

## CHAPTER 14

### FISCAL LAW

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#### I. INTRODUCTION

A. **Fiscal Law and the Deployed Judge Advocate.** Fiscal law touches everything we do, whether in garrison or in contingency operations. Behind every operation or daily requirement, an expenditure of funds is required to pay for goods, services, and the salaries of those performing duties. Your ability to scrutinize fiscal aspects of the mission will help the unit meet the commander's intent and keep the unit within the boundaries of the law.

Article II, Section 2 of the U.S. Constitution, makes the President Commander in Chief of the Armed Services. However, the Constitution grants Congress the power to authorize the use of funds and makes clear that no money may be spent without a specific appropriation (See Art. I, § 9, cl. 7, U.S. Constitution). While commanders recognize the importance of having funds to accomplish their mission, they oftentimes do not appreciate the underlying law that requires affirmative authority to spend money in the manner the commander intends. It is your mission to make sure commands use funds for the purpose for which they are appropriated.

If there was ever any doubt about commanders' recognition of the strategic effect that money can have on an operation, the recent experiences in Iraq and Afghanistan provide clear evidence that commanders appreciate how funds can, and do, shape their overall success. The challenge for Judge Advocates (JA) lies in the requirement for affirmative authority in order to expend funds. When it comes to Fiscal Law, the question is not "show me where the law says I can't do this" but rather, "*show me where the law says I can do this.*"

Congress appropriates money for military programs, and military departments, in turn, allocate money to commands. Therefore, commanders may wonder why legal advisors scrutinize the fiscal aspects of mission execution so closely, even though expenditures or tasks are not prohibited specifically. Similarly, Joint Task Force (JTF) staff members managing a peacekeeping operation may not readily appreciate the subtle differences between

operational necessity and mission creep nation building and humanitarian and civic assistance, or construction versus maintenance and repair. Deployed JAs often find themselves immersed in such issues. When this occurs, they must find affirmative fiscal authority for a course of action, suggest alternative means for accomplishing a task, or counsel against the proposed use of appropriated funds, personnel, or assets.

This chapter affords a basic, quick reference to common spending authorities. However, because fiscal matters are so highly legislated, regulated, audited, and disputed, this chapter is not a substitute for thorough research and sound application of the law to specific facts. The Center for Law and Military Operations' (CLAMO) collection of After Action Reviews is one source for examples of prior applications of the law to specific facts in past operations.

**B. Constitutional Framework:** Pursuant to Article I, Section 8 of the Constitution, Congress raises revenue and appropriates funds for the Federal Government's operations and programs. Courts interpret this constitutional authority to mean that Executive Branch officials, including commanders and staff officers, must find affirmative authority for the obligation and expenditure of appropriated funds.<sup>1</sup> *See, e.g., U.S. v. MacCollom*, 426 U.S. 317, at 321 (1976) ("The established rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress."). In many cases, Congress has granted or limited the ability of the Executive to obligate and expend funds through annual authorization or appropriations acts or in permanent legislation.

**C. Legislative Framework:** The principles of Federal appropriations law permeate all Federal activity, both within the United States, as well as overseas. Thus, there are no "deployment" exceptions to the fiscal principles discussed throughout this chapter. However, Congress has provided DoD with special appropriations and/or authorizations for use during contingency operations.

Fiscal issues arise frequently during contingency operations. Failure to understand the nuances of special appropriations or authorizations during contingency operations may lead to the improper expenditure of funds and possible administrative or criminal consequences. Moreover, early and continuous JA involvement in mission planning and execution is essential. JAs who participate actively and have situational awareness will have a clearer view of the command's activities and an understanding of what type of appropriated funds, if any, are available for a particular need.

JAs should consider several sources that define fund obligation and expenditure authority: (1) Title 10, U.S. Code; (2) Title 22, U.S. Code; (3) Title 31, U.S. Code; (4) DoD authorization acts; (5) DoD appropriations acts; (6) supplemental appropriations acts; (7) agency regulations; and (8) Comptroller General decisions. In the absence of clear legal authority, the legal advisor should be prepared to articulate a rationale for an expenditure which is "necessary and incident" to an existing authority.

**D. Roadmap for this Chapter.** This Chapter is divided into 11 sections. Sections II through V provide an overview of the basic fiscal law controls – Purpose, Time, and Amount/Antideficiency Act. Section VI explores military construction appropriations, authorizations, and regulatory policies (including special authorities for contingency operations). Section VII provides the fiscal law legislative framework that regulates Operational Funding. The focus of Operational Funding is funding of Foreign Assistance operations (i.e., operations whose primary purpose is to assist foreign governments, militaries, and populations). Section VIII analyzes the Department of State appropriations and/or authorizations to fund Foreign Assistance, with a focus on those authorities that DoD commonly executes with or on behalf of DoS via mechanisms such as interagency acquisitions. Section IX details DoD's appropriations and/or authorizations to fund Foreign Assistance operations. Section X identifies and explains some authorities that permit the DoD to transfer property to foreign entities, a function that is otherwise the purview of the DoS. Section XI provides some concluding thoughts for JAs.

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<sup>1</sup> An obligation arises when the government incurs a legal liability to pay for its requirements such as supplies, services, or construction. A contract award normally triggers a fiscal obligation. Commands also incur obligations when they obtain goods and services from other U.S. agencies or from a host nation. An expenditure is an outlay of funds to satisfy a legal obligation. Both obligations and expenditures are critical fiscal events.

## II. BASIC FISCAL CONTROLS<sup>2</sup>

A. Congress imposes legislative fiscal controls through three basic mechanisms, each implemented by one or more statutes. The three basic fiscal controls are as follows:

1. Obligations and expenditures must be for a proper **purpose**;
2. Obligations must occur within the **time** limits (or the “period of availability”) applicable to the appropriation (e.g., operation and maintenance (O&M) funds are available for obligation for one fiscal year); and
3. Obligations must be within the **amounts** authorized by Congress.

## III. THE PURPOSE STATUTE—GENERALLY

A. The Purpose Statute provides that “[a]ppropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law.” 31 U.S.C. § 1301(a). Thus, expenditures must be authorized by law or be “reasonably related” to the purpose of an appropriation. In determining whether expenditures conform to the purpose of an appropriation, JAs should apply the Necessary Expense Doctrine, which allows for the use of an appropriation if:

1. An expenditure is specifically authorized in the statute, *or* is for a purpose that is “necessary and incident” to the general purpose of an appropriation;
2. The expenditure is not prohibited by law; and
3. The expenditure is not provided for otherwise, i.e., it does not fall within the scope of another more specific appropriation.

### B. General Prohibition on Retaining Miscellaneous Receipts and Augmenting Appropriations

1. Absent a statutory exception, a federal agency that receives any funds other than the funds appropriated by Congress for that agency must deposit those funds into the U.S. Treasury. Therefore, if any agency retains funds from a source outside the normal appropriated fund process, the agency violates the Miscellaneous Receipts Statute, 31 U.S.C. § 3302(b). A corollary to the prohibition on retaining Miscellaneous Receipts is the prohibition against augmentation. An augmentation effectively increases the amount available in an agency’s appropriation, which is contrary to the legal premise that only Congress funds an agency’s activities. Congress has enacted limited statutory exceptions to the Miscellaneous Receipts and augmentation prohibitions.

#### 2. Exceptions.

a. *Interagency acquisition* authorities allow augmentation or retention of funds from other sources. *See, e.g.*, Economy Act, 31 U.S.C. § 1535; Foreign Assistance Act (FAA), 22 U.S.C. § 2344, 2360, 2392 (permitting foreign assistance accounts to be transferred and merged). The Economy Act authorizes a Federal agency to order supplies or services from another agency. For these transactions, the requesting agency must reimburse the performing agency fully for the direct and indirect costs of providing the goods and services.

b. Congress also has authorized certain expenditures for military support to civil law enforcement agencies (CLEA) in counterdrug operations. See the Domestic Operations chapter of this handbook for a more complete review. Support to CLEAs is reimbursable *unless* it occurs during normal training and results in DoD receiving a benefit substantially equivalent to that which otherwise would be obtained from routine training or operations. *See* 10 U.S.C. § 377. Another statutory provision authorizes *operations or training* to be conducted for the sole purpose of providing CLEAs with specific categories of support. *See* § 1004 of the 1991 Defense Authorization Act, reprinted in the Notes to 10 U.S.C. § 374. In 10 U.S.C. § 124, Congress assigned DoD the operational mission of detecting and monitoring international drug traffic (a traditional CLEA function). By authorizing DoD support to CLEAs at essentially no cost, Congress has authorized augmentation of CLEA appropriations.

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<sup>2</sup> For a more in-depth review of fiscal law issues, *see*, CONTRACT & FISCAL L. DEP’T, THE JUDGE ADVOCATE GENERAL’S LEGAL CENTER AND SCHOOL, U.S. ARMY, FISCAL LAW DESKBOOK, current edition, *available at* <https://www.jagcnet.army.mil/8525736A005BC8F9/0/F4F01C63D6ABD0BF85257353006B31C5?opendocument&noly=1>; *also available at* [http://www.loc.gov/rr/frd/Military\\_Law/Contract-Fiscal-Law-Department.html](http://www.loc.gov/rr/frd/Military_Law/Contract-Fiscal-Law-Department.html). The annual CONTRACT ATTORNEY’S DESKBOOK, providing detailed coverage of related acquisition law topics, can also be found at these websites.

### C. Purpose Statute Violations.

1. **Violations of the Purpose Statute.** Violations of the Purpose Statute commonly occur in two ways. The first category of Purpose violations involve an agency using an improper funding source to carry out a program for which a more specific appropriation exists. In the second category of violations, an agency makes an expenditure for which there is no proper funding source.

2. **Correcting Violations of the Purpose Statute.** If a suspected Purpose violation involving obligation of the “wrong pot” of money occurs, a correction is possible if the proper funds were available: (1) at the time of the original obligation (e.g., contract award) and (2) at the time the adjustment is made. See discussion of the Anti-Deficiency Act (ADA), below. If a command uses funds for a purpose for which there is no proper appropriation, it violates the Purpose Statute, and may result in a violation of the ADA. Officials must report ADA violations in accordance with the Department of Defense Financial Management Regulation (DoD FMR) and current service policy (see Section V below).

## IV. AVAILABILITY OF FUNDS AS TO TIME

A. **Overview.** The “Time” control includes two major elements:

1. Appropriations have a definite life span; and
2. Appropriations normally must be used for the needs that arise during their period of availability.

B. **Period of availability.** Most appropriations are available for a finite period. For example, O&M funds (the appropriation most prevalent in an operational setting) are available for one year; Procurement appropriations are available for three years; and Military Construction funds have a five-year period of availability. If funds are not *obligated* during their period of availability, they expire and are unavailable for new obligations (e.g., new contracts or changes outside the scope of an existing contract). Expired funds may be used, however, to adjust existing obligations (e.g., to pay for a price increase following in-scope changes to an existing contract).

C. **The “Bona Fide Needs Rule.”** Government agencies may not purchase goods or services they do not require. The bona fide need is the point in time when a government agency becomes authorized to acquire a particular good or service based on a currently existing requirement. The Bona Fide Needs Rule is a timing rule that requires both the timing of the obligation and the bona fide need to be within the appropriated fund’s period of availability. See 31 U.S.C. § 1502(a). In other words, current year funds should be used for current year needs. Time issues often arise when commands try to address future year needs with current year funds.

1. **Supplies.** The bona fide need for supplies normally exists when the government actually will be able to use the items. Thus, a command would use a currently available appropriation for office supplies needed and purchased in the current fiscal year. Conversely, commands may not use current year funds for office supplies that are not needed until the next fiscal year. Year-end spending for supplies that will be delivered within a reasonable time after the new fiscal year begins is proper, however, as long as a *current need* is documented and the amount purchased does not amount to “stockpiling.” Note that there are lead-time and stock-level exceptions to the general rule governing purchases of supplies. The lead-time exception allows the purchase of supplies with current funds at the end of a fiscal year even though the time period required for manufacturing or delivery of the supplies may extend over into the next fiscal year. The stock-level exception allows agencies to purchase sufficient supplies to maintain adequate and normal stock levels even though some supply inventory may be used in the subsequent fiscal year. See Defense Finance and Accounting Service Reg.--Indianapolis 37-1 [DFAS-IN 37-1], Chapter 8; or DoD Financial Management Regulation 7000.14-R, vol. 3, para. 080303. In any event, “stockpiling” items is prohibited.

2. **Services.** Normally, *severable* services are bona fide needs of the period in which they are performed. Grounds maintenance, custodial services, vehicle/equipment maintenance, and other services that address recurring, “day-today” needs, are examples of severable services because the services can be severed into components that independently meet the needs of the government. Use current year funds for severable services performed in the current fiscal year. As an exception, however, 10 U.S.C. § 2410a permits DoD agencies to obligate funds current at the time of award for a severable services contract (or other agreement) with a period of performance that does not exceed one year. Even if some services will be performed in the subsequent fiscal year, current fiscal year funds can be used to fund the full year of severable services. Conversely, *nonseverable* services are bona fide needs of the year in which a contract (or other agreement) is executed. Nonseverable services are those that contemplate a single undertaking, e.g., studies, reports, overhaul of an engine, painting a building, etc. Fund the entire undertaking with

appropriations current when the contract (or agreement) is executed, even if performance extends into a subsequent fiscal year. See DFAS-IN 37-1, ch. 8; DoD Financial Management Regulation 7000.14-R, vol. 3, para. 080303.

## V. AVAILABILITY OF APPROPRIATIONS AS TO AMOUNT

A. **The Anti-Deficiency Act** (31 U.S.C. §§ 1341(a), 1342, & 1517(a)). The Anti-Deficiency Act prohibits any government officer or employee from:

1. Making or authorizing an expenditure or obligation *in advance of or in excess of* an appropriation. (31 U.S.C. § 1341).

2. Making or authorizing an expenditure or incurring an obligation *in excess of* an apportionment or *in excess of* a formal subdivision of funds. (31 U.S.C. § 1517).

3. Accepting voluntary services, unless authorized by law. (31 U.S.C. § 1342).

B. **Informal and Formal Subdivisions.** Commanders must ensure that fund obligations and expenditures do not exceed amounts provided by their higher headquarters. Although over-obligation of an installation O&M account normally does not trigger a reportable ADA violation, an over-obligation locally *may* lead to a breach of a formal O&M subdivision at the Major Command level. See 31 U.S.C. § 1514(a) (requiring agencies to subdivide and control appropriations by establishing administrative subdivisions); 31 U.S.C. § 1517; DoD Financial Management Regulation, vol. 14, Ch. 1, 2; DFAS-IN 37-1, ch. 4. Similarly, as described in the Purpose section, above, an obligation in excess of a statutory limit, e.g., the \$750,000 O&M threshold for construction or the \$250,000 expense/investment threshold, may lead to an ADA violation.

C. **Requirements when an ADA is suspected.** Commanders must investigate suspected violations to establish responsibility and discipline violators. Regulations require “flash reporting” of possible ADA violations. DoD 7000.14-R, Financial Management Regulation, vol. 14, chs. 3-7; DFAS-IN 37-1, ch. 4, para. 040204. If a violation is confirmed, the command must identify the cause of the violation and the senior responsible individual. Investigators file reports through finance channels to the office of the Assistant Secretary of the Army, Financial Management & Comptroller (ASA (FM&C)). Further reporting through the Secretary of Defense and the President to Congress is also required if ASA (FM&C) concurs with a finding of violation. By regulation, commanders must impose administrative sanctions on responsible individuals. Criminal action also may be taken if a violation was knowing and willful, 31 U.S.C. § 1349, § 1350. Lawyers, commanders, contracting officers, and resource managers all have been found to be responsible for violations. Common problems that have triggered ADA violations include the following:

1. Obligating current year funds for the bona fide needs of a subsequent fiscal year without statutory authority. This may occur when activities stockpile supply items in excess of those required to maintain normal inventory levels. The impending expiration of funds that occurs at the end of each fiscal year does not provide justification to violate the bona fide needs rule.

2. Exceeding a statutory limit (e.g., funding a construction project in excess of \$750,000 with O&M or using O&M instead of procurement funds to fund an investment item that exceeds the \$250,000 expense/investment threshold).

