ U.S. DEP'T OF DEF., REPORT: ENHANCEMENT OF PROTECTIONS ON CONSUMER CREDIT FOR MEMBERS OF THE ARMED FORCES AND THEIR DEPENDENTS, 18 (April 2014) [hereinafter DOD REPORT 2014], http://www.consumerfed.org/pdfs/140429_DoD_report.pdf.

⁵⁹ 2015 MLA, 80 Fed. Reg. 43, 561, 43,563; Telephone Interview with Eleanor Blume, Counsel Office of Regulations, Consumer Financial Protection Bureau (Nov. 4, 2015); DOD REPORT 2014, *supra* note 59, at 35-36.

⁶⁰ 2015 MLA, 80 Fed. Reg. 43,563.

⁶¹ DOD REPORT 2014, *supra* note 58, at 8-9.

⁶² DOD REPORT 2014, *supra* note 58, at 8-9.

access to loans that are not “fiscally prudent and highlight alternate” solutions to financial problems.⁶³

A study conducted by the Consumer Federation of America (CFA), five years after the 2007 MLA was passed, found that the law was successful in protecting servicemembers from predatory lending as defined by the 2007 MLA.⁶⁴ However, the legal definition of the products made it easy for predatory lenders to take advantage of the loopholes.⁶⁵ Moreover, the study also found the law had no impact on other risky high cost loans not covered by the 2007 MLA that are similar to payday loans.⁶⁶

For instance, the 2006 DoD report listed military installment loan companies under its list of predatory lenders.⁶⁷ These companies, not covered by the 2007 MLA, offer small loans with high interest rates that are similar to payday loans.⁶⁸ Many military installment loan companies were able to exploit servicemembers because those companies were granted exemptions from state usury laws.⁶⁹ They were able to receive the exemption because they offered loans “exclusively to non-resident military members.”⁷⁰ In light of these challenges, the DoD went through a significant paradigm shift in how it views and confronts predatory lending in order to close the loopholes in the law. Having discussed the origins of the 2007 MLA and its limited effects in curtailing predatory lending, we now turn to the 2015 MLA and discuss its expanded coverage of credit products sold to covered borrowers.

III. 2015 MLA: Closing the Loopholes

A. Consumer Credit

Originally, when the DoD first took steps to prescribe regulations implementing the 2007 MLA, it focused on a small number of credit products because it was concerned with the unintended market consequences of regulating a vast

array of credit products.⁷¹ Now, the DoD is taking a comprehensive approach. As a result, the 2015 MLA defines consumer credit as “credit offered or extended to a covered borrower primarily for personal, family, or household purposes that is subject to a finance charge or payable by written agreement in more than four installments.”⁷² This broader definition covers a wider range of credit products (such as credit cards) and is defined consistently with credit subject to TILA.⁷³ However, credit cards are temporarily exempt from the definition of consumer credit until October 3, 2017.⁷⁴ The 2015 MLA also clarified which consumers are protected under the act.⁷⁵

B. Covered Borrower

The 2007 MLA included dependents as covered borrowers, but the definition lacked clarity. Under the 2007 MLA, creditors could argue that the term dependent was too broad and could include individuals the law was not intended to protect. The 2015 MLA’s definition of dependent is now in accordance with 10 U.S.C. 987.⁷⁶ The definition of dependent for MLA purposes is now “consistent with the term used to establish eligibility for military medical care,” and clarifies “which family members are covered under 10 U.S.C. 987.”⁷⁷

The 2015 MLA also limits the servicemembers eligible for MLA consumer protections. The term in the new regulation for those who are protected by the MLA is “covered borrower.”⁷⁸ It specifies that only servicemembers on active duty at the time they entered into the credit transaction are afforded the MLA consumer protections.⁷⁹ Additionally, the 2015 MLA specifies that once servicemembers are no longer on active duty, they lose the MLA consumer protections and are no longer considered covered borrowers.⁸⁰ This is a significant point for a legal assistance attorney.

⁶³ *Id.*

⁶⁴ Fox, *supra* note 5, at 9.

⁶⁵ *Id.* at 10.

⁶⁶ *Id.* at 61.

⁶⁷ DoD REPORT 2006, *supra* note 18, at 10.

⁶⁸ Fox, *supra* note 5, at 61-62.

⁶⁹ DoD REPORT 2006, *supra* note 18, at 17-18.

⁷⁰ *Id.* at 17.

⁷¹ DoD REPORT 2014, *supra* note 58, at 32.

⁷² 2015 MLA, 80 Fed. Reg. 43,566.

⁷³ *Id.* at 43,563; *see also* NATIONAL CONSUMER LAW CENTER, *supra* note 12, at 1.

⁷⁴ 2015 MLA, 80 Fed. Reg. 43,612. Credit cards also have “limited exclusion for bona fide fees that are reasonable for that type of fee.” Eleanor

Blume, Recent Revisions to the Military Lending Act, at slide 26 (Nov. 3, 2015) (unpublished PowerPoint presentation) (on file with author).

⁷⁵ 2015 MLA, 80 Fed. Reg. 43,580.

⁷⁶ *Id.*; *see also* 2007 MLA, 79 Fed. Reg. 58,602-01, 58,602; PL 112-239 (Jan. 2, 2013).

⁷⁷ 2007 MLA, 79 Fed. Reg. 58,602-01, 58,602. For example, the MLA clarifies that a covered borrower’s dependents include the following: a “[s]pouse; a child under the age of 21; a child under the age of 23 enrolled full-time at an approved institution of higher learning approved by the administering Secretary. . . a child incapable of self-support because of a mental or physical incapacity that occurs under clause (i) or (ii) . . . dependent on the member . . . for over one-half of the child’s support . . . ; a parent or parent-in-law . . . dependent on the member . . . for over one-half of his support . . . ;” 10 U.S.C. 1072(2)(A), (D) (E) (2008). The definition of dependent also includes persons under 10 U.S.C. 1072 (2)(I). *Id.*

⁷⁸ 2015 MLA, 80 Fed. Reg. 43,607.

⁷⁹ *Id.* at 43,579.

⁸⁰ *Id.*

For instance, if SGT Enquiebra established a closed-end credit account before entering active duty, the closed-end credit account is not covered by the 2015 MLA because he was not a covered borrower at the time he established the account.⁸¹ Under this scenario, there is very little that the legal assistance attorney could do for him using the MLA. However, for a servicemember who qualifies as a covered borrower, the 2015 MLA caps the annual percentage interest rate on most credit transactions at 36 percent.⁸² After illustrating the importance of qualifying as a covered borrower, we now turn to one of the most important protections in the new MLA: specifically, the requirement for creditors to include almost every fee associated with the extension of credit when calculating the 36 percent annual interest cap.⁸³

C. Thirty-Six Percent Cap

The DoD recognized that creditors were selling unnecessary ancillary products to servicemembers, such as credit insurance products.⁸⁴ In response, the DoD amended the 2007 MLA to require creditors to include participation fees, credit insurance premiums, credit-related ancillary products, and other fees in its calculation of the 36 percent Military Annual Percentage Rate (MAPR) cap.⁸⁵ The DoD determined that these products are not appropriate for servicemembers because the military provides servicemembers with similar benefits and services.⁸⁶ It believes that these ancillary products significantly increase the cost of credit to consumers and provide little benefit to servicemembers.⁸⁷ In addition to this added protection regarding loan fees, the 2015 MLA prescribes new remedies for servicemembers and their legal counsel to use in order to dissuade predatory lenders from targeting servicemembers.⁸⁸

⁸¹ If SGT Enquiebra establishes an open-end line of credit while on active duty, this account will no longer be covered by the 2015 MLA once he leaves active duty because he is no longer a covered borrower. However, if the creditor violated the 2015 MLA while SGT Enquiebra was a covered borrower, then the contract is voidable and the creditor would be subject to the penalty and remedy provisions in 32 C.F.R. pt. 232.9 (2015). 32 C.F.R. § 232.2(a)(i)-(ii).

⁸² 2015 MLA, 80 Fed. Reg. 43,581.

⁸³ *Id.* at 43,582.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* The military provides benefits and services such as free health insurance. The military also continues to provide financial resources to servicemembers if they become ill or get into an accident. *Id.*

⁸⁷ *Id.*

⁸⁸ Violations of the 2015 MLA are discussed *infra* in section IV.B.3. . See 2015 MLA, 80 Fed. Reg. 43,611.

⁸⁹ Telephone Interview with Eleanor Blume, Counsel Office of Regulations, Consumer Financial Protection Bureau (Nov. 4, 2015) [hereinafter Blume interview]; 2015 MLA, 80 Fed. Reg. 43,591. In 2013, Congress authorized private enforcement actions when it passed the

D. Remedies and the Safe Harbor Provision

Prior to 2013, Soldiers did not have a private right of action against predatory consumers.⁸⁹ The 2015 MLA continues to provide servicemembers the ability to recover damages if a lender violates the MLA requirements.⁹⁰ Lenders who violate the MLA may be civilly liable for “actual damages, but not less than \$500 for each violation; appropriate punitive damages; or appropriate equitable or declaratory relief; and any other relief provided by law.”⁹¹ If a violation is proven, the creditor may be liable for the cost of the action and reasonable attorney fees.⁹² However, creditors can avoid liability by availing themselves of the MLA’s safe harbor provision.⁹³

The 2015 MLA provides creditors with defenses and a safe harbor.⁹⁴ First, a creditor who uses the MLA database or a consumer report from a nationwide consumer reporting agency to assess whether a consumer is a covered borrower is protected from liability.⁹⁵ The MLA database or nationwide consumer report is considered a “conclusive determination” that a consumer is or is not a covered borrower “so long as the creditor timely creates and . . . maintains a record of the information.”⁹⁶ Second, creditors may not be held civilly liable if a violation resulted from an unintentional error despite steps taken to avoid the error.⁹⁷ Legal assistance attorneys need to be aware of these potential creditor defenses as well as the federal agencies that can help servicemembers enforce their rights. One of those federal agencies is the CFPB. In 2010, Congress gave the CFPB authority to enforce the MLA and protect servicemembers from predatory lenders.⁹⁸

National Defense Authorization Act for Fiscal Year 2013 for violations of 10 U.S.C. 987. National Defense Authorization Act for Fiscal Year 2013, Pub. L. 112-239, 126 Stat. 1632 (2013).

⁹⁰ Blume interview, *supra* note 89.

⁹¹ *Id.*

⁹² *Id.*

⁹³ 2015 MLA, 80 Fed. Reg. 43,609.

⁹⁴ *Id.* This article does not discuss the safe harbor provision for credit card companies that charge a bona fide fee that is considered reasonable under the 2015 MLA. For more details on this safe harbor provision, refer to 80 Fed. Reg. 42,608-43,609.

⁹⁵ 2015 MLA, 80 Fed. Reg. 43,609. For additional information on the MLA database, refer to Appendix A, *infra*.

⁹⁶ *Id.*

⁹⁷ *Id.* at 43,611.

⁹⁸ CFPB, FTC receive authority to enforce Military Lending Act provisions, DODD FRANK UPDATE (Jan. 8, 2013), <http://www.doddfrankupdate.com/DFU/ArticlesDFU/CFPB-FTC-receive-authority-to-enforce-Military-Len-56919.aspx> [hereinafter CFPB].

IV. Protecting Our Clients

A. Consumer Financial Protection Bureau

The Dodd-Frank Act of 2010 established the CFPB in order to resolve the failures of consumer protection.⁹⁹ The CFPB was given the responsibility to supervise and enforce the laws covering “consumer financial products and services.”¹⁰⁰ In 2013, President Barack Obama signed the National Defense Authorization Act (NDAA) FY 13 giving the CFPB the authority to enforce the MLA.¹⁰¹ The CFPB can protect servicemembers against predatory lenders by citing MLA violations and taking curative enforcement actions against them.¹⁰² Despite the fact that the CFPB has only been in existence for a few years, the agency has been successful in protecting servicemember’s interests.

One of the best examples is the case of *In Re USA Discounters, LTD (USA Living)*. USA Discounters, Ltd was a privately-held company operating retail stores that sold furniture, electronics, and bedding.¹⁰³ The CFPB found that its retail stores were deceptively marketing to servicemembers and “misleading servicemembers.”¹⁰⁴ USA Discounters led servicemembers to believe that they had Servicemembers Civil Relief Act (SCRA) specialists who were independent agents working on the servicemember’s behalf.¹⁰⁵ In reality, the SCRA specialists were dependent on USA Discounters as its sole source of revenue.¹⁰⁶ USA Discounters settled with the CFPB and agreed to pay full restitution to servicemembers in the amount of \$350,000 and pay a civil monetary penalty.¹⁰⁷ Although the CFPB did not cite any MLA violations in this case, its message to unscrupulous companies was clear: the CFPB will not allow companies to “exploit unsuspecting servicemembers.”¹⁰⁸

⁹⁹ H.R. 4173, 111th Cong. (2010); *see also* CFPB, *supra* note 98.

¹⁰⁰ Morgan Lewis, *The Consumer Financial Protection Bureau: What It Is and What to Expect* 2-3 MORGAN LEWIS (Jan. 2012), http://www.morganlewis.com/pubs/lit_whitepaper_consumerfinancialprotectionbureau_jan2012.pdf

¹⁰¹ National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, 126 Stat. 1632 (2012); *see also* Buckley Sandler, *President Signs Bill Enhancing Enforcement of the Military Lending Act*, JDSUPRA (Jan. 14, 2013), <http://www.jdsupra.com/legalnews/president-signs-bill-enhancing-enforceme-84627/>.

¹⁰² CFPB, *supra* note 98.

¹⁰³ In the Matter of: USA Discounters, Ltd., No. 2014-CFPB-0011, 2014 WL 4472895 (Aug. 14, 2014).

¹⁰⁴ Angela Martin, *CFPB Enforcement Actions*, at slide 26 (Oct. 19, 2015) (unpublished PowerPoint presentation) (on file with author).

¹⁰⁵ In the Matter of: USA Discounters, Ltd., 2014 WL 4472895.

¹⁰⁶ *Id.*

B. Helping the Client

Legal assistance attorneys can help their clients by reviewing the contract and any written disclosures given to the client. However, reviewing the client’s documents will not be enough. Talk to the client about his or her service transaction with the creditor. Practitioners may find that creditors made misleading assertions and promises not memorialized in the written loan documents, which will be key in determining whether the creditor complied with the 2015 MLA. The steps below are a good starting point for legal assistance attorneys navigating the 2015 MLA.¹⁰⁹

1. Define the Problem

Before making any recommendations, a legal assistance attorney should analyze whether the credit transaction is covered by the 2015 MLA, whether there is an exception, and whether the creditor can be held liable for the violation.¹¹⁰ First, determine if the credit transaction is defined as consumer credit for purposes of the 2015 MLA.¹¹¹ Although the new definition for consumer credit covers most credit transactions in the marketplace, some transactions such as federal student loans are not covered by the act.¹¹²

Second, legal assistance attorneys should determine if an exception applies to the credit transaction.¹¹³ The act does not apply to consumer credit transactions intended to finance the purchase of a residence, personal property, or a motor vehicle when the credit is secured by that property.¹¹⁴ In addition, the 2015 MLA does not apply to credit transactions by a consumer who is not a covered borrower.¹¹⁵

Third, determine if the creditor is protected by the safe harbor provision. A creditor cannot be held liable if it availed itself of the safe harbor provision by using the MLA database or a nationwide consumer reporting agency to verify whether the consumer was a covered borrower.¹¹⁶ If the attorney

¹⁰⁷ *Id.*

¹⁰⁸ Martin, *supra* note 104, at 27.

¹⁰⁹ These steps are meant as a starting point and should not replace the attorney’s legal analysis of the case.

¹¹⁰ 2015 MLA, 80 Fed. Reg. 43,607.

¹¹¹ 32 C.F.R. § 232.3 (f)(1)-(2) (2015).

¹¹² Eleanor Blume, *Recent Revisions to the Military Lending Act*, at slide 16 (Nov. 3, 2015) (unpublished PowerPoint presentation) (on file with author). During the presentation, Ms. Blume emphasized that the MLA 2015 does not cover student federal loans. *Id.*

¹¹³ Blume interview, *supra* note 89.

¹¹⁴ 32 C.F.R. § 232.3(f)(2) (2015).

¹¹⁵ *Id.* § 232.3(f)(2)(v).

¹¹⁶ *Id.* § 232.5(b).

determines that the credit transaction is covered by the 2015 MLA, the next step is to inquire whether all of the mandatory disclosures were provided to the client.

2. Mandatory Disclosures

Looking for mandatory disclosures can seem daunting with all of the boilerplate language,¹¹⁷ so it is important to take it one step at a time. If the creditor conducted an MLA credit transaction with the client, determine whether the lender provided a statement of the MAPR. The 2015 MLA requires that the creditor provide the covered borrower a MAPR model statement or a statement substantially similar to the model statement.¹¹⁸ The creditor is required to provide the MAPR statement in writing so that the covered borrower can keep a copy.¹¹⁹ Also, determine if the client was given the MAPR statement orally or given a toll-free number.¹²⁰ In addition to providing the covered borrower a MAPR model statement, creditors are required to provide the statement orally in person or provide a toll-free number that the consumer can call and receive the oral disclosure.¹²¹ Finally, determine if the creditor provided a clear description of the payment obligation.¹²² A payment schedule or account opening disclosure that complies with TILA meets this requirement.¹²³ The next step in the analysis is to look for prohibited terms within the loan contract that violates the 2015 MLA.

3. 2015 MLA Violations

The 2015 MLA proscribes a list of practices that are illegal for creditors to engage in while extending credit to

covered borrowers.¹²⁴ At a minimum, legal assistance attorneys should determine if the creditor violated any of the following MLA prohibitions: (1) whether the servicemember was required “to submit to arbitration,”¹²⁵ (2) whether the creditor “used a check or other method of access to a servicemember’s deposit, or savings as a requirement for the loan,”¹²⁶ (3) whether the creditor requires “an electronic fund transfer to repay the loan,”¹²⁷ (4) whether the creditor requires “a direct deposit of the” servicemember’s salary “as a condition of eligibility for the loan,”¹²⁸ (5) whether the creditor requires “an allotment to repay the obligation as a condition of eligibility for the loan,”¹²⁹ (6) whether the creditor prohibited the servicemember from “prepaying the consumer credit or charging a penalty fee for prepaying . . . the consumer credit,”¹³⁰ (7) whether the servicemember was required to waive his or her “right to legal recourse,”¹³¹ (8) whether the creditor required “unreasonable notice as a condition for legal action,”¹³² (9) whether the creditor uses the servicemember’s “title to a vehicle as a security for the obligation involving consumer credit,”¹³³ or (10) whether the credit in question has been “rolled over, refinanced, renewed, repaid, consolidated in the extension credit to the borrower by a creditor who is not chartered or licensed under Federal or State law as a bank, savings association, or credit union.”¹³⁴

In addition to the legal analysis discussed above, practitioners should also ensure that the client understands how to file a complaint with the CFPB.¹³⁵ Upon receipt of a complaint, the CFPB will contact the company to inquire about the servicemember’s complaint and try to resolve the matter before taking any enforcement actions.¹³⁶

¹¹⁷ Boiler plate language is “ready-made or all-purpose language that will fit in a variety of documents.” BRYAN A. GARNER ET AL., BLACK’S LAW DICTIONARY 209 (10th ed. 2014).

¹¹⁸ 32 C.F.R. § 232.6(a)(1) (2015).

¹¹⁹ *Id.* § 232.6(d).

¹²⁰ Creditors have the option to provide the required disclosures to the covered borrower via a toll-free number. 2015 MLA, 80 Fed. Reg. 43,588. This is particularly important for creditors who conduct credit transactions over the Internet where in-person interaction is impossible. *Id.*

¹²¹ *Id.* § 232.6(d)(2)(i)-(iii).

¹²² *Id.* § 232.6(a)(3).

