

1 **SEC. ___. AUTHORITY TO ACQUIRE MATERIALS FOR THE NATIONAL DEFENSE**
2 **STOCKPILE**

3 (a) ACQUISITION AUTHORITY.—The National Defense Stockpile Manager may use
4 amounts appropriated pursuant to subsection (c) for acquisition of the following materials
5 determined to be strategic and critical materials required to meet the defense, industrial, and
6 essential civilian needs of the United States:

7 (1) Neodymium oxide, Praseodymium oxide and Neodymium Iron Boron
8 (NdFeB) magnet block.

9 (2) Titanium.

10 (3) Energetic Materials.

11 (4) Iso-Molded Graphite.

12 (5) Grain Oriented Electric Steel.

13 (6) Tire Cord Steel.

14 (7) Cadmium Zinc Telluride.

15 (b) FISCAL YEAR LIMITATION.—The authority under subsection (a) is available for
16 purchases during fiscal years 2023 through 2032.

17 (c) AUTHORIZATION OF APPROPRIATIONS. —There is authorized to be appropriated
18 the sum of \$253,500,000 for the acquisition of strategic and critical materials under section
19 6(a) of the Strategic and Critical Materials Stock Piling Act (50 U.S.C. 98e(a)).

20 (d) REQUIREMENT FOR ACQUISITIONS.—Any acquisition using funds appropriated
21 under the authorization of subsection (c) shall be carried out in accordance with the
22 provisions of the Strategic and Critical Materials Stock Piling Act (50 U.S.C. 98 et seq.).

Section-by-Section Analysis

This proposal would authorize acquisition of certain materials for the National Defense Stockpile (NDS) under the Strategic and Critical Materials Stock Piling Act (Act).

ACQUISITION

Subsection (a) of this proposal would provide authority under section 5(a)(1) of the Act (50 U.S.C. 98d(a)(1)) to acquire strategic and critical materials for the Stockpile.

The materials for which acquisition authority is requested have been identified as necessary to meet the military, industrial, and essential civilian needs of the United States through a rigorous analytical requirements determination process and are identified in the 2017, 2019, and 2021 Biennial Report to the Congress on Stockpile Requirements (Report). The Report is prepared pursuant to the Act, which applies a rigorous analytical process to identify strategic and critical materials required to sustain the United States during various military conflict scenarios developed by the Under Secretary of Defense for Policy. A discussion of the materials follows.

Neodymium oxide, Praseodymium oxide and Neodymium Iron Boron (NdFeB) magnet block. The United States does not possess the industrial capability to manufacture a type of rare earth permanent magnets (REPM) known as neodymium-iron-boron (NdFeB) magnets. Stockpiling REPMs and related raw materials is a cost-effective, relatively quick albeit short-term stopgap solution to the U.S.'s foreign reliance on REPMs. Numerous weapon systems rely upon NdFeB magnets to function, and a disrupted foreign supply would similarly disrupt the manufacture of these systems. Select critical NdFeB magnet applications include Joint Direct Attack Munition (JDAM) kits, multiple radar systems, and a next-generation submarine propulsion system.

DLA Strategic Materials recommends implementing a stockpiling strategy for NdFeB magnets consisting of separate Nd oxide and Pr oxide in order to provide operational flexibility to manufacturers of NdFeB magnets should there be a requirement for a particular magnet specification. Stockpiling large quantities of NdFeB magnet block or NdFeB alloy has several limitations, most notably technological obsolescence and shelf life. Furthermore, there are currently about 80 different grades of NdFeB magnets making a grade determination highly uncertain, a problem compounded by the existence of several business proprietary blends of NdFeB magnet materials in defense platforms.

While there are noted limitations with storing multiple grades of magnetic block, DLA Strategic Materials is aware of a specific grade of NdFeB magnet block that meets military specifications. Having some of the material in the block form will shorten the manufacturing time. DLA Strategic Materials recommends acquisition of magnet block, along with the Nd oxide and Pr oxide, as part of an overall risk mitigation strategy.