3. Obligating funds for purposes prohibited by law.

4. Obligating funds for a purpose for which Congress has not appropriated funds, e.g., personal expenses or gifts, where there is no regulatory or case law support for the purchase. Common violations in this area include purchase of food, clothing, bottled water, gifts, or mementos, absent a statutory, regulatory, or case law-created exception.

## VI. MILITARY CONSTRUCTION (MILCON) -- A SPECIAL PROBLEM AREA

A. **Introduction.** Military Construction represents a special area of concern for commands. Misinterpretation and misapplication of the rules is one of the leading causes of Anti-Deficiency Act violations. These violations consume massive amounts of man-hours (investigations, etc.) and can have professional ramifications on the officers involved. Great care should be taken to properly define the scope of the project. Most commands would prefer to use O&M funds for any and all construction projects, though the ability to use these funds is limited.

B. **Definitions.** How you define a project oftentimes determines what type of funds may be used on the project. Congress appropriates funds for military construction projects and, based upon the cost of the project, may or may not specifically authorize projects. Other types of work, such as maintenance and repair, are not construction, and therefore military construction funds are not required to perform maintenance and repair.

1. “Military Construction” includes any construction, development, conversion, or extension carried out with respect to a military installation *whether to satisfy temporary or permanent requirements*. It includes “all military construction work...necessary to produce a complete and usable facility or a complete and usable improvement to an existing facility...” 10 U.S.C. § 2801. The definition of a military installation is very broad and includes foreign real estate under the operational control of the U.S. military. As defined further in AR 420-1, para. 4-17, construction includes the following:

- a. The erection, installation, or assembly of a *new* facility;
- b. The addition, expansion, extension, alteration, functional conversion, or replacement of an *existing facility*;
- c. The *relocation* of a facility from one site to another;
- d. *Installed equipment* (e.g., built-in furniture, elevators, and heating and air conditioning equipment); and
- e. Related real property requirements, including land acquisitions, site preparation, excavation, filling, landscaping, and other land improvements.

2. “Military Construction Project” includes all work necessary to produce a “complete and usable facility, or a complete and usable improvement to an existing facility.” 10 U.S.C. § 2801(b). Splitting projects into separate parts in order to stay under a statutory threshold is strictly prohibited.<sup>3</sup> See summary of construction funding thresholds in paragraph VI.C. below.

3. “Maintenance” and “Repair” are combined into a single category of work. DA PAM 420-11, para. 2-2 (18 Mar. 2010).

a. “Maintenance” is “work required to preserve or maintain a real property facility in such condition that it may be used effectively for its designated purpose.” AR 420-1, Glossary, sec. II. It includes work required to prevent damage and to sustain components (e.g., replacing disposable filters, painting; caulking, refastening loose siding, and sealing bituminous pavements). See DA Pam 420-11, para. 1-6a.

b. “Repair” means the restoration of a real property facility to such conditions that it may be used effectively for its designated functional purpose; or correction of deficiencies in failed or failing components of existing facilities or systems to meet current Army standards and codes where such work, for reasons of economy, should be done concurrently with restoration of failed or failing components; or a utility system or component may be considered “failing” if it is energy inefficient or technologically obsolete. AR 420-1, Glossary, sec. II.

4. Relocatable Buildings (RLB). An arrangement of components and systems designed to be transported over public roads with a minimum of assembly upon arrival and a minimum of disassembly for relocation. A relocatable building is designed to be moved and reassembled without major damage to the floor, roof, walls, or other significant structural modification.<sup>4</sup> AR 420-1, para. 6-14, further defines relocatables as personal property used as a structure that would have a building category code if it was real property, designed to be readily moved, erected, disassembled, stored, reused, and meets the 20 percent rule. In accordance with Department of the Army guidance, the costs for disassembly, repackaging, any exterior or interior work (e.g., electrical or fire suppression systems), labor, and non-recoverable building components, including foundations, may not exceed 20 percent of the purchase price of the relocatable building.<sup>5</sup> If these costs exceed 20 percent of the cost of the relocatable building project, the RLB project is treated as real property and is funded under the construction funding guidelines. In

<sup>3</sup> See *The Honorable Michael B. Donley*, B-234326.15, Dec. 24, 1991 (unpub.) (prohibiting project splitting to avoid statutory thresholds); AR 420-1, para. 2-15a(2), DA Pam 420-11, Glossary, sec. II; AFI 32-1021, para 4.2; OPNAVINST 11010.20G, para. 4.2.1.

<sup>4</sup> See Memorandum, Office of the Assistant Secretary of the Army (Installations and Environment), Delegation of Authority – Relocatable Buildings (22 Feb. 2011). See also U.S. DEP’T OF DEFENSE, INSTR. 4165.56, RELOCATABLE BUILDINGS (7 Jan. 2013).

<sup>5</sup> See Memorandum, Office of the Assistant Secretary of the Army (Installations and Environment), Delegation of Authority – Relocatable Buildings (22 Feb. 2011).

contingency operation areas, the cost of establishing a foundation for relocatable buildings shall be excluded from the 20 percent calculation when force protection requirements warrant that concrete slabs are used.<sup>6</sup>

5. **Funded Costs.** Costs which are charged to the appropriation designated to pay for a project. AR 420-1, Glossary. They are the “out-of-pocket” expenses of a project, such as contract costs, TDY costs, materials, etc. Funded Costs do not include the salaries of military personnel, equipment depreciation, and similar “sunk” costs. The cost of fuel used to operate equipment is a funded cost. Maintenance and repair costs which can be segregated are not funded costs. See DA Pam 420-11, para. 2-9. Only *funded costs* count against the \$1 million O&M threshold.

C. **Funds for Construction.** The chart below summarizes construction funding thresholds:

| <b>Construction Fiscal Law Basics</b>                                                                                                       |                                        |                                 |
|---------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------|---------------------------------|
| <b><u>Amount</u></b>                                                                                                                        | <b><u>Type Funds</u></b>               | <b><u>Approval</u></b>          |
| <b>&gt;\$3 Mil</b>                                                                                                                          | <b>MILCON</b>                          | <b>Congress</b>                 |
| <b>\$1Mil-\$3 Mil*</b>                                                                                                                      | <b>Unspecified Minor MILCON (UMMC)</b> | <b>(Under or Dep) Sec Level</b> |
| <b>Under \$1 Mil</b>                                                                                                                        | <b>O&amp;M</b>                         | <b>Commander</b>                |
| <b>* Upper limit increases to \$4 million if project is intended solely to correct a deficiency that threatens life, health, or safety.</b> |                                        |                                 |

1. Generally, funding for construction is appropriated for the specific projects under the Military Construction Appropriation. However, there are some exceptions. 10 U.S.C. § 2805(c) authorizes the use of O&M funds for unspecified minor military construction up to \$1 million per project. Military Construction projects between \$1 million and \$3 million may use Unspecified Minor Military Construction funds (UMMC). 10 U.S.C. § 2805(a)(2). The threshold for UMMC is increased to \$4 million if the project is “solely to correct a deficiency that threatens life, health, or safety.”<sup>7</sup> Military Construction projects above \$3 million must be funded with Military Construction Funds.

2. DoD also must notify Congress if commanders intend to undertake construction (temporary or permanent) during any exercise where the cost is expected to exceed \$100,000. See Military Construction Appropriation Act, 2004, Pub. L. No. 108-132, 117 Stat. 1374, (2003) § 113.

3. Commanders also must use UMMC funds for all permanent construction during CJCS-coordinated or directed OCONUS exercises. See AR 415-32, c.(2). The authority for exercise-related construction is limited to no more than \$5 million per military department per fiscal year. See AR 415-32, c.(2). This limitation does not affect funding of minor and truly temporary structures such as tent platforms, field latrines, shelters, and range targets that are removed completely once the exercise is completed. Units may use O&M funds for these temporary requirements. Again, however, Congressional notification is required for any exercise-related construction in excess of \$100,000. See Military Construction Appropriation Act, 2000, Pub. L. No. 106-52, § 113, 113 Stat. 264 (1999); AR 415-32, 3-11d.

<sup>6</sup> See Memorandum, Office of the Assistant Secretary of the Army (Installations and Environment), Additional Guidance to the Deputy Assistant Secretary of the Army (Installations and Housing), 8 Feb. 2008; Memorandum, Delegation of Authority – Relocatable Buildings (13 May 2009).

<sup>7</sup> Note that while the statute allows for an increase in the threshold to \$3 million to remedy life, health, or safety deficiencies, there is no statutory guidance as to what constitutes “a deficiency that threatens life, health, or safety.” Further, DoD and Army Regulations do not assist in defining this criteria. At least one Army MACOM has issued limited guidance. The Air Force requires prior approval of SAF/MII and Congressional notification for projects solely to correct a life, health, or safety deficiency that exceed \$500,000. AFI 32-1032, para 5.1.2.1.]

**D. Methodology for analyzing construction funding issues:**

1. Define the scope of the project (i.e., What is the complete and usable facility? How many projects are there? );
2. Classify the work as construction, repair, or maintenance;
3. Determine the funded and unfunded costs of the project;
4. Select the proper appropriation using only the funded costs (O&M <\$ 1 million; UMMC < \$3 mil; MILCON > \$3 mil); and
5. Identify the proper approval authority.

**E. Construction Using O&M Funds During Combat or Declared Contingency Operations.** As stated in the introduction, there is no “deployment exception” to Fiscal Law, whether in construction funding or other types of funding. However, Congress has provided special funding authorities for contingency operations. The following additional authorities are available to DoD to fund combat and contingency-related construction projects. Of the authorities listed below, only the Contingency Construction Authority is frequently used. The remainder of the authorities are rarely used because their requirements include Congressional notification, and in the case of 10 U.S.C. § 2808 and 10 U.S.C. § 2803, the reprogramming of unobligated military construction funds, which are normally limited in amount.<sup>8</sup>

1. **Contingency Construction Authority (CCA).** Congress, recognizing a need for special construction authority when engaged in a contingency operation, provided DoD with this authority beginning in 2003. This authority, sometimes referred to as Contingency Construction authority (CCA), allows DoD to use O&M to fund construction projects outside of the U.S. in support of contingency operations. Section 2806 of the FY15 NDAA provides DoD with authority to use up to \$100 million O&M for these types of projects. JAs should seek guidance from the COCOM prior to attempting to utilize this particular authority.

2. **Projects Resulting from a Declaration of War or National Emergency.** Upon a Presidential declaration of war or national emergency, 10 U.S.C. § 2808 (not to be confused with Section 2808 of the 2004 NDAA which permits the Secretary of Defense (SECDEF) to undertake construction projects not otherwise authorized by law that are necessary to support the armed forces. These projects are funded with unobligated military construction and family housing appropriations, and the SECDEF must notify the appropriate committees of Congress of (a) the decision to use this authority; and (b) the estimated costs of the construction project. On 16 November 2001 President Bush invoked this authority in support of the Global War on Terrorism. *See* Executive Order 13235, Nov. 16, 2001, 66 Fed. Reg. 58343.

a. **Emergency Construction, 10 U.S.C. § 2803.** Limitations: (a) a determination by the Service Secretary concerned that the project is vital to national defense; (b) a 7-day Congressional notice and wait period; (c) a \$50 million cap per fiscal year; and (d) a requirement that the funds come from reprogrammed, unobligated military construction appropriations.

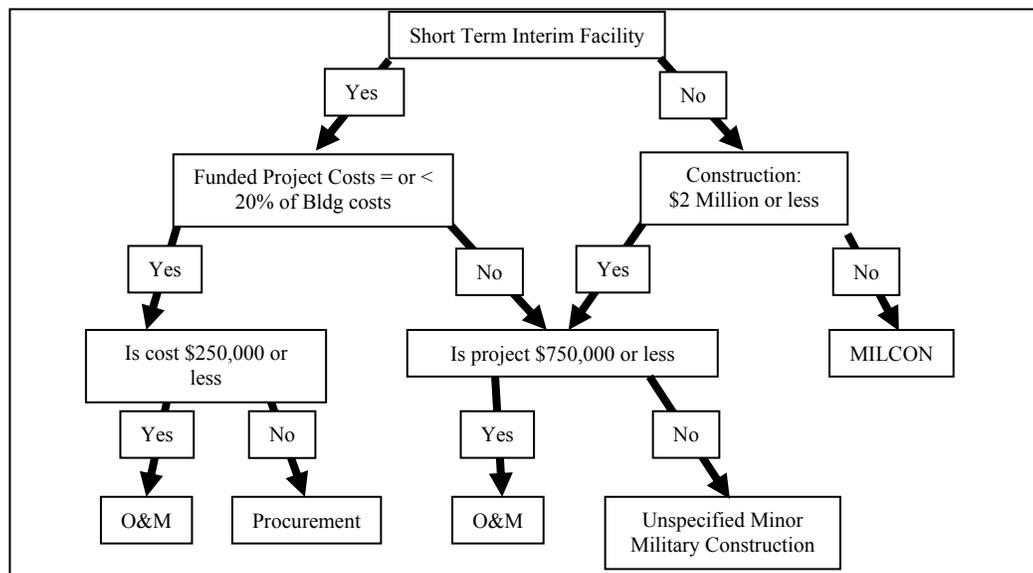
b. **Contingency Construction, 10 U.S.C. § 2804.** Limitations similar to those under 10 U.S.C. § 2803 apply; however, Congress specifically appropriates funds for this authority. In 2003, Congress dramatically increased the amount of funding potentially available to the DoD under this authority. *See* Emergency Wartime Supplemental Appropriations for the Fiscal Year 2003, Pub. L. No. 108-11, 117 Stat. 587 (2003). Section 1901 of the supplemental appropriation authorized the SECDEF to transfer up to \$150 million of funds appropriated in the supplemental appropriation for the purpose of carrying out military construction projects not otherwise authorized by law. The conference report accompanying the supplemental appropriation directed that projects that previously had been funded under the authority of the DoD Deputy General Counsel (Fiscal) 27 February 2003 memorandum, must be funded pursuant to 10 U.S.C. § 2804 in the future. However, because the 2004 and 2005 NDAAs authorized the DoD to spend up to \$200 million per fiscal year on such construction projects, DoD’s authority to fund projects pursuant to 10 U.S.C. § 2804 was later significantly reduced. *See* Pub. L. 108-767, 118 Stat. 1811, Section 2404(a)(4) (limiting funding under this authority to \$10 million for fiscal year 2005).

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<sup>8</sup> For a discussion of O&M and contingency construction and potential project splitting in Afghanistan, *see* Major Teresa G. Love, USAF, “Living in the Gray: Legal Facts and Fictions of Contingency Construction Contracting and Project Splitting in the Combat Zone,” *The Reporter*, Vol. 37, no. 3 (2010).

F. Recurring Construction Funding Issues – Relocatable Buildings and the Logistics Civil Augmentation Program (LOGCAP)

1. **Relocatable Buildings.** Department of the Army issued new guidance regarding Relocatable Buildings and the delegation authority in February 2011. See Memorandum, Office of the Assistant Secretary of the Army (Installations and Environment), Delegation of Authority – Relocatable Buildings (22 Feb. 2011); Memorandum, Assistant Chief of Staff for Installation Management, Interim Policy Change on Relocatable Buildings (10 Feb. 2008); Memorandum, Office of the Assistant Secretary of the Army (Installations and Environment), Additional Guidance to the Deputy Assistant Secretary of the Army (Installations and Housing), 8 Feb. 2008 Memorandum, Delegation of Authority – Relocatable Buildings (13 May 2009). Depending on the purpose of the relocatable, it may be construction or procurement. The flow diagram below shows the analysis for



selecting the proper funds for the use of relocatable buildings.

