**APPROVED CHANGE 17-10 (Consent instructions for Article 120 offenses)**

**Replace NOTE 8 and NOTE 9, and the instructions following each, in Instruction 3-45-13 with the following:**

NOTE 8: Instructing on consent. The issue of “consent” may arise in two ways. First, lack of consent is an element when the accused is charged with rape by administering a drug, intoxicant, or similar substance *without the consent of the alleged victim*. Lack of consent is not an element when the accused is charged with rape by any other method (to include when the accused is charged with administering a drug, intoxicant, or similar substance *by force or by threat of force*). *See United States v. Neal*, 68 MJ 289, 302-304 (CAAF 2010) (statutory definition of “force” does not imply an element of lack of consent). Second, evidence of the alleged victim’s consent to the sexual conduct might be introduced with respect to any rape allegation in order to negate the elements of the offense. Generally, the elements of an Article 120(a) offense require the accused to have committed sexual conduct “by” a certain method. Stated another way, “by” means the sexual conduct occurred because of that method. Consent to the sexual conduct logically precludes that causal link; when the alleged victim consented, the sexual conduct occurred because of the consent, not because of the charged method. Accordingly, evidence that the alleged victim consented to the sexual conduct may be relevant to negate an element, even though lack of consent may not be a separate element. If consent evidence has been introduced to negate other elements of the charged offense, give the second parenthetical below, along with the appropriately tailored definitions of consent. If lack of consent to the administration of a drug, intoxicant, or similar substance is an element of the charged offense, give the first parenthetical below, along with the appropriately tailored definitions of consent.

IF LACK OF CONSENT TO THE ADMINISTRATION OF A DRUG, INTOXICANT, OR SIMILAR SUBSTANCE IS AN ELEMENT, GIVE THE FOLLOWING INSTRUCTION: (As I previously advised you, in (The) Specification(s) (\_\_\_\_\_\_\_\_\_\_) of (The) (Additional) Charge (\_\_\_), the accused is charged with the offense of rape by administering a drug, intoxicant, or other similar substance without the consent of the alleged victim, thereby substantially impairing the ability of that other person to appraise or control conduct. For this offense, lack of consent to the administration of the drug, intoxicant, or other similar substance is an element of the offense.)

IF CONSENT EVIDENCE HAS BEEN INTRODUCED TO NEGATE OTHER ELEMENTS OF THE CHARGED OFFENSE, GIVE THE FOLLOWING INSTRUCTION: (The evidence has (also) raised the issue of whether (state the alleged victim’s name) consented to the sexual conduct listed in (The) Specification(s) (\_\_\_\_\_\_\_\_\_\_) of (The) (Additional) Charge (\_\_\_). All of the evidence concerning consent to the sexual conduct is relevant and must be considered in determining whether the government has proven (the elements of the offense) (that the sexual conduct was done by state the applicable element). Stated another way, evidence the alleged victim consented to the sexual conduct, either alone or in conjunction with the other evidence in this case, may cause you to have a reasonable doubt as to whether the government has proven (every element of the offense) (that the sexual conduct was done by state the applicable element).

“Consent” means a freely given agreement to the conduct at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance or submission resulting from the use of force, threat of force, or placing another person in fear does not constitute consent. A current or previous dating or social or sexual relationship by itself or the manner of dress of the person involved with the accused in the conduct at issue shall not constitute consent.

(A sleeping, unconscious, or incompetent person cannot consent.)

(A person cannot consent to force causing or likely to cause death or grievous bodily harm.)

(A person cannot consent to being rendered unconscious.)

(A person cannot consent while under threat or fear.)

Lack of consent may be inferred based on the circumstances. All the surrounding circumstances are to be considered in determining whether a person gave consent, or whether a person did not resist or ceased to resist only because of another person’s actions.

NOTE 9: Additional definitions related to consent. In *United States v. Pease*, 75 MJ 180 (CAAF 2016), CAAF approved certain non-statutory definitions related to the issue of consent. *Pease* did not require that these definitions be provided to members. However, in the military judge’s discretion, the below definitions may be given to the members when appropriate.

(A “competent person” is a person who possesses the physical and mental ability to consent.)

(An “incompetent person” is a person who lacks either the mental or physical ability to consent because he or she is: (1) asleep or unconscious; (2) impaired by a drug, intoxicant or other similar substance; or (3) suffering from a mental disease or defect or a physical disability.)