Titanium. Titanium can be alloyed with iron, aluminum, vanadium, and molybdenum, and others to produce strong, lightweight alloys for aerospace, military, industrial processes, automotive, agriculture, and medical products. The two most useful properties of titanium are corrosion resistance and strength-to-density ratio, the highest of any metallic element. These properties along with its relatively high melting point (more than 1,650 °C or 3,000 °F) makes titanium ideal for rotating fan blades in jet engines.

Energetic Materials. Energetic materials include propellants, pyrotechnics, and explosives and are used across DoD weapon systems and munitions in mission critical applications such as rockets, missiles, ammunition, and pyrotechnic devices. Propellants are necessary to deliver the weapon system to its intended target and are currently used in military rockets and missiles. Pyrotechnics are critical components of devices used as decoys, obscurants, combat simulators, and signals. They are required to ignite and burn in a specific manner and produce specific colors and intensities of light or smoke. Explosives are used in munitions as the main charge in warheads and in the fuses, primers, and detonators used to initiate the main charge.

Iso-Molded Graphite. Iso-Molded Graphite is considered a higher performing material than more common forms of synthetic graphite (i.e., it possesses superior mechanical and thermal properties). Iso-molded graphite has higher density, strength, and material isotropy (possessing the same properties in all directions).

Grain Oriented Electric Steel. GOES is a special, low electrical steel with high levels of silicon (0.6% - 6%, average 3.5% silicon). The grains in the steel grow during secondary crystallization and cold rolling orients the grains. This process, which requires very high surface pressure, is what imparts magnetic properties to GOES. The magnetic properties prevent core losses in electrical transformers (typically 0.5 W per pound) which allows for less core material and, therefore, lower weight.

Tire Cord Steel. Steel is a component of modern radial tires for passenger cars and light trucks, as well as for heavy trucks. In order to make steel-belted radial tires, virgin steel made from iron ore is cast into steel billets which are then rolled into steel rods. Virgin steel is needed rather than recycled steel to prevent “inclusions” that might result from impurities in scrap. Tire-quality steel wire rod also conforms to additional specifications imposed by the cord fabricators regarding surface properties and other requirements.

Cadmium Zinc Telluride. CZT is a room temperature single crystal semiconductor manufactured by the material being grown into a single crystal boule and then sliced into substrates. CZT is used in radiation and infrared detection systems.

Resource Information: The National Defense Stockpile Transaction Fund (T-Fund) has a Fiscal Year 2021 ending unobligated balance of \$262 million. Budgeted costs of the Stockpile average \$74.8 million per annum for fiscal years 2023-2027. The Fiscal Year 2023 DoD budget includes appropriated funding for the NDS in the amount of \$253.5 million. The resources impacted are reflected in the table below and are included within the Fiscal Year (FY) 2023 President’s Budget Request

Budget Table									
	FY 2023	FY 2024	FY 2025	FY 2026	FY 2027	B A	BLI/S AG	Total	Appropriation
Budget (\$Millions)	\$88.36	\$63.94	\$75.23	\$73.27	\$73.27	4	UNDD	\$374.07	National Defense Stockpile

									Transaction Fund
Proposed Acquisitions (\$Millions)									
Material	FY 2023	FY 2024	FY 2025	FY 2026	FY 2027			Total	Appropriation
Nd-Pr Oxide and NdFeB magnet blocks	\$6.00	\$6.00	\$6.00	\$6.00	\$6.00			\$30.00	National Defense Stockpile Transaction Fund
Energetic Materials	\$34.55	\$34.55	\$34.55	\$34.55	\$34.55			\$172.75	National Defense Stockpile Transaction Fund
Titanium	\$5.00	\$5.00	\$5.00	\$5.00	\$5.00			\$25.00	National Defense Stockpile Transaction Fund
Iso-Molded Graphite	\$2.28	\$2.28	\$2.28	\$2.28	\$2.28			\$11.40	National Defense Stockpile Transaction Fund
Grain Oriented Electric Steel	\$1.40	\$1.40	\$1.40	\$1.40	\$1.40			\$7.00	National Defense Stockpile Transaction Fund
Tire-Cord Steel	\$0.32	\$0.32	\$0.32	\$0.32	\$0.32			\$1.60	National Defense Stockpile Transaction Fund
Cadmium Zinc Telluride	1.15	1.15	1.15	1.15	1.15			\$5.75	National Defense Stockpile Transaction Fund
Acquisition Sub-Total	\$50.70	\$50.70	\$50.70	\$50.70	\$50.70			\$253.50	National Defense Stockpile Transaction Fund

Changes to Existing Law: This proposal would not change the text of any existing statute.