As a general rule, a “relocatable building” must be funded as a construction project IF the estimated funded and unfunded costs for average building disassembly, repackaging (including normal repair and refurbishment of components, but not transportation), and nonrecoverable building components, including typical foundations, exceed 20% of the acquisition cost of the relocatable building itself. (AR 420-1, 6-14). The Army clarified the 20% rule in its Interim Policy published in February 2008. The policy states “[t]he costs for disassembly, repackaging, any exterior refinishing (e.g., brick façade, etc.) and any interior work (e.g., electrical systems, fire suppression systems, walls, or ceilings, etc.) including labor applied to the building after site delivery to make the relocatable building usable, and non-recoverable building components, including foundations, may not exceed 20% of the purchase price of the relocatable building. (Foundations include blocking, footing, bearing plates, ring walls, and concrete slabs. When concrete slabs are used as relocatable building foundations or floors, the entire cost of the slab will be included in the foundation cost).” As previously noted, under the 2009 ASA(I&E) memorandum, in contingency operation areas, the cost of establishing a foundation for relocatable buildings shall be excluded from the 20 percent calculation when force protection requirements warrant that concrete slabs are used. Under the interim policy, relocatable buildings may be used for no more than 6 years.

2. If multiple relocatable buildings are assembled and configured to satisfy a Command’s requirement, a systems analysis should be conducted. All costs necessary to erect the RLB structure will be considered together when compared to the expense and investment threshold that is normally \$250,000. Remember, however, this amount has been increased for CENTCOM to \$500,000. See Consolidated Appropriations Act 2012, Section 9011.

3. **LOGCAP.** The rules concerning construction ordered under LOGCAP are the same as if the unit was funding the construction contract through normal contracting procedures. For years, units ordered things through the LOGCAP service contract through a task order and, because the LOGCAP contract is funded with O&M,

assumed O&M funds were appropriate for all contracted items under the contract. In March 2006, the DoD OGC clarified the fiscal rules concerning the LOGCAP contract, stating “there are no special fiscal rules when using LOGCAP.” Thus, if the task order’s terms calls for construction, then the rules on construction funding apply.

## VII. THE LEGISLATIVE FRAMEWORK REGULATING OPERATIONAL FUNDING.

**A. Fiscal Legislative Controls.** There is NO “deployment exception” to the Fiscal Law Framework! Therefore, the same fiscal limitations regulating the obligation and expenditure of funds apply to operational funding (*see supra*, Purpose, Time, and Amount/ADA; Fiscal Law Deskbook, chapters 2-4). The focus of operational funding is how to fund operations whose primary purpose is to benefit foreign militaries, foreign governments, and foreign populations. Generally, these operations are Foreign Assistance, and are normally funded by the Department of State (DoS). However, Congress does provide DoD with special appropriations and/or authorizations to fund Foreign Assistance. Of the three general limitations—Purpose, Time, and Amount/ADA—the Purpose Statute is the fiscal control that is generally the primary focus for the fiscal law practitioner in a military operational setting.

**B. Operations & Maintenance (O&M) Recurring Issues.** To understand whether O&M funds may be used for Foreign Assistance, it is important to understand the primary purpose of O&M appropriations. The primary purpose of O&M is “[f]or expenses, not otherwise provided for, necessary for the operation and maintenance of the [Army, Air Force, or Navy] as authorized by law....” *See Consolidated Appropriations Act, Pub.L. 113-76, div. C, (2014).*

1. *“For expenses”* – Expenses are non-durable end items that are not expected to last more than one year. Therefore, O&M may generally not be used for capital investments (i.e., durable goods whose expected usable life exceeds one year), or centrally-managed items. Capital investments and centrally-managed items are generally funded with Procurement appropriations. In the annual DoD appropriation, Congress generally provides DoD with the authority to use O&M funds for capital investments whose cost is \$250,000 or less. *See § 8030, Consolidated Appropriations Act, Pub.L. 113-76, div. C, (2014).* For several years during the contingency operations in Iraq and Afghanistan, Congress has also permitted the expense/investment threshold to extend to \$500,000. Section 9010 of the 2014 Consolidated Appropriations Act (CAA) provides for an increase in the threshold to \$500,000 upon determination by the Secretary of Defense that such action is necessary to meet operational requirements of commanders engaged in contingency operations overseas.

2. *“not otherwise provided for”* – O&M is not for Weapons, Ammunition, or Vehicles, since these are investment items. Additionally, Congress appropriates funds separately for each military department for weapons, ammunition, and vehicles. For example, vehicles are purchased with Procurement, Army Other Funds (OPA): “For construction, procurement, production, and modification of vehicles, including tactical, support, and non-tracked combat vehicles; the purchase of passenger motor vehicles for replacement only,” *See Consolidated Appropriations Act, Pub.L. 113-76, div. C, (2014).* Therefore, O&M may not be used to procure these types of “investment” items (even if the cost is \$250,000 or less), since more specific appropriations exist for the purchase of Weapons, Ammunition, and Vehicles (i.e., the various Procurement appropriations). Notably though, Congress has granted limited authority for the purchase of certain vehicles in CENTCOM’s area of responsibility in section 9004 of the 2014 CAA.

3. *“necessary for the operation”* – Military Construction (MILCON) presents a special problem area. 10 U.S.C. § 2805(c), a “codified” or “permanent” authorization (*see infra*, VI.C.), authorizes the use of O&M funds, as opposed to UMMC or MILCON funds, for a military construction project costing not more than \$1 million. Absent this authorization, DoD units would fund all construction projects that cost \$1 million or less with UMMC or MILCON funds. There are, however, some statutory exceptions to the general limitation on the use of O&M funds for construction projects that exceed \$750,000, such as the Contingency Construction Authority.

a. Another recurring issue related to the use of O&M for construction projects is the use of LOGCAP to issue task orders for construction projects. LOGCAP is a multi-year contingency indefinite delivery-indefinite quantity (ID/IQ) contract originally designed for the provision of contractor services to the U.S. Army, but it also allows the Army to contract for the provision of goods and construction in wartime and other contingency operations. Contractors perform the procured services to support U.S. Army units in support of the operational missions. Use of contractors in a theater of operations allows the release of military units for other missions or to fill support shortfalls. This program provides the Army with additional means to adequately support the current and programmed forces.

b. When OEF and OIF began, the Army used LOGCAP to contract for services, goods, and construction. The Army, however, initially paid for all LOGCAP ID/IQ task orders, including construction, with O&M funds. The Army’s rationale for doing this was that the goods and construction were really a LOGCAP service allowed under the LOGCAP ID/IQ (e.g., the Army needs food service for its Soldiers; if the contractor needs to construct a Dining Facility to provide those services, that is their decision; it is still a service to us, which is expended within the current fiscal year, so the Army can use O&M funds to reimburse the contractor for constructing the facility, since what the Army really procured were dining facility “services”). This rationale is no longer legally valid. O&M is no longer the “exclusive” source of funding for LOGCAP. All LOGCAP projects should be financed with the proper purpose funds, depending on what the Army is procuring.

**C. Appropriations vs. Authorizations.** In layman’s terms, an appropriation draws a “pot of money” from the U.S. Treasury, while an authorization may provide additional purposes for which a “pot of money” may be used.

**D. Appropriations and Authorization Statutes.** Traditionally, Congress appropriates funds and authorizes purposes for those funds in three annual public laws:

a. Department of Defense Appropriations Act (DoDAA): appropriates funds for the yearly expenses and investment activities of DoD. These activities are colloquially referred to as “baseline operations,” funded with “baseline funds.” The current administration also requests and receives funds for overseas contingency operations in the DoDDA, though many appropriations for operations occur in “wartime supplemental” appropriations.

b. Military Construction and Veterans Affairs Appropriation Act (MILCON/VA AA): typically, Title I appropriates Unspecified Minor Military Construction (UMMC) and Specified Military Construction (MILCON) funds for DoD. The Department of Veterans Affairs (VA) is a separate agency.

c. National Defense Authorization Act (NDAA): provides maximum amounts that may be appropriated, and additional authorizations (purposes) for which the appropriated funds drawn may be used.

d. Congressional Committees: The Congressional appropriations committees (House and Senate Appropriations Committees) draft the federal appropriations acts for consideration and passage by Congress. The Congressional authorizations committees (House and Senate Armed Services Committees) draft the DoD authorization acts for consideration and passage by Congress.

**E. “Codified” (or “Permanent”) vs. “Uncodified” (or “Temporary”) Authorizations.** “Codified” (or “permanent”) means that Congress inserts a respective authorization into the actual U.S. Code (e.g., Title 10 for DoD and Title 22 for DoS). The significance of this is that Congress need not “re-authorize” the authorization on a yearly basis. Notably, Congress must still provide funds for a codified authority—recall that there must be both an appropriation *and* an authorization. In contrast, “uncodified” (or “temporary”) authorizations are not inserted into the U.S. Code (although they remain an enacted Public Law). As a result, they automatically cease to exist once the period of availability is complete, unless Congress states that the authority extends into future years or subsequently re-authorizes the provision in later legislation.

1. **Operational Funding General Rule.** The general rule in operational funding is that the Department of State (DoS), and not DoD, funds Foreign Assistance to foreign nations and their populations. Section VIII discusses the Title 22 DoS funds available for operational funding. Foreign Assistance includes Security Assistance to a foreign military or government, Development Assistance for major infrastructure projects, and Humanitarian Assistance directly to a foreign population.

2. **Two Exceptions.** There are two exceptions to the operational funding general rule.

a. **Interoperability, Safety, and Familiarization Training.** DoD may fund the training of foreign militaries with O&M only when the purpose of the training is to promote interoperability, safety, and familiarization, with U.S. Forces. This exception, frequently referred to as “little ‘t’ training” ultimately benefits U.S. Forces and therefore is not Security Assistance Training. This exception applies only to training.<sup>9</sup>

b. **Congressional Appropriation and/or Authorization to conduct Foreign Assistance.** DoD may fund Foreign Assistance operations if Congress has provided a specific authorization and appropriated funds to

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<sup>9</sup> See CONTRACT & FISCAL L. DEP’T, THE JUDGE ADVOCATE GENERAL’S LEGAL CENTER AND SCHOOL, U.S. ARMY, FISCAL LAW DESKBOOK, current edition, Chapter 10: Operational Funding, discussing The Honorable Bill Alexander, B-213137, 63 Comp. Gen. 422 (1984).

execute the mission. Section VIII, *infra*, discusses the most frequently used appropriations and authorizations that Congress has enacted for DoD to execute operations that directly benefit a foreign entity.

### VIII. DEPARTMENT OF STATE AUTHORIZATIONS AND APPROPRIATIONS

A. **Introduction.** The United States military has engaged in operations and activities that benefit foreign nations for many decades. The authorities and funding sources for these operations and activities have evolved into a complex set of statutes, annual appropriations, regulations, directives, messages, and policy statements. The key issue for the practitioner is determining whether DoS authorizations and/or appropriations (under Title 22 of the U.S. Code, occasional Foreign Relations Authorization Acts, and the annual Department of State, Foreign Operations, and Related Programs Appropriations Act (FOAA)), or DoD authorizations and/or appropriations (under Title 10 of the U.S. Code, and the annual DoD appropriations and authorizations) should be used to accomplish a particular objective. If there are non-DoD appropriations and/or authorizations that may be used to fund a Foreign Assistance mission, then DoD may still be able to execute the mission, but with DoS funds (as long as DoS approves their use under an appropriate authority).

1. **Operational Funding General Rule.** The general rule in operational funding is that the Department of State (DoS) has the primary responsibility, authority, and funding to conduct Foreign Assistance on behalf of the USG. Foreign assistance encompasses any and all assistance to a foreign nation, including Security Assistance (assistance to the internal police forces and military forces of the foreign nation), Development Assistance (assistance to the foreign government in projects that will assist the development of the foreign economy or their political institutions), and Humanitarian Assistance (direct assistance to the population of a foreign nation). The legal authority for the DoS to conduct Foreign Assistance is found in the Foreign Assistance Act of 1961, 22 U.S.C. § 2151 et seq.

2. **Human Rights and Security Assistance.** The “Leahy Amendment,” first enacted in the 1997 FOAA, prohibits the USG from providing funds to the security forces of a foreign country if the DoS has credible evidence that the foreign country or its agents have committed gross violations of human rights, unless the Secretary of State determines and reports that the government of such country is taking effective measures to bring the responsible members of the security forces unit to justice. 22 U.S.C. § 2378d. This language is also found in annual DoD Appropriations Acts, prohibiting the DoD from funding any training program involving a unit of the security forces of a foreign country if the DoS has credible information that the unit has committed a gross violation of human rights, unless all necessary corrective steps have been taken or the Secretary of Defense, in consultation with the Secretary of State, decides to waive the prohibition due to extraordinary circumstances. *See* 2014 CAA , § 8057.

#### B. Legal Framework for Foreign Assistance.

##### 1. The Foreign Assistance Act.

a. The Foreign Assistance Act of 1961 (FAA).<sup>10</sup> The FAA constituted landmark legislation providing a key blueprint for a grand strategy of engagement with friendly nations. Congress codified the 1961 FAA in Title 22 of the U.S. Code. The FAA intended to support friendly foreign nations against communism on twin pillars:

- (1) Provide supplies, training, and equipment to friendly foreign militaries; and
- (2) Provide education, nutrition, agriculture, family planning, health care, environment, and other programs designed to alleviate the root causes of internal political unrest and poverty faced by foreign populations.
- (3) The first pillar is commonly referred to as “security assistance” and is embodied in Subchapter II of the FAA. The second pillar is generally known as “development assistance” and it is found in Subchapter I of the FAA.

b. The FAA charged DoS with the responsibility to provide policy guidance and supervision for the programs created by the FAA. Each year Congress appropriates a specific amount of money to be used by agencies subordinate to the DoS to execute the FAA programs.<sup>11</sup>

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<sup>10</sup> 22 U.S.C. §§ 2151 et seq.

<sup>11</sup> Annual Foreign Operations Appropriations Acts, *available at* <http://thomas.loc.gov/>.

c. The FAA treats the security assistance and development assistance aspects of U.S. government support to other countries very differently. The treatment is different because Congress is wary of allowing the U.S. to be an arms merchant to the world, but supports collective security. *See* 22 U.S.C. § 2301. The purposes served by the provision of defense articles and services under the security assistance section of the FAA are essentially the same as those described for the Arms Export Control Act (*see* 22 U.S.C. § 2751), but under the FAA, the recipient is more likely to receive the defense articles or services free of charge.

d. Congress imposes fewer restraints on non-military support (foreign assistance) to developing countries. The primary purposes for providing foreign assistance under Subchapter I of the FAA are to alleviate poverty; promote self-sustaining economic growth; encourage civil and economic rights; integrate developing countries into an open and equitable international economic system; and promote good governance. *See* 22 U.S.C. §§ 2151, 2151-1. In addition to these broadly-defined purposes, the FAA contains numerous other specific authorizations for providing aid and assistance to foreign countries. *See* 22 U.S.C. §§ 2292-2292q (disaster relief); 22 U.S.C. § 2293 (development assistance for Sub-Saharan Africa).

e. Even though Congress charged DoS with the primary responsibility for the FAA programs, the U.S. military plays a very important and substantial supporting role in the execution of the FAA's first pillar, Security Assistance. The U.S. military provides most of the training, education, supplies, and equipment to friendly foreign militaries under Security Assistance authority. DoS retains ultimate strategic policy responsibility and funding authority for the program, but the "subcontractor" that actually performs the work is often the U.S. military. It should be noted that Congress requires by statute that DoS conduct human rights vetting of any foreign recipient of any kind of military training. *See* Sec. 8058, DoD Appropriations Act for FY 2012, Pub. L. No. 112-74 (2012).

f. With regard to the second pillar of the FAA, Development Assistance, USAID, the Office for Foreign Disaster Assistance (OFDA) within DoS, and embassies often call on the U.S. military to assist with disaster relief and other humanitarian activities. Again, the legal authority to conduct these programs often emanates from the FAA, the funding flows from DoS's annual Foreign Operations Appropriations, and the policy supervision also rests on DoS. The U.S. military plays a relatively small role in DoS Development Assistance programs.

## 2. DoD Agencies that Participate in Executing DoS Foreign Assistance:

a. **Defense Security Cooperation Agency (DSCA).** DSCA is established under DoD Directive 5105.65 as a separate defense agency under the direction, authority, and control of the Under Secretary of Defense for Policy. Among other duties, DSCA is responsible for administering and supervising DoD security assistance planning and programs.

b. **Defense Institute of Security Assistance Management (DISAM).** DISAM is a schoolhouse operating under the guidance and direction of the Director, DSCA. The mission of DISAM is as follows: the DISAM "provides professional education, research, and support to advance U.S. foreign policy through Security Assistance and Security Cooperation." *See* Defense Institute of Security Assistance Management, <http://www.disam.dscamil/pages/disam/mission.aspx> (last visited Apr. 24, 2015). In addition to resident courses, DISAM prepares a valuable publication entitled "The Management of Security Cooperation," and the periodical "DISAM Journal." DISAM is located at Wright-Patterson AFB, Ohio.

