



**Billing Code 5001-06**

**DEPARTMENT OF DEFENSE**

**Office of the Secretary**

**32 CFR Part 103**

**[DOD-2008-OS-0124; 0790-AJ40]**

**Sexual Assault Prevention and Response (SAPR) Program**

**AGENCY:** Department of Defense.

**ACTION:** Interim final rule; amendment.

**SUMMARY:** This rule amends as a final rule published on April 5, 2013 to implement Department of Defense's SAPR Program. The Department seeks to establish a culture free of sexual assault through prevention, education and training, response capability, victim support, reporting procedures, and accountability to enhance the safety and well-being of all persons covered by this regulation.

**DATES:** This rule is effective **[INSERT date of publication in the Federal Register]**.

Comments must be received by **[INSERT DATE 60 DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

**ADDRESSES:** You may submit comments, identified by docket number and/or RIN number and title, by any of the following methods:

- Federal Rulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- Mail: Department of Defense, Office of the Deputy Chief Management Officer, Directorate of Oversight and Compliance, 4800 Mark Center Drive, Mailbox #24, Alexandria, VA 22350-1700.

*Instructions:* All submissions received must include the agency name and docket number or Regulatory Information Number (RIN) for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at <http://www.regulations.gov> as they are received without change, including any personal identifiers or contact information.

**FOR FURTHER INFORMATION CONTACT:** Diana Rangoussis, Senior Policy Advisor, Sexual Assault Prevention and Response Office (SAPRO), 571-372-2648.

**SUPPLEMENTARY INFORMATION:**

**Retrospective Review**

This rule will be reported in future status updates as part of DoD's retrospective plan under Executive Order 13563 completed in August 2011. DoD's full plan can be accessed at:

<http://www.regulations.gov/#!docketDetail;D=DOD-2011-OS-0036>.

**JUSTIFICATION FOR AN INTERIM FINAL RULE**

The Department of Defense is publishing this rule as interim to maintain and enhance the current SAPR program which elucidates the prevention, response, and oversight of sexual assaults involving members of the U.S. Armed Forces and Reserve Component, to include the National Guard.

Until this interim final rule is published:

- Sexual assault victims do not have the ability to receive individualized legal assistance from a Special Victims Counsel (SVC) and Victims' Legal Counsel (VLC) to help navigate the complex military justice system. Additionally, the SVC/VLC can advise the victim of the ramifications associated with the option (Unrestricted or Restricted) selected.

- Military members who are sexually assaulted cannot receive the ability to request an Expedited Transfer as a means to enhance their safety or well-being.

- Preemption of state and local laws requiring disclosure of personally identifiable information of the service member (or adult military dependent) victim or alleged perpetrator to state or local law enforcement agencies, unless such reporting is necessary to prevent or mitigate a serious and imminent threat to the health and safety of an individual, as determined by an authorized Department of Defense official, cannot be implemented.

### **SUMMARY OF THE MAJOR AMENDMENTS TO THE FINAL RULE**

This rule amends a final rule published in the Federal Register on April 5, 2013 (78 FR 20443-20451) by incorporating congressional mandates from Section 113 of Title 10, United States Code (U.S.C.), Public Laws 112-81, 113-66, and 114-92. Additionally, these amendments include statutory provisions and policy recommendations from the Secretary of Defense specifying:

- CMG Chair inquiries into incidents of retaliation involving the victim, witnesses, bystanders (who intervened), SARC, SAPR VA, or responders;
- Specialized training for all supervisors (officer, enlisted, civilian) that explain requirement to protect victim from retaliation, reprisal, ostracism, and maltreatment;
- What constitutes retaliation, reprisal, ostracism, and maltreatment;
- List of resources available for victims to report instances of retaliation, reprisal, ostracism, or maltreatment.
- Further policy mandates as stated in the Response System Panel's (RSP) recommendation #61 and subsection 1716 of National Defense Authorization Act Fiscal

Year 2014 include the establishment of the requirement that service member victims of sexual assault be informed of the availability of legal assistance and the right to consult with a Special Victim's Counsel (SVC) and Victims' Legal Counsel (VLC). The RSP was a Congressionally mandated independent review body established to review the progress of sexual assault initiatives within the Department of Defense.