¹²³ *Id.* § 232.6(a)(3).

¹²⁴ 2015 MLA provides remedies to covered borrowers for MLA violations such as voiding the contract from its inception, and providing the covered borrower with a private cause of action, to include reasonable attorney fees. 2015 MLA, 80 Fed. Reg. 43,611.

¹²⁵ 32 C.F.R. § 232.8(c) (2015).

¹²⁶ *Id.* § 232.8(e). The prohibition does not apply to credit that is consistent with MAPR requirements under § 232.4(b).

¹²⁷ *Id.* § 232.8(e)(1). The creditor may engage in this practice if the credit transaction is consistent with MAPR requirements under § 232.4(b).

¹²⁸ *Id.* § 232.8(e)(2). The creditor may engage in this practice if the credit transaction is consistent with MAPR requirements under § 232.4(b).

¹²⁹ *Id.* § 232.8(g).

¹³⁰ *Id.* § 232.8(h).

¹³¹ *Id.* § 232.8(b).

¹³² *Id.* § 232.8(d).

¹³³ *Id.* § 232.8(f). Under this provision, a creditor does not include a person “chartered or licensed under Federal or State law as a bank, savings association, or credit union.” *Id.* Therefore, it would not be illegal for a properly licensed bank to use the “title of a vehicle as security for the obligation involving consumer credit.” *Id.*

¹³⁴ *Id.* § 232.8(a).

¹³⁵ *The Complaint Process*, CONSUMER FIN. PROT. BUR., <http://www.consumerfinance.gov/complaint/process/> (last visited Jan. 19, 2016).

¹³⁶ *Id.* Legal assistance attorneys can help their clients submit a complaint to the CFPB by going to the CFPB complaint process webpage listed above. *see id.* The CFPB webpage is user-friendly and can be easily navigated by most consumers. Creditor compliance date for the 2015 MLA is October 3, 2016. For credit cards, the compliance date is October 3, 2017. 2015 MLA, 80 Fed. Reg. 43011. *See infra* App. B, CFPB Complaint Process.

4. Document Review

Most legal assistance attorneys will be relatively new at reviewing credit transactions. However, there are a couple key issues to look for in order to spot problems with the credit transaction. First, a legal assistance attorney should conduct a cursory review of the documents for any obvious arithmetic errors.¹³⁷ For example, in a closed credit transaction, determine if the “amount financed and the finance charge equals the disclosed total of payments.”¹³⁸

Next, review the documents to see if the creditor provided an itemized list of MAPR components.¹³⁹ The 2015 MLA does not require creditors to provide an itemized list. However, if one is provided, then the legal assistance attorney must determine if all ancillary credit products sold in connection with the credit transaction were included in the MAPR calculation. Ancillary products that are not included in the calculation of the MAPR are a sign that there may be a 2015 MLA violation. If there is no itemized list, ask the client whether there were any other ancillary products, such as credit insurance,¹⁴⁰ that were sold in connection with the transaction. If so, review the documents to see if this product was listed and accounted for in the cost.

Third, the practitioner can check the APR provided by the creditor by using commercial online APR calculators or manually using the Federal Reserve Board APR tables.¹⁴¹ After conducting a cursory review, examine the 2015 MLA mandatory disclosures.¹⁴²

V. Conclusion

The 2015 MLA provides servicemembers with a new layer of added protections.¹⁴³ The DoD understood that relying solely on education to combat predatory lending was bound to fail.¹⁴⁴ Education alone could not overcome the aggressive marketing used by predatory lenders.¹⁴⁵ Congress’ enactment of the MLA was a great start to

protecting servicemembers from predatory lending. However, in the years since its enactment, the DoD and consumer advocacy groups recognized that the marketplace had changed.¹⁴⁶ Some predatory lenders’ business practices evolved in order to circumvent the MLA. Changes to the MLA were necessary to close the loopholes.

The 2015 MLA is a comprehensive approach to tackling the ever-changing tactics of predatory lenders.¹⁴⁷ It broadens the definition of consumer credit to align itself to TILA’s definition of consumer credit, thereby covering almost every credit transaction in the marketplace.¹⁴⁸ The regulation provides additional remedies to servicemembers that were not expressly written into the previous version.¹⁴⁹ The task of legal assistance attorneys is to help servicemembers like SGT Enquiebra navigate the process.

“Sir, are you ok? It looks like you were daydreaming.” says SGT Enquiebra. “No, I am fine. I was thinking about your case,” you reply. “Let’s review your contract. Did Free Cash Title Loan verify that you were an active duty servicemember?” you ask. SGT Enquiebra puts his head down and says, “Yes, but they had me sign a form that says that I do not qualify as a covered borrower.” With confidence, you respond, “Don’t worry, Sergeant, I believe there is something we can do about this contract. We will draft a letter to Free Cash and notify them of your rights under the 2015 MLA.”

Legal assistance attorneys are a force multiplier to the Army. Now, they can also be a force multiplier to servicemembers trapped in a cycle of debt. By reviewing the servicemember’s contract and asking a few simple questions, a legal assistance attorney can help their client avoid the cycle debt caused by predatory lenders.

¹³⁷ NATIONAL CONSUMER LAW CENTER, *supra* note 12, at 165. A practitioner may want to refer to helpful manuals covering TILA APR analysis such as the TILA Consumer Credit and Sales Legal Practice series.

¹³⁸ NATIONAL CONSUMER LAW CENTER, *supra* note 12, at 165.

¹³⁹ *Id.* These components will vary, depending on the number of ancillary products sold in connection with the transaction.

¹⁴⁰ Credit insurance is a product that is used to “can cancel or suspend part or all of a credit card debt under specific circumstances, such as loss of life, disability, or involuntary unemployment.” U.S. Gov’t Accountability Office: Consumer Costs for Debt Protection Products Can be Substantial relative to Benefits but Are not a Focus of Regulatory Oversight, GAO-11-311, at 2 (Mar. 2011), <http://www.gao.gov/assets/320/317034.pdf>.

¹⁴¹ NATIONAL CONSUMER LAW CENTER, *supra* note 12, at 165. A copy of the Federal Reserve Board APR tables volumes I & II can be ordered at <http://www.federalreserve.gov/pubs/orderform.pdf>.

¹⁴² The 2015 MLA requires creditors to provide the following mandatory disclosures to covered borrowers with respect to the extension of consumer credit: “(1) a statement of the MAPR applicable to the extension of

consumer credit; (2) any disclosures required under Regulation Z . . . ; and (3) a clear description of the payment obligation of the covered borrower” 2015 MLA, 80 Fed. Reg. 43, 610. Regulation Z is also known as TILA. *Id.* at 43,560. Required disclosures under Regulation Z can also be found at the CFPB website. <http://www.consumerfinance.gov/eregulations/1026-18/2016-06834#1026-18> (last visited Oct. 17, 2016). For example, legal assistance attorneys can look for required content disclosures under a closed-credit transaction on the website and verify that those disclosures are in the contract.

¹⁴³ 2015 MLA, 80 Fed. Reg. 43,610.

¹⁴⁴ DOD REPORT 2014, *supra* note 58, at 9.

¹⁴⁵ *Id.* at 2, 38.

¹⁴⁶ *Id.* at 18, 32.

¹⁴⁷ Blume interview, *supra* note 89.

¹⁴⁸ 2015 MLA, 80 Fed. Reg. 43,610.

¹⁴⁹ Blume interview, *supra* note 89.

2015 MLA



2015 MLA



SSN, DOB, Last name

2015 MLA



Proof of "covered borrower"

CFPB Complaint Process

Covered Borrowers can file a complaint by clicking on "Submit a Complaint"

How we use complaint data
 Each week we send thousands of consumers' complaints about financial products and services to companies for response. Data from those complaints help us understand the financial marketplace and protect consumers. Visit the [Consumer Complaint Database](#).

- We forward each complaint to the appropriate company for a response.
- We share complaint data with state and federal agencies. We also present a report to Congress twice each year.
- We analyze complaint data to help with our work to supervise companies, enforce federal consumer financial laws, and write better rules and regulations.
- We publish complaints in the Consumer Complaint Database (without personal information).

What we publish in the Consumer Complaint Database
 Complaints must meet all of the publication criteria in our [privacy statement](#), [narrative data policy statement](#), and [narrative scrubbing standards](#).

Data that we always share	Date received	The date the CFPB receives the complaint. For example, "05/25/2013"
Product	The type of product the consumer identified in the complaint. For example, "Bank account or service" or "Student loan"	

The complaint process
 When you submit a complaint to the CFPB, we forward your complaint to the company and work to get a response about your issue. [Submit a complaint to the CFPB](#)

- 1. Complaint submitted**
 You submit a complaint about an issue you have with a company about a consumer financial product or service. You will receive email updates and can [log in](#) to track the status of your complaint.
- 2. Review and route**
 We'll forward your complaint and any documents you provide to the company and work to get a response from them. If we find that another government agency would be better able to assist, we will forward your complaint to them and let you know.
- 3. Company response**
 The company reviews your complaint, communicates with you as needed, and reports back about the steps taken or that will be taken on the issue you identify in your complaint.
- 4. Complaint published**
 We publish information about your complaint – such as the subject and date of the complaint – on our public Consumer Complaint Database. With your consent we also publish your description of what happened, after taking steps to remove personal information.
- 5. Consumer review**
 We will let you know when the company responds. You can review that response and give us feedback.
- 6. Analyze and report**
 Complaints help with our work to supervise companies, enforce federal consumer financial laws, and write better rules and regulations. We also [report to Congress](#) about the complaints we receive.

Have an issue with a financial product or service?
[Submit a complaint to the CFPB](#)

Army Emergency Relief

Army Emergency Relief Now Provides Direct Access for all Soldiers

“Effective 9 September 2015, all Soldiers, regardless of rank, are authorized direct access to apply for Army Emergency Relief assistance *except* for those Soldiers who are in Initial Entry Training (BCT/OSUT) and have less than one year time in service. Direct access without the Commander/First Sergeant review will be limited to two assistance requests (loan or grant) within a 12 month period, regardless of rank.”

See
<http://www.aerhq.org/dnn563/FinancialAssistance/FAQs.aspx>.

Who is eligible?

“Soldiers on active duty and their eligible dependents.

Soldiers retired from active duty because of longevity, or retired upon reaching age 60 (Reserve Component) and their eligible Family members.

Widows(ers) and orphans of Soldiers who died while on active duty or while retired.

Medically retired Soldiers and their eligible Family members.

Members of the Reserve Component of the Army (Army National Guard and Army Reserve under Title 10 U.S.C.) on continuous active duty for more than 30 consecutive days and their eligible Family members.”

Army Emergency Relief

When is a Soldier NOT eligible for direct access to AER?

“Effective 9 September 2015, all Soldiers, regardless of rank, are authorized direct access to AER for financial assistance, except for those who fall in one or more of the categories listed below:

Soldiers in the grades of E-1 through E-4 who are in Initial Entry Training (Basic Training/OSUT) *are not* eligible for direct access to AER.

Soldiers with less than 12 months Time in Service (TIS) *are not* eligible for direct access to AER..

Soldiers who have two or more requests (Loan or Grant) within a 12 month period *are not* eligible for direct access to AER.

Soldiers who exhibit “High Risk” behavior for financial problems IAW AR 600-85 and Sec Army Directive 2015-21 *are not* eligible for direct access to AER.

Soldiers who fall in one or more of the categories listed above will require the Company Commander/First Sergeant review of their AER application prior to submitting a request for AER assistance.”

AER does not provide funds:

“For nonessentials

To finance ordinary leave or vacation

To pay fines or legal expenses

To liquidate or consolidate debt

For purchase of home or home improvements

To cover bad checks or pay credit card bills”

For more information, go to
<http://www.aerhq.org/dnn563/>.

Non-Economy Act Authorities: The Other White Meat of Interagency Acquisitions—Their Uses, Mechanics, and Limitations

By Major Bruce L. Mayeaux*

“It is critical that the Federal Government, in its procurement activity, leverage its buying power to the maximum extent as well as achieve administrative efficiencies and cost savings. Too often, however, agencies establish new overlapping and duplicative contracts for supplies or services, because the agencies have not adequately considered the suitability of . . . interagency contract vehicles . . . This failure to make maximum appropriate use of interagency vehicles and agency-specific contracts results in higher prices and unnecessary administrative costs.”¹

I. Introduction

You are a general attorney working in the Office of the Staff Judge Advocate (OSJA) for Orange Sands Missile Range (OSMR). The Chief of Staff (CoS) walks into your office and in a concerned tone says, “Judge, we have a problem.” The CoS starts to walk you through an all too familiar story; while the individual facts always differ, an action occurred without coming through the OSJA for advice and it is not playing out as the command envisioned.

The commander of the High Velocity Nuclear Systems Test Facility (HVNSTF) convinced the OSMR command to request that the responsible contracting activity² release a requirement³ and now the HVNSTF finds itself without a contracting activity to handle the quickly upcoming re-compete.⁴ Rubbing your forehead and bracing yourself for the answer, you regrettably ask, “Why was the requirement released?” The CoS explains that the HVNSTF commander wanted an incumbent contractor to *do more stuff* in the re-compete and wanted the responsible contracting activity to expand the requirement. Specifically, the commander wanted the facility maintenance incumbent contractor to perform training services on commercial items previously purchased by the command. The responsible contracting activity pushed

back, insisting the re-compete would require full and open competition and that the incumbent contractor does not have experience providing the services.

Unhappy with that response, the HVNSTF commander spoke to the U.S. Army Corps of Engineers (USACE) and asked if they would be willing to service the requirement. Before any agreement was entered into, the HVNSTF commander convinced the OSMR command to ask the responsible contracting activity to release the requirement so that the USACE could service it. The contracting activity agreed, but the USACE did not pick up the requirement, citing work load limitations. Now, the USACE does not want the requirement, the responsible contracting activity is refusing to pick the requirement back up, the re-compete was due out for solicitation⁵ a while back, and the command’s remaining operations funds that are set aside for the re-compete are about to expire. The good news is that the value of the requirement seems to fall under the Simplified Acquisition Threshold (SAT).⁶ Visibly frustrated, the CoS asks you, “What can we do, Judge?” You seem to recall reading about Interagency Acquisition⁷ (IA) authorities when you were trying to fall asleep by reading the *Fiscal Law Deskbook*. You decide to look there.

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¹ Memorandum from Office of Management & Budget (OMB) Administrator to Chief Acquisition [sic] Officers and Senior Procurement Executives, subject: Development, Review and Approval of Bus. Cases for Certain Interagency and Agency-Specific Acquisitions (Sept. 29, 2011) (on file with author).

² “‘Contracting activity’ means an element of an agency designated by the agency head and delegated broad authority regarding acquisition functions.” Federal Acquisition Regulation [48 C.F.R.] 2.101 (2015) [hereinafter FAR].

³ A requirement is a description of supplies or services to be acquired that will satisfy an agency’s needs. See FAR 2.101.

⁴ While the term re-compete is not defined in the Federal Acquisition Regulation (FAR), in this article, the term refers to the acquisition process of re-acquiring a supply or service for an agency where such supply or service has been acquired by the agency in the past under the FAR. See generally, FAR 6.000 (discussing competition requirements applicable to all acquisitions).

⁵ “‘Solicitation’ means any request to submit offers or quotations to the Government.” FAR 2.101.

⁶ The Simplified Acquisition Threshold (SAT) means a value of up to \$150,000. See FAR 2.101.

⁷ See generally, FAR 17.502-1(a)(1)–(2) (explaining the difference between assisted acquisitions, when a servicing agency performs acquisition services on behalf of a requiring activity, and direct acquisitions, when a requiring activity places an order against a servicing agency’s contract). This article will cover Interagency Acquisitions (IA) in both categories, plus certain reimbursable operations similar to a direct acquisition. See generally, U.S. DEP’T OF DEF., 7000.14-R, DoD FINANCIAL MANAGEMENT REGULATION, vol. 11A (Nov. 2014) [hereinafter DoD FMR] (covering reimbursable operations that are, and are not, governed by the FAR 17.5).

A working understanding of certain non-Economy Act IA authorities such as the Project Order Statute, the assisted acquisition services of franchise funds, and the Federal Supply Schedule is necessary to provide decision-makers and acquisition professionals meaningful legal advice. This includes a familiarity with how these authorities generally differ from the better-known Economy Act authority, and their individual uses, mechanics, and limitations.

Navigating the amount of information available on the aforementioned IA authorities can be quite daunting for a practitioner. However, this article will guide the reader through the basics of each authority and identify potential problem areas. The article will explain the uses and limitations of the Economy Act then delve into the Project Order Statute, Franchise Funds, and the Federal Supply Schedule; specifically, their uses and mechanics, and limitations.

II. The Economy Act—The Most Commonly Known IA Authority

After the CoS leaves your office, you decide that the best way to tackle this endeavor is to eliminate IA authorities that likely will not fit with this requirement for facility maintenance and training. To start, you plan to look at the IA authorities that are the most common and eliminate them from consideration one-by-one. In this vein, you see that a substantial amount of information is available on the Economy Act—you begin there.

In examining this IA authority, you first research its purpose.⁸ At first glance, this authority seems useful as the facility maintenance and training requirement does seem to qualify as services under the Act; as long as four basic conditions are met the contracting activity should be able to place an order with another major organizational unit within

the Department of Defense (DoD) rather quickly.⁹

A. Economy Act—Uses

As you continue your research, you notice that the Economy Act allows a requiring agency to procure goods and services by means of a servicing agency.¹⁰ This is generally accomplished through the servicing agency's already existing contract vehicle or through an assisted acquisition process.¹¹ In the fact pattern, the requiring or requesting agency is OSMR, and the servicing agency would be whichever agency agreed to assist with OSMR's requirement—such as the USACE. You see that the Economy Act would provide the command options in developing, awarding, and administering this requirement.

Specifically, the command can have another agency either develop, award, and administer the requirement, or order off of the already existing contract vehicle.¹² The Economy Act seems promising, but you see a catch: it has certain limitations to its use.

B. The Economy Act—Limitations

The Economy Act has three major limitations that other IA authorities do not have. A requiring activity¹³ must examine these limitations in order to decide if the Economy Act is the right IA authority for its purposes; specifically, de-obligation, an onerous determination and findings (D&F) requirement, and the last resort clause.¹⁴

1. De-obligation

At the end of the period of availability of the requesting agency's¹⁵ appropriation, subject funds must be de-obligated if certain conditions are present.¹⁶ These conditions include that the servicing agency has not itself incurred obligations by (1) providing goods or services or (2) entering into an

conduct an assisted acquisition on behalf of the requesting agency").

⁸ "The Economy Act, codified at 31 U.S.C. § 1535 (2012), provides authority for federal agencies to order goods and services from major organizations within the same agency or other federal agencies and to pay the actual costs of those goods and services. The Congress passed the Act in 1932 to obtain economies of scale and eliminate overlapping activities of the Federal Government. Act of June 30, 1932, ch. 314, § 401, 47 Stat. 382, 413. Within the Department of Defense (DoD), an activity within a DoD component may place an order for goods or services with (1) another activity within the same DoD component, (2) another DoD component, or (3) with another federal agency." DoD FMR, *supra* note 7, para. 030102.

⁹ See DoD FMR, *supra* note 7, at para. 030104.A (explaining the legal authority and listing the four basic conditions as the following: (1) funds are available; (2) the head of the requesting agency or unit decides the order is in the best interest of the United States Government; (3) the agency or unit to be asked to fill the order is able to provide or get by contract the ordered goods or services; and (4) the head of the requesting agency decides that ordered goods or services cannot be provided by contract as conveniently or economically by a commercial enterprise); *see also id.* para. 030103.G–H (defining severable and non-severable services).

¹⁰ See generally, 31 U.S.C. § 1535(d)(3) (2012); FAR 17.502-1(a) (2015); FAR 2.101 (2015) (defining a servicing agency as "the agency that will

¹¹ See FAR 17.502-1(a); DoD FMR, *supra* note 7, vol. 11A.