## c. The Military Departments.

(1) *Secretaries of the Military Departments.* Advise the SECDEF on all Security Assistance matters related to their Departments. Functions include conducting training and acquiring defense articles.

(2) *Department of the Army.* Consolidates its plans and policy functions under the Deputy Undersecretary of the Army (International Affairs). Operational aspects are assigned to Army Materiel Command. The executive agent is the U.S. Army Security Assistance Command, Security Assistance Training Field Activity (SATFA) and Security Assistance Training Management Office (SATMO). These offices coordinate with force providers to provide mobile training teams (MTT) to conduct the requested training commonly referred to as a "train and equip" mission.

(3) *Department of the Navy.* The principal organization is the Navy International Programs Office (Navy IPO). Detailed management occurs at the systems commands located in the Washington, D.C. area and the Naval Education and Training Security Assistance Field Activity in Pensacola, Florida.

(4) *Department of the Air Force*. Office of the Secretary of the Air Force, Deputy Under Secretary for International Affairs (SAF/IA) performs central management and oversight functions. The Air Force Security Assistance Center oversees applicable FMS cases, while the Air Force Security Assistance Training Group (part of the Air Education Training Group) manages training cases.

(5) *Security Assistance Organizations (SAO)*. The term encompasses all DoD elements located in a foreign country with assigned responsibilities for carrying out security assistance management functions. It includes military missions, military groups, offices of defense cooperation, liaison groups, and designated defense attaché personnel. The primary functions of the SAO are logistics management, fiscal management, and contract administration of country security assistance programs. The Chief of the SAO answers to the Ambassador, the Commander of the Combatant Command (who is the senior rater for efficiency and performance reports), and the Director, DSCA. The SAO should not be confused with the Defense Attachés who report to the Defense Intelligence Agency.

### 3. DoD Support to DoS Foreign Assistance Programs Through Interagency Funding.

a. The overall tension in the FAA between achieving national security through mutual military security, and achieving it by encouraging democratic traditions and open markets, is also reflected in the interagency transaction authorities of the act. *Compare* 22 U.S.C. § 2392(c) *with* 22 U.S.C. § 2392(d) (discussed below). DoD support of the military assistance goals of the FAA is generally accomplished on a full cost recovery basis; DoD support of the foreign assistance and humanitarian assistance goals of the FAA is accomplished on a flexible cost recovery basis.

b. By authorizing flexibility in the amount of funds recovered for some DoD assistance under the FAA, Congress permits some contribution from one agency's appropriations to another agency's appropriations. That is, an authorized augmentation of accounts occurs whenever Congress authorizes recovery of less than the full cost of goods or services provided.

c. DoS reimbursements for DoD or other agencies' efforts under the FAA are governed by 22 U.S.C. § 2392(d). Except under emergency Presidential drawdown authority (22 U.S.C. § 2318), reimbursement to any government agency supporting DoS objectives under "subchapter II of this chapter" (Part II of the FAA (military or security assistance)) is computed as follows:

[a]n amount *equal to the value* [as defined in the act] of the defense articles or of the defense services [salaries of military personnel excepted], or other assistance furnished, *plus expenses arising from or incident to operations* under [Part II] [salaries of military personnel and certain other costs excepted].

d. This reimbursement standard is essentially the "full reimbursement" standard of the Economy Act. Pursuant to FAA § 632 (22 U.S.C. § 2392), DoS may provide funds to other executive departments to assist DoS in accomplishing its assigned missions (usually implemented through "632 Agreements" between DoD and DoS). Procedures for determining the value of articles and services provided as security assistance under the Arms Export Control Act and the FAA are described in the Security Assistance Management Manual (DoD Manual 5105.38-M) and the references therein.

e. In addition to the above, Congress has authorized another form of DoD contribution to the DoS's counterdrug activities by providing that when DoD furnishes services in support of this program, it is reimbursed only for its "additional costs" in providing the services (i.e., its costs over and above its normal operating costs), not its full costs.

f. The flexible standard of reimbursement under the FAA mentioned above for efforts under Part I of the FAA is described in 22 U.S.C. § 2392(c). This standard is applicable when any other Federal agency supports DoS foreign assistance (*not* military or security assistance) objectives for developing countries under the FAA.

[A]ny commodity, service, or facility procured . . . to carry out subchapter I of this chapter [Part I] [foreign assistance] . . . shall be (reimbursed) at replacement cost, or, if required by law, at actual cost, or, in the case of services procured from the DoD to carry out part VIII of subchapter I of this chapter [International Narcotics Control, 22 U.S.C. § 2291(a)-2291(h)], the amount of the additional costs incurred by the DoD in providing such services, or at any other price authorized by law and agreed to by the owning or disposing agency.

g. Note the specific reference to DoD services in support of DoS counterdrug activities. “Additional costs incurred” is the lowest acceptable interagency reimbursement standard. If Congress wishes to authorize more DoD contribution (that is, less reimbursement to DoD appropriations), Congress authorizes the actual expenditure of DoD funds for or on the behalf of other agencies. *See* National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, §§ 1001-11, 104 Stat. 1485, 1628-34 (1990) [codified at 10 U.S.C. § 374 note] (providing general authority for DoD to engage in counterdrug operations); *see also* section 1014 of the National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, which extended DoD’s counterdrug authority for certain foreign governments through 30 September 2012.

h. The DoD reimbursement standards for 22 U.S.C. § 2392(c) are implemented by DoD 7000.14-R, vol. 11A (Reimbursable Operations, Policies and Procedures), ch. 1 (General) and ch. 7 (International Narcotics Control Program). When DoD provides services in support of DoS counterdrug activities, the regulation permits “no cost” recovery when the services are incidental to DoD missions requirements. The regulation also authorizes pro rata and other cost sharing arrangements. *See* DoD 7000.14-R, vol. 11A, ch. 7.

4. **Presidential Decision Directive 25 – Reimbursable Support vs. Non-Reimbursable Support.** On 6 May 1994, President Bill Clinton signed PDD 25, which remains in effect today. PDD 25 set the U.S. policy for all USG agencies (including DoD) with regards to the financing of combined exercises and operations with foreign nations. USG agencies should seek reimbursement for their activities in combined exercises and operations prior to accessing non-reimbursable Congressional appropriations to fund those activities. PDD 25 affects all USG funding policy decisions, including both DoS and DoD. *See* Presidential Decision Directive 25, Section IV.B., <http://www.fas.org/irp/offdocs/pdd25.htm>.

a. As previously discussed, Foreign Assistance can take two forms – Security Assistance to a foreign nation’s military/security forces, and Development/Humanitarian Assistance. Although DoD’s role in Development/Humanitarian Assistance has traditionally been small, DoD plays a primary role in executing Security Assistance on behalf of the DoS. When DoD executes Security Assistance programs on behalf of the DoS, the DoS generally reimburses DoD for all its costs. When the DoS approves the use of a reimbursable authorization and/or appropriation, the benefitting foreign nation reimburses DoS for all its costs (including the costs that DoD charges DoS to provide the requested assistance).

b. PDD 25 provides a policy overlay to Security Assistance provided by DoS or DoD on behalf of DoS. Before obligating and expending appropriated funds from non-reimbursable appropriations and/or authorizations, the DoS and the DoD should seek to use its reimbursable authorizations during Foreign Assistance operations. The DoS appropriations and/or authorizations are divided into three categories: Reimbursable Security Assistance; Non-Reimbursable (U.S.-Financed) Security Assistance; and Development Assistance (in which DoD traditionally has a small or no role, except for Disaster Relief).

### C. Reimbursable DoS Security Assistance Programs.

1. **Foreign Military Sales (FMS) Program, 22 U.S.C. § 2761.** Foreign countries and the U.S. may enter standard FMS contracts with DoD for the sale of defense articles, services, and training from existing stocks or new procurements at no cost to the U.S. government.<sup>12</sup>

a. FMS is a “Revolving Fund,” with the intent of being self-funded. DoS charges a 3.5% administrative fee to the foreign purchasing nation for each “case” (sale), to reimburse the U.S. for administrative costs. The administrative fee allows DoS to generate the funds necessary to reimburse the DoD MILPER account via an Economy Act transaction.

b. FMS cases can be used for support to multilateral operations, logistics support during a military exercise, training, purchase of equipment, weapons, and ammunition. The military equipment, weapons, ammunition, and logistics services, supplies, and other support must conform with the restrictions of the DoS International Traffic in Arms Regulations (ITARs).

c. The FMS program, like many of the DoS Security Assistance programs, is operated by DoD on behalf of DoS via the Defense Security Cooperation Agency (DSCA). DoS reimburses DoD for the use of military personnel by reimbursing the DoD Military Personnel (MILPER) appropriation via an Economy Act transaction.

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<sup>12</sup> For a detailed discussion of the FMS process, *see* U.S. DEP’T OF DEF., 5105.38-M, SECURITY ASSISTANCE MANAGEMENT MANUAL, C4-C6 (30 April 2012).

d. DSCA-designated Significant Military Equipment (SME) may only be purchased via the FMS, and may not be purchased via the Direct Commercial Sales (DCS) program.

e. In conjunction with both FMS cases and Direct Commercial Sales (DCS), the U.S. may provide foreign nations loans and/or grants via the DoS Foreign Military Financing Program, a separate authorization for which Congress provides yearly appropriations.

f. To enter into an FMS case for the purchase of military equipment, DSCA (on behalf of the USG) and the foreign nation enter into a Letter of Agreement (LOA). The LOA outlines the items that the foreign nation will purchase via FMS. DSCA may provide the items from existing stock, or it may enter into a new contract with a defense contractor to produce the item. The foreign nation, however, does not have any third party beneficiary rights against the contractor, and has no cause of action against the contractor for any disputes that may arise between the contractor and the receiving foreign nation.<sup>13</sup>

2. **Foreign Military Lease Program, AECA §§ 61-62, 22 U.S.C. § 2796-2796a.** Authorizes leases of Defense articles to foreign countries or international organizations. The leases generally occur on a reimbursable basis. The U.S. may, however, provide foreign nations loans and/or grants via the DoS Foreign Military Financing Program.

3. Economy Act Security Assistance, 31 U.S.C. § 1535. Authorizes the provision of defense articles and services indirectly to third countries, the UN, and international organizations on a reimbursable basis for another federal agency (e.g., Department of State).

4. USG Commodities and Services (C&S) Program, 22 U.S.C. §. 2357. USG agencies may provide C&S to friendly nations and international organizations. DoS approval is required.

5. Direct Commercial Sales (DCS) Program, 22 U.S.C. § 2778. Authorizes eligible governments to purchase defense articles or services directly from defense contractors. A DoS review and DoS-issued “license” is required before the contractor may provide the products to the foreign nation. DoD is not involved in the management of the sale from the contractor to the foreign nation.

#### **D. U.S.-Financed DoS Security Assistance.**

1. **Foreign Military Financing (FMF) Program, 22 U.S.C. § 2763.** Congressionally-approved grants or loans. The FY14 Consolidated Appropriations Act provided over \$5.3 billion to finance grants and loans to buy equipment, services, or training from U.S. suppliers through the FMS/FML or DCS programs.

2. **Presidential Drawdowns.** Presidential Drawdowns are directives by the President for DoD to access its current stock of equipment and services, and to provide the identified equipment to a foreign country, their military or security services, or the foreign civilian population. The items need not be “surplus” or “excess.”

a. Foreign Assistance Act (FAA) § 506(a)(1), 22 U.S.C. § 2318(a)(1) - Authorizes the President to direct the drawdown of defense articles and services having an aggregate value of up to \$100,000,000 in any fiscal year for unforeseen military emergencies requiring immediate military assistance to a foreign country or international organization. Requires Presidential determination and prior Congressional notification.<sup>14</sup>

b. FAA § 506(a)(2), 22 U.S.C. § 2318(a)(2) - Authorizes the President to direct the drawdown of articles and services having an aggregate value of up to \$200,000,000 from any agency of the U.S. in any fiscal year for other emergencies including (among other things) counterdrug activities, disaster relief, non-proliferation, anti-terrorism, and migrant and refugee assistance. The Security Assistance Act of 2000 increased the amount from \$150M to \$200M and added anti-terrorism and non-proliferation to the permissible uses of this authority. Of that amount, not more than \$75M may come from DoD resources; not more than \$75M may be provided for counternarcotics; and not more than \$15M to Vietnam, Cambodia and Laos for POW accounting. Drawdowns supporting counternarcotics and refugee or migration assistance require a Presidential determination and 15-day prior Congressional notification.<sup>15</sup>

c. FAA § 552(c)(2), 22 U.S.C. § 2348a(c)(2) - Authorizes the President to direct the drawdown of up to \$25,000,000 in any fiscal year of commodities and services from any federal agency for unforeseen emergencies

<sup>13</sup> Secretary of State for Defense v. Trimble Navigation Limited, 484 F.3d 700 (4th Cir. 2007).

<sup>14</sup> Defense and Security Assistance Improvements Act, Pub. L. 104-164 (1996) (increase from \$75M to \$100M).

<sup>15</sup> See *id*; see also Security Assistance Act, Pub. L. 106-280, 114 Stat. 850 (2000).

related to peacekeeping operations and other programs in the interest of national security. Requires a Presidential determination and prior Congressional notification

d. Iraq Liberation Act of 1998, Pub. L. No. 105-338, 112 Stat. 3178 (31 Oct. 1998) – Authorizes the President to direct the drawdown of defense articles from the stocks of DoD, defense services of DoD, and military education and training for Iraqi democratic opposition organizations. This assistance may not exceed \$97 million and requires fifteen days notice to Congress. President Bush subsequently directed \$92 million in drawdown assistance in 2002. *See*, Presidential Determination No. 03-06, 67 Fed. Reg. 78,123 (23 Dec. 2002). Congress subsequently appropriated \$63.5M reimbursement for IFSA drawdown support. *See* Sec. 1309 of the FY-03 Emergency Wartime Supplemental Appropriation.

e. Afghanistan Freedom Support Act of 2002, Pub. L. No. 107-327, 116 Stat. 2797 (4 Dec. 2002, codified at 22 U.S.C. § 7532 – Authorizes the President to direct the drawdown of up to \$300 million of defense articles, defense services, and military education and training for the Government of Afghanistan, eligible foreign countries, and eligible international organizations. This authority is carried out under section 506 (22 U.S.C. § 2318(a)(1)) of the Foreign Assistance Act. The assistance may also be provided by contract. Section 9008 of the FY-05 Defense Appropriations Act, Pub. L. No. 108-287 (2004) increased this Afghan drawdown authority to \$550 million. Much as it did for the Iraq drawdown authority, Congress provided \$165M reimbursement for the AFSA Drawdown. *See* Sec. 1307 of the FY-03 Emergency Wartime Supplemental Appropriation.

3. **Excess Defense Articles (EDA)**. EDA is a “subprogram” of FMS. “Excess” Defense articles no longer needed by the DoD may be made available to third countries for sale (sometimes financed with FMF), or on a grant basis. Prior to sale, FMS/EDA has the authority to depreciate the value of the item. EDA are priced on the basis of their condition, with pricing ranging from 5 to 50 percent of the items’ original value. “Excess” items are no longer required by DoD, even though that type of item may still be regularly used by DoD units. *See* Security Assistance Management Manual (SAMM). EDA may be purchased by foreign nations, and they may be purchased by foreign nations with funds loaned or granted by the United States under the DoS FMF program. *See* Foreign Military Financing, *supra* VII.C.1. FMS receives EDA from the Defense Logistics Agency (DLA) Disposition Services (formerly known as the Defense Reutilization and Marketing Service, or DRMS). Only countries that are justified in the annual Congressional Presentation Document (CPD) by the DoS or separately justified in the FOAA during a fiscal year are eligible to receive EDA. EDA must be drawn from existing stocks. Congress requires fifteen days notice prior to issuance of a letter of offer if the USG sells EDA. However, most EDA are transferred on a grant basis. No DoD procurement funds may be expended in connection with an EDA transfer. The transfer of these items must not adversely impact U.S. military readiness.

a. FAA § 516, 22 U.S.C. § 2321(j). This statute authorizes both lethal and non-lethal EDA (including Coast Guard equipment) support to any country for which receipt was justified in the annual Congressional Presentation Document (CPD). It continues to accord priority of delivery to NATO, non-NATO Southern-flank allies, and the Philippines, as well as continuing the 7:10 EDA grant split between Greece & Turkey. *See* Defense and Security Assistance Improvements Act, Pub. L. 104-164 (1996) (consolidation of EDA authorities into § 516 and repeal of §§ 518-520); Security Assistance Act of 1999, Pub. L. 106-113, § 1211(b) (1999).

b. Transportation. No-cost, space-available transportation of EDA is authorized for countries receiving less than \$10M FMF or IMET in any fiscal year, as long as DoS makes the determination that it is in the national interest of the United States to pay for the transportation.