Additional changes from the April 2013 rule include:

- Requirement to prescribe training and certification protocol for sexual assault medical forensic examiners in accordance with section 1725 of NDAA FY14.
- Requirement to notify sexual assault victims to answer "no" to Question 21 on Standard Form 86, if consultation with health care professional meets outlined criteria per section 1747 of NDAA FY14.
- Establishment of a confidential process by which a sexual assault victim may challenge the terms or the characterization of their discharge on the grounds that the terms or characterization were adversely affected by being a sexual assault victim per section 547 of NDAA FY15.
- Requiring the installation SARC and the installation Family Advocacy Program (FAP) staff to coordinate when a sexual assault occurs as a result of domestic abuse or domestic violence or involves child abuse.
- Providing SAPR policy guidance and procedures for the National Guard through direction of the Chief, National Guard Board (NGB).
- Establishing the Expedited Transfer (E.T.) program for service member victims of sexual assault.

## **BACKGROUND**

The SAPR program authorities are based on the following:

- 10 U.S.C. 136 and DoD Directive 5124.02 (available at <http://www.dtic.mil/whs/directives/corres/pdf/512402p.pdf>), where the Under Secretary of Defense for Personnel and Readiness (USD (P&R)) may:
  - Establish and allocate civilian personnel authorizations of the DoD Components and review and approve military and civilian personnel authorization changes during program execution.
  - Exercise the authorities of the Secretary of Defense, whenever vested, relating to civilian personnel, whether established by law, regulation, or other actions.
- 10 U.S.C. 113 which states
  - The Secretary of Defense is head of the Department of Defense appointed by the President.
  - The Secretary of Defense shall report annually in writing to the President and the Congress on the expenditures, work, and accomplishments of the Department of Defense.
- Public Law 112-81, National Defense Authorization Act for Fiscal Year 2012 which:
  - Reforms offenses relating to rape, sexual assault, and other sexual misconduct under the Uniform Code of Military Justice.
  - Compels production of documentary evidence.
- Public Law 113-66, National Defense Authorization Act for Fiscal Year 2014 which requires:
  - Temporary administrative reassignment or removal of alleged offender.
  - Retention of forms in connection with Restricted Reports for 50 years.
  - Elevating oversight to senior leadership through an eight-day incident report in response to an Unrestricted Report in which the victim is a member of the Armed Forces.

- Discharge or dismissal for certain sex-related offenses and trial of such offenses by general courts-martial.

- Public Law 114-92, National Defense Authorization Act for Fiscal Year 2016 which:

- In cases involving restricted reporting, preempts any State law or regulation requiring disclosure of PII of an adult military victim (or adult military dependent victim) or alleged perpetrator of a sexual assault to a state or local law enforcement agency except when reporting is necessary to prevent or mitigate a serious and imminent threat to the health or safety of an individual.

### **DISCUSSION OF COSTS AND BENEFITS**

The Fiscal Year 2015 Operation and Maintenance funding for DoD SAPRO was \$24.3 million.

There is an additional Congressional allocation of \$ 25.0 million designated for the Special Victims' Counsel program and the Special Victims' Investigation and Prosecution capability reprogrammed to the Military Services and the National Guard Bureau. Additionally, each of the Military Services establishes its own SAPR budget for the programmatic costs arising from the implementation of the training, prevention, reporting, response, and oversight requirements established by this rule.

The benefits of these amendments are the following:

- Preempts state and local laws requiring disclosure of personally identifiable information of the service member (or adult military dependent) victim or alleged perpetrator to state or local law enforcement agencies, unless such reporting is necessary to prevent or mitigate a serious and imminent threat to the health and safety of an individual, as determined by an authorized Department of Defense official.

