



## REVISION OF THE PROHIBITED ACTIVITIES AND CONDUCT (PAC) ORDER (MCO 5354.1G)

### *BLUF*

A recent revision to MCO 5354.1\_ (series) (the “PAC Order”) reorganizes the order to better distinguish between sexual harassment and other forms of prohibited activities and conduct, removes redundant prohibitions, and modifies the definition of sexual harassment to align with the new standalone offense under Article 134, UCMJ. It also modifies sexual harassment complaint procedures and clarifies review and appeal procedures. Practitioners are advised to read the new revision closely, paying particular attention to the following changes.

### *Reorganization*

The revision to MCO 5354.1\_ (series) further distinguishes sexual harassment from other PAC violations. Complaints of sexual harassment are governed by Chapter 7. All other PAC violation complaints are governed by Chapter 6. In order to avoid unnecessary confusion and cross-referencing, procedures for appeal to the SECNAV designee—which apply to sexual harassment investigations and to prohibited discrimination investigations—have been moved to Appendix E.

### *Removal of Certain Punitive Provisions*

The revised PAC Order removes punitive provisions that are already punishable as enumerated offenses under the UCMJ—especially those that are covered offenses—or made punitive by another order.

- Wrongful distribution or broadcasting of intimate images. See Articles 117a and 120c, UCMJ; Article 1168, U.S. Navy Regulations.
- Dissident and protest activities. See DoD Instruction 1325.06, SECNAV Instruction 1610.4.<sup>1</sup>
- Stalking. See Article 130, UCMJ.
- Retaliation. See Article 132, UCMJ.
- Sexual harassment. The revised PAC Order continues to address sexual harassment, particularly with regard to complaint and investigation procedures. However, rather than prohibiting sexual harassment as an orders violation, it recognizes that “[s]exual harassment is defined and prohibited by paragraph 107a of Part IV of the Manual for Courts-Martial . . . as a standalone offense under Article 134 of the Uniform Code of Military Justice.”<sup>2</sup>

### *Definition of Sexual Harassment*

The PAC Order defines sexual harassment by reference to the standalone offense of sexual harassment under Article 134, UCMJ. Although the Article 134 definition is largely similar to the old PAC Order language, there are some key differences:

- NEW: Conduct must be knowing to be a violation.

<sup>1</sup> The revised PAC Order references extremism reporting. MCO 5354.1G, para. 5.a.(4). A MARADMIN specifying extremism reporting requirements is forthcoming.

<sup>2</sup> MCO 5354.1G, Encl (2), Ch. 3, para. 7.

- NEW: Any “conduct of a sexual nature,” not just “gestures or comments of a sexual nature,” can serve as the underlying conduct of a violation.
- NEW: Quid pro quo prohibitions now also protect non-pay benefits and entitlements, such as leave.
- NEW: Interference with work performance alone, without creating an intimidating, hostile, or offensive working environment, is not sexual harassment under Article 134.
- NEW: Prohibited conduct ancillary to sexual harassment—such as condoning sexual harassment, or deliberate or repeated comments of a sexual nature that do not meet all of the elements of sexual harassment—is now distinguished from Article 134 sexual harassment.<sup>3</sup>

### *Changes to Sexual Harassment Complaint Process*

The revised PAC Order allows for informal, formal, and anonymous complaints of any PAC violation. Additionally, a complaint of sexual harassment—but not other PAC complaints—may be made confidentially. For timelines associated with various types of complaints, please see the Appendix to this Practice Advisory.