1 **SEC. ___. EXPANSION OF AUTHORITY TO ALLOW OFFICERS TO OPT OUT OF**
2 **PROMOTION CONSIDERATION.**

3 Section 619(e)(2)(C) of title 10, United States Code, is amended by striking “to the grade
4 for which the officer requests the exclusion from consideration” and inserting “to the next higher
5 grade for the second time”.

**[Please note: The “Changes to Existing Law” section below sets out in red-line format how
the legislative text would amend existing law.]**

Section-by-Section Analysis

This legislative proposal would provide expanded authority to the Secretary concerned to allow certain officers, upon request, the ability to opt out of consideration for promotion even if the officer was a one-time, prior non-select for promotion.¹

Officer non-selection for promotion may be driven by factors other than performance. Specifically, force structure imbalance at a higher grade may prevent officers from being selected to the next higher grade. Simultaneously, the service may have requirements to retain the officer skill at the current grade. Allowing officers in a non-select status to opt out of a promotion board in limited cases may assist services with retention of high demand officer specialties and gives officers positive agency over their career path, avoiding the negative event of successive non-selections. The Secretary concerned still has substantial latitude to deny opt out requests based on the interests of the department, thereby ensuring that the opt-out provision will not be abused. Additionally, the Army would seek to implement a regulatory structure that would prevent misuse.

Although this authority is applicable and useful across the force, it has significant relevance to the Army Medical Department. With the addition of substantial company grade force structure in support of Holistic Health and Fitness, certain medical officer specialties will be limited in opportunities for promotion. The limited promotion opportunity will drive officers to leave service or pursue non-clinical assignments to enhance their perceived promotion potential. In both instances, the Army will garner minimal “return on investment” for these highly skilled clinicians who have been recruited and trained. For those who fail at a promotion board, often through no fault of their own, officers and Army families will experience a significantly negative event that shapes both their behavior and satisfaction with military service. This impacts the morale of the force and reduces retention in these low-density career fields. In turn, the reduced retention decreases support for Holistic Health and Fitness and directly impacts the readiness of combat forces.

¹ Within the Army, this authority would be further limited by implementing regulations to apply only to officers in certain specialties such as the following medical specialties: 65A (Occupational Therapist), 65B (Physical Therapist), and 65C (Dietitian).

This authority would work in conjunction with section 637 of title 10, United States Code, which authorizes the selection of regular officers for continuation on active duty, by providing an option that would allow for a limited period of continuation in the event of a one-time failure for selection to promotion without the requirement of a separate board.

If adopted, this proposal would provide the services with expanded flexibility to allow certain officers an opportunity for continued service and give officers agency to determine the course of their careers. The resulting increased officer retention would mitigate personnel shortages in low-density specialties and alleviate pressure on the recruiting mission. The continuing requirement for the Secretary concerned to act on an individual case basis prior to approving “opt out” for non-select officers, and only in cases where the officer was a one-time failure for selection to promotion, will ensure that officer quality is not diminished and that the expanded authority is not abused.

Resource Information: This proposal has no impact on the use of resources.

PERSONNEL					
Program	FY 2023	FY 2024	FY 2025	FY 2026	FY 2027
Army	25	30	30	35	35
Navy	Navy does not intend to use this authority.				
Air Force	Air Force does not intend to use this authority.				
Space Force	5	5	5	5	5
Marines	Marines do not intend to use this authority.				
Total	30	35	35	40	40

Changes to Existing Law: This proposal would make the following changes to section 619 of title 10, United States Code:

§619. Eligibility for consideration for promotion: time-in-grade and other requirements

(a) TIME-IN-GRADE REQUIREMENTS.—(1) An officer who is on the active-duty list of the Army, Air Force, or Marine Corps and holds a permanent appointment in the grade of second lieutenant or first lieutenant or is on the active-duty list of the Navy and holds a permanent appointment in the grade of ensign or lieutenant (junior grade) may not be promoted to the next higher permanent grade until he has completed the following period of service in the grade in which he holds a permanent appointment:

(A) Eighteen months, in the case of an officer holding a permanent appointment in the grade of second lieutenant or ensign.