- Protects victims of sexual assault from coercion, retaliation, and reprisal in accordance with DoD Directive 7050.06, “Military Whistleblower Protection” (available at <http://www.dtic.mil/whs/directives/corres/pdf/705006p.pdf>).
- Requires notification to victims of their right to speak to an SVC before providing a statement to a Military Criminal Investigative Office (MCIO) or trial counsel interview.
- Insures victims are aware of their rights related to speaking with defense counsel by requiring counsel to request the interview through the SVC, or other counsel for the victim as the victim chooses.
- Expands access to SVC to DoD Civilians thus affording them the same legal counseling given to service members.
- Eliminates the five-year statute of limitations on trial by court-martial for additional offenses involving sex-related crimes.
- Requires all forms related to the reporting and forensic examination to be retained for 50 years to insure victims access to historical documentation.
- Includes consultation and assisting victims with complaints against the government, FOIA requests, and correspondence or communications with Congress as discussed in DoD Directive 7050.06
- Requires evidence to be retained for 5 years, or until the completion of related proceedings to allow victims the opportunity to proceed forward in the investigative process at their own pace.
- Elevates oversight to senior leadership by an 8-day incident reporting requirement

in response to Unrestricted Report of sexual assault when victim is a military member.

- Tracks a commanding officer's compliance in conducting organizational climate assessments for purposes of preventing and responding to sexual assaults with all assessments to be completed within 120 days of taking command and annually thereafter.
- Requires review of information on sex-related offenses in personnel service records of members of the Armed Forces (for members who were not "convicted" but received disciplinary action for sexual assault-related act.) This will assist in insuring the proper assignment of individuals in those "positions of special trust and responsibilities" within the military.
- Authorizes members of the Reserve Component to be represented by a Special Victims' Counsel, even when the member is not authorized to receive legal assistance, if the member is the victim of an alleged sex-related offense with a nexus to the member's military service.

#### **REGULATORY PROCEDURES:**

#### **Executive Order 12866, "Regulatory Planning and Review" and Executive Order 13563, "Improving Regulation and Regulatory Review"**

It has been determined that this rule is not an economically significant regulatory action.

The rule does not:

1. Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy; a section of the economy; productivity; competition; jobs; the environment; public health or safety; or State, local, or tribal governments or communities.



2. Create a serious inconsistency or otherwise interfere with an action taken or planned by another Agency.
3. Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligations of recipients thereof.

However, it has been determined that 32 CFR part 103 does raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in these Executive Orders.

**Sec. 202, Public Law 104-4, "Unfunded Mandates Reform Act"**

It has been determined that this rule does not contain a Federal mandate that may result in the expenditure by State, local and tribal governments, in aggregate, or by the private sector, of \$100 million or more in any one year.

**Public Law 96-354, "Regulatory Flexibility Act" (5 U.S.C. 601)**

It has been certified that this rule is not subject to the Regulatory Flexibility Act (5 U.S.C. 601) because it would not, if promulgated, have a significant economic impact on a substantial number of small entities. This rule provides SAPR Program guidance only.

**Public Law 96-511, "Paperwork Reduction Act" (44 U.S.C. Chapter 35)**

It has been determined that this rule does impose reporting or recordkeeping requirements under the Paperwork Reduction Act of 1995. OMB has approved these requirements under OMB Control Number 0704-0482 "Defense Sexual Assault Incident Database. The System of Records Notice for DHRA 06, Defense Sexual Assault Incident Database is available at <https://www.gpo.gov/fdsys/pkg/FR-2015-11-04/pdf/2015-28081.pdf>. The Privacy Impact Assessment (PIA) is available at <http://www.dhra.mil/webfiles/docs/Privacy/PIA/DHRA.06.SAPRO.DSAID.7.15.2015.pdf>; or

<http://www.dhra.mil/website/headquarters/info/pia.shtml>.

### **Executive Order 13132, “Federalism”**

It has been certified that this rule does have federalism implications, as set forth in Executive Order 13132. This rule does have substantial direct effects on:

1. The States;
2. The relationship between the National Government and the States; or
3. The distribution of power and responsibilities among the various levels of Government.

### **List of Subjects in 32 CFR Part 103**

Crime, Health, Military personnel, Reporting and recordkeeping requirements.