¹² See FAR 17.502-1.

¹³ "A requiring activity is a military or other designated supported organization that identifies, plans for, and coordinates for contracted support during military operations." U.S. DEP'T OF ARMY, OPERATIONAL CONTRACT SUPPORT TACTICS, TECHNIQUES, AND PROCEDURES 4-10, para. 1-4(e) (June 2011) [hereinafter ATTP 4-10]. "A requiring activity may also be the supported unit." *Id.*

¹⁴ See 31 U.S.C. § 1535(d) (2012); DoD FMR, *supra* note 7, paras. 030404.B, 180102; FAR 17.502-2(b)–(c) (2015).

¹⁵ The term requesting agency is synonymous with the term requiring activity in this context. See ATTP 4-10, *supra* note 13, para. 1-4(e).

¹⁶ See 31 U.S.C. § 1535(d); DoD FMR, *supra* note 7, para. 030404.B.

authorized contract with another entity to provide the requested goods or services.¹⁷ In other words, those funds committed, or fenced off, to be used under an Economy Act transaction must be de-committed unless they are otherwise legally obligated at the end of the funds' period of availability.¹⁸

You can see that this is a major limitation to the Economy Act's authority. The concern is that agencies will use the Economy Act to otherwise extend the availability of an appropriation and effectively launder or remove the fiscal identity of the funds.¹⁹ Orange Sands Missile Range receives Research, Development, Test, and Evaluation (RDT&E) funds, which have a two-year period of availability.²⁰ The timing could severely limit the viability of the Economy Act if the command wants the period of performance for this requirement to exceed the RDT&E funds' remaining period of availability.

2. *The Economy Act's Determination and Findings*

You notice that all Economy Act transactions that are not between two DoD activities must be supported with a substantial written D&F by the requesting agency stating that (1) the use of an interagency acquisition is in the best interest of the government, (2) the supplies or services cannot be obtained as conveniently or economically by contracting directly with a private source, and (3) a statement covering three specific circumstances.²¹ Further, you notice that the D&F must be approved by a contracting officer of the requesting agency with the authority to contract for the supplies or services that are being ordered. Additionally, if the agreement contemplates an order with a non-DoD servicing agency, then the D&F must be approved by the head of the major organizational unit ordering the support—generally, that is at the Senior Executive Service (SES) or General/Flag Officer level.²²

The D&F requirement of the Economy Act seems like an additional task for the busy contracting activity you would

like to avoid. Further, if the servicing activity comes from outside the DOD, there is a high level of approval. While you can see scenarios where this would not be such a burden, you still want to avoid making more work for the contracting activity or the organizational head. More and more you start to feel like the Economy Act is not going to work for you; then you find the final nail in the coffin—the last resort clause.

3. *The Last Resort Clause*

You determine that the Economy Act is literally an IA authority of last resort. The last resort clause states, "Specific statutory authority is required to place an order with a Non-DoD agency for goods or services If specific statutory authority does not exist, the default will be the Economy Act" ²³ Therefore, in order to use the Economy Act, you must first eliminate all other IA authorities that have a specific statutory authority for the type of good or service you are trying to procure. Discouraged and frustrated, you realize that your initial gut reaction that the Economy Act was too good to be true was accurate. The last resort clause inevitably will require your command to exhaust all other possible remedies before relying on the Economy Act as a possible procurement authority. Luckily, you remember that there are many other non-Economy Act IA authorities for you to consider, though not without their own limitations.

III. Non-Economy Act Authorities

Quickly you realize that there are many other non-Economy Act IA authorities. Blindly sifting through all of the available authorities just to get to a range of options to choose from seems daunting. Instead, you decide to focus on three that you have heard mentioned in and around the office: (1) the Project Order Statute, (2) Franchise Funds, and (3) the Federal Supply Schedule. You decide to look at their individual uses, mechanics, and limitations to eliminate those that will not work.²⁴ First, you examine the IA authority

¹⁷ See 31 U.S.C. § 1535(d); DoD FMR, *supra* note 7, para. 030404.B.

¹⁸ See U.S. Gov't Accountability Office, *A Glossary of Terms Used in the Federal Budget Process*, at 32, 70 (2005), <http://www.gao.gov/new.items/d05734sp.pdf>. (contrasting between a commitment—which is an administrative reservation of allotted funds, or of other funds, in anticipation of their obligation—and an obligation, which is a definite act that creates a legal liability on the part of the government for the payment of goods and services ordered or received, or a legal duty on the part of the United States that could mature into a legal liability by virtue of actions on the part of the other party beyond the control of the United States). Here, deobligation actually refers to the decommitment of funds not legally already obligated.

¹⁹ See DoD FMR, *supra* note 7, para. 030407.

²⁰ See CONT. & FISCAL L. DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, FISCAL LAW DESKBOOK 2-10 (2015).

²¹ See FAR 17.502-2(c)(1)(i)–(iii); DoD FMR, *supra* note 7, paras. 030303, 030302.B. However, if the Economy Act transaction is between two DoD activities, the onerous determination and findings (D&F) requirement is

avoided if the transaction is documented on a DD Form 1144, which is a support agreement signed by the head of the requiring and servicing activities—usually an O-6 or General Schedule (GS)-15. See U.S. DEP'T OF DEF., INSTR. 4000.19, SUPPORT AGREEMENTS, ENCLOSURE 3: PROCEDURES, para. 2(b)(4) (2013); DoD FMR, *supra* note 7, para. 030303.

²² See FAR 17.502-2(c)(2); DoD FMR, *supra* note 7, para. 030304. "The [Senior Executive Service] SES includes most managerial, supervisory, and policy positions classified above General Schedule (GS) grade 15 or equivalent positions in the Executive Branch of the Federal Government." Office of Personnel Management, *Senior Executive Service: Overview & History*, <https://www.opm.gov/policy-data-oversight/senior-executive-service/overview-history/> (last visited Oct. 17, 2016).

²³ See FAR 15.502-2(b); DoD FMR, *supra* note 7, para. 180102.

²⁴ One of the commonalities among non-Economy Act IA authorities is the absence of a forum to decide disagreements between the parties. See FAR 17.503(c). The FAR suggests the parties should agree in writing to the use of a third-party forum, but does not give any examples of what would be an appropriate forum. *Id.*

discussed at OSMR meetings—the Project Order Statute.

A. The Project Order Statute

As you begin to research the Project Order Statute you realize that it is a unique IA authority that may allow for the subject requirement to be contracted out to another federal entity.²⁵ Perfect; why not get military manpower in the form of that unit on the other side of OSMR to do this? Unfortunately, as you start going through the requirements of the IA you realize that the Project Order Statute may not be as flexible as you had hoped.

1. *The Project Order Statute—Uses*

You start looking into what the general language in the Project Order Statute means, and you quickly realize that the authority is a great resource, but for a very narrow purpose. First, you notice that a project order's funding and modification rules are very permissive. You find that a project order is normally fully funded by the requiring activity at the time the order is issued and accepted.²⁶ Unlike the Economy Act, there is no general requirement to de-obligate funds if the servicing agency has not performed before the expiration of the funds' period of availability.²⁷ This seems extremely useful as it allows funding of projects where performance crosses fiscal periods of availability.²⁸ Further, you see that project orders may be changed or modified at any time to accommodate new or additional work as long as funding is available, and the type of work is appropriate for a project order.²⁹ In fact, if the original appropriation is still available for obligation, it can be used to fund the new work,

²⁵ “An order or contract placed with a Federal Government-owned establishment for work, material, or the manufacture of material pertaining to an approved project is deemed to be an obligation in the same manner that a similar order or contract placed with a commercial manufacturer or private contractor is an obligation. Appropriations remain available to pay an obligation to a Federal Government-owned establishment just as appropriations remain available to pay an obligation to a commercial manufacturer or private contractor.” 41 U.S.C. § 6307 (2012).

²⁶ See DoD FMR, *supra* note 7, para. 020518. There is a research, development, test, and evaluation (RDT&E) exception that allows incremental funding instead of all up front funding of the project order. See DoD FMR, *supra* note 7, para. 020518.

²⁷ See 41 U.S.C. § 6307 (2012).

²⁸ Contrast the multiple year funding authority for nonseverable services provided under the Project Order Statute with the single-year funding authority for severable services that begin in one fiscal year and end in the next provided under 10 U.S.C. § 2410a (2012). See U.S. Army Europe—Obligation of Funds for an Interagency Agreement for Severable Services, B-323940 (Comp. Gen. Jan. 7, 2015).

²⁹ See DoD FMR, *supra* note 7, para. 020514. Contrast this flexibility with open market-type FAR contracts that have competition requirements that limit possible modifications. See FAR 6.001 (2015).

³⁰ See DoD FMR, *supra* note 7, para. 020514. Where the initial appropriation has expired and the modification to the project order is outside of the original scope, the modification is funded from current funds.

even if it is outside of the original scope.³⁰ The project order statute seems useful; however, as you continue researching, you see its availability starts to get more and more narrow.

Continuing your analysis, you learn that the term federal government-owned establishment really means government-owned and government-operated (GOGO) establishments within the DoD that include testing facilities, research and development laboratories, arsenals, factories, and shipyards owned by the military.³¹ Orange Sands Missile Range is a Major Range Test Facility Base (MRTFB) and as such seems to fit into this GOGO category.³² Next, you learn that the term “approved projects” in the statute simply refers to projects approved by officials having legal authority to do so.³³ Believing that the Project Order Statute may still be a viable option, you start to look into the procedural rules, or the mechanics, of entering into a project order agreement.

2. *The Project Order Statute—Mechanics*

The first step occurs in the pre-planning stage. First, the requiring activity must send the servicing activity advance-planning data covering the concerned work.³⁴ This data is used by the servicing activity to develop an overall operating budget.³⁵ Next, the parties start to put the terms of the agreement together, which at a minimum should include a complete description of the requirement, the period of performance, and grievance procedures.³⁶ Although the use of a specific project order form is not prescribed, the Army requires that they be issued on a Military Interdepartmental Purchase Request Department of Defense Form 448 (MIPR DD Form 448).³⁷

Id.

³¹ See *id.* at para. 020303; Mr. John J. Kominski, Gen. Counsel, Library of Cong., B-246773, 72 Comp. Gen. 172 (1993).

³² See DoD FMR, *supra* note 7, ch. 12 (discussing Major Range Test Facility Base (MRTFB)). The fictional missile range OSMR is sized, operated, and maintained primarily for DoD test and evaluation support missions, and is considered a government-owned and government-operated (GOGO) for the purpose of this article.

³³ See DoD FMR, *supra* note 7, para. 020103. The phrase “officials having legal authority to do so” is not defined in the Financial Management Regulation (FMR). *Id.*

³⁴ See DoD FMR, *supra* note 7, para. 020401. The phrase “advance-planning data” generally means work and cost estimates. *Id.*

³⁵ *Id.*

³⁶ See DoD FMR, *supra* note 7, para. 020302; U.S. DEP'T OF DEF., 37-1, DEF. FIN. & ACCT. SERV.-INDIANAPOLIS REGULATIONS, para. 120803.A (9 Apr. 2014) [hereinafter DFAS-IN Reg. 37-1]. Under a Project Order Statute paradigm, there are very few mandatory terms the party must agree to; however, all forms must have a statement to the effect of that “[t]his order is placed in accordance with the provisions of 41 U.S.C. § 6307, as implemented by DoD regulation.” DoD FMR, *supra* note 7, para. 020302.

³⁷ See DoD FMR, *supra* note 7, para. 020302; DFAS-IN Reg. 37-1, *supra*

When determining the period of performance, the “[e]xpiration dates may not extend beyond the point in time in which the appropriation funding the order shall be canceled (generally five years after the appropriation expires for new obligation).”³⁸ After negotiations are complete and the project order agreement is ready for execution, an official of the issuing entity must then certify that the funds cited on the project order are properly chargeable under a purpose analysis.³⁹ After receipt, the requiring activity must verify a bona fide need exists in the fiscal period of availability in which the agreement is issued.⁴⁰ Lastly, at acceptance, evidence must exist that the work will be commenced without delay and that the work will be completed within the normal period for the work ordered.⁴¹

If performance does not play out as planned and the recipient of the project order agreement defaults, you see that you may procure from another source using the original funding appropriation if (1) the new order is made without undue delay and (2) it does not extend beyond the point in time when the appropriation is canceled.⁴² The Project Order Statute has some permissive authorities that may allow your command to quickly get the services they need in a flexible format. Then you remember the issue with the Economy Act—the limitations. So, you turn your attention to the limitations of the Project Order Statute.

3. The Project Order Statute—Limitations

Although permissive on funding and modifications, the Project Order Statute is restrictive on use and purpose. Project orders are analogous to contracts placed with commercial vendors; and, as with such contracts, they must be specific, definite, and certain both as to the work and the terms of the order itself.⁴³ You learn that “[n]o project order shall be issued if commencement of work is contingent upon the occurrence of a future event or authorizing action by the ordering [requiring activity] DoD Component.”⁴⁴ Unlike other IA authorities, you see that the Project Order Statute cannot be used as an authorization for the servicing agency to

act as a general contracting agent for the requiring activity.⁴⁵ Further, “[c]onsistent with the concept that one entity cannot enter into a formal contract with itself, a project order shall not be used by one organizational unit to order work from another organizational unit under the same activity commander.”⁴⁶ While limiting, these restrictions seem reasonable and do not necessarily eliminate the project order from consideration. Nonetheless, as you continue reading, you find that using this authority may not be in the stars.

First, you see that the GOGO must substantially do the work in-house, in other words, it must incur the costs of not less than fifty-one percent of the total costs attributable to performing the work.⁴⁷ You think about how this seems like a restriction on contracting out work and that it may be a major problem if a part of the requirement cannot be performed by the GOGO in-house. Lastly, you discover that project orders may be used only for non-severable services or entire efforts that call for a single or unified outcome or product.⁴⁸

Next, you examine non-severable and severable services. Non-severable services consist of (1) manufacture or modification of ships, aircraft, vehicles, guided missiles, and other weapons systems; (2) construction or conversion of buildings and other structures; (3) development of software programs and automated systems when the purpose of the order is to acquire a specific end-product; and (4) production of engineering and construction related products and services.⁴⁹ Examples of severable services include: (1) routine maintenance; (2) education, training, and travel; and (3) efforts where the primary purpose is to acquire a level of effort rather than a specific, definite, and certain end-product.⁵⁰ Your requirement for facility maintenance and training seems to fall outside of the non-severable effort and tends to resemble a severable service effort. This is an onerous restriction designed to limit the use of the project order and eliminates this IA authority from the list of possibilities. Discouraged, but not defeated, you decide to

note 36, para. 120803.A.

³⁸ See DoD FMR, *supra* note 7, para. 020503.

³⁹ See *id.* para. 020507. Issuing entity is not defined in the FMR; however, it is likely to be the fund authority that services the requiring agency. See *id.* para. 020301.A.

⁴⁰ *Id.* The servicing agency must refuse to accept a project order if it is obvious that said order does not contain a bona fide need in the fiscal year issued. See *id.* para. 020508.

⁴¹ See *id.* para. 020510.A. The phrase “commenced without delay” refers to usually within 90 days. *Id.*

⁴² See DoD FMR, *supra* note 7, para. 020517. This authority does not address grievances with the defaulting party, only authority to use the prior used appropriation on the new project order. *Id.*

⁴³ See *id.* para. 020506.

⁴⁴ See *id.* para. 020511.

⁴⁵ See *id.* para. 020516. This limitation is referring to a concept called off-loading which is “when one agency buys goods or services under a contract entered and administered by another agency.” 3 U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-08-978SP, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW ch. 12, pt. B, sec. 1, at 12-75 (3rd ed. 2008) [hereinafter GAO Red Book III].

⁴⁶ See DoD FMR, *supra* note 7, para. 020502. The FMR does not define activity commander or specify how far the breakdown of organizational units goes in this context. See *id.* Glossary.

⁴⁷ See *id.* para. 020515.

⁴⁸ See *id.* para. 020509.B.

⁴⁹ See *id.*

⁵⁰ See *id.* para. 020509.A.

move on to the next potential IA authority—Franchise Funds.

B. Franchise Funds

As you start to examine what franchise funds are, you realize that there is not that much literature available about franchise funds in general.⁵¹ Just like the Project Order Statute, you think this seems like a promising IA authority that may allow you to shift the burden of procuring this requirement to another servicing agency. You start to think how you would use franchise funds and if doing so would solve your problem considering any limitations.

1. Franchise Funds—Uses

Immediately, you learn that franchise funds are revolving, businesslike enterprises that provide an array of common administrative services for a fee, to include contracting services.⁵² As there does not seem to be much literature in your deskbooks as to what constitutes contracting services, you decide to look at an example of the contracting services provided by a franchise fund. Based on a quick Google search, you choose to examine the Franchise Fund run by the Department of Interior (DoI) to get an idea.⁵³

You see that the acquisition services provided under this Franchise Fund IA authority are serviced by the DoI's Interior Business Center (IBC).⁵⁴ These acquisition services include (1) market research and planning, (2) solicitation, (3) negotiation and award, and (4) administration and closeout.⁵⁵ This seems great. Through their assisted acquisition services, this franchise fund seems to be able to provide cradle-to-grave acquisition support to the command. You envision a scenario where the command could offload this requirement to the IBC and just sit back and wait for the contract offers to start

⁵¹ Franchise Funds were first established by the Government Management Reform Act of 1994 to provide common administrative support services on a competitive and fee basis. Franchise fund programs originated within the Environmental Protection Agency, Department of Commerce, Department of Veterans Affairs, Department of Health and Human Services, Department of Interior, and Department of the Treasury. *See id.* para. 180102.B.

⁵² *See* The Government Management Reform Act of 1994, Pub. L. No. 103-356, § 403, 103 Stat. 3413 (1994); Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, § 730, 121 Stat. 1844 (2007).

⁵³ The Government Management Reform Act of 1994 authorized the Director of the Office of Management and Budget (OMB) to establish six Franchise Fund pilot programs. *See* § 403, 103 Stat. 3413. The Department of Interior's Franchise Fund is one of those funds commonly used by DoD. *See* Memorandum of Agreement between Dep't of Army and Dep't of the Interior (6 Mar. 2007), https://www.doi.gov/sites/doi.gov/files/uploads/DoD_AQD_Agreement_Hatfield_Assad.pdf [hereinafter DoI MoA].

⁵⁴ *See* U.S. Dep't of the Interior, *Acquisition Services*, <https://www.doi.gov/ibc/services/acquisition> (last visited Jan. 6, 2016). The Interior Business Center is an organization within the Department of the Interior (DoI) that provides services under the DoI's Franchise Fund IA authority. *See* U.S. Dep't of the Interior, *About the Interior Business Center*, <https://www.doi.gov/ibc/about-us> (last visited Oct. 17, 2016).

pouring in. Encouraged, you delve into the mechanics of offloading the requirement to the IBC.

2. Franchise Funds—Mechanics

Once you start looking into the possibility of offloading the requirement to the IBC you notice there are essentially two parallel processing tracks that will need to be followed since the command is part of the DoD. One is the DoD track under the Federal Acquisition Regulation (FAR) and Defense Federal Acquisition Regulation Supplement (DFARS), and the other is the IBC's internal process track.⁵⁶ You decide to look at each one in turn.

Looking at the FAR track, you notice that this process must be followed for all non-Economy Act IAs.⁵⁷ Just like under the Economy Act, prior to requesting that the IBC's conduct an acquisition on behalf of the command under their franchise fund IA authority, OSMR must make a determination that the use of this franchise fund's assisted acquisition services represents the best procurement approach.⁵⁸ As part of this determination, the command must obtain the concurrence of the responsible servicing contracting activity.⁵⁹ This may be a problem if the command does not have a good relationship with the responsible contracting activity. However, in this case, you feel that both parties would be open to offloading the subject requirement, given its history.