(B) Two years, in the case of an officer holding a permanent appointment in the grade of first lieutenant or lieutenant (junior grade), except that the minimum period of service in effect under this subparagraph before October 1, 2008, shall be eighteen months.

(2) Subject to paragraph (4), an officer who is on the active-duty list of the Army, Air Force, or Marine Corps and holds a permanent appointment in a grade above first lieutenant or is

on the active-duty list of the Navy and holds a permanent appointment in a grade above lieutenant (junior grade) may not be considered for selection for promotion to the next higher permanent grade until he has completed the following period of service in the grade in which he holds a permanent appointment:

(A) Three years, in the case of an officer of the Army, Air Force, or Marine Corps holding a permanent appointment in the grade of captain, major, or lieutenant colonel or of an officer of the Navy holding a permanent appointment in the grade of lieutenant, lieutenant commander, or commander.

(B) One year, in the case of an officer of the Army, Air Force, or Marine Corps holding a permanent appointment in the grade of colonel or brigadier general or of an officer of the Navy holding a permanent appointment in the grade of captain or rear admiral (lower half).

(3) When the needs of the service require, the Secretary of the military department concerned may prescribe a longer period of service in grade for eligibility for promotion, in the case of officers to whom paragraph (1) applies, or for eligibility for consideration for promotion, in the case of officers to whom paragraph (2) applies.

(4) The Secretary of the military department concerned may waive paragraph (2) to the extent necessary to assure that officers described in subparagraph (A) of such paragraph have at least two opportunities for consideration for promotion to the next higher grade as officers below the promotion zone.

(5) In computing service in grade for purposes of this section, service in a grade held as a result of assignment to a position is counted as service in the grade in which the officer would have served except for such assignment or appointment.

(b) CONTINUED ELIGIBILITY FOR CONSIDERATION FOR PROMOTION OF OFFICERS WHO HAVE PREVIOUSLY FAILED OF SELECTION.—(1) Except as provided in paragraph (2), an officer who has failed of selection for promotion to the next higher grade remains eligible for consideration for promotion to that grade as long as he continues on active duty in other than a retired status and is not promoted.

(2) Paragraph (1) does not apply to a regular officer who is ineligible for consideration for promotion under section 631(c) of this title or to a reserve officer who has failed of selection for promotion to the grade of captain or, in the case of an officer of the Navy, lieutenant for the second time.

(c) OFFICERS TO BE CONSIDERED BY PROMOTION BOARDS.—(1) Each time a selection board is convened under section 611(a) of this title for consideration of officers in a competitive category for promotion to the next higher grade, each officer in the promotion zone (except as provided under paragraph (2)), and each officer above the promotion zone, for the grade and competitive category under consideration shall be considered for promotion.

(2) The Secretary of the military department concerned—

(A) may, in accordance with standards and procedures prescribed by the Secretary of Defense in regulations which shall apply uniformly among the military departments, limit the officers to be considered by a selection board from below the promotion zone to those officers who are determined to be exceptionally well qualified for promotion;

(B) may, by regulation, prescribe a period of time, not to exceed one year, from the time an officer is placed on the active-duty list during which the officer shall be ineligible for consideration for promotion; and

(C) may, by regulation, preclude from consideration by a selection board by which he would otherwise be eligible to be considered, an officer who has an established separation date that is within 90 days after the date the board is convened.

(3)(A) The Secretary of Defense may authorize the Secretaries of the military departments to preclude from consideration by selection boards for promotion to the grade of brigadier general or rear admiral (lower half) officers in the grade of colonel or, in the case of the Navy, captain who—

(i) have been considered and not selected for promotion to the grade of brigadier general or rear admiral (lower half) by at least two selection boards; and

(ii) are determined, in accordance with standards and procedures prescribed pursuant to subparagraph (B), as not being exceptionally well qualified for promotion.