- Informal complaints. Use informal methods of conflict management. Informal complaints cannot be used for complaints involving “quid pro quo” solicitation, unwanted sexual contact, or wrongful broadcast or distribution of intimate visual images; these must be investigated formally.<sup>4</sup>
- Formal complaints. The Commanding Officer of the alleged offender will forward the complaint within 72 hours to the first O-6 or higher level commander (referred to as the “next higher level commander” (NHLC)) superior in the chain of command.<sup>5</sup> The NHLC will appoint an independent investigator outside the subject’s and the complainant’s chain of command. The NHLC, if not a GCMCA, must also notify the first GCMCA superior in the chain of command about the complaint, including a detailed description of the allegation.<sup>6</sup>
- Anonymous complaints. Initiated whenever the command receives anonymous information, from an unknown or unidentified source that contains allegations of sexual harassment.<sup>7</sup> Anonymous complaints will be documented within a memorandum for the record to permit the initiation of an investigation.<sup>8</sup>
- Confidential complaints. Intended to operate similar to Restricted Reports of sexual assault. Confidential reports can only be disclosed to the EOA or other victim service provider.<sup>9</sup> However, disclosure to a close friend or family member will not prevent the filing of a confidential report, so long as that person is not in the chain of command. A confidential report allows the service member to obtain a safety assessment, counseling, referral, and other eligible services, but the allegation will not be investigated.<sup>10</sup> A confidential report may be converted to a formal or informal report within 90 days of the last incident (120 days for Reserve component complainants).<sup>11</sup>

### *Reviews and Appeals*

The relationship between the Reviewing GCMCA and the Appeal Authority has been clarified. In most cases, the Reviewing GCMCA and the Appeal Authority are the same, assuming they are superior in the administrative chain of command to the investigation convening authority. However, in cases where the investigation convening authority is

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<sup>3</sup> These ancillary behaviors do not constitute sexual harassment under Article 134, UCMJ or 10 U.S.C. § 1565. However, DoD and DON policies pertaining to sexual harassment have not yet been updated to reflect the statutory change. As a result, certain requirements—such as the right for an administrative appeal to the SECNAV designee—may still apply to conduct of this nature. However, Congress has clearly spoken on the definition of sexual harassment within the military, and we must take care to observe the distinction, particularly as Article 134 sexual harassment will become a covered offense beginning 1 January 2025. See P.L. 117-263, sec. 541(b), 136 Stat. 2579-2580 (Dec. 23, 2022).

<sup>4</sup> MCO 5354.1G, Encl (2), Ch. 7, para. 2.a.

<sup>5</sup> Id. at para. 2.b.(1).

<sup>6</sup> Id. at para. 2.b.(1)(b).

<sup>7</sup> Id. at para. 2.c.

<sup>8</sup> Id.

<sup>9</sup> Id. at para. 2.d.

<sup>10</sup> Id.

<sup>11</sup> Id. at para. 2.d.(4).

an Alternate Show Cause Authority, they may also serve as the Reviewing GCMCA, but cannot be the Appeal Authority for their own decisions. In such cases, the Appeal Authority is DC, M&RA.<sup>12</sup>

In sexual harassment and prohibited discrimination cases, in accordance with SECNAVINST 5350.16A, there is a possibility of further appeal to SECNAV or designee.<sup>13</sup> These appeals go through the chain of command to the Civil and Administrative Law Branch (JCA), Judge Advocate Division who acts on behalf of the SECNAV.<sup>14</sup> To maintain the benefits of clear distinction, Secretarial appeals are described in Appendix E.

### ***Role of the SJA in the PAC process***

Consultation—the cognizant SJA is the primary source of legal advice for commanders, IOs, and EOAs. Commanders are directed to “involve” their SJA “immediately upon receiving a PAC complaint.”<sup>15</sup> This involvement may include, but is not limited to: discerning whether the report implicates behavior that violates the UCMJ and, therefore, should be forwarded to the cognizant Military Criminal Investigative Organization (MCIO); discerning the appropriate rules and regulations applicable to the facts presented in the complaint; and advising on the appropriate forum and process for conducting the investigation. During the investigation, the IO should utilize the SJA office for advice and shall submit the investigation to the SJA office for a legal sufficiency review.<sup>16</sup> All formal complaints are required to include an SJA legal sufficiency review prior to action by the Convening Authority.<sup>17</sup> The SJA will forward the legal sufficiency review along with the investigation to the commander when complete.<sup>18</sup>

### ***Points of Contact***

Please direct questions about the revised PAC Order to your command’s servicing Equal Opportunity Advisor (EOA). Questions specifically about this Practice Advisory may be directed to the JMJ Deputy Branch Head at (703) 693-9299.