(To be able to freely make an agreement, a person must first possess the cognitive ability to appreciate the nature of the conduct in question and then possess the mental and physical ability to make and to communicate a decision regarding that conduct to the other person. However, if the person has the ability to appreciate the conduct and communicate lack of consent, but does not do so out of fear or because of some other external influence counteracting voluntariness, the sexual conduct is not voluntary.)

(A person is “incapable of consenting” when (he/she) lacks the cognitive ability to appreciate the sexual conduct in question or the physical or mental ability to make or to communicate a decision about whether (he/she) agrees to the conduct.)

**Replace NOTE 12 and NOTE 13, and the instructions following each, in Instruction 3-45-14 with the following:**

NOTE 12: Instructing on consent. The issue of “consent” may arise in two ways. First, lack of consent is an element when the accused is charged with sexual assault by causing bodily harm, and the alleged bodily harm is the same as the alleged sexual act (i.e., the charge alleges a nonconsensual sexual act). Lack of consent is not an element when the accused is charged with sexual assault by any other method. Second, evidence of the alleged victim’s consent to the sexual conduct might be introduced with respect to any sexual assault allegation in order to negate the elements of the offense. Generally, the elements of an Article 120(b) offense require the accused to have committed sexual conduct “by” a certain method or "when" the alleged victim was in a certain state. Stated another way, “by” means the sexual conduct occurred because of that method, and "when" means the sexual conduct occurred while the alleged victim was in a state that precluded consent. Consent to the sexual conduct logically precludes these causal links; when the alleged victim consented, the sexual conduct occurred because of the consent, not because of the charged method. Accordingly, evidence that the alleged victim consented to the sexual conduct may be relevant to negate an element, even though lack of consent may not be a separate element. If consent evidence has been introduced to negate other elements of the charged offense, give the parenthetical below, along with the appropriately tailored definitions of consent. If lack of consent is an element in a charged offense of sexual assault by causing bodily harm, give the appropriately tailored definition of consent.

IF CONSENT EVIDENCE HAS BEEN INTRODUCED TO NEGATE OTHER ELEMENTS OF THE CHARGED OFFENSE, GIVE THE FOLLOWING INSTRUCTION: (The evidence has raised the issue of whether (state the alleged victim’s name) consented to the sexual conduct listed in (The) Specification(s) (\_\_\_\_\_\_\_\_\_\_) of (The) (Additional) Charge (\_\_\_). All of the evidence concerning consent to the sexual conduct is relevant and must be considered in determining whether the government has proven (the elements of the offense) (that the sexual conduct was done by/when state the applicable element). Stated another way, evidence the alleged victim consented to the sexual conduct, either alone or in conjunction with the other evidence in this case, may cause you to have a reasonable doubt as to whether the government has proven (every element of the offense) (that the sexual conduct was done by/when state the applicable element).

“Consent” means a freely given agreement to the conduct at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance or submission resulting from the use of force, threat of force, or placing another person in fear does not constitute consent. A current or previous dating or social or sexual relationship by itself or the manner of dress of the person involved with the accused in the conduct at issue shall not constitute consent.

(A sleeping, unconscious, or incompetent person cannot consent.)

(A person cannot consent to force causing or likely to cause death or grievous bodily harm.)

(A person cannot consent to being rendered unconscious.)

(A person cannot consent while under threat or fear.)

(A person cannot consent to a sexual act when believing, due to a fraudulent representation, that the sexual act served a professional purpose.)

(A person cannot consent to a sexual act when believing, due to artifice, pretense, or concealment, that the accused was another person.)

Lack of consent may be inferred based on the circumstances. All the surrounding circumstances are to be considered in determining whether a person gave consent, or whether a person did not resist or ceased to resist only because of another person’s actions.

NOTE 13: Additional definitions related to consent. In *United States v. Pease*, 75 MJ 180 (CAAF 2016), CAAF approved certain non-statutory definitions related to the issue of consent. *Pease* did not require that these definitions be provided to members. However, in the military judge’s discretion, the below definitions may be given to the members when appropriate.

(A “competent person” is a person who possesses the physical and mental ability to consent.)

(An “incompetent person” is a person who lacks either the mental or physical ability to consent because he or she is: (1) asleep or unconscious; (2) impaired by a drug, intoxicant or other similar substance; or (3) suffering from a mental disease or defect or a physical disability.)