(B) If the Secretary of Defense authorizes the Secretaries of the military departments to have the authority described in subparagraph (A), the Secretary shall prescribe by regulation the standards and procedures for the exercise of such authority. Those regulations shall apply uniformly among the military departments and shall include the following provisions:

(i) A requirement that the Secretary of a military department may exercise such authority in the case of a particular selection board only if the Secretary of Defense approves the exercise of that authority for that board.

(ii) A requirement that an officer may be precluded from consideration by a selection board under this paragraph only upon the recommendation of a preselection board of officers convened by the Secretary of the military department concerned and composed of at least three officers all of whom are serving in a grade higher than the grade of such officer.

(iii) A requirement that such a preselection board may not recommend that an officer be precluded from such consideration unless the Secretary concerned has given the officer advance written notice of the convening of such board and of the military records that will be considered by the board and has given the officer a reasonable period before the convening of the board in which to submit comments to the board.

(iv) A requirement that the Secretary convening such a preselection board shall provide general guidance to the board in accordance with standards and procedures prescribed by the Secretary of Defense in those regulations.

(v) A requirement that the preselection board may recommend that an officer be precluded from consideration by a selection board only on the basis of the general guidance provided by the Secretary of the military department concerned, information in the officer's official military personnel records that has been described in the notice provided the officer as required pursuant to clause (iii), and any communication to the board received from that officer before the board convenes.

(d) CERTAIN OFFICERS NOT TO BE CONSIDERED.—A selection board convened under section 611(a) of this title may not consider for promotion to the next higher grade any of the following officers:

(1) An officer whose name is on a promotion list for that grade as a result of his selection for promotion to that grade by an earlier selection board convened under that section.

(2) An officer who is recommended for promotion to that grade in the report of an earlier selection board convened under that section, in the case of such a report that has not yet been approved by the President.

(3) An officer of the Marine Corps who is an officer designated for limited duty and who holds a grade above major.

(4) An officer in the grade of first lieutenant or, in the case of the Navy, lieutenant (junior grade) who is on an approved all-fully-qualified-officers list under section 624(a)(3) of this title.

(5) An officer in the grade of captain or, in the case of the Navy, lieutenant who is not a citizen of the United States.

(6) An officer excluded under subsection (e).

(e) AUTHORITY TO ALLOW OFFICERS TO OPT OUT OF SELECTION BOARD

CONSIDERATION.—(1) The Secretary of a military department may provide that an officer under the jurisdiction of the Secretary may, upon the officer's request and with the approval of the Secretary, be excluded from consideration by a selection board convened under section 611(a) of this title to consider officers for promotion to the next higher grade.

(2) The Secretary concerned may only approve a request under paragraph (1) if-

(A) the basis for the request is to allow an officer to complete a broadening assignment, advanced education, another assignment of significant value to the Department, or a career progression requirement delayed by the assignment or education;

(B) the Secretary determines the exclusion from consideration is in the best interest of the military department concerned; and

(C) the officer has not previously failed of selection for promotion ~~to the grade for which the officer requests the exclusion from consideration~~ to the next higher grade for the second time.

1 **SEC. ____ . DEPARTMENT OF DEFENSE FEDERALLY FUNDED RESEARCH AND**
2 **DEVELOPMENT CENTER FACILITY MODERNIZATION FUND.**

3 (a) IN GENERAL.—Subchapter III¹ of chapter 303 of title 10, United States Code, is
4 amended by adding at the end the following new section:

5 **“§ 4127. Department of Defense Federally Funded Research and Development Center**
6 **Facility Modernization Fund**

7 “(a) ESTABLISHMENT.—The Secretary of Defense shall establish a fund in the Treasury of
8 the United States to be known as the ‘Department of Defense Federally Funded Research and
9 Development Center Facility Modernization Fund’ (hereafter in this section referred to as the
10 ‘Fund’). The Fund shall consist of—

11 “(1) proceeds from fees assessed against orders placed under subsection (b); and

12 “(2) amounts appropriated or otherwise made available to the Fund by law.

13 “(b) FEE.—The Secretary of a military department may impose a fee, subject to approval
14 by the Secretary of Defense, not to exceed 5 percent, on any order placed by a Federal
15 Government entity with a nonprofit federally funded research and development center that
16 conducts ongoing operations on a military installation in facilities provided by or leased from the
17 Department of Defense. All such fees shall be deposited into the Fund.

