

## SUBCHAPTER P—OBTAINING DOD INFORMATION

### PART 336—PUBLICATIONS OF PROPOSED AND ADOPTED REGULATIONS AFFECTING THE PUBLIC

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AUTHORITY: 10 U.S.C. 125.

#### § 336.1 Purpose.

This part:

(a) Establishes a policy and procedure by which the Department of Defense will invite the comments of the public on those of its proposed regulations and other types of rulemaking as described hereafter which originate within the Department of Defense as a requirement of general applicability and future effect designed to implement, interpret, or prescribe law or policy, or practice or procedure requirements of a component. This requirement applies to those regulations which constitute the authority for actions having a substantial and direct impact on the public when consistent with other responsibilities of the Department for the efficient and responsible conduct of public business.

(b) Implements the provisions of 5 U.S.C. 552 relating to the kinds of regulations that must be published in the FEDERAL REGISTER after they are adopted.

[40 FR 4911, Feb. 3, 1975. Redesignated at 56 FR 64482, Dec. 10, 1991]

#### § 336.2 Applicability and scope.

(a) The provisions of this part apply to the Office of the Secretary of Defense, the Military Departments, the Organization of the Joint Chiefs of Staff, and the Defense Agencies (hereinafter referred to singularly as a "DoD component" or collectively as "DoD components").

(b) These provisions are applicable to those directives, instructions, regula-

tions, policy memoranda, manuals, and other forms of rulemaking (hereinafter referred to as "regulations") that have a substantial and direct impact on the public. Only a regulation which must be published in the FEDERAL REGISTER after its adoption in accordance with 5 U.S.C. 552 (as implemented in § 336.5) comes within the requirement that it be evaluated to determine whether it will have the substantial and direct impact on the public that warrants an invitation for public comment prior to its adoption. An implementation by a subordinate component of a regulation adopted by a component at a higher level within the Department of Defense is not deemed to "originate" a requirement of general applicability and future effect, and therefore, does not fall within the scope of the obligation to invite public comment on its provisions.

(c) The determination by the component originating a regulation shall be final and conclusive in determining whether a regulation or a proposed regulation comes within the purview of this part. Consideration shall be given, however, to the definition of "rulemaking" found in 5 U.S.C. 551 as it relates to the requirements of 5 U.S.C. 553 in making this determination.

(d) The requirement for inviting public comment on a proposed regulation shall not be deemed applicable to any proposed regulation coming within one or more of the following exemptions or exceptions to the rulemaking procedures set forth in 5 U.S.C. 553.

(1) Any matter pertaining to a military or foreign affairs function of the United States which has been determined under the criteria of an Executive Order or statute to require a security classification in the interests of national defense or foreign policy.

(2) Any matter relating to (i) agency management, (ii) agency personnel, or (iii) public contracts (e.g., the Armed Services Procurement Regulation), including nonappropriated fund contracts.

(3) Any matter involving (i) interpretative rules, (ii) general statements of

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policy, or (iii) rules of agency organization, procedure, or practice.

(4) Any situation in which the DoD Component for good cause finds that inviting public comment on a proposed regulation is (i) impracticable, (ii) unnecessary, or (iii) contrary to the public interest, and incorporates in the adopted regulation that determination and its basis.

(e) Exceptions to the requirement in 5 U.S.C. 552 for publication in the FEDERAL REGISTER of adopted regulations for the guidance of the public shall be made in accordance with guidance provided in 32 CFR 286.8.

[40 FR 4911, Feb. 3, 1975. Redesignated at 41 FR 27074, July 1, 1976, and further redesignated and amended at 56 FR 64482, Dec. 10, 1991]

### § 336.3 Policy.

(a) It is the policy of the Department of Defense to encourage the maximum practicable participation of the public in the formulation of regulations having a substantial and direct impact on the public, and to inform the public fully through publication in the FEDERAL REGISTER of all adopted regulations intended for public guidance.

(b) A proposed regulation which would originate a Department of Defense policy having a substantial and direct impact on the public should be published, along with a notice of purpose and authority, in the FEDERAL REGISTER in order to invite public comment within a designated time at least 30 days prior to its intended adoption. This policy should be followed even though the proposed regulation may come within one or more of the exceptions or exemptions to the requirement for prepublication of proposed rules described in § 336.2(d) (2) (i) and (ii), (3) and (4), unless it is determined by the DoD Component as a matter within its sole and exclusive prerogative that the employment of the exception or exemption is appropriate to satisfy a significant and legitimate interest of the DoD Component or the public.

(c) After their adoption, all regulations for the guidance of the public shall be published in the FEDERAL REGISTER in accordance with 5 U.S.C. 552, even though they may come within one or more of the exemptions described in

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32 CFR 286.6. If no significant and legitimate interest of the DoD Component or public precludes such publication. This policy extends to some adopted regulations for the guidance of the public which were not the subject of notice and public comment.

[40 FR 4911, Feb. 3, 1975. Redesignated at 41 FR 27074, July 1, 1976, and further redesignated and amended at 56 FR 64482, Dec. 10, 1991]

### § 336.4 Proposed regulations.

(a) The general notice of a proposed regulation shall be published in the FEDERAL REGISTER in accordance with the guidance contained in the "Federal Register Handbook on Document Drafting" (GSA), whenever that regulation would have a substantial and direct impact on the public or any significant portion of the public, unless it comes within one or more of the exceptions or exemptions previously set forth in § 336.2(d).

(b) The notice shall include:

(1) A statement of the purpose and objective of the proposed regulation;

(2) Reference to the legal authority under which the regulation is proposed; and

(3) The terms or substance of the proposed regulation.

(c) Whenever the originating DoD Component finds that notice and prepublication of a proposed regulation for public comment are impracticable, unnecessary, or contrary to the public interest, it shall incorporate that finding and a brief statement of its reasons in the adopted regulation, or it may adopt and publish in the FEDERAL REGISTER a separate regulation excepting or exempting categories of regulations for any of these reasons, with an explanation of the basis for excepting or exempting each particular category. Separate regulations for this purpose shall be promulgated by the procedures for proposed rules whenever this falls within the requirements of paragraph (a) of this section.

(d) Following the publication of notice and the proposed regulation in the FEDERAL REGISTER, the DoD Component shall give all interested persons an opportunity to participate in the rulemaking through the submission of written data, views, or arguments. An