(To be able to freely make an agreement, a person must first possess the cognitive ability to appreciate the nature of the conduct in question and then possess the mental and physical ability to make and to communicate a decision regarding that conduct to the other person. However, if the person has the ability to appreciate the conduct and communicate lack of consent, but does not do so out of fear or because of some other external influence counteracting voluntariness, the sexual conduct is not voluntary.)

(A person is “incapable of consenting” when (he/she) lacks the cognitive ability to appreciate the sexual conduct in question or the physical or mental ability to make or to communicate a decision about whether (he/she) agrees to the conduct.)

**Replace NOTE 8 and NOTE 9, and the instructions following each, in Instruction 3-45-15 with the following:**

NOTE 8: Instructing on consent. The issue of “consent” may arise in two ways. First, lack of consent is an element when the accused is charged with aggravated sexual contact by administering a drug, intoxicant, or similar substance *without the consent of the alleged victim*. Lack of consent is not an element when the accused is charged with aggravated sexual contact by any other method (to include when the accused is charged with administering a drug, intoxicant, or similar substance *by force or by threat of force*). *See United States v. Neal*, 68 MJ 289, 302-304 (CAAF 2010) (statutory definition of “force” does not imply an element of lack of consent). Second, evidence of the alleged victim’s consent to the sexual conduct might be introduced with respect to any aggravated sexual contact allegation in order to negate the elements of the offense. Generally, the elements of an Article 120(c) offense require the accused to have committed sexual conduct “by” a certain method. Stated another way, “by” means the sexual conduct occurred because of that method. Consent to the sexual conduct logically precludes that causal link; when the alleged victim consented, the sexual conduct occurred because of the consent, not because of the charged method. Accordingly, evidence that the alleged victim consented to the sexual conduct may be relevant to negate an element, even though lack of consent may not be a separate element. If consent evidence has been introduced to negate other elements of the charged offense, give the second parenthetical below, along with the appropriately tailored definitions of consent. If lack of consent to the administration of a drug, intoxicant, or similar substance is an element of the charged offense, give the first parenthetical below, along with the appropriately tailored definition of consent.

IF LACK OF CONSENT TO THE ADMINISTRATION OF A DRUG, INTOXICANT, OR SIMILAR SUBSTANCE IS AN ELEMENT, GIVE THE FOLLOWING INSTRUCTION: (As I previously advised you, in (The) Specification(s) (\_\_\_\_\_\_\_\_\_\_) of (The) (Additional) Charge (\_\_\_), the accused is charged with the offense of aggravated sexual contact by administering a drug, intoxicant, or other similar substance without the consent of the alleged victim, thereby substantially impairing the ability of that other person to appraise or control conduct. For this offense, lack of consent to the administration of the drug, intoxicant, or other similar substance is an element of the offense.)

IF CONSENT EVIDENCE HAS BEEN INTRODUCED TO NEGATE OTHER ELEMENTS OF THE CHARGED OFFENSE, GIVE THE FOLLOWING INSTRUCTION: (The evidence has (also) raised the issue of whether (state the alleged victim’s name) consented to the sexual conduct listed in (The) Specification(s) (\_\_\_\_\_\_\_\_\_\_) of (The) (Additional) Charge (\_\_\_). All of the evidence concerning consent to the sexual conduct is relevant and must be considered in determining whether the government has proven (the elements of the offense) (that the sexual conduct was done by state the applicable element). Stated another way, evidence the alleged victim consented to the sexual conduct, either alone or in conjunction with the other evidence in this case, may cause you to have a reasonable doubt as to whether the government has proven (every element of the offense) (that the sexual conduct was done by state the applicable element).

“Consent” means a freely given agreement to the conduct at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance or submission resulting from the use of force, threat of force, or placing another person in fear does not constitute consent. A current or previous dating or social or sexual relationship by itself or the manner of dress of the person involved with the accused in the conduct at issue shall not constitute consent.

(A sleeping, unconscious, or incompetent person cannot consent.)

(A person cannot consent to force causing or likely to cause death or grievous bodily harm.)

(A person cannot consent to being rendered unconscious.)

(A person cannot consent while under threat or fear.)

Lack of consent may be inferred based on the circumstances. All the surrounding circumstances are to be considered in determining whether a person gave consent, or whether a person did not resist or ceased to resist only because of another person’s actions.

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(A “competent person” is a person who possesses the physical and mental ability to consent.)