Accordingly, 32 CFR part 103 is amended to read as follows:

#### **PART 103—[AMENDED]**

1. The authority citation for part 103 is revised to read as follows:

Authority: 10 U.S.C. 113; secs. 541 and 542, Pub. L. 112-81, 125 Stat. 1298; secs. 1705, 1713, 1723, and 1743, Pub. L. 113-66, 127 Stat. 672; and sec. 536, Pub. L. 114-92, 129 Stat. 817.

2. Amend § 103.1 by:

- a. Removing paragraph (a)(6) and redesignating paragraphs (a)(7) through (16) as (a)(6) through (15).

- b. Revising newly redesignated paragraph (a)(14).

- c. Removing paragraph (a)(17) and redesignating paragraph (a)(18) as (a)(16).

e. Redesignating paragraph (a)(19) as (a)(17) and removing “and” from the end of newly redesignated paragraph (a)(17).

d. Removing paragraph (a)(20).

e. Adding paragraphs (a)(18) through (23).

The revisions and additions read as follows:

**§103.1 Purpose.**

(a) \* \* \*

(14) “Department of Defense 2014-2016 Sexual Assault Prevention Strategy,” April 30, 2014.

\* \* \* \* \*

(18) Public Law 113-66, “The National Defense Authorization Act for Fiscal Year 2014,” December 2013;

(19) Public Law 110-417, “The Duncan Hunter National Defense Authorization Act for Fiscal Year 2009,” October 14, 2008;

(20) DoD Instruction 5545.02, “DoD Policy for Congressional Authorization and Appropriations Reporting Requirement,” December 19, 2008;

(21) Title 32, United States Code;

(22) Public Law 112-81, “National Defense Authorization Act for Fiscal Year 2012,” December 31, 2011; and

(23) Public Law 114-92, “National Defense Authorization Act for Fiscal Year 2016”, November 25, 2015.

3. Amend §103.2 by:

a. In paragraph (b), removing “medical” and adding in its place “healthcare.”

b. Revising paragraph (c).

c. In paragraph (d) introductory text, removing the first occurrence of “medical” and adding in its place “healthcare (medical and mental),” and removing the two other occurrences in the third and fourth sentences of “medical” and adding in their place “healthcare.”

d. Redesignating paragraph (f) as (g), and adding new paragraph (f).

The revision and addition read as follows:

**§103.2 Applicability.**

\* \* \* \* \*

(c) Military dependents 18 years of age and older who are eligible for treatment in the military healthcare system, at installations in the continental United States and outside of the continental United States (OCONUS), and who were victims of sexual assault perpetrated by someone other than a spouse or intimate partner.

\* \* \* \* \*

(f) Does not apply to victims of sexual assault perpetrated by a spouse or intimate partner, or military dependents under the age of 18 who are sexually assaulted. The Family Advocacy

Program (FAP), as described in DoDI 6400.06, provides the full range of services to victims of domestic abuse or domestic violence, and to military dependents under the age of 18 who are sexually assaulted.

\* \* \* \* \*

4. Amend §103.3 by:

a. Revising the definition of “Consent.”

b. Adding the definitions of “Family Advocacy Program (FAP),” “Healthcare,” and “Healthcare provider” in alphabetical order.

c. In the definition of “Official investigative process,” removing “commander or.”

d. Revising the definition of “Restricted reporting.”

e. Adding the definition of “Special Victims’ Counsel (SVC)” in alphabetical order.

f. In the definition of “Victim,” removing “Program” and adding in its place “Option” in the second sentence.

g. Adding the definition of “Victims’ Legal Counsel (VLC)” in alphabetical order.

The revisions and additions read as follows:

**§103.3 Definitions.**

\* \* \* \* \*

Consent. A freely given agreement to the conduct at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or

physical resistance or submission resulting from the use of force, threat of force, or placing another person in fear does not constitute consent. A current or previous dating or social or sexual relationship by itself or the manner of dress of the person involved with the accused in the conduct at issue shall not constitute consent. A sleeping, unconscious, or incompetent person cannot consent.

\* \* \* \* \*

Family Advocacy Program (FAP). A DoD program designated to address child abuse and domestic abuse in military families in cooperation with civilian social service agencies and military and civilian law enforcement agencies. Prevention, advocacy, and intervention services are provided to individuals who are eligible for treatment in military medical treatment facilities.