18 “(c) AVAILABILITY AND USE OF FUNDS.—Amounts deposited into the Fund shall be
19 available for their original period of availability to undertake military construction projects
20 authorized by sections 2805 or 2811 of this title for facilities on a military installation that are or
21 will be used by a nonprofit federally funded research and development center operating on a

¹Subchapter III of chapter 303 of title 10, United States Code, was revised by section 1843(b)(1) of the FY2021 NDAA (Public Law 116–283), as amended by 1701(u)(4)(A) of the FY22 NDAA (Public Law 117–81).

22 military installation. The total amount of funds within the Fund shall not exceed \$750,000,000 at
23 the end any fiscal year.

24 “(d) REPORTING.—The Secretary of Defense shall submit to Congress, before December
25 31 each year, a report that sets forth the balance of the Fund at the end of the preceding fiscal
26 year; a statement of all deposits into and expenditures from the Fund; and a description,
27 estimated cost, and estimated start date of any anticipated projects planned to be financed from
28 the Fund in the subsequent fiscal year.

29 “(e) TERMINATION OF AUTHORITY.—The Secretary concerned may not enter into a
30 contract for a project using the Fund after December 31, 2031.”.

31 (b) CLERICAL AMENDMENT.—The table of sections at the beginning of such chapter is
32 amended by inserting after the item relating to section 4126 the following new item:

“4127. Department of Defense Federally Funded Research and Development Center Facility Modernization
Fund.”.

**[Please note: The “Changes to Existing Law” section below sets out in red-line format how
the legislative text would amend existing law.]**

Section-by-Section Analysis

The proposed legislation establishes a means to accomplish the necessary modernization, construction, repair, or expansion of Department of Defense facilities in use or to be used by a nonprofit federally funded research and development center (FFRDC) on a military installation. The proposal allows the Secretary concerned to collect from each Federal FFRDC customer its fair share of infrastructure costs, retain those funds, and use them for authorized facility projects. Specifically, the proposal (1) establishes a Fund in the U.S. Treasury; (2) authorizes the Secretary concerned, subject to the approval of the Secretary of Defense, to collect and deposit into that Fund a fee of up to 5 percent on each order placed by Federal customers of the FFRDC; (3) makes those collections available for their original period of availability for the purpose of repair, sustainment, construction, or expansion of facilities to be used by a nonprofit FFRDC operating on a military installation; (4) authorizes such military construction projects; and (5) requires the Secretary concerned to notify the defense committees of project(s) before obligating funds. Importantly, the funds remain in the U.S. Treasury, subject to both Congressional and Departmental oversight and control.

There is currently a gap in funding for modernizing and constructing facilities that, while located on a military installation, are used exclusively or predominantly by a nonprofit FFRDC

for research and development (R&D) performed for the Government. Most FFRDCs own their own real property and bear the cost of constructing, maintaining, and repairing necessary facilities directly. Those costs are recovered through the FFRDC contract subject to OMB accounting principles in Title 2 CFR Part 200. However, there is currently at least one FFRDC whose facilities are owned by a military service and are provided as Government Furnished Property for the FFRDC's use conducting R&D for agencies and departments across the Federal Government.

This proposed legislation authorizes the Secretary concerned, subject to the approval of the Secretary of Defense, to collect a "fair share" proportional fee from orders placed across the Federal Government, to deposit the fee in a Fund and to use this Fund to modernize or construct new FFRDC facilities. In the absence of this authority, the military service that owns the government property provided to the FFRDC inappropriately and disproportionately bears the entire cost of modernizing and constructing necessary facilities for the FFRDC, although all FFRDC customers benefit from those facilities.

The proposed legislation addresses these issues by putting the cost of proper facilities on the Federal customers for whom the FFRDC performs research. It enables the cost to be borne by those customers through the mechanism of a fee collected from the Federal customers and set aside in an internal Treasury account dedicated specifically to providing ongoing facility construction and modernization funding to FFRDCs located on a military installation. The funds remain within the Government's control, and the Department of Defense is required to apprise Congress of how those funds are being used.