You see, at a minimum, this determination must include an analysis of procurement approaches considered.⁶⁰ The command must then determine whether using the assisted acquisition service of another agency satisfies the requirement's schedule, is cost effective, and will result in the use of funds in accordance with appropriation laws and policies.⁶¹ This has likely already been worked on by the

⁵⁵ *See* U.S. Dep't of the Interior, *Understanding Federal Acquisitions*, https://www.doi.gov/sites/doi.gov/files/uploads/aqd_lifecycle_brochures.pdf (last visited Feb. 9, 2016).

⁵⁶ *See* FAR 17.5, 17.7; DEP'T OF DEF., DEFENSE FEDERAL ACQUISITION REGULATION SUPPLEMENT 217.7 (Nov. 2015) [hereinafter DFARS]; *See* Dep't of the Interior, *Getting Started*, <https://www.doi.gov/ibc/services/acquisition/getting-started> (last visited Jan. 8, 2016).

⁵⁷ *See* FAR 17.5. This subpart applies to all IAs, not just non-Economy Act IAs. There are two exceptions to the mandatory use of this process: (1) IA reimbursable work performed by federal employees other than acquisition assistance, where contracting is incidental to the purpose of the transaction; or (2) orders of \$550,000 or less issued against Federal Supply Schedules. *See* FAR 17.5(c).

⁵⁸ *See* FAR 17.502-1. The Defense Federal Acquisition Regulation Supplement (DFARS) specifies factors to consider when making this determination. *See* DFARS, *supra* note 56, at 217.770.

⁵⁹ *See* FAR 17.502-1.

⁶⁰ *See* FAR 17.502-1(a)(i)–(iii).

⁶¹ *Id.*

responsible contracting activity and should not be difficult to complete.

Next, you see that the IBC and the command must both agree to, and sign a written representation of, general terms and conditions governing their relationship, to include roles and responsibilities.⁶² Fortunately, you find that both the IBC and the DoD have already agreed to general terms, conditions, roles, and responsibilities regarding this assisted acquisition service.⁶³ With what seems like a turnkey contract solution for the command, you turn your sights to an additional part of the FAR track that applies in this case—the process requirements for acquisitions by nondefense agencies on behalf of the DoD.⁶⁴

You find that for any assisted acquisitions performed for the DoD, by any agency not part of the DoD, there are additional processes to consider.⁶⁵ Specifically, if the acquisition is in excess of the SAT, the nondefense servicing agency must certify it will comply with applicable procurement requirements for that fiscal year.⁶⁶ This means the nondefense agency's policies, procedures, and internal controls must be adequate to ensure the nondefense agency's compliance with the FAR, DFARS, and other applicable procurement laws.⁶⁷ After some research, you find that the IBC has certified that it will comply with defense procurement requirements for Fiscal Year 2016.⁶⁸ Though not necessarily applicable in this case because the procurement falls under the SAT, you start to feel comfortable about meeting the process hurdles. You now turn to the IBC's internal procedures.

In general, you find that the IBC's process seems user friendly and timely. First, you notice there is a fee for this service, so while you are researching the IBC's internal process you send an email to the IBC's Acquisition Services Directorate (AQD) for the fiscal year's current calculated rate.⁶⁹ Next, you notice that the command must "[p]rovide a clear description of your requirements through a Statement of Work/Statement of Objectives/Performance Based Work Statement."⁷⁰ Then, the command must "[i]nclude an Independent Government Cost Estimate (IGCE)."⁷¹ The IBC

goes on to provide examples and instructions on performing an IGCE. Lastly, the command must provide a period of performance and a desired award date.⁷² You almost cannot believe the two processes could be so simple. The only thing left for the command to do is send funding paperwork and then wait for a turnkey-like contract. Then it hits you; you remember something the CoS told you when she first came in—the requirement was funded with the command's remaining operations appropriation balance, and it was about to expire. Surely this is not the first time this issue has arisen; the franchise fund must have special authorities to deal with this. You continue your research into this potential limitation.

3. Franchise Funds—Limitations

After a discussion with the Resource Manager (RM) you have two concerns. First, the command only committed the exact estimated re-compete cost because of budget policy limitations imposed by the higher command. This could be problematic, considering the assisted acquisition service fee was not included in the original committed amount. Second, the end of the committed funds' period of availability is closing fast and you are worried that the IBC will not have the time to solicit and award the requirement before funds expire. Just then, the IBC emailed you back the fee rate you asked for a little while ago.

The IBC AQD's, "current Interior Franchise Fund fee is calculated at [five percent] for dollars obligated on a contract."⁷³ "The fee percentage is based on [the] AQD's calculated rate for service delivery and is updated at least every two years."⁷⁴ While at first glance it does not seem like much, five percent of the total obligated value on the contract can be a pretty substantial fee; especially in today's fiscally austere environment.

Unfortunately, the RM confirms that the five percent fee would push the requirement's cost over the amount the command committed for this requirement. You think that the command could request more funds to pay the difference, but that takes time and you are already concerned with the amount

⁶² See FAR 17.502-1(b)(1)(i).

⁶³ See DoI MoA, *supra* note 53. Further, the FAR requires sufficient documentation to be included within the file to ensure an adequate audit over and above the agreed to terms between DoI and DoD. See FAR 17.502-1(b)(2).

⁶⁴ The term turnkey contract is used in this context to describe a contract that is substantially developed by a third party for immediate use by the requiring party.

⁶⁵ See FAR 17.5; 17.7; 17.701 (2015); DFARS, *supra* note 56, at 217.700; 217.701.

⁶⁶ See FAR 17.703(a).

⁶⁷ See FAR 17.703(b).

⁶⁸ See Letter from Keith J. O'Neill, Assoc. Dir., Acquisition Services Directorate, Interior Business Center, to Claire M. Grady, Director, Defense

Procurement and Acquisition Policy, Dep't of Def. (Oct. 1, 2015), http://www.acq.osd.mil/dpap/cpic/cp/docs/FY16_DOI_IBC_AQD_-_Nondefense_Agency_Certification_of_Compliance.pdf.

⁶⁹ The Acquisition Services Directorate (AQD) runs the assisted acquisition services of the IBC. See *Acquisition Services*, *supra* note 54.

⁷⁰ See *Getting Started*, *supra* note 56.

⁷¹ *Id.*

⁷² *Id.*

⁷³ Email from Katherine Valltos, Senior Acquisition Advisor, Acquisition Services Directorate, Interior Business Center, to author (Jan. 07, 2016, 11:52 EST) (on file with author).

⁷⁴ *Id.*

of time the IBC would have to award the contract and obligate the funds before they expire. You ponder, “What if the IBC has some special authority to hold on to funds so they do not expire?”

After some research you find the Government Accountability Office’s (GAO) opinion on this issue.⁷⁵ The GAO found that a DoI revolving fund, GovWorks the predecessor to IBC, accepted Military Interdepartmental Purchase Requests (MIPR) to document interagency agreements between the DoI and the DoD that did not identify specific items or services to be procured.⁷⁶ Because the MIPRs did not specify items or services to be ordered, those MIPRs could not properly obligate the DoD-appropriated funds attached to them.⁷⁷

Meanwhile, the GAO found that routinely the DoD would send more specificity to the DoI at a later date; however, by then the DoD appropriations had expired and were not available for obligation.⁷⁸ Thus, when the DoI later used those funds after their period of availability, the use was determined to be improper because it did not fulfill a *bona fide* need arising during the funds’ period of availability.⁷⁹ This practice is called parking or banking funds.⁸⁰ The GAO opined that when an agency withdraws funds from its appropriation and makes them available for credit to another appropriation, like a franchise fund, the withdrawn amounts retain their time character and do not assume the time character of the appropriation to which they are credited until they are earned.⁸¹ Therefore, unless otherwise required by law, unexpired balances must be returned to the customer agency.⁸²

You come to the realization that because your appropriation’s period of availability is coming to an end and a franchise fund cannot park or bank funds, the IBC will not have time to award this requirement, let alone give the

command time to secure more funding. Lamenting, you think that it would be great if there was an IA authority that already had pre-negotiated, turnkey contracts just waiting for you to pull off a shelf. Then it hits you: each month, you buy office supplies without open market competition.⁸³ You just pull out a book, pick out your supplies, and supplies appear on your desk. Energized like you were when you watched *Making a Murderer*,⁸⁴ you remember the other IA authority the logistics team always talks about—the Federal Supply Schedule (FSS).

C. The Federal Supply Schedule

As you have done multiple times before, you set out to learn the gist of the FSS IA authority.⁸⁵ Again, you see some promise in this IA authority; but based on your recent experiences, lots of questions start popping into your head. Will my requirement fit here? How long will this process take? Is Jon Snow really a Targaryen?⁸⁶ You start researching these questions and you realize that you may have found that proverbial needle in the haystack.

1. The Federal Supply Schedule—Uses

You find that the Federal Property and Administrative Services Act authorizes the General Services Administration (GSA) to enter into contracts for government-wide use outside the restrictions of the Economy Act.⁸⁷ The FSS program provides federal agencies with a simplified process for obtaining commercial supplies and services at prices associated with volume buying.⁸⁸ The GSA negotiates with vendors for the best prices afforded their preferred customers for the same or similar items or services, and awards government-wide indefinite duration and indefinite quantity (ID/IQ) contracts for over 11 million commercial items and services.⁸⁹ Agencies then place orders against these schedule

⁷⁵ See GAO Red Book III, *supra* note 45, pt. C, sec. 4, at 2-115 to 2-116.

⁷⁶ See *id.* A Military Interdepartmental Purchase Request (MIPR) is a type of interagency agreement used to place orders for supplies and non-personal services with a military department. See 48 C.F.R. § 2917.501 (2016).

⁷⁷ See GAO Red Book III, *supra* note 45, pt. C, sec. 4, at 2-115 to 2-116.

⁷⁸ See *id.*

⁷⁹ See *id.*

⁸⁰ See Implementation of the Library of Cong. FEDLINK Revolving Fund, B-288142 (Comp. Gen. Sept. 6, 2001); Continued Availability of Expired Appropriation for Additional Project Phases, B-286929 (Comp. Gen. Apr. 25, 2001).

⁸¹ See GAO Red Book III, *supra* note 45, pt. C, sec. 4, at 2-115 to 2-116.

⁸² See *id.*; see also FAR 15.501 (stating that this IA authority cannot be used to circumvent conditions and limitations imposed on the use of funds).

⁸³ This refers to the Federal Supply Schedule (FSS). See *infra* Part III.C.

⁸⁴ *Making a Murderer* (Netflix broadcast Dec. 18, 2015).

⁸⁵ “The Federal Supply Schedule program is also known as the GSA [General Services Administration] Schedules Program or the Multiple Award Schedule Program. The Federal Supply Schedule program is directed and managed by GSA and provides Federal agencies with a simplified process for obtaining commercial supplies and services at prices associated with volume buying.” FAR 8.402(a).

⁸⁶ GAME OF THRONES (Home Box Office broadcast Jun. 26, 2016).

⁸⁷ See Federal Property and Administrative Services Act, 40 U.S.C. § 501 (2012); FAR 8.4.

⁸⁸ See Federal Property and Administrative Services Act, 40 U.S.C. § 501 (2012); FAR 8.4. A commercial service is installation services, maintenance services, repair services, training services, and other services if: such services are procured for support of a commercial item as defined by the FAR regardless of whether such services are provided by the same source or at the same time as the item; and the source of such services provides similar services contemporaneously to the general public under terms and conditions similar to those offered to the federal government. See FAR 2.101.

⁸⁹ See Federal Property and Administrative Services Act, 40 U.S.C. § 501

contracts.⁹⁰

As before, this IA authority seems like a perfect solution for your problem. You are in need of acquiring facility maintenance and training services for support of commercial items within the HVNSTF. Further, because the turnkey-like FSS contracts are already pre-negotiated, full and open competition does not seem to be a concern, which means the command may be able to obligate their expiring funds for this requirement quickly. Hopeful, you start researching the mechanics of this IA authority to determine if it will fit your need.

2. The Federal Supply Schedule—Mechanics

First, you notice that the general IA authority procedures in FAR 17.5 do not apply to orders of \$550,000 or less, issued against the FSS.⁹¹ The value of the subject requirement is under the SAT, which does indeed fall under this limit. Next, you see that the FSS ordering procedures depend on the value of the requirement and whether or not there is a need for a statement of work (SOW).⁹² In this case, you believe it is likely that the services will require a SOW, so you decide to research that applicable procedure.

Once you start researching, you find that the GSA provides a guide to help you through the ordering procedures under FAR 8.405.⁹³ In accordance with the guide and FAR 8.405-2, you determine that first a SOW or Performance Work Statement (PWS) and evaluation criteria will have to be developed.⁹⁴ Again, this step should be an easy task as most of this was likely completed by the responsible contracting activity for the aforementioned re-compete. Next, a Request for Quotations (RFQ), the SOW/PWS, and the evaluation criteria have to be sent to at least three GSA schedule contractors.⁹⁵ You decide to go to the GSA FSS eBuy webpage to find three schedule contractors you believe can

provide the facility maintenance and training contemplated under the immediate requirement just to see what is available.⁹⁶ To your amazement, after registering for the website you find what looks like three potential contractors rather quickly. Lastly, you see that the potential contractors then submit quotes; the ordering agency makes a best value determination, and then selects a contractor.⁹⁷ Using the FSS to fulfill your requirement cannot be this easy. Unconvinced, you decide to look at what are the limitations to using this IA authority.

3. The Federal Supply Schedule—Limitations

The first limitation you see is an increased market research requirement when using the FSS in some situations. In accordance with Army policy, contracting officers for ordering agencies must seek discounts for orders exceeding the maximum order threshold of an individual schedule contract.⁹⁸ The same contracting officer must then document where a discount is obtained and where it is not.⁹⁹ This limitation does not seem overly burdensome and can probably be handled simply by a contracting officer. However, you would need to convince the responsible contracting activity to re-accept the requirement to do this. Given your good relationship with the responsible contracting activity, you feel you may be able to convince them to re-accept the requirement; therefore, you move on.

Next, you see that agencies must use fixed-price orders for the acquisition of commercial services to the maximum extent practicable.¹⁰⁰ Again, this does not greatly concern you as the services you are looking to procure are commercial in nature and generally must be procured under a fixed-price

(2012); FAR 8.4.

⁹⁰ See Federal Property and Administrative Services Act, 40 U.S.C. § 501 (2012); FAR 8.4. An agency may also establish a blanket purchase agreement (BPA). *Id.* A ____ (BPA) is a simplified method of filling anticipated repetitive needs for supplies or services by establishing charge accounts with qualified sources of supply. See FAR 13.303-1(a).

⁹¹ See FAR 17.500(c)(2) (2015).

⁹² See FAR 8.405-1; -2 (2014). The FAR does not differentiate between a Statement of Work (SOW), which is generally used to describe tangible things to be purchased, and a Performance Work Statement (PWS), which is generally used to describe services to be purchased. See FAR 2.101 (2016); 8.405-1; -2 (2014). Therefore, for the purposes of this discussion SOW and PWS should be read interchangeably.

⁹³ See U.S. GEN. SERV. ADMIN., MULTIPLE AWARD SCHEDULES DESK REFERENCE, Vol. 6 (version 7, 2016) [hereinafter Desk Reference].

⁹⁴ See *id.* at 29; FAR 8.405-2(a), (b), (c)(2).

⁹⁵ See *id.* at 28; FAR 8.405-2 (c)(2). If three schedule contractors are not used, the ordering agency must document the circumstances for restricting consideration to fewer than three schedule contractors based on one of the

reasons at FAR 8.405-6(a). See FAR 8.405-2(c)(2)(ii).

⁹⁶ See U.S. Gen. Serv. Admin., EBUY, <http://www.gsa.gov/portal/content/104675> (last reviewed Sept. 15, 2016). eBuy is a component of GSA *Advantage!*®, which is the online Request for Quotation (RFQ) tool. *Id.* eBuy is designed to facilitate the request for submission of quotations for a wide range of commercial supplies (products) and services under the GSA supply schedules. *Id.*

⁹⁷ See Desk Reference, *supra* note 93, at 28; FAR 8.405-2 (c)(2).

⁹⁸ See Memorandum from Dir., Def. Procurement and Acquisition Policy to Assistant Sec'y of the Army (Acquisition, Logistics, and Technology) et al., Subject: Use of Federal Supply Schedules and Market Research (Jan. 28, 2005), <http://www.acq.osd.mil/dpap/policy/policyvault/2004-0810-DPAP.pdf>. While contracts on the FSS are prenegotiated, costs can still be negotiated with the individual schedule contractors to provide further savings. *Id.* These aftermarket negotiated costs apply only to the specific contract they were negotiated for and not to the entire federal government. *Id.*

⁹⁹ *Id.*

¹⁰⁰ See FAR 8.404(h)(2).

paradigm anyway.¹⁰¹ Lastly, you remember a logistics team member saying something to the effect that FSS orders under the SAT must be set aside for small businesses.¹⁰² However, you find that in 2010, Congress amended the Small Business Act to remove the mandatory nature of the small business set-asides under multiple award contracts like the FSS.¹⁰³ You find a couple of minor other requirements, but nothing glaring, unreasonable, or applicable to the immediate case.¹⁰⁴ You finally have a solution—an IA authority that will let you procure your facility maintenance and training contract. Under the FSS the acquisition can be feasibly done quickly to allow the command to use their expiring committed funds. Plus, this vehicle does not bust your budget with a fee. Relieved, you pick up the phone and call the CoS. “Ma’am, I think we have a way ahead.”

IV. Conclusion

In today’s fast-paced operational environment, decision-makers need every tool at their disposal to make the best decision. Army attorneys need to develop a working understanding of non-Economy Act IA authorities like the Project Order Statute, franchise funds, and the Federal Supply Schedule in order to provide proactive acquisition advice. Understanding how they differ from the Economy Act as well as their individual uses, mechanics, and limitations provides a depth of knowledge required for more complete counsel. Developing such a familiarity may not be an easy goal to achieve, especially in these times of increasing workload and shrinking resources. Ultimately, developing a working understanding of non-Economy Act IA authorities will not only elevate the contract law practitioner’s practice to the next level, but will provide a more complete picture for a decision-maker.

¹⁰¹ See FAR 12.207.

¹⁰² Prior to 2010, The Small Business Act required all contracts under the SAT to be exclusively set aside for small businesses. See Aldevra, B-411752 (Comp. Gen. Oct. 16, 2015).

¹⁰³ *Id.*

¹⁰⁴ See generally FAR 8.405-3 (describing other requirements for use of a blanket purchase agreements).

Wait, I Owe How Much In Penalties?: U.S. International Tax Considerations For Servicemembers with Foreign Bank Accounts & Foreign Securities

Captain Adam G. Province*

I. Introduction

Foreign bank accounts created by servicemembers stationed outside the continental United States (OCONUS) may prove to be financially convenient while living abroad. Even though there are reasons for OCONUS servicemembers to obtain foreign accounts, the United States imposes a number of burdensome reporting requirements related to these foreign accounts. In addition, these reporting requirements may apply because of a servicemember marrying a foreign spouse or having certain business activities abroad. Failure to report these foreign accounts and assets may result in civil and criminal penalties. Several programs, however, offered by the Internal Revenue Service (IRS) provide a fresh start for individuals with civil penalties and criminal liability. This article reviews the U.S. international tax requirements related to ownership of foreign assets, discusses the strict penalty provisions for failing to meet certain compliance obligations, and provides options that judge advocates should consider when assisting servicemembers with penalty mitigation.