\* \* \* \* \*

Healthcare. Medical (physical) and mental health care.

\* \* \* \* \*

Healthcare provider. Those individuals who are employed or assigned as healthcare professionals, or are credentialed to provide healthcare services at a medical treatment facility (MTF), or who provide such care at a deployed location or otherwise in an official capacity. This also includes military personnel, DoD civilian employees, and DoD contractors who provide healthcare at an occupational health clinic for DoD civilian employees or DoD contractor personnel. Healthcare providers may include, but are not limited to:

(1) Licensed physicians practicing in the military healthcare system (MHS) with clinical privileges in obstetrics and gynecology, emergency medicine, family practice, internal medicine,

pediatrics, urology, general medical officer, undersea medical officer, flight surgeon, psychiatrists, or those having clinical privileges to perform pelvic examinations or treat mental health conditions.

(2) Licensed advanced practice registered nurses practicing in the MHS with clinical privileges in adult health, family health, midwifery, women’s health, mental health, or those having clinical privileges to perform pelvic examinations.

(3) Licensed physician assistants practicing in the MHS with clinical privileges in adult, family, women’s health, or those having clinical privileges to perform pelvic examinations.

(4) Licensed registered nurses practicing in the MHS who meet the requirements for performing a SAFE as determined by the local privileging authority. This additional capability shall be noted as a competency, not as a credential or privilege.

(5) A psychologist, social worker or psychotherapist licensed and privileged to provide mental health care or other counseling services in a DoD or DoD-sponsored facility.

\* \* \* \* \*

Restricted reporting. Reporting option that allows sexual assault victims to confidentially disclose the assault to specified individuals (i.e., SARC, SAPR VA, or healthcare personnel), in accordance with 32 CFR 105.3 and 105.8, and receive medical treatment, including emergency care, counseling, and assignment of a SARC and SAPR VA, without triggering an official investigation. The victim’s report provided to healthcare personnel (including the information acquired from a SAFE Kit), SARC’s, or SAPR VAs at DoD installations will not be reported to law enforcement or to the command to initiate the official investigative process unless the victim

consents to such reporting or an established exception applies in accordance with DoDI 6495.02 or as provided for in 32 CFR part 105. The Restricted Reporting Program applies to Service Members and their adult military dependent 18 years of age and older.

\* \* \* \* \*

Special Victims' Counsel (SVC). Attorneys who are assigned to provide legal assistance in accordance with section 1716 of Public Law 113-66 and Service regulations. The Air Force, Army, National Guard, and Coast Guard refer to these attorneys as SVC. The Navy and Marine Corps refer to these attorneys as VLC.

\* \* \* \* \*

Victims' Legal Counsel (VLC). Attorneys who are assigned to provide legal assistance in accordance with section 1716 of Public Law 113-66 and Service regulations. The Air Force, Army, National Guard, and Coast Guard refer to these attorneys as SVC. The Navy and Marine Corps refer to these attorneys as VLC.

4. Amend §103.4 by:

- a. In paragraph (i), removing “comprehensive medical treatment” and adding in its place “comprehensive healthcare (medical and mental health) treatment.”
- b. In paragraph (j), removing “medical” and adding in its place “health” in the first sentence.
- c. In paragraph (k) introductory text, removing “Complete,” at the beginning of the second sentence.
- d. In paragraph (k)(1):



- i. Removing “medical treatment” and adding in its place “healthcare” in the first sentence.
- ii. Removing “medical” and adding in its place “health” in the second sentence.
- e. In paragraph (k)(2) introductory text:
  - i. Removing “medical” and adding in its place “healthcare” in the first sentence.
  - ii. Adding “, state laws, or federal regulations” at the end of second sentence.
  - iii. Removing “medical care” and adding in its place “healthcare” in the last sentence.
- f. In paragraph (k)(2)(i), removing “Program” and adding in its place “option” in the first sentence.
- g. In paragraph (k)(2)(ii), removing “complete” in the fourth sentence.
- h. In paragraph (k)(2)(v), revising the third sentence.
- i. Adding paragraph (n).