4. **International Military Education & Training (IMET)**. U.S.-funded program for the military training of foreign soldiers at U.S. military schools.

a. FAA §§ 541-545 (22 U.S.C. §§ 2347-2347(d). Security assistance program to provide training to foreign militaries, including the proper role of the military in civilian-led democratic governments and human rights.

b. *See also*, Section 1222 of FY-07 NDAA, which deletes the IMET program from the sanctions of the American Servicemembers’ Protection Act.

#### 5. Personnel Details.

a. FAA § 627, 22 U.S.C. § 2387. When the President determines it furthers the FAA’s purposes, the statute permits a federal agency head to detail officers or employees to foreign governments or foreign government agencies, where the detail does not entail an oath of allegiance to or compensation from the foreign countries. Details may be with or without reimbursement. FAA § 630, 22 U.S.C. § 2390.

b. FAA § 628, 22 U.S.C. § 2388. When the President determines it furthers the FAA's purposes, the statute permits federal agency heads to detail, assign, or otherwise make their officers and employees available to serve with international organizations, or serve as members of the international staff of such organizations, or to render any technical, scientific, or professional advice or service to the organizations. May be authorized with or without reimbursement. FAA § 630, 22 U.S.C. § 2390.

c. 22 U.S.C. § 1451. Authorizes the Director, United States Information Agency, to assign U.S. employees to provide scientific, technical, or professional advice to other countries. Details may be on reimbursable or nonreimbursable basis. Does not authorize details related to the organization, training, operation, development, or combat equipment of a country's armed forces.

#### **E. Development Assistance.**

1. **Overview.** DoS and USAID finance a number of development assistance programs, including: Agriculture and Nutrition, Population Control, Health, Education, Energy, and Environment Improvement. Most of these projects are financed with direct grants or loans from DoS or USAID to the developing country. These are large-scale projects and normally do not involve DoD.

2. **Foreign Disaster Relief (not the same as Foreign Disaster Assistance).** Statutory authority for the President to grant disaster relief aid for natural or manmade disasters is found in the Foreign Assistance Act, 22 U.S.C. § 492. Primary implementing tool for this program is USAID. USAID may request DoD assistance and must reimburse DoD for its costs via an Economy Act transaction.

3. **Military Role.** The military's role in the provision of development assistance through the FAA is relatively limited when compared to its role in the provision of security assistance. Nevertheless, from time to time, agencies charged with the primary responsibility to carry out activities under this authority, call upon the U.S. military to render assistance. An example of participation by the U.S. military would be action taken in response to a request for disaster assistance from the Office for Foreign Disaster Assistance (OFDA). OFDA often asks the U.S. military for help in responding to natural and man-made disasters overseas. Key point: generally, costs incurred by the U.S. military pursuant to performing missions requested by other Federal agencies under the FAA, Development Assistance provisions, must be reimbursed to the military pursuant to FAA § 632 or pursuant to an order under the Economy Act.

#### 4. Foreign Disaster Relief In Support of OFDA.

a. The United States has a long and distinguished history of aiding other nations suffering from natural or manmade disasters. In fact, the very first appropriation to assist a foreign government was for disaster relief.<sup>16</sup> The current statutory authority continuing this tradition is located in the Foreign Assistance Act.<sup>17</sup> For foreign disaster assistance, Congress granted the President fiscal authority to furnish relief aid to any country "on such terms and conditions as he may determine."<sup>18</sup> The President's primary implementing tool in carrying out this mandate is USAID.

b. USAID is the primary response agency for the U.S. government to any international disaster.<sup>19</sup> Given this fact, DoD traditionally has possessed limited authority to engage in disaster assistance support. In the realm of Foreign Disaster Assistance, the primary source of funds should be the International Disaster Assistance Funds.<sup>20</sup> The Administrator of USAID controls these funds because the President has designated that person as the Special Coordinator for International Disaster Assistance.<sup>21</sup> In addition, the President has designated USAID as the lead agency in coordinating the U.S. response for foreign disaster.<sup>22</sup> Normally these funds support NGO and PVO

<sup>16</sup> This appropriation was for \$50,000 to aid Venezuelan earthquake victims in 1812. Over 25,000 people died in that tragedy. Act of 8 May 1812, 12th Cong., 1st Sess., ch. 79, 2 Stat. 730.

<sup>17</sup> FAA § 492 (10 U.S.C. § 2292) (International Disaster Assistance). The President may furnish foreign disaster assistance under such terms and conditions determined appropriate pursuant to the FAA §§ 491-496 (22 U.S.C. §§ 2292-2292q). *See, e.g.*, Foreign Operations Appropriations Act for FY-03, Pub. L. 108-7, (2003) (\$230M appropriated to DoS for international disaster assistance under this authority).

<sup>18</sup> 22 U.S.C. § 2292(b).

<sup>19</sup> E.O. 12966, 60 Fed. R. 36949 (14 July 1995).

<sup>20</sup> FAA §§ 491 - 495K, 22 U.S.C. §§ 2292 - 2292q.

<sup>21</sup> *See* FAA § 493, 22 U.S.C. § 2292b and E.O. 12966, Sec. 3, 60 Fed. R. 36949 (14 July 1995). *See also* E.O. 12163, section 1-102(a)(1), 44 Fed. R. 56673 (Sept. 29, 1979), *reprinted as amended in* 22 U.S.C.A. § 2381 (West Supp. 1996).

<sup>22</sup> *See generally*, E.O. 12966, 60 Fed. R. 36949 (July 14, 1995).

efforts in the disaster area. However, certain disasters can overwhelm NGO and PVO capabilities, or the military may possess unique skills and equipment to accomplish the needed assistance.<sup>23</sup> In these situations, DoS, through OFDA, may ask for DoD assistance. Primary funding in these cases is supposed to come from the International Disaster Assistance fund controlled by OFDA. DoD is supposed to receive full reimbursement from OFDA when they make such a request. DoD access to these funds to perform Disaster Assistance missions occurs pursuant to § 632 FAA. However, DoD also has access to Overseas Humanitarian, Disaster and Civic Aid (OHDACA) funds that are specifically appropriated for DoD use in worldwide humanitarian assistance and disaster relief (see Section E. below).<sup>24</sup>

**F. Accessing the DoS Appropriations and Authorizations.** For the deployed unit, properly coordinating for access to the DoS appropriations and authorizations becomes critical. In a non-deployed environment, a DoD unit would normally coordinate with the Defense Security and Cooperation Agency (DSCA) and follow the procedures of the Security Assistance Management Manual (SAMM).

1. Due to the dramatically increased Operational Tempo (OPTEMPO), the deployed unit normally requires the appropriate funds much more quickly than in a non-deployed situation. As a result, the unit should coordinate with the deployed DoS Political Advisor (POLAD) located at the Combined Joint Task Force (CJTF), or division, level. The unit may also coordinate with the DoS Foreign Officers located at the local Provincial Reconstruction Teams (PRTs). PRTs will likely be disbanded after calendar year 2014,

2. The DoD legal advisor should be aware of the cultural, structural, and procedural differences between DoD and DoS, and plan accordingly.<sup>25</sup> DoD has the cultural and structural capability to plan for operations far in advance via the Military Decision-Making Process (MDMP). DoS generally has neither the structural capability nor the organizational culture that would allow it to plan for operations as far in advance as DoD. These structural differences between DoD and DoS will need to be overcome by the deployed unit.

**G. Conclusion.** The general rule for operational funding is that the DoS (and not DoD) funds foreign assistance. Section VIII, *supra*, discussed the most frequently used DoS appropriations and authorizations impacting DoD operations. Section IX, *infra*, will discuss the DoD appropriations and authorizations for operational funding that Congress has enacted for DoD to fund Security Assistance outside of DoS appropriations and authorizations. All of the DoD appropriations and authorizations discussed in Section IX constitute statutory exceptions to the general rule that DoS funds Foreign Assistance.

## IX. DEPARTMENT OF DEFENSE APPROPRIATIONS AND AUTHORIZATIONS

**A. Introduction.** The general rule in operational funding is that DoS has the primary responsibility, authority, and funding to conduct Foreign Assistance on behalf of the USG. The legal authority for the DoS security assistance and development assistance mission is found in the Foreign Assistance Act of 1961, 22 U.S.C. § 2151.

1. **Two Exceptions.** As previously indicated, there are two exceptions to the general rule that foreign assistance is funded with DoS authorizations and appropriations. The first exception is based on historical Government Accountability Office (GAO) opinions which allow for the use of O&M to train foreign forces, as long as the purpose of the training is Interoperability, Safety, and Familiarization of the foreign forces operating with U.S. forces. The second group of exceptions occur when Congress enacts a DoD appropriation and/or authorization to conduct foreign assistance (security assistance, development assistance, and/or humanitarian assistance):

a. **Exception 1 - Security Assistance Training (“Big T training”) vs. Interoperability Training (“Little t training”).** Security Assistance Training is funded with DoS authorizations and appropriations. Interoperability training is generally funded with DoD O&M funds.

(1) If the primary purpose of the training of foreign forces is to improve the operational readiness of the foreign forces, then this is Security Assistance Training (“Big T”) and should be funded with DoS

<sup>23</sup> See generally, JOINT CHIEFS OF STAFF, JOINT PUB. 3-29, FOREIGN HUMANITARIAN ASSISTANCE (17 Mar. 2009).

<sup>24</sup> The OHDACA appropriation funds several different statutorily authorized OHDACA Programs: 10 U.S.C. 401, Humanitarian and Civic Assistance, 10 U.S.C. 402, 10 U.S.C. 404, Foreign Disaster Assistance, Denton Transportation of Humanitarian Relief Supplies for NGOs, 10 U.S.C. 407, Humanitarian Demining Assistance, 10 U.S.C. 2557, Excess Nonlethal Supplies for Humanitarian Relief, and 10 U.S.C. 2561, Humanitarian Assistance.

<sup>25</sup> See Rosemary Hansen, “Defense is from Mars, State is from Venus: Improving Communications and Promoting National Security,” U.S. Army War College Strategy Research Project (1998).

authorizations and appropriations. On the other hand, if the primary purpose of the training of foreign forces is for interoperability, safety, and/or familiarization, then this is Interoperability Training (“Little t”) and is NOT security assistance training. *See* Hon. Bill Alexander U.S. House of Representatives, 63 Comp. Gen. 422 (1984).

(2) In most circumstances, the training effect for DoD in providing the training, along with the factual support for the stated DoD intent, will guide the advising attorney in determining whether a training event is Security Assistance Training or Interoperability, Safety, and Familiarization Training. In classifying the type of training of foreign troops by DoD (Security Assistance vs. Interoperability), the advising attorney should consider such factors as the cost of the training, the current level of training of the foreign troops before the training vs. the expected level of training of the foreign troops after the training is complete, and the amount of time and resources that DoD will need to expend to provide the training. As these factors increase, it becomes more likely that the training envisioned is Security Assistance Training, as opposed to Interoperability Training.

(3) For example, in a month-long Combined Airborne Parachute Exercise with other countries, whose participating troops are all airborne qualified in their own countries, a 2-hour block of instruction on C-130 entry and egress safety procedures would be Interoperability Training (“Little t” training), since the primary purpose is safety and interoperability of the foreign troops. Additionally, it is a short duration (2 hours) training event, the cost is not significant, and their level of training is not significantly enhanced (since the foreign troops are already airborne qualified). Therefore, this would likely be classified as Interoperability, Safety, and Familiarization Training, and DoD may fund this training with its own O&M funds.

(4) On the other hand, training foreign troops on airborne operations, including the provision of DoD trainers for a month-long airborne school to qualify all the individual foreign troops in airborne jumps, would likely be classified as Security Assistance Training (“Big T” training). In this case, the duration of the training is long (one month), the cost is likely significant, and most importantly, the level of training of the foreign troops is significantly increased. As a result, the primary purpose of the training is not the Interoperability, Familiarization, and Safety of the foreign troops, and this training should be classified as Security Assistance training.

b. **Exception 2 - Statutory Appropriation or Authorization.** Congress may appropriate funds, or authorize the use of funds, for DoD to provide Foreign Assistance outside of Title 22 DoS appropriations and authorizations. The remainder of this section discusses the DoD statutory authorizations and appropriations to conduct Foreign Assistance.

2. **Grouping the Statutory Appropriations and Authorizations.** There are no formal Congressionally-designed categories of operational funding for DoD-funded foreign assistance. Categories for funding can often depend on the nature of a mission and the sentiments of Congress. Currently, there are three general categories of appropriations and/or authorizations: (1) Building and Funding Foreign Partners; and (2) DoD Aid and Assistance to Foreign Civilians; and (3) Authorities that are tailored for Conducting Counterinsurgency, Counterterrorism & Overseas Contingency Operations (OCO). Judge Advocates will find both permanent and temporary authorizations in all of these general categories.

#### B. Building and Funding Foreign Partners

1. **Acquisition & Cross-Servicing Agreements (ACSA), 10 U.S.C. §§ 2341-2350.** ACSAs are bilateral agreements for the reimbursable mutual exchange of Logistics Supplies, Services, and Support (LSSS) (*see* DoD Directive 2010.9, 28 Apr. 2003; Chairman of the Joint Chiefs of Staff, Instruction (CJCSI) 2120.01B, 20 Sep. 2010). The ACSA authorization allows DoD (as opposed to DoS) to enter into mutual logistics support agreements with the defense departments of foreign nations. The ACSA authorizes DoD to acquire logistic support, without resorting to commercial contracting procedures (i.e., DoD does not need to follow the competition in contracting requirements of the Federal Acquisition Regulation) and to transfer limited support outside of Title 22 the Arms Export Control Act (AECA). Under the ACSA statutes, after consulting with the State Department, DoD (i.e., the affected Combatant Commander) may enter into agreements with NATO countries, NATO subsidiary bodies, other eligible countries, the UN, and international regional organizations of which the U.S. is a member for the reciprocal provision of LSSS.<sup>26</sup>

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<sup>26</sup> Most current ACSAs and a wealth of additional information is available online at a restricted-access website [https://www.intelink.gov/wiki/Acquisition\\_and\\_Cross-Servicing\\_Agreements\\_%28ACSA%29](https://www.intelink.gov/wiki/Acquisition_and_Cross-Servicing_Agreements_%28ACSA%29).

a. Two different ACSA Authorities/methods exist:

(1) Acquisition and Cross-Servicing Agreements (ACSAs), 10 U.S.C. § 2342 (full ACSA authority), allows the DoD to both purchase LSSS from the foreign military department, as well as to provide LSSS, on a reimbursable basis, to the foreign military department.