The tax consequences for U.S. citizens holding foreign bank accounts and foreign assets is a growing concern when considering the potential civil monetary fines and criminal penalties that can be imposed under U.S. law. For example, in 2012, Dr. Michael Canale, a former U.S. Army surgeon and Bronze Star recipient, pled guilty to a charge of willfully failing to notify the IRS of his ownership of a foreign bank

account.¹ In 2000 Dr. Canale and his brother inherited the foreign bank account, and then later concealed the ownership from the IRS by linking the foreign account to a sham Lichtenstein foundation.² By 2010 the estimated value of the foreign bank account grew to roughly \$1.4 million.³ After a criminal investigation and indictment by the Department of Justice, Dr. Canale received six months of incarceration in federal prison for his attempt to conceal the foreign bank account.⁴ A civil monetary fine of \$100,000 and back taxes of \$216,407, plus 400 hours of community service, were also imposed on Dr. Canale.⁵

Issues related to owning foreign assets prove to be relevant when considering the number of current and retired U.S. military personnel living abroad. At the end of fiscal year 2016, it is estimated that 201230 servicemembers in all branches of the U.S. military were stationed OCONUS.⁶ When national guard and reservist are added to this amount, OCONUS servicemembers totaled 241,634 during 2016.⁷ In addition, it is believed that 65,628 U.S. civilians were employed abroad by the Department of Defense.⁸ The total U.S. military retiree population living in foreign countries during 2015 is unclear; however, some assessments indicate that as many as 550,000 U.S. military retirees and their families are living abroad.⁹ For those living abroad, special tax requirements may apply for individuals who have a connection to certain foreign accounts and foreign securities maintained abroad.

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¹ See David Voreacos & Patricia Hurtado, *U.S. Tax Cheats Nailed After Swiss Adviser Mails It In*, BLOOMBERG BUSINESS (Mar. 12, 2013), <http://www.bloomberg.com/news/articles/2013-03-12/u-s-tax-cheats-picked-off-after-adviser-mails-it-in> (stating Dr. Canale had a distinguished Army career as a paratrooper and then later worked for the Veteran's Administration until his retirement in 2010).

² Press Release, Department of Justice Office of Public Affairs, Manhattan U.S. Attorney Announces Charges Against Kentucky Resident for Maintaining Secret Swiss Bank Accounts (Nov. 18, 2014), <http://www.justice.gov/opa/pr/manhattan-us-attorney-announces-charges-against-kentucky-resident-maintaining-secret-swiss>.

³ Patricia Hurtado, *Peter Canale Avoids Prison in Swiss Bank Tax Evasion Case*, Daily Tax Rep. (BNA), Dec. 4, 2015, at K-2.

⁴ See David Voreacos, *Beanie Baby Billionaire Sentence Comes Amid Tax Leniency*, BLOOMBERG (Nov. 1, 2013), <http://www.bloomberg.com/news/articles/2013-11-01/beanie-baby-billionaire-sentence-comes-amid-tax-leniency> (stating Dr. Canale was

instructed to use the foreign account to care for his mother, but the matter resulted in Dr. Canale losing his dignity when he "betrayed his core values of duty, honor and country").

⁵ David Voreacos, *Offshore Tax Scorecard: Bankers, Lawyers, Other Advisers See Charges Alongside Clients*, Daily Tax Rep. (BNA), Nov. 5, 2013, at J-3.

⁶ See DEFENSE MANPOWER DATA CENTER, TOTAL MILITARY PERSONNEL AND DEPENDENT END STRENGTH BY SERVICE, REGIONAL AREA, AND COUNTRY (Sept. 30, 2015), https://www.dmdc.osd.mil/appj/dwp/dwp_reports.jsp (providing a numeric breakdown of U.S. military servicemember who are stationed abroad by each individual foreign country compared to U.S. servicemembers who are stationed in the continental United States (CONUS)).

⁷ *Id.*

⁸ *Id.*

⁹ See Liz Davidson, *A Great Retiree Migration Abroad is Not So Far Fetched*, FORBES (Apr. 7, 2011), <http://www.forbes.com/sites/financialfinesse/2011/04/07/a-great-retiree-migration-abroad-is-not-so-far-fetched-2/> (re-stating that the Department of State believes that 6.6 million Americans live abroad, and of that total population, it is estimated that 550,000 are U.S. military retirees and their families).

Congress provides, under the Internal Revenue Code (IRC), that U.S. citizens are required to report all worldwide income to the IRS annually.¹⁰ Various U.S. international reporting requirements related to foreign accounts should be considered for judge advocates who provide tax assistance to servicemembers, civilians, and retirees living abroad. These international reporting requirements may not be relevant for the average servicemember stationed abroad.

Of particular importance are the monetary penalty provisions for failure to meet certain annual reporting requirements imposed by the IRS. Failure to meet these reporting obligations could result in substantial civil penalties enforced by the IRS.¹¹ In recent years, the IRS has increased its enforcement of reporting requirements related to foreign bank accounts and foreign assets.¹² Likewise, the IRS has increased its collection of civil penalties over the past twenty years.¹³ Failure to file certain reports related to foreign bank accounts could result in substantial civil monetary penalties.¹⁴ An additional interest charge may be added to the outstanding penalties related to the failure to file certain IRS reports.¹⁵ Moreover, potential criminal penalties may apply in the case of an individual who willfully fails to file certain required annual reports.¹⁶

The purpose of this article is to guide judge advocates providing tax assistance to servicemembers and retirees living abroad.¹⁷ This article first summarizes the United States reporting rules related to the ownership of foreign bank accounts. Next, this article reviews a number of programs established by the IRS and Department of Justice may assist in mitigating the civil and criminal penalties. The article concludes by noting how a judge advocate may assist to minimize substantial monetary penalties, in addition to limiting potential criminal liability if willful conduct is

discovered. A thorough review of the international tax compliance rules is first discussed below.

II. International Tax Reporting Law

This section reviews international tax reporting rules and regulations imposed by Congress and the Department of Treasury. First, the Foreign Bank and Financial Accounts (FBAR) reporting requirements imposed by the Department of Treasury are reviewed for servicemembers who have a connection to certain foreign financial accounts.¹⁸ Second, if a servicemember has a connection to a foreign financial account that is in excess of a specific monetary value, additional reporting requirements are imposed under the IRC. Third, other reporting rules are considered for special situations that may apply to OCONUS servicemembers who hold certain foreign security interests. A review of the FBAR rules in Part II.A. is first addressed.

A. FBAR Reporting Requirements

Congress enacted the Bank Secrecy Act of 1970 in order to collect certain information related to criminal activity with ties to international terrorism.¹⁹ Congress delegated to the Department of Treasury the ability to adopt regulations requiring U.S. citizens to file certain reports for transactions occurring with a foreign financial agency.²⁰ The FBAR regulations, if applicable, impose serious civil and monetary penalties for those who fail to meet the annual reporting requirements.²¹ Currently, FBAR noncompliance is a significant issue, which should result in increased enforcement by the IRS in future years.²²

¹⁰ See 3 BORIS I. BITTKER & LAWRENCE LOKKEN, FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS ¶ 65.1.2 (rev. 3d. ed. 2005 & 2016 Cum. Supp. No. 2) (summarizing the U.S. tax rules applied to U.S. citizens who earn both foreign and domestic sourced income).

¹¹ See 31 U.S.C. § 5321 (2012) (outlining civil monetary penalties for failure to file certain reports related to foreign transactions).

¹² See Internal Revenue Service, *Voluntary Disclosure: Questions and Answers* (Sept. 21, 2009), <https://www.irs.gov/uac/Voluntary-Disclosure:-Questions-and-Answers> (stating, "[r]ecent IRS enforcement efforts in the offshore area have led to an increased number of voluntary disclosures").

¹³ Compare INTERNAL REVENUE SERVICE, 2014 DATA BOOK 41 (March 2015), <https://www.irs.gov/pub/irs-soi/14databk.pdf> (stating the IRS assessed almost \$25.6 billion in civil penalties during fiscal year 2014), with INTERNAL REVENUE SERVICE, 1993–1994 DATA BOOK 100 (1993–1994) (stating the IRS assessed \$13.1 billion in civil penalties during fiscal year 1994).

¹⁴ For example, if a U.S. servicemember fails to file Form 8938, discussed *infra* at Part I.A, a civil monetary penalty of \$10,000 is due for *each* year that a failure to file occurs.

¹⁵ See I.R.C. § 6601(a) (2012) (requiring an interest charge of the federal short-term rate plus 3 percentage points, as stated in I.R.C. § 6621, is due on any non-payments or underpayments).

¹⁶ See 31 U.S.C. § 5322 (2012) (outlining criminal penalties for willful violations of failure to file required foreign transaction reports).

¹⁷ Note that this discussion of international compliance law related to foreign accounts may also apply to dual citizen servicemembers who maintain foreign accounts in their native country. Judge advocates serving CONUS should also consider any compliance obligations related to these dual citizen servicemembers who maintain a foreign bank account in their native country.

¹⁸ See *infra* pp. 4-7.

¹⁹ 31 U.S.C. § 5311 (2012).

²⁰ 31 U.S.C. § 5314 (2012).

²¹ See 3 BORIS I. BITTKER & LAWRENCE LOKKEN, FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS ¶ 65.6.4 (rev. 3d. ed. 2005 & 2016 Cum. Supp. No. 2) (summarizing the FBAR rules, filing requirements, and discussing the civil and criminal penalties).

²² For example, in 2012 the IRS only received 807,040 FBAR submissions even though an estimated 7.6 million U.S. citizens lived abroad. See *Offshore Tax Evasion: The Effort to Collect Unpaid Taxes on Billions in Hidden Offshore Accounts Before the Permanent Subcommittee on Investigations of the S. Comm on Homeland Security and Government Affairs*, 113th Cong. 22 (2014) (citing the Taxpayer Advocate as stating "[w]hile 7.6 million U.S. citizens reside abroad and many more U.S.

1. FBAR Rules

The Department of Treasury requires an FBAR report for any U.S. person who has a financial interest or signature authority over any foreign financial account and the aggregate maximum value of the account exceeds \$10,000 at any time during a calendar year.²³ First, the reporting requirement is imposed on all U.S. persons, which includes U.S. citizens, U.S. residents, and any entity formed in the United States.²⁴ Second, the reporting requirements apply for any foreign financial account.²⁵ Third, the U.S. person must have a financial interest over the foreign financial account, which occurs if a U.S. person is the owner of record, holder of legal title, agent, nominee, or attorney of the foreign financial account.²⁶ If a U.S. citizen does not have a financial interest in a foreign account, a reporting requirement may still apply if that citizen has signature authority over the foreign account.²⁷ Fourth, the aggregate value of the foreign accounts must exceed \$10,000 per calendar year.²⁸

2. Filing Requirements

For U.S. persons who are subject to the FBAR rules, a taxpayer must report this information on his or her annual

residents have FBAR filing requirements, the IRS received only 807,040 FBAR submissions in 2012”).

²³ 31 C.F.R. 1010.350(a) (2015).

²⁴ 31 C.F.R. 1010.350(b) (2015).

²⁵ See 31 C.F.R. 1010.350(c) (2015) (noting that foreign financial accounts include foreign bank accounts, foreign brokerage accounts, foreign life insurance and annuity accounts, and many other accounts held by a foreign entity).

²⁶ 31 C.F.R. 1010.350(e)(1)–(2)(i) (2015). A financial interest is broadly defined to include any U.S. person who owns a greater than 50 percent, direct or indirect, interest in a U.S. entity or a partnership. 31 C.F.R. 1010.350(e)(2)(ii) (2015). In addition, a financial interest may also occur for any U.S. person who holds an interest in a grantor trust or a greater than 50 percent beneficial interest in assets held in trust. 31 CFR 1010.350(e)(2)(iii)–(iv) (2015).

²⁷ Signature authority includes any individual who has the authority to control the disposition of assets held by the foreign financial account, but does not include an officer or employee of a foreign financial institution related to the foreign financial account. 31 C.F.R. 1010.350(f) (2015); see also Internal Revenue Service, *IRS FBAR Reference Guide 5* (2016), <https://www.irs.gov/pub/irs-utl/irsfbarreferenceguide.pdf> [hereinafter *IRS FBAR Reference Guide*] (noting that a U.S. person who has a power of attorney over a foreign financial account is required to meet the annual FBAR filing obligations).

²⁸ The aggregate maximum value applies to all foreign financial accounts held by a U.S. person during the calendar year. See, e.g., *IRS FBAR Reference Guide*, *supra* note 27, at 3 (providing an example: “Kristin, a United States person, owns foreign financial accounts A, B and C with account balances of \$3,000, \$1,000 and \$8,000, respectively. Kristin is required to report accounts A, B and C because the aggregate value of the accounts is over \$10,000. It does not matter that no single account exceeded \$10,000”).

Form 1040 tax return.²⁹ In addition, Report 114a of the U.S. Treasury Department’s Financial Crimes Enforcement Network (FinCEN) is annually required by the deadline prescribed by the Department.³⁰ FinCEN Report 114a must be electronically filed by June 30, 2016, with no extensions for a taxpayer who is subject to the FBAR rules during calendar year 2015.³¹ For tax year 2016, the deadline is moved to April 15, 2017, and includes a six-month extension.³² If a servicemember fails to timely file FinCEN Form 114a, civil penalties may apply.³³

3. Civil and Criminal Penalties

Civil penalties for failure to file FinCEN Form 114a range depending on the nature of the violation.³⁴ The amount of civil monetary penalty depends on whether the taxpayer’s conduct was the result of either non-willful or willful conduct.³⁵ For non-willful conduct, a civil monetary penalty will range between \$500 for a negligent violation up to \$10,000 for violations that were not due to reasonable cause.³⁶ For any willful conduct related to the deficient FBAR filing, the civil monetary penalty is increased to the greater of \$100,000 or 50 percent of the total balance of the foreign financial account.³⁷ Interest will apply to an outstanding

²⁹ See Form 1040, Sch. B, Part III, Line 7a, Internal Revenue Service (2015) (reminding the taxpayer that FinCEN Form 114 is required to be filed if the taxpayer answered “Yes” to line 7a.).

³⁰ Note that the Department of the Treasury initially required Form TD F 90-22.1 to be timely submitted to it through the mail. Today, FinCEN Report 114a must be electronically filed on the Bank Secrecy Act’s e-Filing website at <http://bsaeifiling.fincen.treas.gov/main.html>.

³¹ See Financial Crimes Enforcement Network, BSA Electronic Filing Requirements For Report of Foreign Bank and Financial Accounts (FinCEN Form 114) 47 (Mar. 2015), <http://bsaeifiling.fincen.treas.gov/docs/FinCENFBARElectronicFilingRequirements.pdf> (“The FBAR must be received by the Department of the Treasury on or before June 30th of the year immediately following the calendar year being reported. The June 30 filing date may not be extended.”).

³² See Surface Transportation and Veterans Health Care Choice Improvement Act of 2015, Pub. L. No. 114-41, § 2006, 129 Stat. 443, 458–59 (2015) (“The due date of FinCEN Report 114 . . . shall be April 15 with a maximum extension for a 6-month period ending on October 15 . . .”).

³³ See 31 U.S.C. § 5321(a)(5) (2012) (outlining the civil penalties imposed by the Department of Treasury for failure to annually file certain reports related to foreign financial agency transactions).

³⁴ *Id.*

³⁵ See *infra* p. 13.

³⁶ Compare 31 U.S.C. § 5321(a)(6)(A) (2012) (noting a \$500 civil penalty for any negligent failure to file any foreign financial agency transaction), with 31 U.S.C. § 5321(a)(5)(B) (stating the civil penalty imposed shall not exceed \$10,000 for violations there were not the result of reasonable cause).

³⁷ See 31 U.S.C. § 5321(a)(5)(C) (2012) (declaring any willful violations for failure to file FinCEN Form 114a will result in a civil penalty of the greater of either (i) \$100,000, or (ii) 50 percent of the value of the foreign financial account).

FBAR penalty at a rate of 6 percent if a taxpayer does not pay the FBAR penalty within ninety days of assessment.³⁸ Criminal penalties may apply in certain circumstances.³⁹

4. FBAR Military Exception

One important exception to the FBAR filing requirement in regard to OCONUS servicemembers relates to foreign accounts maintained at a U.S. military finance facility.⁴⁰ Specifically, any account that is operated by a U.S. military banking facility designated by the U.S. government to serve at U.S. military installations abroad does not meet the definition of a foreign financial account and therefore is not required to be reported to the on FinCEN Report 114a.⁴¹ Any account, however, that is not maintained by a U.S. military banking facility and does not serve U.S. military installations abroad would not meet the exception provided in the FBAR regulations, which should require an annual FBAR filing requirement.⁴²

B. Specified Foreign Financial Assets & Form 8938

In addition to the FBAR filing requirements, OCONUS servicemembers should also be aware of the annual reporting requirements related to Form 8938.⁴³ As of 2011, Form 8938 is required for specified individuals⁴⁴ who own a specified foreign financial asset and the total value of that asset meets certain reporting thresholds.⁴⁵ The reporting threshold varies depending on the servicemember's residence in or outside the United States, marital status, and individual tax return filing status.⁴⁶ The difference between the FBAR reporting requirements and Form 8938 depends on the value of the

foreign financial asset. It is important to note that filing Form 8938 does not relieve a servicemember of their FBAR filing requirement.⁴⁷

1. Rules for Form 8938

Similar to the FBAR rules, Form 8938 requires an annual filing requirement for any specified foreign financial assets.⁴⁸ A specified foreign financial asset is broadly defined to include any financial account that is maintained by a foreign financial institution.⁴⁹ This definition includes any foreign financial asset that is held for investment that is either stock, security, any interest in a foreign entity, financial instrument, or contract with a counterparty who is not a U.S. person.⁵⁰ In addition, a specified foreign financial asset includes a foreign partnership interest, foreign mutual funds, foreign issued life insurance policies and annuities, and interests held in foreign hedge funds and private equity funds.⁵¹

The total value requirement of a specified foreign financial asset depends on the individual circumstances of each taxpayer. Generally, the valuation requirement is met if the aggregate value of all the foreign financial assets exceeds either \$50,000 on the last day of the taxable year or \$75,000 at any time during the taxable year.⁵² If the taxpayer is married filing jointly, the valuation amounts of the foreign financial asset is increased to include \$100,000 on the last day of the taxable year or \$150,000 at any time during the taxable year.⁵³ The valuation amounts of foreign financial assets are increased to \$200,000 on the last day of the taxable year or \$300,000 at any time during the taxable year if a specified individual qualifies under I.R.C. § 911(d)(1).⁵⁴ In addition, the valuation rules of a foreign financial asset are increased to

³⁸ 31 U.S.C. § 3717(b) (2012).

³⁹ See 31 U.S.C. § 5321(d) (2012) (stating a "civil money penalty may be imposed . . . with respect to any violation of this subchapter notwithstanding the fact that a criminal penalty is imposed with respect to the same violation").

⁴⁰ 31 C.F.R. 1010.350(c)(4)(iii) (2015).

⁴¹ *Id.*

⁴² For example, any foreign bank account opened by a servicemember at a foreign branch that is off-post would not meet the FBAR military exception. Therefore, a judge advocate needs to determine whether the foreign account is managed by a bank with a branch either on or off a military installation.

⁴³ See generally I.R.S. Notice 2011-55, 2011-29 I.R.B. 53 (discussing guidance for enacting I.R.C. § 6038D and the corresponding reporting requirements for filing Form 8938).

⁴⁴ See Treas. Reg. § 1.6038D-1(a)(2) (as amended in 2016) (defining broadly who qualifies as a "specified individual" for purposes of IRC § 6038D); see also Internal Revenue Service, Instructions for Form 8938 at 1 (Oct. 22, 2015) (stating a specified individual is broadly defined to include U.S. citizens, resident aliens, and certain non-resident aliens).

⁴⁵ See I.R.C. § 6038D(a) (2012) (noting the general rule for those who are required to meet certain information reporting requirements related to foreign financial assets).

⁴⁶ See Internal Revenue Service, Instructions for Form 8938 at 2 (Oct. 22, 2015) (noting the reporting thresholds for each individual's tax status).