The revisions and additions read as follows:

**§103.4 Policy.**

\* \* \* \* \*

(k) \* \* \*

(2) \* \* \*

(v) \* \* \* Improper disclosure of confidential communications protected under Restricted Reporting, improper release of healthcare information, and other violations of this policy or other

laws and regulations are prohibited and may result in discipline pursuant to the UCMJ, or other adverse personnel or administrative actions.

\* \* \* \* \*

(n) Victims must be informed of the availability of legal assistance and the right to consult with a Special Victims' Counsel (SVC)/Victims' Legal Counsel (VLC) in accordance with section 1716 of the National Defense Authorization Act for Fiscal Year 2014 (Public Law (P.L.) 113-66).

6. Amend §103.5 by:

a. In paragraph (a)(1), adding “, and the Staff Judge Advocate to the Commandant of the Marine Corps” after “Military Departments.”

b. Revising paragraph (a)(6) introductory text.

c. In paragraph (a)(6)(i), adding “, and the Staff Judge Advocate to the Commandant of the Marine Corps” after “Military Departments.”

d. In paragraph (a)(6)(iii), adding “, and the Staff Judge Advocate to the Commandant of the Marine Corps” after “Military Departments.”

e. Adding paragraph (a)(6)(vi).

f. Revising paragraph (f)(5).

g. In paragraph (f)(6), removing “medical treatment” and adding in its place “healthcare.”

h. Revising paragraph (f)(12).

i. In paragraph (f)(16), adding “the requirements in” after “accordance with.”

j. Redesignating paragraphs (f)(17) through (19) as (f)(18) through (20), and adding a new paragraph (f)(17).

k. Redesignating paragraphs (g), (h), and (i) as (h), (i), and (j), and adding a new paragraph (g).

l. In newly redesignated paragraph (i)(2), removing “medical” and adding in its place “healthcare.”

m. In newly redesignated paragraph (i)(5), removing “medical treatment” and adding in its place “that healthcare.”

n. Adding paragraph (i)(12).

The revisions and additions read as follows:

**§103.5 Responsibilities.**

(a) \* \* \*

(6) Oversee the DoD Sexual Assault Prevention and Response Office (SAPRO). Serving as the DoD single point of authority, accountability, and oversight for the SAPR program, SAPRO provides recommendations to the USD(P&R) on the issue of DoD sexual assault policy matters on prevention, response, and oversight. The SAPRO Director will be appointed from among general or flag officers of the Military Services or DoD employees in a comparable Senior Executive Service position in accordance with Public Law 112-81 . The SAPRO Director is responsible for:

\* \* \* \* \*

(vi) Overseeing development of strategic program guidance and joint planning objectives for resources in support of the SAPR Program, and making recommendations on modifications to policy, law, and regulations needed to ensure the continuing availability of such resources (Public Law 113-66).

\* \* \* \* \*

(f) \* \* \*

(5) Align Service prevention strategies with the DoD Sexual Assault Prevention Strategy.

\* \* \* \* \*

(12) Submit required data to DSAID. Require confirmation that a multi-disciplinary case management group (CMG) tracks each open Unrestricted Report, is chaired by the installation commander (or the deputy installation commander), and that CMG meetings are held monthly for reviewing all Unrestricted Reports of sexual assaults in accordance with DoD Instruction 6495.02.

\* \* \* \* \*

(17) Require the installation SARC and the installation FAP staff to coordinate together when a sexual assault occurs as a result of domestic abuse or domestic violence or involves child abuse to ensure the victim is directed to FAP.

\* \* \* \* \*

(g) On behalf and with the approval of the Secretaries of the Army and Air Force, and in coordination with DoD SAPRO and the State Adjutants General, the Chief, NGB establishes and

implements SAPR policy and procedures for National Guard members on duty pursuant to Title 32, U.S.C.

\* \* \* \* \*

(i) \* \* \*

(12) Establish guidance for when an Expedited Transfer has been requested in accordance with DoD Instruction 6495.02.

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Dated: September 7, 2016.

Patricia L. Toppings,

OSD Federal Register Liaison Officer,

Department of Defense.

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