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<sup>12</sup> MCO 5354.1G, para. 3.c.(1)(c); MCO 5354.1G, Encl (2), Ch. 6, para. 11-12; MCO 5354.1G, Encl (2), Ch. 7, para. 4.

<sup>13</sup> Id.

<sup>14</sup> MCO 5354.1G, App’x E.

<sup>15</sup> MCO 5354.1G, Encl (2), Ch. 4, para. 8.

<sup>16</sup> MCO 5354.1G, Encl (2), Ch. 6, para. 6.

<sup>17</sup> Id.

<sup>18</sup> Id.

## APPENDIX

### Timelines Associated with Various PAC Complaints

Harassment<sup>19</sup> complaints: investigation must be convened within 5 business days of receipt of complaint along with a GCMCA notification; investigation must be completed within 30 days of commencement; final report must be delivered to the GCMCA 6 days after the date of receipt of the final investigation along with a final report that describes any command action taken in response to the findings; all harassment investigation reports should be reviewed for legal sufficiency. If the investigation cannot be completed within the timelines, a progress report will be forwarded to the cognizant GCMCA every 14 days.<sup>20</sup>

Sexual Harassment complaints: complaint along with a detailed description of the facts and circumstances reported to GCMCA within 72 hours after receipt of the complaint; NHLC convenes investigation within 72 hours of receipt of the complaint; investigation completed no later than 14 days after the date the investigation is convened; final report on the results of the investigation must be submitted to the cognizant GCMCA within 20 days after commencement of the investigation. If the investigation cannot be completed within the timelines, a progress report will be forwarded to the cognizant GCMCA every 14 days.<sup>21</sup>

Informal Military Equal Opportunity (MEO) complaint: command should initiate informal resolution procedures within 3 duty days of receiving complaint; if complainant is not satisfied with result or if the complaint cannot be resolved within 30 days, the complainant may file a formal complaint.<sup>22</sup>

Formal MEO complaint: complaint along with a detailed description of the facts and circumstances must be reported to the first GCMCA within 5 business days of receipt; commander initiates investigation within 5 business days of receipt of complaint; notification of complainant and alleged offender must occur when the investigation begins; investigation should be completed within 30 business days; final report on the results of the investigation must be submitted to the GCMCA within 6 business days after the completion of the investigation. Extensions may be requested from the next highest commander for extenuating circumstances for not more than 30 days. If an extension is granted, a progress report must be submitted every 14 calendar days to the next highest commander.<sup>23</sup>

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<sup>19</sup> Harassment is “behavior that is unwelcome or offensive to a reasonable person, whether oral, written, or physical, that creates an intimidating, hostile, or offensive environment.” DoDI 1020.03, para. G.2. Types of harassment include, but are not limited to, “discriminatory harassment, sexual harassment, hazing, bullying, and stalking.” Id. at para. 3.1. Stalking must be reported to the appropriate MCIO. Id. These guidelines only apply to harassment allegations not including sexual assault allegations. Id. at para. 4.2. Sexual assault allegations must be reported to the cognizant Sexual Assault Response Coordinator (SARC) for victim support services and the appropriate MCIO for investigation. Id. at para. 4.3.

<sup>20</sup> MCO 5354.1G, Encl (2), Ch. 6, para. 3-4.

<sup>21</sup> MCO 5354.1G, Encl (2), Ch. 7, para. 2.b.

<sup>22</sup> MCO 5354.1G, Encl (2), Ch. 5, para. 3.

<sup>23</sup> MCO 5354.1G, Encl (2), Ch. 6, para. 3-4.