⁴⁷ See Internal Revenue Service, *Comparison of Form 8938 and FBAR Requirements* (last updated May 4, 2016), <https://www.irs.gov/Businesses/Comparison-of-Form-8938-and-FBAR-Requirements> [hereinafter Form 8938/FBAR Comparison] (comparing Form 8938 with certain FBAR filing requirements and noting that Form 8938 does not relieve any reporting obligations related to FinCEN Form 114).

⁴⁸ See I.R.C. § 6038D(b) (2012) (defining broadly that a "specified foreign financial account" is any financial instrument, stock or security interest issued by a foreign person, any financial instrument or contract issued by a foreign person, and any interest in a foreign entity).

⁴⁹ I.R.C. § 6038D(b)(1) (2012). See also I.R.C. § 1471(d)(2), (4) (2012) (defining what qualifies as a financial account and a foreign financial institution).

⁵⁰ I.R.C. § 6038D(b)(2) (2012).

⁵¹ See Form 8938/FBAR Comparison, *supra* note 47.

⁵² Treas. Reg. § 1.6038D-2(a)(1) (as amended in 2016).

⁵³ Treas. Reg. § 1.6038-2(a)(2) (as amended in 2013).

⁵⁴ Treas. Reg. § 1.6038-2(a)(3) (as amended in 2013).

\$400,000 on the last day of the taxable year or \$600,000 at any time during the taxable year if the individual meets the requirements under I.R.C. § 911(d)(1) and files a joint return with his or her spouse.⁵⁵

For purposes of determining whether a servicemember is treated as living within the United States or abroad, one must analyze whether the servicemember is a qualified individual under I.R.C. § 911(d)(1). To qualify under I.R.C. § 911(d)(1), an individual must have a “tax home” in a foreign country, and be either a *bona fide* resident of a foreign country for an uninterrupted entire taxable year or the individual must be present in a foreign country for 330 days of the taxable year.⁵⁶ The term “tax home” includes an individual’s place of business or, if the individual has no place of business, then at his or her regular place of abode.⁵⁷ An individual’s “tax home,” however, does not include a foreign country if the individual has an abode within the United States.⁵⁸ For purposes of applying the correct valuation amount of a foreign financial asset, careful analysis should include determining whether a servicemember is treated as living in the United States or living abroad.

2. Reporting Requirements and Penalties

Various monetary penalties may apply if the event the annual compliance obligations are not met. Form 8938 is due on the date when an individual’s annual Form 1040 is due, which includes extensions in the event an individual timely files Form 4868. If a servicemember fails to timely file Form 8938 with his or her annual Form 1040, then civil penalties may apply.⁵⁹ Specifically, a \$10,000 penalty applies for failure to file Form 8938, in addition to another \$10,000 penalty for each 30-day period after the IRS sends notice to the servicemember about the failure to file.⁶⁰ No penalties, however, will apply if the servicemember has reasonable cause for failure to timely file Form 8938.⁶¹ Accuracy-related

penalties and criminal penalties may also apply in certain circumstances.⁶²

C. Other Miscellaneous Considerations for OCONUS Servicemembers

Some circumstances may impose other international tax reporting requirements for certain foreign security interests owned by a servicemember. In addition to the FBAR and Form 8938 rules, other annual reporting requirements may apply to servicemembers who have an interest in either foreign corporations or foreign partnerships. In this case, if certain reporting requirements are not met, civil penalties will apply in addition to penalties already imposed by any FBAR or Form 8938 violations. Judge advocates should be familiar with these unique tax reporting requirements in the event the rules apply to a servicemember.

1. Interests in Foreign Corporations

Reporting requirements will apply to any servicemember who holds a stock interest in a foreign corporation. Specifically, Form 5471 is required for any U.S. person who holds a ten percent or greater interest in any foreign corporation.⁶³ Any servicemember who meets these requirements should file Form 5471 in order avoid any civil penalties. Specifically, a \$10,000 penalty is imposed for failure to timely file Form 5471, in addition to a \$10,000 penalty for each 30-day period after the IRS sends notice to the servicemember about the failure to file.⁶⁴

2. Interests in Foreign Trusts

U.S. servicemembers who own an interest in a foreign trust will have additional annual reporting requirements.⁶⁵ While not common, this reporting obligation may occur if a

⁵⁵ Treas. Reg. § 1.6038-2(a)(4) (as amended in 2013).

⁵⁶ I.R.C. § 911(d)(1)(A)–(B) (2012).

⁵⁷ Treas. Reg. § 1.911-2(b) (1985).

⁵⁸ I.R.C. § 911(d)(3) (2012).

⁵⁹ See I.R.C. § 6038D(d) (2012) (noting the civil penalty for failure to timely disclose Form 8938).

⁶⁰ The maximum additional penalty for continuing to fail to file Form 8938 is \$50,000. See Internal Revenue Service, Instructions for Form 8938 at 7 (Oct. 22, 2015) (listing the penalty provisions for failure to timely file Form 8938).

⁶¹ I.R.C. § 6038D(g) (2012).

⁶² Treas. Reg. § 1.6038D-8(f) (2014).

⁶³ See, e.g., Treas. Reg. § 1.6046-1(a)(2) (as amended in 2014) (noting a filing requirement for any U.S. citizen or resident who is an officer or director of a foreign corporation if a U.S. person either acquires 10 percent or more of the total voting power of all classes of the foreign corporation or acquires an additional 10 percent or more voting interest in the foreign corporation); Treas. Reg. § 1.6046-1(c)(1) (noting a Form 5471 filing

requirement for U.S. citizens who acquire 10 percent or more voting power of a foreign corporation, U.S. citizens who acquire an additional 10 percent or more voting interest in certain foreign corporations, and certain U.S. citizens who dispose of stock of a foreign corporation that results in owning less than 10 percent voting interest in the foreign corporation); Treas. Reg. § 1.6038-2(a) (as amended in 2013) (noting a Form 5471 filing requirement for U.S. citizens who control, as defined by holding a more than 50 percent vote or value, a foreign corporation for an uninterrupted period of at least 30 days). See also Internal Revenue Service, Instructions for Form 5471 at 2 (Jan. 13, 2015) (requiring Form 5471 to be filed by any U.S. citizens who are U.S. shareholders of a foreign corporation that is treated as a controlled foreign corporation for an uninterrupted period of 30 days or more).

⁶⁴ The maximum additional penalty for continuing to fail to file Form 5471 is \$50,000. See Internal Revenue Service, Instructions for Form 5471 at 4 (Jan. 13, 2015) (listing the penalty provisions for failure to timely file Form 5471).

⁶⁵ See I.R.C. § 6048(a) (2012) (requiring notification to the IRS if either (i) a U.S. person creates a foreign trust, (ii) a U.S. person transfers property to a foreign trust, or (iii) a U.S. beneficiary receives a distribution from a foreign trust).

U.S. servicemember has an interest in a foreign trust and the servicemember is included as a beneficiary of that foreign trust. In that case, Form 3520 is required to be filed with the taxpayer's annual tax return in the year that the notification requirement under IRC § 6048 occurs.⁶⁶ Further, the foreign trust with a U.S. citizen beneficiary must file Form 3520-A as part of the notification event that corresponds with Form 3520.⁶⁷ Failure to file Form 3520 and the corresponding Form 3520-A will result in a civil monetary penalty the greater of either (i) \$10,000, or (ii) 35 percent of the gross value of any property transferred or distributions received by the foreign trust.⁶⁸

3. Interests in Foreign Partnerships

Other reporting requirements will apply to any servicemember who holds an interest in a foreign partnership. Any U.S. citizen who holds certain interests in foreign partnerships must timely file Form 8865.⁶⁹ Similar to the rules for Form 5471, there are four categories that may require U.S. citizens to file Form 8865.⁷⁰ While not discussed in depth for purposes of this overview, judge advocates should be aware of this filing requirement in the event a servicemember happens to hold an interest in a foreign partnership.

III. Options For Mitigating Compliance Deficiencies

This section outlines options for mitigating civil and criminal penalties for servicemembers whose tax reporting deficiencies are the result of owning a foreign financial asset, while distinguishing options between willful and non-willful conduct by a taxpayer servicemember. First, if a taxpayer's activity results in willful conduct, judge advocates should carefully consider the Offshore Voluntary Disclosure

Program ("OVDP") after analyzing potential civil and criminal penalties imposed by this program.⁷¹ Second, if a servicemember's delinquent international tax return filing is the product of non-willful conduct, judge advocates should consider five different programs offered by the IRS that may either eliminate or mitigate outstanding civil monetary penalties.⁷² Each option offered by the IRS provides for different eligibility rules and penalty abatement features, so judge advocates should research the benefits of each based on their clients' facts and concerns.

A. Options for Willful Conduct

Civil and criminal liability may attach if it is determined that the tax compliance deficiency was the result of willful conduct.⁷³ In that case, taxpayers should be concerned about both increased civil penalties and criminal liability that will attach if the deficiency is not corrected.⁷⁴ Regarding deficient international tax compliance, a taxpayer only needs to know that the reporting requirement exists in order for the conduct to become willful.⁷⁵ In certain situations, willful conduct may be present if there is a reckless disregard of a statutory duty.⁷⁶ This section outlines the options that judge advocates should consider if a servicemember's international tax compliance deficiency is the result of willful conduct.

1. Do Nothing and Pray

The first option is to simply do nothing and hope that the IRS never discovers the deficient filing requirement.⁷⁷ The option to do nothing may lead to many sleepless nights for the taxpayer and is ill-advised given the recent increased international tax compliance enforcement by the IRS and the Department of Justice.⁷⁸ Taxpayers need to weigh the benefits, if any, of this option—the taxpayer hopes the IRS

⁶⁶ See Internal Revenue Service, Instructions for Form 3520, at 1 (Nov. 25, 2014) (listing the various requirements for a U.S. person to file Form 3520).

⁶⁷ See Internal Revenue Service, Instructions for Form 3520-A, at 1 (Dec. 2, 2014) (requiring a foreign trust with a U.S. owner to first file Form 3520-A in order to allow the U.S. owner to file Form 3520).

⁶⁸ I.R.C. § 6677.

⁶⁹ See Internal Revenue Service, Instructions for Form 8865, at 2 (Sept. 30, 2014) (describing the four different categories of filers that will require Form 8865 to be filed by a U.S. person).

⁷⁰ *Id.*

⁷¹ See discussion *infra* Part III.A.3.

⁷² See discussion *infra* Part III.B.

⁷³ See, e.g., *Cheek v. United States*, 498 U.S. 192, 201 (1991) (noting willfulness occurs if there is an intentional violation of a known legal duty); see also INTERNAL REVENUE SERVICE, INTERNAL REVENUE MANUAL § 4.26.16.6.5.1(4) (last visited Oct. 12, 2016), <https://www.irs.gov/irm/> [hereinafter IRM] ("Willfulness is shown by the person's knowledge of the reporting requirements and the person's conscious choice not to comply with the requirements.").

⁷⁴ See, e.g., 31 U.S.C. § 5321(a)(5) (2012) (noting the civil penalty for willfully failing to file the annual FBAR is increased to the greater of either \$100,000 or 50 percent of the total balance of the foreign financial account).

⁷⁵ See, e.g., IRM, *supra* note 73 at § 4.26.16.6.5.1(4) ("Willfulness is shown by the person's knowledge of the reporting requirements and the person's conscious choice not to comply with the requirements.").

⁷⁶ See, e.g., *United States v. Williams*, 489 F. App'x 655, 660 (4th Cir. 2012) (finding that the taxpayer's reckless conduct of refusing to learn about FBAR filing requirements was enough to demonstrate willful conduct; the taxpayer's signature on his annual tax returns was enough to demonstrate that he knew of a duty to file returns related to his financial interest in two Swiss bank accounts).

⁷⁷ See JOINT COMMITTEE ON TAXATION, 109TH CONG., GENERAL EXPLANATION OF TAX LEGISLATION ENACTED IN THE 108TH CONGRESS, JCS-5-05, at 377-78 (Comm. Print 2005) (discussing the reason for enacted legislation related to civil penalties and enforcement to combat abusive tax schemes).

⁷⁸ See JOINT COMMITTEE ON TAXATION, GENERAL EXPLANATION OF TAX LEGISLATION ENACTED IN THE 108TH CONGRESS, JCS-5-05, at 377-78 (2005) (discussing the reason for enacted legislation related to civil penalties and enforcement in order to combat abusive tax schemes).

never notices the compliance deficiency and, therefore, none of the civil penalties will apply. The risk, however, is that the deficiency will eventually be caught by the IRS. Therefore, this option is not advised for a taxpayer with deficient international compliance issues.

2. Quiet Disclosure

The second option includes a taxpayer making his or her tax disclosure in the current tax year for all delinquent international filings during the statute of limitations period.⁷⁹ This option is known as a “quiet disclosure” because the taxpayer files all the deficient tax returns without alerting the IRS for applying the applicable penalties—the taxpayer hopes that the quiet filing is not noticed by the IRS so that the civil penalty provisions are never applied to the taxpayer.⁸⁰ In addition, a quiet disclosure would include a taxpayer filing amended Form 1040s for as many years as applicable under the tax return statute of limitations.⁸¹

Here, the advantage of the quiet disclosure occurs only if the IRS never notices the amended filing and, thus, full civil penalties for the late filings would not apply once the statute of limitations period expires.⁸² The risk, however, is that late filing will trigger an indication of a deficient taxpayer filing,

which may result in willful conduct by the taxpayer and the application of full penalties imposed by the IRS.⁸³ At a minimum, the quiet disclosure option brings the taxpayer back into good standing for meeting his or her annual compliance obligation; however, this option would not cut off potential criminal liability related to willful conduct for the deficient filing requirements.⁸⁴ Therefore, judge advocates should carefully review the third and final option before recommending a quiet disclosure.

3. Offshore Voluntary Disclosure Program

The third option allows taxpayers to confess their violations before the IRS in order to bring the taxpayer back into full compliance. Under the current version of the Offshore Voluntary Disclosure Program (OVDP),⁸⁵ a taxpayer agrees to come into full compliance with the U.S. tax rules by filing for up to eight years of non-compliant tax returns.⁸⁶ If any tax deficiencies apply to any of the previous non-compliant eight years, the taxpayer is obligated to pay any outstanding tax liability in addition to a 20 percent accuracy-related penalty, a failure-to-file penalty, and interest.⁸⁷

⁷⁹ See 31 U.S.C. § 5321(b)(1) (2012) (noting the six-year statute of limitations period of assessing civil penalties for FBAR filings). In the FBAR context, a six-year statute of limitations period applies from the date of the transaction for assessing the civil penalty for FBAR violations. 31 U.S.C. 5321(b)(1) (2012). According to the IRS, the date of the transaction starts the six-year statute of limitations period on the due date for when FinCEN Report 114a should be reported. For example, a taxpayer’s FBAR that applies to calendar year 2015 would be due on June 30, 2016, and therefore the statute of limitations for assessing civil penalties would expire on June 30, 2021. See IRM, *supra* note 73, § 4.26.17.5.5.1(2) (“The date of the transaction for report filing violations is June 30th of the year following the calendar year for which the foreign financial account should be reported.”). The liability could turn into a willful violation of failure to file FinCEN Report 114a if the taxpayer becomes aware of his or her FBAR filing requirement and then does nothing to correct this deficiency. See IRM, *supra* note 73 at § 4.26.16.6.5.1(4) (“Willfulness is shown by the person’s knowledge of the reporting requirements and the person’s conscious choice not to comply with the requirements.”).

⁸⁰ See Michael S. Kirsch, *Revisiting the Tax Treatment of Citizens Abroad: Reconciling Principle and Practice*, 16 FLA. TAX REV. 117, 156 (2014) (discussing the motivations for a taxpayer to file a quiet disclosure in order to avoid the FBAR civil penalty).

⁸¹ A three-year statute of limitations generally begins to run after a taxpayer has filed his or her tax return with the IRS. I.R.C. § 6501(a) (2012). A six-year statute of limitations, however, would apply if the taxpayer omits 25 percent or more of gross income on his or her tax return. I.R.C. § 6501(e)(1) (West Supp. 2016). In either case, taxpayers who make a quiet disclosure must amend Form 1040 to correctly reflect their ownership of a foreign account on Line 7a on Schedule B, Part III.

⁸² Note that the benefit of avoiding the FBAR civil penalty is only achieved once the two separate statute of limitations periods for the FBAR and tax return filings have expired. Similar to the first option, this may lead to many sleepless nights for the taxpayer and, therefore, should be carefully considered when weighing the benefits of this option.

⁸³ Again, the civil penalties for non-willful conduct will range between a minimum of \$500 for a negligent violation and up to \$10,000 for each FBAR violation that is not the result of reasonable cause. 31 U.S.C. §

5321(a)(5)(B)(i) (2012). The willful civil penalty is as high as the greater of either \$100,000 or 50 percent of the total balance of the foreign financial account per violation. 31 U.S.C. § 5321(a)(5)(C) (2012).

⁸⁴ If the IRS discovers any willful conduct by the taxpayer in a quiet disclosure scenario, criminal prosecution may be recommended to the Department of Justice. See Internal Revenue Service, *Offshore Voluntary Disclosure Program Frequently Asked Questions and Answers 2014* (last updated Sept. 20, 2016), <https://www.irs.gov/Individuals/International-Taxpayers/Offshore-Voluntary-Disclosure-Program-Frequently-Asked-Questions-and-Answers-2012-Revised> (stating “quiet disclosures provide no protection from criminal prosecution and may lead to civil examination and the imposition of all applicable penalties”); see also IRM, *supra* note 73, § 9.5.11.9(1) (“It is currently the practice of the IRS that a voluntary disclosure will be considered along with all other factors in the investigation in determining whether criminal prosecution will be recommended.”).

⁸⁵ The IRS implemented the first OVDP in 2009 to encourage taxpayers with FBAR deficiencies to come forward and pay a reduced FBAR civil penalty. After the expiration of the 2009 OVDP, the IRS extended the program again in 2011 and 2012 after taxpayers and tax practitioners showed strong interest in clearing up compliance issues related to foreign accounts. Currently the OVDP is extended for an indefinite period of time. See Internal Revenue Service, *Hiding Money or Income Offshore Among the “Dirty Dozen” List of Tax Scams for the 2015 Filing Season* (Jan. 28, 2015), <https://www.irs.gov/uac/Newsroom/Hiding-Money-or-Income-Offshore-Among-the-Dirty-Dozen-List-of-Tax-Scams-for-the-2015-Filing-Season> (noting the OVDP is extended for an indefinite period until otherwise announced).

⁸⁶ See Internal Revenue Service, *Offshore Voluntary Disclosure Program Frequently Asked Questions and Answers 2014*, FAQ 9 (last updated Sept. 20, 2016) [hereinafter OVDP FAQ], <https://www.irs.gov/Individuals/International-Taxpayers/Offshore-Voluntary-Disclosure-Program-Frequently-Asked-Questions-and-Answers-2012-Revised> (requiring a taxpayer to voluntarily disclose the eight most recent non-compliant tax returns).

⁸⁷ *Id.* at FAQ 7.

The OVDP provides the option of a reduced civil penalty regime. For taxpayers eligible for the OVDP, the penalty is limited to only 27.5 percent of the highest balance of the foreign account over the period of time covering the deficient filing period.⁸⁸ Here, the benefit to the taxpayer is that the IRS is limited to the 27.5 percent penalty over a period of eight years compared to the increased willful conduct civil penalty.⁸⁹

Perhaps one of the strongest reasons for taxpayers to enter into the OVDP is the ability to cut off potential criminal liability. If a taxpayer's deficient filing is the result of willful conduct, the potential for criminal prosecution may end when the taxpayer enters into the OVDP.⁹⁰ This policy, however, does not apply to taxpayers with certain illegal source income.⁹¹ Nevertheless, in most cases for taxpayers with willful conduct, the OVDP offers the best chance to start fresh from any criminal liability.