(An “incompetent person” is a person who lacks either the mental or physical ability to consent because he or she is: (1) asleep or unconscious; (2) impaired by a drug, intoxicant or other similar substance; or (3) suffering from a mental disease or defect or a physical disability.)

(To be able to freely make an agreement, a person must first possess the cognitive ability to appreciate the nature of the conduct in question and then possess the mental and physical ability to make and to communicate a decision regarding that conduct to the other person. However, if the person has the ability to appreciate the conduct and communicate lack of consent, but does not do so out of fear or because of some other external influence counteracting voluntariness, the sexual conduct is not voluntary.)

(A person is “incapable of consenting” when (he/she) lacks the cognitive ability to appreciate the sexual conduct in question or the physical or mental ability to make or to communicate a decision about whether (he/she) agrees to the conduct.)

**Replace NOTE 12 and NOTE 13, and the instructions following each, in Instruction 3-45-16 with the following:**

NOTE 12: Instructing on consent. The issue of “consent” may arise in two ways. First, lack of consent is an element when the accused is charged with abusive sexual contact by causing bodily harm, and the alleged bodily harm is the same as the alleged sexual contact (i.e., the charge alleges a nonconsensual sexual contact). Lack of consent is not an element when the accused is charged with abusive sexual contact by any other method. Second, evidence of the alleged victim’s consent to the sexual conduct might be introduced with respect to any abusive sexual contact allegation in order to negate the elements of the offense. Generally, the elements of an Article 120(d) offense require the accused to have committed sexual conduct “by” a certain method or "when" the alleged victim was in a certain state. Stated another way, “by” means the sexual conduct occurred because of that method, and "when" means the sexual conduct occurred while the alleged victim was in a state that precluded consent. Consent to the sexual conduct logically precludes these causal links; when the alleged victim consented, the sexual conduct occurred because of the consent, not because of the charged method. Accordingly, evidence that the alleged victim consented to the sexual conduct may be relevant to negate an element, even though lack of consent may not be a separate element. If consent evidence has been introduced to negate other elements of the charged offense, give the parenthetical below, along with the appropriately tailored definitions of consent. If lack of consent is an element in a charged offense of abusive sexual contact by causing bodily harm, give the appropriately tailored definitions of consent.

IF CONSENT EVIDENCE HAS BEEN INTRODUCED TO NEGATE OTHER ELEMENTS OF THE CHARGED OFFENSE, GIVE THE FOLLOWING INSTRUCTION: (The evidence has raised the issue of whether (state the alleged victim’s name) consented to the sexual conduct listed in (The) Specification(s) (\_\_\_\_\_\_\_\_\_\_) of (The) (Additional) Charge (\_\_\_). All of the evidence concerning consent to the sexual conduct is relevant and must be considered in determining whether the government has proven (the elements of the offense) (that the sexual conduct was done by/when state the applicable element). Stated another way, evidence the alleged victim consented to the sexual conduct, either alone or in conjunction with the other evidence in this case, may cause you to have a reasonable doubt as to whether the government has proven (every element of the offense) (that the sexual conduct was done by/when state the applicable element).

“Consent” means a freely given agreement to the conduct at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance or submission resulting from the use of force, threat of force, or placing another person in fear does not constitute consent. A current or previous dating or social or sexual relationship by itself or the manner of dress of the person involved with the accused in the conduct at issue shall not constitute consent.

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(A person cannot consent to sexual contact when believing, due to a fraudulent representation, that the sexual contact served a professional purpose.)

(A person cannot consent to sexual contact when believing, due to artifice, pretense, or concealment, that the accused was another person.)

Lack of consent may be inferred based on the circumstances. All the surrounding circumstances are to be considered in determining whether a person gave consent, or whether a person did not resist or ceased to resist only because of another person’s actions.

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(To be able to freely make an agreement, a person must first possess the cognitive ability to appreciate the nature of the conduct in question and then possess the mental and physical ability to make and to communicate a decision regarding that conduct to the other person. However, if the person has the ability to appreciate the conduct and communicate lack of consent, but does not do so out of fear or because of some other external influence counteracting voluntariness, the sexual conduct is not voluntary.)

(A person is “incapable of consenting” when (he/she) lacks the cognitive ability to appreciate the sexual conduct in question or the physical or mental ability to make or to communicate a decision about whether (he/she) agrees to the conduct.)