(2) Acquisition Only Authority (AoAs), 10 U.S.C. § 2341, provides limited authority allowing DoD to acquire LSSS for our deployed forces use from that host country if it has a defense alliance with the U.S., allows stationing of U.S. Forces, prepositioning of U.S. materiel, or allows U.S. military exercises or operations in the country. No specific formal agreement is required. The DoD, however, may NOT provide LSSS to the foreign nation if it has not entered into an approved ACSA with that foreign nation.

b. LSSS definition, 10 U.S.C. § 2350. Congress defines LSSS as: food, billeting, transportation, POL, clothing, communication services, medical services, ammunition (generally limited to small arms ammunition like 5.56 mm rifle rounds), base operations support, storage services, use of facilities, training services, spare parts and components, repair and maintenance services, calibration services, and port services. Prohibited items are those designated as significant military equipment on the U.S. Munitions List promulgated under the AECA.

c. Special equipment transfer authority. In Section 1202 of the FY-07 NDAA, Pub. L. 109-364, (17 Oct 2006), Congress granted SECDEF specific authority to transfer, via ACSA, personnel survivability equipment to coalition forces in Iraq and Afghanistan. Section 1252 of the FY-08 NDAA and Section 1204 of the FY-09 NDAA expanded it to include the use of military equipment by the military forces of one or more nations participating in both combined operations and as part of a peacekeeping operation under the Charter of the United Nations or another international agreement. Section 1203 of the FY-11 NDAA further expanded the authority to permit loaning equipment for forces training to be deployed to Iraq, Afghanistan, or peacekeeping operations as well. This authority is for a lend period not to exceed one year, and it requires a Combatant Commander to make a finding of “no unfilled requirements” for U.S. personnel. It is most recently implemented by memorandum from the Deputy Secretary of Defense, Approval and Delegation of Authority to Transfer Personnel Protection Equipment and Other Personnel Survivability Significant Military Equipment to Certain Foreign Forces Using Acquisition and Cross-Servicing Agreement Authority, 30 April 2009. The FY-15 NDAA (sec. 1207) extended this special “ACSA-lend” authority through 30 September 2019.

d. ACSA Transaction Approval Authority. The approval authority for ACSA transactions is delegated from the SECDEF to “ACSA Warranted Officers” within the Combatant Commands. The ACSA Warranted Officers receive a warrant, or authorization, to approve the transactions. Prior to executing any ACSA transaction, an ACSA Warranted Officer must approve the reimbursable transaction.

e. ACSA Reimbursement. Acquisitions and transfers executed under an ACSA may be reimbursed under three methods: Payment-In-Kind (PIK), Replacement-In-Kind (RIK), or Equal Value Exchange (EVE). *See* U.S. DEP’T OF DEF., DIR. 2010.9, ACQUISITION AND CROSS-SERVICING AGREEMENTS (Apr. 28, 2003); *see also* Joint CHIEFS OF STAFF, INSTR. 2120.01B, ACQUISITION AND CROSS-SERVICING AGREEMENTS, (Feb. 13, 2013).

(1) Payment-In-Kind (PIK). This reimbursement option requires that the receiving defense department reimburse the providing defense department the full value of the LSSS in currency. For example, if the DoD provides \$10,000 worth of tents to a foreign defense department, they reimburse us with \$10,000 in currency. In accordance with the DoD FMR, reimbursement must occur within 90 days of the initial provision of the LSSS.

(2) Replacement-In Kind (RIK). This reimbursement option requires that the receiving defense department reimburse the providing defense department by providing the same type of LSSS. For example, if the DoD provides 10 tents to a foreign defense department, the foreign defense department provides the exact same type of tents to the DoD in return. This often occurs when a foreign nation has the LSSS required in their inventory, but does not have the logistical capability to deliver the LSSS to their own troops in a contingency operation. In that situation, DoD may provide the LSSS to the foreign troops in the contingency location, and the foreign government provides the same type of LSSS to the DoD at another location. In accordance with the DoD FMR, the reimbursement must occur within one year of the initial provision of the LSSS.

(3) Equal Value Exchange (EVE). This reimbursement option requires that the receiving defense department reimburse the providing defense department by providing LSSS that has the same value as the LSSS initially provided. For example, the DoD may provide \$10,000 in tents to the foreign nation via the ACSA, and the

foreign nation may provide \$10,000 worth of fuel as reimbursement. In accordance with the DoD FMR, the reimbursement must occur within one year of the initial provision of the LSSS.

f. ACSAs and Presidential Decision Directive (PDD) 25:

(1) Presidential Decision Directive (PDD) 25. On 6 May 1994, President Bill Clinton signed PDD 25, which remains in effect today. PDD 25 set the U.S. policy for all USG agencies (including DoD) with regards to the financing of combined exercises and operations with foreign nations. USG agencies should seek reimbursement for their activities in combined exercises and operations prior to accessing Congressional appropriations to fund those activities.<sup>27</sup>

(2) ACSA/AoA authority is the only Congressional authorization for DoD to receive direct reimbursement from foreign nations (through their defense ministries) for the costs of DoD-provided support in combined exercises and operations. As such, prior to accessing DoD appropriations to finance a foreign nation's LSSS in a combined exercise or operation, units should determine whether the foreign nation defense ministry has an ACSA/AoA with DoD, and if so, whether the foreign nation has the capability to reimburse DoD under the existing ACSA for any LSSS support that DoD provides.

(3) The fact that a foreign nation defense ministry has an ACSA in place with DoD does not create a requirement that all transactions with that foreign nation be reimbursable. The size and scope of the support should be considered in relation to that nation's capability to reimburse the U.S. for the required LSSS. Generally, developing nations with little reimbursement capability will not be required to reimburse the U.S. for LSSS (assuming that there is a U.S.-financed appropriation or authorization available to fund the requested LSSS). On the other hand, developed nations should normally reimburse the U.S. for any LSSS via an ACSA.

2. **Personnel Details, 10 U.S.C. § 712.** Authorizes the President to detail members of the armed forces to assist in military matters in any foreign nation of North, Central, or South America; the Republics of Haiti and Santo Domingo; or—during a war or a declared national emergency—in any other country. Personnel Details may be on a reimbursable or non-reimbursable basis.

3. **Global Lift and Sustain, 10 U.S.C. § 127d.** In Section 1201 of FY-07 NDAA, Congress codified this drawdown-like authority to use up to \$100 million of DoD O&M per fiscal year to provide logistic supplies, services, and support (LSSS), including air-lift and sea-lift support, to partner nation forces worldwide in support of the GWOT. In section 1202 of the FY-11 NDAA, Congress expanded the authority to provide LSSS to enhance interoperability of logistical support systems, and also permitted the provision of LSSS to nonmilitary logistics, security, or similar agencies of allied governments if such provision would directly benefit U.S. forces. The approval authority for Global Lift and Sustain remains at the SECDEF level. Other limitations include:

- a. Prior to the use of this authority, the Secretary of State must concur with its use.
- b. May only be used for a combined operation with U.S. forces carried out during active hostilities or as part of contingency operation or noncombat operation (i.e. humanitarian assistance, foreign disaster assistance, country stabilization, or peacekeeping operation). In essence, this authority may not be used to support training exercises, but may be used to provide assistance to allied forces supporting combined operations.
- c. May not be used in Iraq and Afghanistan. The Necessary Expense Doctrine pre-empts the use of Global Lift and Sustain authority in Iraq and Afghanistan, since Iraq/Afghanistan Lift and Sustain is the more specific authorization.

4. **Emergency & Extraordinary Expenses (“EEE,” or “Triple E”), 10 U.S.C. § 127.**

a. General. The SECDEF, the Inspector General (TIG), and the secretaries of the military departments may receive EEE funds for use of any type of emergency or extraordinary expenditure that cannot be anticipated or classified. The SECDEF, TIG, and the secretaries of the military departments may obligate the funds appropriated for such purposes as they deem proper; such determination is final and conclusive upon the accounting officers of the U.S. The SECDEF, TIG, and the secretaries of the military departments may delegate (and redelegate) the authority to obligate EEE funds. One of the common uses of “Triple E” authority is for Official Representation Funds, which are for official courtesies (including to foreign dignitaries) and other representation. They are regulated by DoDI 7250.13 and Army Regulation 37-47.

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<sup>27</sup> See Presidential Decision Directive 25, <http://www.fas.org/irp/offdocs/pdd25.htm>.

b. Congressional Notification. DoD Authorization Act for FY 1996 revised § 127 to require that SECDEF provide the Congressional defense and appropriations committees 15 days advance notice before expending or obligating funds in excess of \$1 million, and five days advance notice for expenditures or obligations between \$500,000 and \$1 million. Pub. L. No. 104-106, § 915, 110 Stat. 413 (1996).

c. While the purposes these funds can be used for is broad, they are highly regulated and the amount appropriated is very small. The FY14 CAA authorized the following amounts for EEE:

- (1) SECDEF: Authorization for the SECDEF to obligate up to \$36M in DoD O&M for EEE purposes.
- (2) Secretary of the Army: Authorization of \$12.478M for Secretary of the Army EEE.
- (3) Secretary of the Navy: Authorization of \$15.055M for Secretary of the Navy EEE.
- (4) Secretary of the Air Force: Authorization of \$7.699M for Secretary of the Air Force EEE.

#### 5. **Combatant Commander Initiative Funds (CCIF).** 10 U.S.C. § 166a.

a. Purpose. CJCS may provide to Combatant Commanders (and NORAD) sums appropriated for the following activities: (1) Force training; (2) Contingencies; (3) Selected operations; (4) Command and control; (5) Joint exercises (including the participating expenses of foreign countries); (6) Humanitarian and Civil Assistance; (7) Military education and training to military and related civilian personnel of foreign countries (including transportation, translation, and administrative expenses); (8) Personnel expenses of defense personnel for bilateral or regional cooperation programs; and (9) Force protection. Section 902 of the FY-07 NDAA also codified “civic assistance, to include urgent and unanticipated humanitarian relief and reconstruction assistance” as a proper purpose for the use of CCIF.

b. Relationship to Other Funding. Any amount provided as CCIF for an authorized activity are “in addition to amounts otherwise available for that activity during the fiscal year.”

c. Of \$25M in DoD O&M funds made available for CCIF in FY14, no more than \$20 million may be used to buy end items with a cost greater than \$250,000; no more than \$10 million may be used to pay the expenses of foreign countries participating in joint exercises; no more than \$5 million may be used for education and training to military and related civilian personnel of foreign countries; and no funds may be used for any activity for which Congress has denied authorization.

6. **Emergency Contingency Operations Funding Authority.** This authority, under 10 U.S.C. § 127a (amended by DoD Authorization Act for FY 1996, Pub. L. No. 104-106, § 1003 (1996)), applies to certain “emergency” contingency operations for which Congress has not appropriated funds. The intent of the statute is to provide standing authority to fund DoD contingency operations for which DoD has not had the opportunity to request funding. The statute authorizes SECDEF to transfer up to \$200 million in any fiscal year to reimburse accounts used to fund operations for incremental expenses incurred for designated emergency contingency operations. This transfer authority funding is regulated by volume 12, chapter 23 of the DoD Financial Management Regulation, DoD 7000.14-R. Due to provisions requiring Congressional notification and GAO compliance reviews, this authority is rarely used.

a. This authority applies to deployments, other than for training, and humanitarian assistance, disaster relief, or support to law enforcement operations (including immigration control) for which:

- (1) Funds have not been provided;
- (2) Operations are expected to exceed \$50 million; or
- (3) The incremental costs of which, when added to other operations currently ongoing, are expected to result in a cumulative incremental cost in excess of \$100 million.

b. This authority does *not* apply to operations with incremental costs not expected to exceed \$10 million. The authority provides for the waiver of Working Capital Fund (WCF) reimbursements. Units participating in applicable operations receiving services from WCF activities may not be required to reimburse for the incremental costs incurred in providing such services. This statute restricts SECDEF’s authority to reimburse WCF activities from O&M accounts. (In addition, if any activity director determines that absorbing these costs could cause an ADA violation, reimbursement is required.)

C. **DoD Overseas Contingency Operation (OCO) and Coalition Support Authorizations.** These uncodified, or “temporary” appropriations and authorizations consist primarily of logistical support for coalition allies. The general rule for foreign military training is that security assistance training of foreign militaries is authorized under Title 22 and funded by DoS from the annual Foreign Operations, Export Financing and Related Programs Appropriations Act (FOAA). Exceptions to this rule occur when there are specific statutory authorizations (Title 10) or when the training is incident to U.S. military training. The general rule for foreign police training is that no funds shall be used to provide training or advice to police, prisons, or other law enforcement forces for any foreign government. Exceptions include Iraq Security Forces Fund (ISFF)/Afghanistan Security Force Fund (ASFF) and Pakistan Counterinsurgency Fund (PFC), assistance for sanctions monitoring and enforcement, and assistance for reconstitution of civilian police authority and capability in post-conflict restoration.

1. **Coalition Support Fund (CSF).** The current authorization of \$1.5B for the CSF is found in Section 1213 of the FY14 NDAA. Originally enacted in section 1223 of the FY-10 NDAA, the amount and authority has been modified and extended numerous times. This fund was established to reimburse Pakistan, Jordan, and other key cooperating nations for logistical and military support provided to U.S. military operations in connection with military action in Iraq and Afghanistan. Notably, this appropriation now includes “access” and specialized training as additional purposes. DSCA administers this fund.

2. **Afghanistan Lift and Sustain.** This authority is currently authorized under Section 1217 of the FY14 NDAA. Its purpose is to “provide supplies, services, transportation, including airlift and sealift, and other logistical support to coalition forces supporting military and stability operations in Afghanistan” from DoD O&M. This authority is similar to “global lift and sustain,” except that it is geographically limited to Afghanistan. Practitioners should note that:

a. Section 1234 of the 2008 NDAA limited the amount of DoD O&M that the SECDEF may obligate for Afghanistan Lift and Sustain to \$400 Million for that fiscal year; however, this limitation was increased to \$450,000,000 by section 1211 of the FY-12 NDAA and maintained through the FY-15 NDAA.

b. Note: The key distinction between lift & sustain and the Coalition Support Fund (CSF) is that the CSF is used to reimburse countries for costs they incur, and the lift & sustain authority is for military departments to fund costs incurred for services provided to support eligible countries.

3. **Afghanistan Security Forces Fund (ASFF).** In 2005, Congress created two appropriations, the Afghanistan Security Forces Fund and the Iraq Security Forces Fund, to enable the DOD to “train and equip” the security forces of Afghanistan and Iraq, respectively. Congress initially appropriated \$1.285 billion for the ASFF and \$5.7 billion for the ISFF, to remain available for new obligations until Sept. 30, 2006. Since fiscal year 2005, Congress has generally appropriated ISFF/ASFF funds on a yearly basis with a period of availability of two years. Most recently, in the FY-12 DoDAA, Congress appropriated an additional \$11.2 billion for the ASFF, and removed the ISFF from the appropriation. The ASFF is available to the SECDEF “for the purpose of allowing the Commander, Combined Security Transition Command-Afghanistan, or the Secretary’s designee, to provide assistance, with the concurrence of the Secretary of State, to the security forces of Afghanistan, including the provision of equipment, supplies, services, training, facility and infrastructure repair, renovation, and construction, and funding[.]” Note, the security forces must be under the control of the government of Afghanistan (GIROA). Further, the Afghanistan Resources Oversight Council (AROC) must approve all service requirements over \$50 million and all non-standard equipment requests over \$100 million.

4. **Building Partner Capacity (BCP) or “Train and Equip” Authority (introduced in 2006 NDAA § 1206; codified in 10 U.S.C. 2282 in 2015).** Section 1206 of the FY06 NDAA, as amended most recently by section 1201 of the FY14 NDAA, provides DoD with the authority to “build the capacity” of foreign military forces in support of Overseas Contingency Operations.

a. T&E authority allows DoD to build the capacity of a foreign country's national military forces in order for that country to—

- (1) conduct counterterrorist operations; or
- (2) participate in or support military and stability operations.
- (3) conduct maritime or border counterterrorism operations;
- (4) prepare national level security forces for the conduct of counterterrorism operations.

- b. Authorizes the SECDEF to approve the use of \$350 million of O&M in FY 2015.
- c. Small scale construction is limited to \$750,000 per project limit and all construction projects in a particular fiscal year are limited to 5% of the amount available under this authority.
- d. Requires concurrence of the Secretary of State and 15-day prior Congressional notification. This program is available for new obligations.