The IRS imposes strict procedural requirements when applying to enter the OVDP. First, a taxpayer must meet the preclearance process.⁹² Second, if the taxpayer is precleared to enter the OVDP, then he or she will need to amend and submit all the non-compliant tax returns during the eight-year lookback period, in addition to a voluntary disclosure letter to the IRS filed within 45 days.⁹³ Third, if the taxpayer is preliminarily accepted into the OVDP, the taxpayer will then need to submit all voluntarily disclosure documents to the IRS within 90 days.⁹⁴ It is important to note that the OVDP is unavailable to a taxpayer when the IRS previously started either a civil or criminal investigation related to the deficient taxpayer filing.⁹⁵

When weighing the benefits of entering the OVDP, taxpayers should note that the penalty imposed while in the

OVDP is 27.5 percent compared to the increased penalty regime for taxpayers outside the OVDP.⁹⁶ In addition, taxpayers are able to eliminate the chance of criminal prosecution if any willful conduct occurred from the deficient filings. The downside, however, is that the taxpayer agrees to pay any tax liability, penalties and interest for a period of up to eight years of non-compliant tax returns. Judge advocates assisting taxpayers entering into the OVDP would need to conduct a complete calculation as to the total payment owed to the IRS under both the OVDP and non-OVDP options.⁹⁷

B. Options for Non-Willful Conduct

Civil liability may attach if it is determined that the tax compliance deficiency was the result of only non-willful conduct. Taxpayer negligence resulting in the reporting deficiency is generally the type of conduct that is considered non-willful.⁹⁸ This section outlines the options that judge advocates should consider if a servicemember's international tax compliance deficiency is the result of non-willful conduct.

1. Streamlined Foreign Offshore Procedures

For individuals whose non-willful conduct resulted in the deficient international tax filing, the Streamlined Foreign Offshore Procedures (SFOP) program provides certain penalty relief to taxpayers who failed to report certain foreign accounts. Specifically, eligible taxpayers who meet the non-residency requirement, who are not under examination, and who certify that their tax return deficiency was the product of non-willful conduct are eligible for certain penalty relief.⁹⁹

⁸⁸ *Id.*

⁸⁹ An analysis is needed in order to determine whether the penalties imposed outside of the OVDP over a period of three to six years would be less than the penalties imposed under the OVDP over a period of eight years. Under the OVDP, the penalty should be less compared to taxpayers who are subject to penalties outside the OVDP. The calculation under both scenarios is needed to accurately weigh all the benefits of OVDP.

⁹⁰ IRM, *supra* note 73 at § 9.5.11.9(2) ("A voluntary disclosure will not automatically guarantee immunity from prosecution; however, a voluntary disclosure may result in prosecution not being recommended.")

⁹¹ *Id.*

⁹² The preclearance process requires that the IRS's Criminal Investigation Lead Development Center confirm that the taxpayer is eligible to enter into the OVDP. If, for example, the taxpayer is already under investigation for failure to meet certain filing requirements related to their foreign accounts, then the taxpayer would be ineligible to enter into the OVDP. See OVDP FAQ, *supra* note 86, at FAQ 23 (noting the disclosure requirements for entering the preclearance process).

⁹³ *Id.* at FAQ 24.

⁹⁴ Required documents include, but are not limited to, copies of original and amended tax returns during the eight-year period, a signed voluntary disclosure letter, a completed foreign account asset statement, a completed penalty computation worksheet, completed FBARs (if applicable), signed

extension of time to assess tax, and payment by the taxpayer for the outstanding tax, penalties, and interest. *Id.* at FAQ 25.

⁹⁵ *Id.* at FAQ 14.

⁹⁶ Again, penalties imposed by the IRS for taxpayers with willful conduct could be the greater of either \$100,000 or 50 percent of the highest value of the foreign account. 31 U.S.C. § 5321(a)(6)(A) (2012).

⁹⁷ The IRS offers special taxpayer assistance related to FBAR filings and penalty calculations. Judge advocates should consider these resources when trying to calculate taxpayer penalties for entering into the OVDP. The IRS office dedicated to the OVDP may be contacted toll free at 1-866-270-0733 or toll charge at 1-313-234-6146.

⁹⁸ For example, in the FBAR context, non-willful conduct occurs if the taxpayer's intent does not meet the definition of willful. In that case, non-willful conduct may be present if the taxpayer had no knowledge of any FBAR reporting requirement. See, e.g., IRM, *supra* note 73, § 4.26.16.6.5.1 ("Willfulness is shown by the person's knowledge of the reporting requirements and the person's conscious choice not to comply with the requirements.")

⁹⁹ See Internal Revenue Service, *U.S. Taxpayers Residing Outside the United States* (last updated Aug. 5, 2016) [hereinafter *Taxpayers Residing Outside the U.S.*], <https://www.irs.gov/Individuals/International-Taxpayers/U-S-Taxpayers-Residing-Outside-the-United-States> (noting eligibility for a taxpayer entering into the SFOP option).

For U.S. citizen servicemembers, the SFOP only applies to those who meet the non-residency test. This test analyzes whether a U.S. citizen, if in at least one of the most recent three tax years, did not maintain a U.S. abode and whether the U.S. citizen was outside the United States for at least 330 days of a tax year.¹⁰⁰ First, the U.S. citizen must not have an abode in the United States during one of the previous three tax years.¹⁰¹ An abode is broadly defined by the IRS to include a home, habitation, residence, domicile or place of dwelling.¹⁰² Second, the U.S. citizen must have resided outside the United States for at least 330 days during a tax year.¹⁰³

For taxpayers who meet the eligibility requirements for the SFOP, they must take the following steps to qualify. First, the taxpayer must file all delinquent tax returns up to the most recent three years with the statement at the top of the first page “Streamlined Foreign Offshore” in red text.¹⁰⁴ Second, the taxpayer must submit Form 14653 certifying that the deficient filing was the result of non-willful conduct.¹⁰⁵ Third, the taxpayer must pay all tax and interest due, if any, that relates to the deficient filing.¹⁰⁶ Fourth, if the deficient return relates to an FBAR filing, then the taxpayer must electronically file no more than six years of FBARs.¹⁰⁷

Eligible taxpayers who enter the SFOP are able to eliminate most penalties related to the tax deficiency. Specifically, taxpayers entering the SFOP are not subject to the following penalties: (i) failure-to-file and failure-to-pay penalties, (ii) accuracy-related penalties, (iii) information return penalties, or (iv) the FBAR penalty.¹⁰⁸ It is important to note that a taxpayer who submits an application to enter the SFOP is no longer eligible to enter the OVDP, so careful analysis must be made before submitting an application to this program.¹⁰⁹

2. Streamlined Domestic Offshore Procedures

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² Internal Revenue Service, Publication 54, *Tax Guide for U.S. Citizens and Resident Aliens Abroad*, 12 (Dec. 14, 2015).

¹⁰³ *Taxpayers Residing Outside the U.S.*, *supra* note 99.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ See Internal Revenue Service, *Streamlined Filing Compliance Procedures*, (last updated July 18, 2016), <https://www.irs.gov/Individuals/International-Taxpayers/Streamlined-Filing-Compliance-Procedures> (noting the limitations when entering into the Streamlined Compliance Procedures compared to the OVDP).

¹¹⁰ *Taxpayers Residing in the United States*, *supra* note 99.

For servicemembers who are ineligible for the SFOP, penalty relief may still occur through the Streamlined Domestic Offshore Procedures (SDOP) program offered by the IRS. For servicemembers who fail to meet the non-residency requirements under the SFOP, the SDOP applies to U.S. citizens who previously filed tax returns for the past three years, who failed to report a foreign financial asset, and whose tax return deficiency results in non-willful conduct.¹¹⁰ If eligible, the SDOP offers a taxpayer the ability to limit his or her imposed penalties to only 5 percent of the highest aggregate value of the foreign financial asset during the years of the covered tax return period.¹¹¹ The SDOP offers similar procedural requirements for taxpayers who are eligible for this option, in addition to submitting payment for the 5 percent penalty.¹¹² While not as favorable as the SFOP, the SDOP provides for penalty mitigation and thus should be considered as a potential option for taxpayers who face considerable penalties related to deficient tax returns.

3. Delinquent FBAR Submission Procedure

The third option, while applying only to delinquent FBAR returns, offers favorable penalty relief for taxpayers with deficient FBAR filings. Specifically, a taxpayer who only failed to file an annual FBAR but correctly filed all tax returns reporting all foreign income in a given taxable year is eligible for the Delinquent FBAR Submission Procedure.¹¹³ This option allows a taxpayer simply to file delinquent FBARs during the six-year statute of limitations period without paying any penalties imposed by the IRS.¹¹⁴ Eligible taxpayers include only those who (i) correctly filed all tax returns, (ii) do not owe any additional tax liability, (iii) are not currently under civil or criminal investigation by the IRS, and (iv) were not already notified by the IRS about the delinquent FBAR.¹¹⁵ The important reason to consider the Delinquent FBAR Procedure option is that the IRS will not impose any penalties for filing delinquent FBARs.¹¹⁶ Based on the

¹¹¹ *Id.*

¹¹² See *id.* (requiring the following procedural steps to be made: (i) submit delinquent tax returns for the most recent three years including the statement “Streamlined Domestic Offshore” written in red text at the top of the first page of the return, (ii) complete and sign Form 14653 certifying that the delinquent return was the product of non-willful conduct by the taxpayer, (iii) submit and pay all tax and interest, if any, due on the delinquent tax returns, (iv) submit payment related to the 5% penalty, and (v) if the deficient return relates to a FBAR filing, then the taxpayer must electronically file no more than six years of FBAR filings).

¹¹³ See Internal Revenue Service, *Delinquent FBAR Submission Procedures* (last updated Apr. 8, 2016), <https://www.irs.gov/Individuals/International-Taxpayers/Delinquent-FBAR-Submission-Procedures> (outlining the requirements for eligible taxpayers meeting the Delinquent FBAR Submission Procedure option).

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

eligibility requirements, however, this option likely applies to a very limited group of taxpayers, so judge advocates must confirm that a taxpayer qualifies before recommending this option.¹¹⁷

4. *Delinquent International Information Return Submission*

The fourth option applies to taxpayers who have reasonable cause for failing to file a non-FBAR international return.¹¹⁸ The Delinquent International Information Return Submission option applies only to a taxpayer who (i) has not filed one or more required international information returns, (ii) has reasonable cause for his or her failure to timely file the international information returns, (iii) is not under a civil or criminal examination by the IRS, and (iv) has not already been contacted by the IRS about the delinquent informational return.¹¹⁹ The taxpayer must include a statement establishing that he or she has reasonable cause for failure to timely file the international informational return.¹²⁰ If the IRS disagrees that the taxpayer has reasonable cause for failing to file the international information return, then penalties for the late filing would apply.¹²¹ Therefore, the decision to submit late returns under the Delinquent International Information Return Submission option is somewhat of a gamble in the event the IRS disagrees with whether the taxpayer has reasonable cause.

5. *Offshore Voluntary Disclosure Program*

The fifth and final option discussed for non-willful conduct resulting in international tax compliance deficiencies is the OVPD. While the rules of this program were already discussed for purposes of willful conduct, taxpayers may still apply for the OVPD even though their conduct resulted in non-willful conduct.¹²² All of the same eligibility rules

previously outlined will apply in the event a taxpayer considers this option.¹²³ The important feature about considering the OVPD is that any potential criminal liability is extinguished in the event a judge advocate is unsure whether the taxpayer's conduct is the result of willful or non-willful conduct. The civil penalties, however, are not completely eliminated, but are mitigated, if the taxpayer considers entering the OVPD.¹²⁴ Therefore, judge advocates should confirm with a strong level of certainty that a servicemember has no criminal liability before considering the OVPD as a potential option.

IV. Conclusion

A number of international reporting rules may apply to OCONUS servicemembers with a financial interest in certain foreign accounts. The Dr. Canale example shows what could go wrong if the U.S. international tax rules are ignored and later discovered by the IRS. In order to avoid such draconian penalties, judge advocates should first inquire as to whether any of the reporting rules apply to a servicemember. If it is determined that the reporting rules apply, a judge advocate should analyze the outstanding civil and criminal liability. A judge advocate should then review all of the programs offered by the IRS in order to assist with penalty mitigation or elimination. Legal assistance related to international tax compliance issues may save a servicemember from significant monetary penalties, in addition to possible criminal liability.

¹¹⁷ Note that the taxpayer must have properly reported all the income from any foreign financial account on Form 1040. If the taxpayer failed to report the foreign financial account on Form 1040, Sch. B, Part III, Line 7a, then the taxpayer may not be eligible for the Delinquent FBAR Submission Option. Judge advocates should confirm that the taxpayer correctly reported all the income from any foreign accounts before recommending the Delinquent FBAR Submission Option.

¹¹⁸ International informational returns include, but are not limited to, Forms 8938, 8621, 5471, 5472, 3520, 3520-A, 926, 8858, and 8865.

¹¹⁹ See Internal Revenue Service, *Delinquent International Information Return Submission Procedures* (last updated Aug. 23, 2016), <https://www.irs.gov/Individuals/International-Taxpayers/Delinquent-International-Information-Return-Submission-Procedures> (noting the requirements for entering into the Delinquent International Information Return Submission Procedure).

¹²⁰ Reasonable cause is present if the IRS determines that the taxpayer exercised ordinary care and prudence in determining his or her tax obligations but was nevertheless unable to timely file the international informational return. See, e.g., Treas. Reg. § 1.6038-2(k)(3)(ii) (as amended in 2013) (noting the reporting requirements for making an affirmative showing that reasonable cause existed); Treas. Reg. § 1.6038-3(k)(4) (as amended in 2003) (discussing reasonable cause limitations for taxpayer who fail to file Form 8865); Treas. Reg. § 1.6038A-4(b) (as

amended in 2014) (stating “[i]f an affirmative showing is made that the taxpayer acted in good faith and there is reasonable cause for a failure that results in the assessment of the monetary penalty, the period during which reasonable cause exists shall be treated as beginning on the day reasonable cause is established and ending not earlier than the last day on which reasonable cause existed for any such failure”); Treas. Reg. § 301.6679-1(a)(3) (as amended in 1985) (noting the reasonable cause requirement when taxpayer fail to file certain returns related to foreign corporations or foreign partnerships).

¹²¹ In this event, all the penalties under IRC §§ 6038 and 6038A would apply if the taxpayer is ineligible for the Delinquent International Information Return Submission option.

¹²² See OVDP FAQ, *supra* note 86 at FAQ 4 (stating the reasons to consider the OVDP compared to the either the SFOP or SDOP).

¹²³ See *supra* text accompanying notes 80–92.

¹²⁴ Compared to the SFOP or Delinquent International Information Return Submission program, which provides for the waiver of *all* civil penalties, the OVDP only mitigates civil penalties that are applied against the taxpayer. Therefore, judge advocates should weight the potential criminal liability, if any, against possible civil penalties imposed on the servicemember.

Company Man: Thirty Years of Controversy and Crisis in the CIA¹

Reviewed by Major Dustin B. Kouba*

*The main thing to know about “Company Man,” John Rizzo’s memoir of his three decades as a C.I.A. lawyer, including seven years as the agency’s chief legal officer, is that its title is not the slightest bit ironic.*²

I. Introduction

In *Company Man: Thirty Years of Controversy and Crisis in the CIA*, autobiographer John Rizzo details his thirty-four year career as an attorney with the Central Intelligence Agency (CIA). Rizzo’s career begins in the mid-1970s, not long after the U.S. Senate’s Church Committee investigation into illegal intelligence gathering activities by the CIA and other agencies.³ His career highlights include involvement in the Iran-contra scandal⁴ in the 1980s; the Ames spy case⁵ and the hunt in Iraq for weapons of mass destruction issue in the early 2000s.⁶ Rizzo’s career culminated in his periodic service as acting CIA General Counsel, mostly from July 2004⁷ until his retirement in October 2009.⁸ His thirty-four years of service to the Agency was marred by an embarrassing Senate confirmation hearing that led to his decision to withdraw his nomination to be the CIA’s General Counsel.⁹

While the book has been well received,¹⁰ *Company Man* actually does little to explain the inner workings, processes or legal foundations of the most controversial CIA programs of recent history. Rizzo fails to shed any meaningful light on his legal opinions, advocacy and love for a government bureaucracy. Instead, Rizzo spends much of his time praising his good-old-boy network, criticizing those who stood in the way of questionable intelligence tactics for which he provided legal justification and providing a roadmap of how not to practice as a government attorney. He unknowingly creates a tenuous relationship with his employer by considering agency employees his clients.¹¹ He plays fast and loose with legal

advice that finally catches up to him as a result of the downfall of the Enhanced Interrogation Program and the destruction of the “Torture” tapes.

In the end, the book’s introduction and its discussion of the creation of Enhanced Interrogation Techniques (EITs) become the only portions of the book worth reading for a military lawyer.

II. Enhanced Interrogation Techniques

The book’s introduction recounts the destruction of the 2002 interrogation tapes of a highly-prized Al Qaeda operative, Abu Zubaydah, who was captured in March of 2002.¹² Once the high-value target Zubaydah was captured and his physical condition stabilized (he was shot during his capture), the CIA and FBI interrogators quickly found their subject uncooperative and nonresponsive.

According to Rizzo, this is when Zubaydah begins taunting and lying to his captors.¹³ After Zubaydah’s psychological profile is built, CIA psychologists call for “something to change the equation with Zubaydah”¹⁴ largely based on him being a “cold-blooded psychopath”¹⁵ and the need for information. About a week later, attorneys from the Counterterrorist Center (CTC) within the CIA first describe “Enhanced Interrogation Techniques” (EITs) to be used on Zubaydah in attempt to further the gathering of intelligence.¹⁶

EITs were approved by President George W. Bush in the

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¹ JOHN RIZZO, *COMPANY MAN: THIRTY YEARS OF CONTROVERSY AND CRISIS IN THE CIA* (2014).

² Fred Kaplan, *The Spy Who Came Into the Fold*, N.Y. TIMES (Jan. 3, 2014), http://www.nytimes.com/2014/01/05/books/review/john-rizzos-company-man.html?_r=1

³ RIZZO, *supra* note 1, at 31. Congressional hearings revealed questionable and illegal covert CIA operations from the preceding twenty-five years, including assassination plots, drug experiments, illegal surveillance of U.S. citizens, and mail monitoring of U.S. citizens opposed to the Johnson and Nixon administrations. *Id.*

⁴ RIZZO, *supra* note 1, at 122-25. In May of 1987, Rizzo spent forty days watching every single minute of the Iran-contra committee hearings. The highlight Rizzo provides in his memoir from the endeavor is his independent approval of releasing classified information in the form of a public statement by a CIA witness. This revelation is the first of many that shows Rizzo plays fast and loose with the law. *Id.*

⁵ *Id.* at 139-43. Rick Ames sold CIA secrets resulting in the unexplained disappearances and deaths of multiple CIA sources within the Soviet Union.

Rizzo advised an investigating officer regarding financial privacy of the subject, and remained loosely connected to the case until it resolved. *Id.*

⁶ *Id.* at 301.

⁷ *Id.* at 213.

⁸ *Id.* at 291.

⁹ *Id.* at 274.

¹⁰ See, e.g., Tobias Gibson, LAW AND POLITICS BOOK REVIEW, <http://www.lpbr.net/2014/04/company-man-thirty-years-of-controversy.html> (last visited Sept. 21, 2016).

¹¹ RIZZO, *supra* note 1, at 46.

¹² *Id.* at 1.

