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DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 235

[Docket ID: DOD-2016-OS-0098]

RIN 0790-AJ15

Sale or Rental of Sexually Explicit Material on DoD Property

AGENCY: Office of the Under Secretary of Defense for Personnel and Readiness, DoD.

ACTION: Final rule.

SUMMARY: This final rule removes DoD's regulation concerning sale or rental of sexually explicit material on Department of Defense (DoD) property. The codified rule does not impose any duty or obligation on the public that is not already imposed by statute. The rule paraphrases and does not substantially deviate from 10 U.S.C. 2495b, which establishes the prohibition on selling or renting sexually explicit material on DoD property. Also, the codified rule delegates internal authorities and establishes procedures for administering the statute, neither of which have public impact. Consequently, Federal Register rulemaking is not necessary under the Administrative Procedure Act.

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

FOR FURTHER INFORMATION CONTACT: Patricia Toppings at 571-372-0485.

SUPPLEMENTARY INFORMATION:

The Department of Defense published a proposed rule in the Federal Register titled “Prohibition of the Sale or Rental of Sexually Explicit Material on DoD Property” on December 22, 2015 (80 FR 79526-79528) for a 60-day public comment period. The Department of Defense received five public comments.

After publishing the proposed rule, DoD began a review of all rules currently being processed to determine if publication in the Federal Register is required. After reconsidering publication of the proposed rule against Administrative Procedure Act criteria and exceptions, DoD decided not to publish a final rule and to remove the previously-codified rule from the CFR. Although DoD has decided to remove the previously-codified rule, we are addressing the public comments received on the proposed rule that published in the Federal Register on December 22, 2015.

Comment 1: I believe this proposed rule is not only an excellent example of agency waste, but a direct infringement of Constitutional Rights that employment by the DoD in any manner cannot supersede. It would appear there are some great ambiguities associated with the definitions that structure this rule. The definition of Lascivious, "lewd and intended or designed to elicit a sexual response," which also controlling in the definition of sexual elicit material is too ambiguous. If an employee or citizen acting as a representative of the DoD has a foot fetish, will all magazines depicting bare feet be banned? Then the word lewd within the definition, what qualifies as lewd? Is it more or less lewd if in a novel the author describes an intimate evening between a hetero couple or homosexual couple?

Comment 2: So not only can a man or woman be sent into harm's way without questioning the reasons for being sent, but they can't even purchase from the exchange or PX material that is deemed "...Lascivious. Lewd and intended or designed to elicit a sexual response."? And who deems material to be considered prohibited for sale or rent on DoD property? A board of censors. Yes this is censorship, plain and simple. This is an end around the First Amendment of the Constitution. Why? Will this regulation improve our readiness or war fighting capability? No. Will this regulation reduce our readiness or war fighting capability? No. Is there solid, objective science showing that availability of this sort of deemed material leads to other behavior or effects that reduces our readiness or war fighting capability to a greater extent than other products or services offered for sale on DoD property such as alcoholic beverages, tobacco products, sugar-laden pop and greasy carbs-loaded prepared food? Hence making the reason for this regulation by reference to other directives spurious. Will this regulation reduce revenue generated by the retail sales operations of the various branches of our military services? Yes. If so, has this cost been included in the calculation of the cost of compliance with this regulation? No. Is the cost of the time of the members of the board and of the various submissions of material for review and judgement of the board been included in calculating the cost of this regulation? No. What objective criteria is used to determine if material should be submitted for review or upon which a determination be made to offer for sale or not? Not specified. For instance, under the authority of regulation, the purchase of the right to play a song by the DoD said to contain lyrics deemed lascivious, lewd and intended or designed to elicit a sexual response could be prohibited. This would make virtually the entire book of Cole Porter and Frank Sinatra songs subject to possible prohibition under a reasonable understanding of the words lascivious, lewd and the process of eliciting a sexual response. To whom can an appeal be made regarding the decision or

judgement of material under this regulation? Re submission to the same board after 5 years?

That's not an appeal, that's a sentence longer than what is typically given to criminals who cause effects of far greater cost in terms of readiness and manpower to our military forces. I am quite certain we can certainly find better things to decide when offering products and services for sale on DoD property? How about lower prices and better quality products?

Comment 3: I am having trouble understanding reasoning and purpose for this rule. This rule would cost "\$5,500 annually for the life of the rule to manage the Board." It seems as if nearly 6 grand annually could be saved and spent on something else that would have greater effects.

I do not believe that it is the government's place to say what a person may or may not do within the comfort and privacy of their own home. And by doing so becomes dangerously close to interfering with fundamental liberties that we, as Americans, enjoy. I believe the deterring effects of this rule would do little good. Because those in the military are specifically trained to deal with instances of sexual harassment, military members are already equipped with the information they need to deal with these unique situations. This rule, which would ban the sale or rental of sexually explicit material on property under DoD jurisdiction, in my opinion, could have the opposite intended affect. Just think back to when you were a kid, and your parents told you that you were not allowed to eat ice cream after 9PM. What is the one single thing you wanted to do after 9PM? I do not know about you, but I would want to eat ice cream. If you do not draw attention to something in the first place, then it is more likely to go unnoticed.

Therefore, I see little persuasive reasoning for the passage of this rule. Not only does it waste money, but also it is also a waste of time and valuable resources that could be better spent elsewhere.

Comment 4: This proposed rule seems to be a waste of money, no matter how small the amount in controversy is. With a growing budget deficit, and no end in sight, all possible means should be taken to tighten the purse strings and prevent excess spending. Furthermore, I am troubled by any proposal which cannot state for certainty that the cost will not go up in the future. Second, there does not seem to be any identified criteria for determining what can and can't be sold. It seems to be what is considered prohibited will turn on whoever is making the decision at that time. This will lead to inconsistent enforcement and a regulation that changes over time.

Comment 5: This rule is just plain silly. Aside from wasting money I don't see any value this rule would have. Just because military members have access to sexually explicit material does not mean they will turn into sexual predators. I believe the opposite is true. Military members have extensive training on sexual harassment, and have an effective method to report sexual misconduct. As stated above, this rule would be a waste of money.

Response: DoD thanks each commenter for their comments. However, no changes will be made to DoD's policy because it has been mandated by Congress through 10 U.S.C. 2495b. Based upon the information in the SUMMARY and SUPPLEMENTARY INFORMATION sections of this rule, we are removing the rule from the Code of Federal Regulations. Nevertheless, DoD's initial guidance contained in DoD Instruction 4105.70, which may be updated from time to time, remains in effect and is available at <http://www.dtic.mil/whs/directives/corres/pdf/410570p.pdf>.

DoD has determined that publication for public comment of this CFR part removal is impracticable, unnecessary, and contrary to public interest, since removal from the CFR will remove DoD internal policies and procedures that are publically available on the DoD issuance web site.

The removal of this rule will be reported in future status updates of DoD's retrospective review in accordance with Executive Order 13563, "Improving Regulation and Regulatory Review." DoD's full plan can be accessed at:

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

List of Subjects in 32 CFR Part 235

Business and industry, Concessions, Government contracts, Military personnel.

PART 235—[REMOVED]

Accordingly, by the authority of 5 U.S.C. 301, 32 CFR part 235 is removed.

Dated: October 14, 2016.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

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