**5. Training of Foreign Forces by General Purpose Forces.** In § 1203 of the 2014 NDAA, Congress provided DoD with the authority to conduct training with friendly foreign forces. General purpose forces are those forces that do not fall under the special operations authority or command structure. Congress provided the following limitations to this particular type of training:

- a. Requires SECDEF approval prior to executing any training under this authority.
- b. Requires concurrence of the Secretary of State and 15-day prior Congressional notification.
- c. The type of training authorized by this provision is limited to training that supports the mission essential tasks for the training unit, be with a friendly foreign force that has similar organization and equipment, observes respect for human rights, and respects the legitimate civilian authority within the foreign country concerned.
- d. A Service Secretary may approve payment for incremental expenses incurred by the friendly foreign country; however, Congress limited the amount of incremental expenses in any fiscal year to \$10 million.

**D. DoD Assistance to Allies, Title 10 Training Authorizations and Appropriations.** In determining if we are training foreign forces primarily for their benefit, Congress defines “training” very broadly: “[T]raining includes formal or informal instruction of foreign students in the United States or overseas by officers or employees of the United States, contract technicians, or contractors (including instruction at civilian institutions), or by correspondence courses, technical, educational, or information publications and media of all kinds, training aid, orientation, training exercise, and military advice to foreign military units and forces.” AECA § 47(5) (22 U.S.C. § 2794(5)). The FAA § 644 (22 U.S.C. § 2403) contains a substantially similar definition, though “training exercises” is omitted. The default setting for training with foreign forces is that it is Security Assistance that must be completed by FMS or IMET or other DoS authority. Although the following authorizations provide DoD with the appropriations and/or authorizations to conduct Security Assistance training that would normally be conducted by the Department of State, most of these DoD Security Assistance training authorizations may require a program to be forwarded for approval to the SECDEF, and may also require Secretary of State concurrence, and/or prior notification to Congress.

**1. Special Operations Forces (SOF) Training.** 10 U.S.C. § 2011, SOF Training as Joint Combined Exchange Training (JCET).

a. Scope. The Commander of U.S. Special Operations Command and the commander of any other Combatant Command may pay any of the following expenses relating to the training of SOF of the combatant command: (1) expenses of training the SOF assigned to the command in conjunction with training with the armed forces and other security forces of a friendly foreign country; (2) expenses of deploying SOF for the training; and (3) incremental expenses incurred by the friendly developing foreign country incurred as the result of the training.

b. Definitions. SOF includes civil affairs and psychological operations forces. Incremental Expenses include the reasonable and proper cost of goods and services consumed by a developing country as a direct result of the country’s participation in a bilateral or multilateral exercise, including rations, fuel, training, ammunition, and transportation. The term does not include pay, allowances, and other normal costs of the country’s personnel.

**2. Multilateral Conferences, Seminars, and Meetings.**

a. The Need for Express Authority. 31 U.S.C. § 1345: “Except as specifically provided by law, an appropriation may not be used for travel, transportation, and subsistence expenses for a meeting.” 62 Comp. Gen. 531 (1983): “[T]here is a statutory prohibition against paying the travel, transportation, and subsistence expenses of non-Government attendees at a meeting. . . . By using the word ‘specifically’ Congress indicated that authority to pay travel and lodging expenses of non-Government employees should not be inferred but rather that there should be a definite indication in the enactment that the payment of such expenses was contemplated.” See also B-251921 (14 Apr. 1993); 55 Comp. Gen. 750 (1976).

b. General Authorities. U.S. Civilian Employees & Military Personnel. *See, e.g.*, 5 U.S.C. §§ 4109-4110; 31 U.S.C. § 1345(1); 37 U.S.C. § 412. Individuals Performing Direct Services for the Government. GAO, I Principals of Federal Appropriations Law 4-44 to 4-51 (3d ed. 2004); *see also* B-242880 (27 Mar. 1991); 8 Comp. Gen. 465 (1929); Joint Travel Regulations ¶ C.6000.3.

c. Military Cooperative Authorities for Conferences, Meetings, and Threat Reduction

(1) **Latin American Cooperation (LATAM COOP)**, 10 U.S.C. § 1050. Authorizes the service secretaries to fund the travel, subsistence, and special compensation of officers and students of Latin American countries and other expenses the secretaries consider necessary for Latin American cooperation.

(2) **African Cooperation**, 10 U.S.C. § 1050a. Originally created in section 1204 of the 2011 NDAA, this authorizes the service secretaries to fund the travel, subsistence, and special compensation of officers and students of African countries and other expenses the secretaries consider necessary.

(3) **Bilateral or Regional Cooperation Programs**, 10 U.S.C. § 1051.

(a) Travel Expenses. The SECDEF may authorize the payment of travel, subsistence, and similar personal expenses of defense personnel of developing countries “to and within the area of responsibility in which the bilateral or regional conference...is located...,” if the SECDEF deems attendance in U.S. national security interest.

(b) Other Expenses. The SECDEF may pay such other expenses in connection with the conference, seminar, or meeting, as he considers in the national interest.

(c) Additional Funding Authority. The authority to pay expenses under section 1051 is in addition to the authority under LATAM COOP, 10 U.S.C. § 1050. *See* DoD Authorization Act for FY-97, Pub. L. 104-201 § 1065 (1996) (10 U.S.C. § 113 note) for Marshall Center Participants.

(4) **Regional Centers for Security Studies**. 10 U.S.C. § 184. The SECDEF may waive reimbursement of the cost of activities of the Regional Centers for Security Studies for foreign military officers and foreign defense and security civilian government officials from a developing country if in U.S. national security interest.

(5) **Cooperative Threat Reduction (CTR) with States of the Former Soviet Union (FSU)**. Congress appropriates funds for assistance to the republics of the former Soviet Union and other countries to facilitate a variety of programs aimed at reducing the threat from nuclear, chemical, and other weapons. In the FY14 CAA, Congress provided \$500,455,000.00 in three-year funds (available until September 30, 2016).

3. **Multinational Military Centers of Excellence (MCOE)**. 10 U.S.C. § 2350m. This authority permits the SECDEF, with concurrence of the Secretary of State, to authorize the participation of members of the armed forces and DOD civilians in any multinational military center of excellence for specific purposes, and makes O&M funding available for operating expenses and the costs of participation.

4. **Bilateral & Multilateral Exercise Programs, Developing Countries Combined Exercise Program (DCCEP)**, 10 U.S.C. § 2010.

a. Scope. After consulting with the Secretary of State, the SECDEF may pay the incremental expenses of a developing country incurred by the country’s participation in a bilateral or multilateral exercise, if —

(1) the exercise is undertaken primarily to enhance U.S. security interests; and

(2) SECDEF determines the participation of the participating country is necessary to achieve the “fundamental objectives of the exercise and those objectives cannot be achieved unless the U.S. pays the incremental expenses . . . .”

b. Definition of Incremental Expenses. “Incremental expenses” are reasonable and proper costs of goods and services consumed by a developing country as a direct result of the country’s participation in exercises, including rations, fuel, training, ammunition, and transportation. The term does not include pay, allowances, and other normal costs of the country’s personnel.

E. **Title 10 Humanitarian Assistance (HA) Authorizations and Appropriations.**

1. Introduction to DoD Humanitarian Assistance.

a. In the Honorable Bill Alexander opinion, the GAO established the limitations on DoD's ability to conduct humanitarian assistance. "[I]t is our conclusion that DoD's use of O&M funds to finance civic/humanitarian activities during combined exercises in Honduras, in the absence of an interagency order or agreement under the Economy Act, was an improper use of funds, in violation of 31 U.S.C. § 1301(a)." Generally, Humanitarian Assistance is "ordinarily carried out through health, education, and development programs under the Foreign Assistance Act of 1961, 22 U.S.C. § 2151 *et seq.*" See, The Honorable Bill Alexander, B-213137, 63 Comp. Gen. 422 (1984).

b. Humanitarian assistance is authorized by 10 U.S.C. § 2561. This authority is funded by the Overseas Humanitarian Disaster and Civic Aid (OHDACA) appropriation. It is regulated by the Defense Security Cooperation Agency (DSCA), and policy guidance for its use is found at chapter 12 of the Security Assistance Management Manual (SAMM), DoD 5105.38-M.

## 2. Immediate Response Authority

a. **Immediate Foreign Disaster Relief.** DoD Directive 5100.46 outlines various responsibilities for DoD components in undertaking foreign disaster relief operations in response to a Department of State request. However, paragraph 4.f. provides that the Directive does not prevent "a military commander with assigned forces near the immediate scene of a foreign disaster from taking prompt action to save human lives." See DoD Directive 5100.46, Foreign Disaster Relief (July 6, 2012).

b. **Immediate Response Authority for Domestic Emergencies.** DoD Directive 3025.18 outlines various responsibilities for DoD components in undertaking domestic disasters or emergencies in accordance with the Stafford Act, 42 U.S.C. § 5121. Similar to the foreign disaster immediate response authority, military commanders, heads of DoD Components, and responsible DoD civilian officials have "immediate response authority... under imminently serious conditions and if time does not permit approval from higher authority... to save lives, prevent human suffering, or mitigate great property damage within the United States." See DoD Directive 3025.18, Defense Support of Civil Authorities (DSCA) (29 Dec. 2010). See also OPNAVINST 3440.16D, and MCO 3440.7A.

c. **Emergency Medical Care.** AR 40-400 authorizes the commander to provide medical care to any person in an emergency "to prevent undue suffering or loss of life." AR 40-400, Patient Administration, ¶ 3-55 (15 Sep. 2011).

3. **Overseas Humanitarian, Disaster, and Civic Aid (OHDACA).** The primary purpose of the OHDACA appropriation is for DoD to conduct Overseas Humanitarian, Disaster, and Civic Aid programs under the following permanent title 10 authorities: 401, 402, 404, 407, 2557, and 2561.

### a. **Transportation of Humanitarian Relief Supplies for NGOs,** 10 U.S.C. § 402.

(1) **Scope of Authority.** SECDEF may transport to any country, without charge, supplies furnished by NGOs intended for humanitarian assistance. Transport permitted only on a space-available basis. Supplies may be distributed by U.S. agencies, foreign governments, international organizations, or non-profit relief organizations.

(2) **Preconditions.** Before transporting supplies, SECDEF must determine —

- (a) the transportation of the supplies is consistent with U.S. foreign policy;
- (b) the supplies to be transported are suitable for humanitarian purposes and are in usable condition;
- (c) a legitimate humanitarian need exists for the supplies by the people for whom the supplies are intended;
- (d) the supplies will, in fact, be used for humanitarian purposes; and
- (e) adequate arrangements have been made for the distribution of the supplies in the destination country.

(3) **Limits.** Supplies transported may not be distributed (directly or indirectly) to any individual, group, or organization engaged in military or paramilitary activities.

b. **Foreign Disaster Assistance**, 10 U.S.C. § 404. The President may direct the SECDEF to provide disaster assistance outside the U.S., to respond to manmade or natural disasters when necessary to prevent the loss of life. Amounts appropriated to DoD for Overseas Humanitarian, Disaster, and Civic Aid (OHDACA) are available for organizing general policies and programs for disaster relief programs.

(1) Delegation of Authority. The President delegated to the SECDEF the authority to provide disaster relief, with the Secretary of State's concurrence. In emergencies when there is insufficient time to seek the concurrence of the Secretary of State, the SECDEF may authorize the disaster relief and begin execution, provided the SECDEF seeks Secretary of State concurrence as soon as practicable thereafter. See E.O. 12966, 60 Fed. Reg. 36949 (14 Jul. 1995).

(2) Types of Assistance. Transportation, supplies, services, and equipment.

(3) Notice to Congress. Within 48 hours of commencing relief activities, President must transmit a report to Congress. All costs related to these disaster relief operations are funded from the OHDACA appropriation.

c. **Humanitarian Demining Assistance**, 10 U.S.C. § 407. Under SECDEF regulations, the Service Secretaries may carry out humanitarian demining assistance in a country if it will promote either the security interests of both the U.S. and the country in which the activities are to be carried out, or the specific operational readiness skills of the members of the armed forces participating in the activities.

d. **Excess Nonlethal Supplies for Humanitarian Relief**, 10 U.S.C. § 2557.

(1) The SECDEF may make available for humanitarian relief purposes any DoD nonlethal excess supplies. Excess supplies furnished under this authority are transferred to DoS, which is responsible for distributing the supplies. "Nonlethal excess supplies" means property that is excess under DoD regulations and is not a weapon, ammunition, or other equipment or material designed to inflict serious bodily harm or death. If the required property is in the excess property inventory, it is transferred to the Secretary of State for distribution to the target nation. This statute does not contain the authority to transport the items, though it may be provided under authority of 10 U.S.C. § 2561, below.

(2) In § 1074 of the FY-11 NDAA, Congress expanded this authority by adding support for domestic emergency assistance activities as a proper purpose. Excess supplies made available for such purposes are to be transferred to the Secretary of Homeland Security instead of USAID, although DoD may still provide assistance in the distribution of such supplies.

e. **Humanitarian Assistance**, 10 U.S.C. § 2561.

(1) Scope of Authority. To the extent provided in authorization acts, funds appropriated to DoD for humanitarian assistance shall be used for providing transportation of humanitarian relief and other humanitarian purposes worldwide.

(2) Funds. Funded from OHDACA appropriations, which usually remain available for two years.

(3) General. This authority is often used to transport U.S. Government donated goods to a country in need. (10 U.S.C. § 402 applies when relief supplies are supplied by non-governmental and private voluntary organizations.) "Other humanitarian purposes worldwide" is not defined in the statute. Generally, if the contemplated activity falls within the parameters of HCA under 10 U.S.C. § 401, then the more specific HCA authority should be used (*see* HCA authority below). 10 U.S.C. § 2561 primarily allows more flexibility in emergency situations such as disasters (natural or man-made), and it allows contracts if necessary for mission execution. While HCA under 10 U.S.C. § 401 generally requires pre-planned activities and must promote operational readiness skills of the U.S. participants, section 2561 does not require the promotion of operational readiness skills of the U.S. military participants. Also, unlike HCA, which must be conducted in conjunction with an exercise or on-going military operation, humanitarian assistance (HA) can be conducted as a stand-alone project. Section 312 of the FY04 NDAA Act amended 10 U.S.C. § 2561 to allow SECDEF to use this authority to transport supplies intended for use to respond to, or mitigate the effects of, an event or condition that threatens serious harm to the environment (such as an oil spill) if other sources of transportation are not readily available. The SECDEF may require reimbursement for the costs incurred by DoD to transport such supplies. Judge Advocates must obtain and review for implementation purposes the DoD message on current guidance for Humanitarian Assistance Activities.

4. **Humanitarian & Civic Assistance (HCA)**, 10 U.S.C. § 401. There are three funding sources for HCA: OHDACA; O&M; and for “minimal cost” HCA, unit O&M funds may be available, depending on DoD and Combatant Commander’s policy guidance.

a. **Pre-Planned (or “Budgeted”) HCA.**

(1) Scope of Authority. Secretary concerned may carry out HCA in conjunction with authorized military operations of the armed forces in a country if the Secretary determines the activities will: (1) promote the security interests of the U.S. and the country where the activities will be carried out; and (2) the specific operational readiness skills of the servicemembers who will participate in the activities.

(2) Definition. Pre-Planned HCA under 10 U.S.C. § 401 means:

- (a) medical, dental, surgical, or veterinary care in rural or underserved areas;
- (b) construction of rudimentary surface transportation systems;
- (c) well drilling and construction of rudimentary sanitation facilities;
- (d) rudimentary construction and repair of public facilities; and
- (e) detection and clearance of landmines, including education, training, and technical assistance.

(3) Limits. (1) May not duplicate other forms of U.S. economic assistance; (2) May not be provided (directly or indirectly) to any individual, group, or organization engaged in military or paramilitary activities; (3) SECSTATE must specifically approve assistance; (4) Must be paid out of funds budgeted for HCA as part of the service O&M appropriations; (5) U.S. personnel may not engage in the physical detection, lifting, or destroying of landmines (except concurrent with U.S. military operation), or provide such assistance as part of a military operation not involving U.S. forces; and (6) Expenses funded as HCA shall include the costs of consumable materials, supplies, and services reasonably necessary to provide the HCA. They shall not include costs associated with the military operation (e.g., transportation, personnel expenses, POL) that likely would have been incurred whether or not the HCA was provided. *See* DoD Instruction 2205.2, “Humanitarian and Civic Assistance (HCA) Activities” (2 Dec. 2008).

b. **Command Approved HCA.** 10 U.S.C. § 401(c)(4) Based on language in the authorizing statute (10 U.S.C. 401), and also by language in the yearly DoDAA, certain costs associated with HCA may be funded from O&M other than the “pot” of O&M specifically appropriated for HCA projects. O&M is authorized for “costs incidental to authorized [HCA] operations.” Judge Advocates should consult COCOM policy guidance on the use of both “budgeted” and incidental cost HCA associated with O&M funded projects.