¹³ *Id.* at 183.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

days after the 9-11 attacks.¹⁷ While Rizzo describes the birth of the CIA's Enhanced Interrogation Program in the book,¹⁸ at no point does he provide a legal basis for supporting the use of said operations, a "substance-free" pattern throughout the memoir.¹⁹

The EIT program and the methods used were based primarily on the U.S. military's Search, Escape, Resistance, and Evasion program. The techniques ranged from an attention grasp to sleep deprivation and waterboarding.²⁰

When presented with recommendations by the CTC attorneys, Rizzo considered the idea that the proposed EITs violated the federal anti-torture statute.²¹ He concluded the issue wasn't straightforward and ordered his staff to conduct research over the course of a week. Apparently little was learned from the hurried examination of the issues considering Rizzo's response:

Well, some of the techniques seem okay, but others are very harsh, even brutal. What I can't do is sit here and tell you now if it legally constitutes torture. And if it does meet the torture threshold, it doesn't matter what the justification is, even [if] it's being done to prevent another nine-eleven.²²

As opposed to providing his own actual legal opinion, Rizzo punted the request for use of EITs to the Department of Justice (DOJ), as the "binding arbiter inside the Executive Branch for legal interpretation of all federal statutes and the U.S. Constitution."²³ Finally in August 2002, DOJ breathes life into the EIT program through the production of the infamous "Torture" memos and the CIA quickly creates guidance for implementation on Zubaydah.²⁴

In the book and related interviews,²⁵ Rizzo provides conflicting justifications for the use of EITs. He is convinced EITs work,²⁶ and believes they were necessary to prevent a

second 9/11-like attack and ultimately led to the killing of Osama bin Laden.²⁷ But in hindsight Rizzo seems to be distancing himself from his original position. During a radio interview Rizzo punted to DOJ one more time when he said, "[I]f the Justice Department concluded that these techniques constituted torture, we would never have done them. So, I mean, I can't say they were torture. I didn't concede it was torture then, and I don't concede it was – it's torture now."²⁸ As will be discussed below, Rizzo's faulty logic based on unreliable evidence and loss of objectivity are startling considering he rose so high in the CIA.

III. Not the "Company" Man, but maybe the "Yes" Man

Throughout *Company Man*, Rizzo demonstrates time and time again that he's simply a "yes" man for the executives and employees at the CIA. As a result, he fails to properly identify his actual client, the CIA itself, and thus practices law haphazardly. Fred Kaplan of the New York Times captured these ideas best in his review of the book, "The main thing to know about *Company Man*, John Rizzo's memoir of his three decades as a C.I.A. lawyer, including seven years as the agency's chief legal officer, is that its title is not the slightest bit ironic."²⁹

Rizzo, in his own words, reveals his misplaced loyalties. He discloses, "I always considered everyone in the CIA as a 'client,' from the director down."³⁰ Rizzo viewed himself as "an attorney for all Agency personnel, and that [his] job was to advise them on the law and protect them from jeopardy for doing their jobs."³¹ Reflecting on the Iran-contra scandal, Rizzo recalls that the "arms-for-hostages initiative was conceived and approved at the highest levels of our government, including the CIA director."³² He admits, "In all likelihood I would have gone along . . .,"³³ a clear example of the "yes" man choosing the CIA employees over the actual client.

¹⁷ RIZZO, *supra* note 1, at 172-73.

¹⁸ *Id.* at 183.

¹⁹ Angelo M. Codevilla, 'Inside Story' Misses the Mark, WASH. TIMES (Jan. 20, 2014), <http://www.washingtontimes.com/news/2014/jan/20/a-self-licking-ice-cream-cone/>.

²⁰ RIZZO, *supra* note 1, at 242. In late 2005, when the EIT program was experiencing intense national scrutiny, Senator John McCain was given a private briefing by Porter Gross, then CIA director. Gross walked McCain "through all the techniques, how they were applied, the safeguards that were in place, and the demonstrable results the EIT program yielded, and so on." In stark contrast to Rizzo's opinion of the legality of EITs, McCain is quoted as saying, "It's all torture." *Id.*

²¹ *Id.* at 186.

²² *Id.* at 187.

²³ *Id.* at 188.

²⁴ *Id.* at 187-93.

²⁵ *Morning Edition: CIA Lawyer: Waterboarding Wasn't Torture Then*

and Isn't Torture Now, NATIONAL PUBLIC RADIO, (Jan. 7, 2014) <http://www.npr.org/2014/01/07/260155065/cia-lawyer-waterboarding-wasnt-torture-then-and-isnt-torture-now>.

²⁶ RIZZO, *supra* note 1, at 193. Rizzo cites the capture of two Al Qaeda "big fish" as specific proof that the program worked. This information as gained after eighty-three applications of waterboarding on Zubaydah over several days. *Id.*

²⁷ Malcolm Wilkerson, *The Government Attorney's Client: An Examination of John Rizzo's Company Man: Thirty Years of Controversy and Crisis in the C.I.A.*, 47 CONN. L. REV. ONLINE 65, 69 (2015).

²⁸ NATIONAL PUBLIC RADIO, *supra* note 25.

²⁹ Kaplan, *supra* note 3.

³⁰ RIZZO, *supra* note 1, at 46.

³¹ *Id.* at 47.

³² *Id.* at 128.

³³ *Id.*

Similarly, when considering the legality of EITs it appears Rizzo again plays the role of “yes” man. This time, Rizzo quickly becomes a “true believer” of the interrogation tactics.³⁴ Rizzo considers the EIT program a success and justified because it worked, it prevented a second 9/11-like attack on American soil and resulted in the killing of Osama bin Laden.³⁵ But *Company Man* is void of any legal analysis on the issues and Rizzo’s policy rationales are weak.³⁶ Assuming Rizzo effectively analyzed the legality of EITs, it appears he put his quasi-client interests ahead of his actual client’s interests.

Taking a step back, generally government attorneys are viewed as gatekeepers who protect the public good.³⁷ This ideal fails when an administration or agency seeks out attorneys who will agree with its agenda and not present obstacles.³⁸ Also, and more important in Rizzo’s case, it’s critical that government attorneys properly identify their client. The client is either the government agency, the head of a specific agency, the government as a whole, or even the people/public interest.³⁹

IV. Conclusion

Long after losing objectivity in service to his actual clients, John Rizzo finds himself back in the EIT fray one last time by writing this book. In the end, he effectively protected his ex-quasi-clients from criminal liability for their participation in the EIT program.⁴⁰ Although we’ll never know if the EIT program was in the best interests of the United States, reading *Company Man* provides an interesting source to analyze the pitfalls of practicing as a government attorney.

³⁴ Kaplan, *supra* note 3.

³⁵ Wilkerson, *supra* note 27, at 69-70.

³⁶ *Id.* A Senate Intelligence Committee found that the EIT program “produced very little intelligence of value,” “did not effectively assist . . . in acquiring intelligence,” and the “CIA inaccurately characterized the effectiveness of the [EITs] to justify their use.” *Id.* (citing Brad Knickerbocker, *Senate Report: Interrogation Methods “Far Worse” than CIA Acknowledged*, CHRISTIAN SCIENCE MONITOR (Apr. 12, 2014), <http://www.csmonitor.com/USA/DC-Decoder/2014/0412/Senate-report-Interrogation-methods-far-worse-than-CIA-acknowledged>).

³⁷ Elisa Ugarte, *The Government Lawyer and the Common Good*, 40 S. TEX. L. REV. 269, 270 (1999).

³⁸ Note, *Government Counsel and Their Obligation*, 121 HARV. L. REV. 1409, 1423 (2008) (citing Jack Goldsmith, *THE TERROR PRESIDENCY: LAW AND JUDGEMENT INSIDE THE BUSH ADMINISTRATION*, 26 (2007)).

³⁹ Ugarte, *supra* note 37 at 270.

⁴⁰ Wilkerson, *supra* note 27 at 73. In 2012, the U.S. Attorney General declined to prosecute anyone involved in the EIT program based on a lack of evidence. *Id.*

Book Review

The Power of Being Yourself: A Game Plan for Success by Putting Passion into Your Life and Work¹

Reviewed by Major Andrew D. Smith*

*I put myself and my own ambitions before him. I was kept away by this business trip or that business trip . . . But even when I was home I wasn't present . . . I was worrying about my own career rather than the things that I obviously should have been worrying about. I was preoccupied. My heart was more into me than it was into him.*²

I. Introduction

Joe Plumeri seeks to motivate and inspire readers to reach success with his book, *The Power of Being Yourself: A Game Plan for Success by Putting Passion into Your Life and Work*. Plumeri, an exceptionally successful businessman,³ provides guidance in the form of eight principles. The principles are not profound,⁴ but Plumeri deftly shows their effectiveness through anecdotal evidence of his own successes. But the true takeaway from the book is that it is equally necessary to apply principles for success in your personal life. Leaders who neglect to prioritize personal relationships may reach professional success, but may do so at great personal cost.

The Power of Being Yourself's principles for success are primarily leadership tenets, and they include concepts such as being genuine, having a clear vision, leading from the front and having a purpose.⁵ The book takes these very simple concepts and provides real-world examples of their effective application in business. Plumeri's optimism and energy radiate from the pages; he inspires the reader to believe that great success is readily attainable.

However, the fourth chapter, "Let Sadness Teach You," is what truly resonates. Plumeri confronts the reader with the fact that his prolific professional accomplishments came from a workaholic nature that prioritized family last.⁶ Plumeri ignored his eight principles in his most important relationships, and suffered resulting profound personal tragedy in the form of the death of his son. The book has profound value for civilian and military leaders alike. It provides great ideas and new ways to look at basic leadership concepts, while also issuing a dire warning to those who

would seek professional success at any cost.

II. Useful Insight on Leadership

The principles *The Power of Being Yourself* espouses are not overly technical or hard to understand; they are basic leadership concepts. The simplicity of the principles makes them compelling. They are not business-focused principles; they apply in any field. Plumeri skillfully guides the reader through the application of the principles, giving a first-hand account of how simple principles can make a huge impact on even the most powerful corporations.

Plumeri's hands-on approach with subordinates is particularly enlightening. In order to combat his company's impersonal culture, he began writing handwritten notes to employees on a daily basis.⁷ In an age where electronic communications are the norm, Plumeri wrote notes to let employees know how much he appreciated them and their work.⁸

When I first got there no one would communicate with each other. This was a global company with seventeen thousand people working for it worldwide, and I must have sent thirty, forty, fifty notes a weekend. They caused a commotion. They blew people away. People would have them framed up on the wall. They couldn't believe I took the time to send a handwritten note. That made them feel

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¹ JOE PLUMERI, *THE POWER OF BEING YOURSELF: A GAME PLAN FOR SUCCESS BY PUTTING PASSION INTO YOUR LIFE AND WORK* (2015).

² PLUMERI, *supra* note 1, at 72.

³ Joe Plumeri served as the CEO of multiple large corporations, including Willis Group, Citibank North America, and Travelers Primerica Financial Services. He was named to Treasury & Risk magazine's list of "100 Most Influential People in Finance" in 2009 and 2010. *Joseph Plumeri: Vice Chairman*, FIRSTDATA, http://www.firstdata.com/en_us/about-first-data/leadership-team/joseph-plumeri-bio.html (last visited Oct. 21, 2016)

⁴ The concepts Plumeri uses to develop his principles are very similar to those found in other books about leadership and inspiration. See e.g., JOHN MAXWELL, *THE 21 INDISPENSABLE QUALITIES OF A LEADER: BECOMING*

THE PERSON OTHERS WILL WANT TO FOLLOW (2000) (discussing the importance for a leader to value relationships and to have vision, passion, communication skills, initiative and the ability to listen to your heart).

⁵ Plumeri's first principle of success is to be yourself, to be genuine. See PLUMERI, *supra* note 1, at 1-28. His second principle is to have a vision of where you are going. See *id.* at 29-45. His fifth principle is to lead from the front. See *id.* At 95-120. His eighth principle is to have purpose. See *id.* at 169-190.

⁶ *Id.* at 69-94.

⁷ *Id.* at 138.

⁸ *Id.*

good, made them feel special.⁹

As the Chief Executive Officer (CEO) of Willis Group, Plumeri built offices that did not have doors.¹⁰ By doing so, he made it clear that face-to-face communication was the standard. He wanted leaders to have open doors for their subordinates at all times and vice versa.¹¹ Plumeri not only wanted communication to improve, but he also wanted his employees to enjoy work. He felt the best way to create an environment that people enjoyed was to get them speaking to one another.¹²

The book also highlights the importance of reaching out to people directly, of going the extra mile. Plumeri describes a situation, while he was heading Willis Group, where a major client was unhappy and about to leave the company. He instantly called the client.¹³

Directly after the call, he got on a train from New York to Washington, D.C., to speak face-to-face with the client.¹⁴ The client, so impressed by the fact that the CEO came to visit him personally, stayed with the company.¹⁵

Plumeri's actions were simple, easy, and extremely effective. As a leader, he was unhappy with his company's culture and wanted a change. These three anecdotes, as well as others sprinkled throughout the book,¹⁶ provide great lessons for any leader. *The Power of Being Yourself* shows that ideas do not have to be complicated to be effective. The book reassures that leadership does not take extraordinary talent or genius. It illustrates the importance of showing genuine care, enhancing communication, and giving effort. Plumeri's leadership principles are important to review, not because they are unorthodox or mind-blowing, but because they reiterate basic truths. A leader in any field should analyze the principles from the book, because there is much to garner.

III. Where Plumeri and His Plan Fall Short

Plumeri introduces his own personal tragedy in the

⁹ *Id.* at 139.

¹⁰ *Id.* at 42, 138.

¹¹ *Id.*

¹² *Id.* at 43.

¹³ *Id.* at 128.

¹⁴ *Id.* at 129.

¹⁵ *Id.* at 130.

¹⁶ Plumeri gives a number of anecdotes throughout the book that help to demonstrate his leadership principles. See *e.g., id.* at 11 (discussing how, after joining the Willis Group, he would take time to personally call all of his executives throughout the world). See also, *id.* at 96-99 (explaining how he used positive thinking and determination to get the "Sears Tower"

Prologue. He explains that his son, Chris, died in 2008 after years of battling drug addiction.¹⁷ He provides the full account of his son's story in the fourth chapter. His son went to a treatment facility to deal with anorexia at the age of thirteen.¹⁸ Plumeri believes his son became a drug addict at the treatment facility.¹⁹ His son continued to struggle with addiction for the next twenty-six years until his death.²⁰ Plumeri attributes his son's struggles to lack of self-esteem, and places the blame upon himself.²¹ He explains that he focused on his work instead of his son.²² He uses his mistake to reinforce the fourth principle in *The Power of Being Yourself*, "making time for relationships that matter."²³

Plumeri admits he failed at his fourth principle; he failed to make time for his son. His true failure was that he did not apply any of his principles to his personal life:

I put so much into my work. I gave so much of myself. People at work waited for me to give them inspiring, motivational speeches, and I did. But I didn't go home and give inspiring, motivational speeches. . . . I had to be a real fraud to really be passionate about motivating other people . . . but as soon as I walked in the door of my own home I wasn't that way anymore.²⁴

Plumeri did not have the hands-on approach with his family that made him so effective with his subordinates. He did not lead at home. He did not have a passion for his family.

Although he understands that he made mistakes,²⁵ Plumeri fails to realize that his personal success required more than adhering to one additional principle. He needed to apply all eight principles in his personal life. He needed to lead at home with the same passion he led his subordinates.

Plumeri's strict adherence to his eight principles in his professional life also led to his personal failure. He did not modify his principles when necessary; he did not prioritize effectively. Plumeri advocates going to every meeting

renamed the "Willis Tower").

¹⁷ *Id.* at XIII.

¹⁸ *Id.* at 74.

¹⁹ *Id.*

²⁰ *Id.* at 69-94.

²¹ *Id.* at 69-72, 91-94.

²² See *e.g., id.* at 72, 92.

²³ *Id.* at 93-94, 197.

²⁴ *Id.* at 92.

²⁵ See *e.g., id.* at 69-94.

possible, and explains how he “took every meeting.”²⁶ He states that many of these meetings were disasters, but he believed they were all worth going to because of the opportunities that might present themselves.²⁷ He also extolls the value of attending as many social events, clubs, and other large organizational events as possible.²⁸ He describes this as “playing in traffic.”²⁹ This principle has value; but unchecked, it had drastic consequences for his family life. Taking every meeting at work, and attending as many social functions as possible meant he had to sacrifice time elsewhere, and his family bore that sacrifice.

Not only did Plumeri fail to implement his principles effectively in his personal life, the book’s eight principles themselves also have a major shortcoming in that they do not identify the importance of taking time away from work. It is clear that Plumeri failed, and still fails, to understand the importance of down time:

I would call people on weekends. I would call people when they were on vacation. I never minded being called when I was on vacation. I’m a workaholic. I love to work. That led to anxiety for some of them. That led to resentment and even some bitterness. As I look back I realize I was wrong.

Give people a break sometimes. Let them relax. Let them enjoy a sense of a job well done. I’ve learned from that mistake. Not everybody was going to be as zealous as I was. Not everybody wanted to work all hours and on weekends and vacations.³⁰

Plumeri sees that his actions caused problems with his employees, but he does not seem to grasp how this issue led to problems in his personal life. His plan does not identify down time as a necessary ingredient for success. He only advocates providing subordinates with more personal time. This failure cuts against the book’s fourth principle, “making time for important relationships.” Also, the plan’s silence on the importance of time off ignores the extensive research that shows longer work hours can lead to negative effects on health and productivity.³¹

Plumeri’s personal failures cast a large shadow on his professional accomplishments. On the other hand, his failures

provide more value to the reader than his accomplishments.

The Power of Being Yourself helps the reader obtain the balance between work and personal life that Plumeri never had. Leaders can learn from his mistakes in order to avoid the type of personal regret that far too many professionals have.³² Understanding Plumeri’s personal failings, and the failure of his plan to take into account the need for personal time also helps leaders professionally. Leaders can learn from Plumeri’s failure to provide employees with enough personal time, which led to certain employees resenting him and his leadership style.

Also, the book motivates leaders to emphasize to subordinates the importance of spending personal time with their family. After reading this book, leaders will want to ensure that neither they, nor the people they lead, fall into the same traps as Plumeri.

IV. Conclusion

Joe Plumeri intended his book to motivate and inspire the reader to reach success. The book does motivate and inspire, but not quite as he intended. *The Power of Being Yourself* provides very useful leadership principles to follow. The simplicity and effectiveness of the book’s principles motivate and inspire the reader to believe that success is possible without extraordinary abilities or luck. Also, Plumeri’s professional insight and experiences allow the reader to see basic leadership concepts applied in a variety of creative ways. However, once the reader understands the true cost of Plumeri’s success, the desire for professional superstardom loses much of its appeal. The book intended to push readers toward professional success alone, but it unintentionally leads them toward a more encompassing type of success that includes both personal and professional achievement. Overall, the book provides keen insight on leadership along with a warning to always prioritize what matters most in life; it is a great addition to any leader’s reading list.

²⁶ *Id.* at 122-23.

²⁷ *Id.* at 123.

²⁸ *Id.* at 127-28, 142-46.

²⁹ *Id.* at 121-46.

³⁰ *Id.* at 20-21.

³¹ See e.g., Dean Obeidallah, *When You’re Dying What Will You Regret?*, CNN (June 21 2013, 6:35 P.M.), <http://www.cnn.com/2013/06/21/opinion/obeidallah-death-regret/index.html/> (citing to research that indicates that

shorter work hours leads to better problem solving and short term memory). See also Jenna Goudreau, *Why Working 6 Days a Week is a Terrible Idea*, BUSINESS INSIDER (Nov. 18 2013, 4:44 P.M.), <http://www.businessinsider.com/why-working-6-days-a-week-is-bad-for-you-2013-11/> (discussing how decades of research indicates longer working hours can have negative effects on health, family life, and productivity).

³² See e.g., Dean Obeidallah, *When You’re Dying What Will You Regret?*, CNN (June 21 2013, 6:35 P.M.), <http://www.cnn.com/2013/06/21/opinion/obeidallah-death-regret/index.html/> (sharing observations from a nurse that the number one regret from dying men was that they worked too much).

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