5. HCA vs. OHDACA from a funding perspective. 10 U.S.C. § 401 “Pre-planned” or “budgeted” HCA is funded from DoD O&M. 10 U.S.C. § 401 de minimus HCA is funded from the unit’s O&M account. All the other Humanitarian Assistance authorizations are funded from the OHDACA appropriation.

6. § 2561 “HA,” § 401 “Pre-planned HCA,” and the Election Doctrine. If the assistance fits § 401 in every respect, and satisfies all the requirements for the use of § 401 HCA, then the unit should use § 401 HCA. If the assistance does not satisfy the requirements for the use of § 401 HCA, but still has a humanitarian purpose, then the unit should use the § 2561 HA authorization.

F. **Special Authorities in Counterinsurgency**

1. **Commander’s Emergency Response Program (CERP).** CERP is a statutory authorization to obligate funds from the DOD O&M appropriation for the primary purpose of authorizing U.S. military commanders “to carry out small-scale projects designed to meet urgent humanitarian relief requirements or urgent reconstruction requirements within their areas of responsibility” that provide an “immediate and direct benefit to the people of Afghanistan.” The CERP authority is found at § 1211 of the FY14 NDAA. CERP is an important authority to commanders in Afghanistan. It is essential that Judge Advocates study the relevant CERP laws, policy guidance from DoD, and theater regulations, as CERP requirements and management controls are frequently changing. The Money As A Weapon System – Afghanistan (MAAWS-A) is important theater policy guide for the use of CERP. Judge Advocates can find the most recent editions on the CLAMO website.

a. **CERP Appropriated Funding.** Section 1211 of the FY15 NDAA authorized \$10M for CERP for FY15.

(1) Section 1201 of the FY12 NDAA includes “waiver authority.” The language in the Authorization Act states that, “[f]or purposes of the exercise of the authority provided by this section or any other provision of law making funding available for the Commanders’ Emergency Response Program...the Secretary may waive any provision of law not contained in this section that would (but for the waiver) prohibit, restrict, limit, or otherwise constrain the exercise of that authority.”

(2) Based on prior authorizations, the SECDEF has periodically waived the Competition in Contracting Act requirements for CERP-funded projects. *See, e.g.*, Memorandum from the Honorable William J. Lynn, Deputy Secretary of Defense, to the Secretaries of the Military Departments, et. al, subject: Waiver of Limiting Legislation for Commander’s Emergency Response Program (CERP) for FY 2010 (May 24, 2010). As a result, CERP-funded projects did not need to follow the competition requirements of the Federal Acquisition Regulation (FAR). Judge Advocates should look for the most recent waiver memorandum to ensure proper application in the use of CERP.

(3) The SECDEF has also periodically waived the Foreign Claims Act (FCA). As a result, CERP may fund condolence payments and battle damage claims that are normally barred by the FCA.

b. **DoD Guidance for CERP.** DoD regulates CERP through the DoD Financial Management Regulation (DoD FMR) Volume 12, Chapter 27 (last update January 2009). While this guidance is somewhat out-of-date, having not been updated to reflect significant statutory changes to CERP made since 2009, it is still mandatory reading for anyone intending to use CERP funds and is available as an appendix to this chapter.

(1) **Battle Damage Claims.** CERP appropriated funds may be used to repair property damage to that results from U.S., coalition, or supporting military operations that are not otherwise compensable under the Foreign Claims Act.

(2) **“Solatia-like” or “condolence” payments.** CERP appropriated funds may be used for condolence payments to individual civilians for the death or physical injury resulting from U.S., coalition, or supporting military operations that are not compensable under the Foreign Claims Act. Condolence payments may also include payments (“martyr payments”) to surviving spouse or kin of defense or police personnel killed as a result of U.S., coalition, or supporting military operations.

(3) **Reward/microrewards and Weapons Buy-Back Programs.** CERP appropriated funds *may not* be used to pay rewards or fund any type of weapon buy-back program. Title 10, U.S.C. § 127b, provides the authority for the Rewards Program.

2. **Rewards Program**, 10 U.S.C. § 127b. Allows the military to pay monetary rewards to foreign individuals for providing USG personnel with information or nonlethal assistance that is beneficial to:

a. An operation or activity of the armed forces conducted outside the U.S. against international terrorism; or

b. Force protection of the armed forces.

c. Although NOT a weapons buy-back program (DoD currently has no program for a buy-back program), rewards can be paid for information leading to the recovery of enemy weapons.

d. Though a “permanent” Title 10 authority, the NDAA or DoDAA must authorize O&M funding for this program. § 1021 of the FY23 NDAA authorizes O&M funding for this program until 30 September 2014.

e. Congress set specific statutory approval authorities and amounts for the rewards program. SECDEF may approve individual rewards up to \$5M, though DoS concurrence is required for rewards over \$2M.

f. The statute permits delegation of approval authority to lower echelon commanders for individual reward amounts not to exceed \$10,000. Theater policies, such as those found in the Money As A Weapon System (MAAWS) guides, provide pre-approved “micro-reward” authority. These programs permit Company-level commanders to pay out individual rewards in “pre-approved” amounts when certain criteria are met. Judge Advocates should become familiar with policy limitations on the micro-reward program, while also reminding commanders that Congress has set specific dollar limits on the approval authority levels for reward payouts.

G. Conclusion. Between the DoS and DoD appropriations and authorizations discussed *infra*, Congress has provided the funds necessary for DoD to fund the vast majority of contingency operations. The key for the legal practitioner is to identify the proper appropriation and/or authorization that would allow DoD to legally fund the mission. Once the proper fund(s) are identified and the unit makes the policy decision to access an appropriation or authorization to fund a mission, the legal practitioner should assist the unit in requesting, and receiving, the identified funds from the proper approval levels.

## X. DOD PROPERTY DISPOSAL AUTHORITIES

A. **Property Disposal Introduction.** As with foreign assistance, the DoS, under the current statutory framework, has the primary responsibility for the disposal of U.S.-taxpayer purchased property to any foreign entity. However, in overseas theaters, and especially in contingency operations, DoD uses some existing authorities to dispose of property, including military property. Practitioners should consult with DSCA, the traditional executive agent for the DoD's role in property disposal and/or selling property to a foreign government or entity. Even with relatively new special authorities, the processes developed in DSCA's regulations are often the foundation for processes that are implementing new legislation for property disposal.

B. **FEPP Introduction.** Title 40, chapter 7 of the United States Code, authorizes the head of an executive agency to "dispose of foreign excess property in a manner that conforms to the foreign policy of the United States." See 40 U.S.C. § 701(b)(2)(B). This authority comes from the Federal Property and Administrative Services Act of 1949 (41 U.S.C. § 251, *et seq.*).

1. DoD 4160.21-M, Defense Materiel Disposition Manual, sets forth the policy and process for Disposing of Foreign Excess Personal Property. Practitioners should note that "foreign excess personal property" is a term of art defined in the statute and regulations. It is distinct from "excess and surplus," which applies to the DLA Disposition Services process (the baseline process to dispose of U.S.-DoD property while overseas).

2. A series of memoranda provide transfer authority to lower echelon commanders in Afghanistan. The memoranda describe the nature and type of property that can be transferred, as well as the approval authority limits for certain commanders and the locations eligible for FEPP transfers to entities within Iraq. These memoranda affect the statutory requirement that a head of an agency make a determination that the property is not required to meet the agency's needs or responsibilities.

3. Section 1222 of the FY13 NDAA provides authority to transfer defense articles to the Afghanistan military and security services. Under this authority, DoD may transfer non-excess defense articles for DoD stock without reimbursement. This authority is in addition to the transfer authority provided for in the Foreign Assistance Act (§ 516, Authority to Transfer Excess Defense Articles) discussed *supra*. Authority currently expires on 31 Dec 2014, is limited to \$250 million per fiscal year, and requires concurrence of SECSTATE.

C. **DLA Disposition Services Introduction.** The DLA Disposition Services (formerly the Defense Reutilization and Marketing Service, or DRMS) is the "baseline" authority for DoD to dispose of durable (investment item) DoD property (including all military equipment) purchased with appropriated funds. It has the authority to use business judgment in determining the most appropriate and economical manner of disposal. The disposal procedure that DLA Disposition Services chooses for a specific piece of government property, however, must conform to all DoD and USG statutory and regulatory restrictions (e.g., although DLA Disposition Services may "abandon" some types of government property, it may not "abandon" a nuclear warhead, because this would violate statutory and regulatory procedures for the disposal of such items). DLA Disposition Services co-locates its subordinate offices (still often referred to under their former name of Defense Reutilization and Marketing Offices (DRMOs)) with DoD units world-wide, usually at the post/installation level or the CJTF (Division) level in contingency environments.

D. **DLA Disposition Services Statutory Authority to Dispose of DoD equipment.** DLA Disposition Services derives its statutory authority from a delegation of disposal authority by the General Services Administration (GSA). DLA Disposition Services is a field activity of DLA.

1. 40 U.S.C. § 101 authorizes the GSA to dispose of federal government property (both real and personal property).

2. 40 U.S.C. § 121(d) authorizes the GSA to delegate disposal authority to the head of another agency.

3. DLA Disposition Services Disposal Authority. In 1972, DRMS was created as a subordinate element to DLA. That year, GSA delegated the authority to dispose of DoD equipment to DRMS via DoD and DLA. Prior to the creation of DRMS, disposal authority of DoD property resided at DLA. In 2010, DRMS changed its name to DLA Disposition Services.

E. **DLA Disposition Services Disposal Process.** Generally, DLA Disposition Services has the authority to dispose of DoD property through reutilization, transfer, donation, usable sales, scrap sales, abandonment, and destruction, in order of disposal priority. Once DLA Disposition Services advertises the government property to be disposed of, multiple government entities may have a need for the property. Therefore, DLA Disposition Services assigns the following four priorities to government elements requesting DLA Disposition Services -owned property (*see* DRMS-I 4160.14):

1. **Priority 1, Reutilization.** DoD property that is turned in to DLA Disposition Services and is requisitioned by another DoD component.

a. After DoD property is turned in to DLA Disposition Services and is ready for reuse, for the first 14-day window, the DLA Disposition Services property may be requisitioned only by DoD components and “Special Programs.”

b. “Special Programs”: Designated non-DoD USG programs that also receive Priority 1 status and rights. Special Programs include: Foreign Military Sales (DoS), Computers for Schools (Dept. of Ed.), and Equipment for Law Enforcement (FBI, ICE, DHS).

2. **Priority 2, Transfer.** DoD property that is turned in to DLA Disposition Services and is not needed within DoD, but is needed by another USG agency.

a. After the first 14-day window with no Priority 1 requisition requests, the property enters a 21-day window in which non-DoD USG agencies may requisition the property.

b. During the 21-day Priority 2 window, the property may be requisitioned only by Priority 2 USG components.

3. **Priority 3, Donation.** DoD property that is turned in to DLA Disposition Services and is not needed by any USG agency.

a. After the Priority 2 requisition window closes with no USG requisition requests, the property enters the Priority 3 five-day window where DLA Disposition Services may donate the property to approved state governments and organizations.

b. Priority 1-3 “Final Screening”: If no approved state government agencies and organizations wish to receive donation of the property, then the property receives a 2-day final screening and “last chance” requisition window for Priority 1-3 components, agencies, and approved governments and organizations.

4. **Priority 4, Sales.** DoD property that is turned in to DLA Disposition Services and is not needed by any USG agency nor may be donated to approved state agencies and organizations may now be sold to the general public. Normally, these sales occur via public auctions.

a. All DoD property with military capabilities must be demilitarized prior to sale to the general public. If an item cannot be demilitarized, it cannot be sold and must be destroyed.

b. DoD property that has been demilitarized may be sold as either “usable sales” or “scrap sales.” Usable sales occur when an item, although demilitarized, may still be used by the general public for the originally intended purpose of the item. For example, a WW II Jeep that is in a significantly usable state of operation may be a usable sale. Scrap sales, on the other hand, occur when the item is sold simply for the scrap value of the materials with which it was created.

5. **Abandonment or Destruction.** DoD property that is turned in to DLA Disposition Services and cannot be disposed of by any other method may be abandoned or destroyed. Additionally, DoD military equipment that cannot be demilitarized may not be sold or abandoned, and must be destroyed.

6. General DLA Disposition Services Guidelines applicable to all DLA Disposition Services disposal procedures.

a. Components, agencies, state government agencies, approved organizations, and private individuals may generally requisition or purchase DLA Disposition Services property on an “as is/where is” basis. See DRMS-I 4160.14.

b. Receiving agencies, organizations, and/or public individuals that requisition or purchase DLA Disposition Services equipment must pay for all costs related to Packaging, Crating, Handling, and Transportation (PCH&T) of the DLA Disposition Services property from the local office where the equipment was originally turned in to the receiver’s location. PCH&T costs include the costs of inspection of the items by other USG agencies whenever the items re-enter the United States from their OCONUS locations.

F. **Conclusion.** Contact DLA Disposition Services immediately if you are considering the disposal of DoD property. DLA Disposition Services is the only DoD element with statutory authority to dispose of durable (investment item) DoD property (including military equipment) purchased with appropriated funds. Disposal of DoD government property outside of DLA Disposition Services-authorized channels may lead to potential ADA violations, as well as criminal and/or regulatory violations.

## XI. CONCLUSION

A. Congress limits the authority of DoD and other executive agencies to use appropriated funds. The principal fiscal controls imposed by statute, regulation, and case law are Purpose, Time and Amount. These controls apply both to CONUS activity and OCONUS operations and exercises. The Comptroller General, service audit agencies, and inspectors general monitor compliance with rules governing the obligation and expenditure of appropriated funds. Commanders and staff rely heavily on JAs for fiscal advice. Active participation by JAs in mission planning and execution, as well as responsive and well-reasoned legal advice, will help ensure that commands use appropriated funds properly.

B. Necessity for the JA to Get It Right.

1. Military commanders and staffs often plan for complex, multi-faceted, joint and combined operations, exercises, and activities overseas. Not only do foreign allies participate in these activities, but other U.S. government agencies, international non-governmental organizations, and U.S. Guard and Reserve components do as well. Not surprisingly, these operations, exercises, and activities are conducted under the bright light of the U.S. and international press, and thus precise and probing questions concerning the legal authority for the activity are certain to surface. Congress will often have an interest in the location, participants, scope, and duration of the activity. Few operations the U.S. military conducts overseas escape Congressional interest. Thus, it is imperative that the commander and his or her staff be fully aware of the legal basis for the conduct of the operation, exercise, or activity that benefits a foreign nation.

2. Judge Advocates bear the primary responsibility for ensuring that all players involved, and especially the U.S. commander and his or her staff, understand and appreciate the significance of having a proper legal basis for the activity. This fundamental understanding will shape all aspects of the activity, especially a determination of where the money will come from to pay for the activity. Misunderstandings concerning the source and limits of legal authority and the execution of activities may lead to a great deal of wasted time and effort to correct the error, and embarrassment for the command in the eyes of the press and the Congress. At worst, such misunderstandings may lead to violations of the ADA, and possible reprimands or criminal sanctions for the responsible commanders and officials.

C. How the JA Can Get It Right—Early JA Involvement.

1. Judge Advocates must be part of the planning team from the inception of the concept, through all planning meetings, and through execution of the operation or activity. It is too late for the JA to review the operations plan the week, or even the month, before the scheduled event. Funding, manpower, logistics, transportation, and diplomatic decisions have long been made, and actions based on those decisions have already been executed weeks in advance of the activity.

2. In short, the JA must understand the statutory, regulatory, and policy framework that applies to military operations and activities that benefit foreign nations. More importantly, the JA must ensure that the commander understands what that legal authority is and what limits apply to the legal authority. The JA must then ensure that the commander complies with such authorities.

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