This authority is expected to be used initially to accomplish badly needed facility modernization at Hanscom AFB, MA for the Massachusetts Institute of Technology Lincoln Laboratories (MIT-LL) FFRDC, to ensure MIT-LL can continue to perform the cutting-edge R&D on which multiple DoD and other Federal agencies rely. At present, MIT-LL is using numerous buildings that were provided at its inception in 1951. They were not structurally designed and built as laboratories and increasingly fall short of providing a safe and effective environment conducive to modern-day research. More modern and purpose-built R&D facilities are needed to enable MIT-LL to continue to perform the advanced research, technology development, and "end-to-end" prototyping that DoD and other Federal agencies require. Air Force program officials estimate that modernization of MIT-LL facilities will encompass executing approximately 15 construction projects, costing approximately \$1.5 billion.

The MIT-LL FFRDC Primary Sponsor, USD(R&E), recognizes this need for more modern and purpose-built R&D facilities, as does the DoD Joint Advisory Committee that oversees MIT-LL's research program, comprised of DDRE (R&T) (Chair), Service Acquisition Executives, and the Directors of MDA, DARPA, and NRO. Other than two projects currently being undertaken with Military Construction appropriated funds, no modernization or new construction has been undertaken pending enactment of this authority. Once obtained, the Secretary concerned, subject to the approval of the Secretary of Defense, will develop the facility and funding approval processes as well as the processes needed for Congressional notification and reporting.

Both the House and Senate Armed Services committees have “recognize[d] the critical role that Lincoln Laboratory plays in conducting research and developing technologies that address critical national security challenges;” acknowledge “that the military construction program may not be able to support such a large investment due to competing Air Force infrastructure priorities;” and have “direct[ed] the Secretary of the Air Force, not later than November 1, 2019, to provide a briefing to the committee[s] on funding and authorities under consideration to support the long-term modernization plan for Lincoln Laboratory. The briefing should include a discussion on legislative proposals under consideration that could provide a viable path to support the long-term modernization plan, including the benefits of and equities related to all Lincoln Laboratory contract users paying a fair share of facility sustainment, recapitalization, and construction costs.”

The Air Force has analyzed the various existing legal authorities that could potentially contribute to solving this problem, and has concluded that none of them fully addresses the issue in a way satisfactory to both the Government and MIT-LL. This legislative proposal presents an approach suitable for both parties – providing the FFRDC a means to ensure its facilities continue to support its cutting edge research today and into the future while providing the Government a means by which the cost of those facilities is transparent and shared by all Federal customers and by which the funds remain within its control.

Resource Information: Because this legislation is expected to be used over the FYDP only in connection with facilities used by MIT-LL, the table below is limited to the implications arising from that usage. The primary Air Force budgetary implication is a cost savings, with costs that would have been funded with Air Force Military Construction (MILCON) funds shifted to the FFRDC’s Federal customers. This is consistent with the House and Senate Armed Service’s committees’ request for a legislative proposal “that could provide a viable path to support the long-term modernization plan, including the benefits of and equities related to all Lincoln Laboratory contract users paying a fair share of facility sustainment, recapitalization, and construction costs.” For PAYGO purposes, the proposed legislation is budget neutral in that it provides for both (1) the collection of specific funds within amounts appropriated to Federal customer agencies and (2) the use of those collected funds for FFRDC facility construction and modernization.

The chart below has been completed using notional figures to demonstrate the budgetary effect. Approximately 28 percent of MIT-LL’s current workload comes from the Air Force. Based on information from the 2019 JAC meeting, approximately 61 percent of the workload comes from other DoD entities, and approximately 11 percent comes from non-DoD Federal customers. Work attributable to non-Federal customers is a negligible part of MIT-LL’s contract workload.

Currently, it is expected that the first project undertaken in this facilities modernization effort will cost approximately \$100M with another subsequent 14 projects totaling \$1.4 billion needed to complete modernization of MIT-LL facilities over an execution period which may stretch to two decades

With this first project, AF would not have to provide \$100M in MILCON. Instead, the funds for the project would come from an equitable spread of the cost across all Federal MIT-LL

customers, including AF. AF pays MIT-LL with RDT&E funds, so this amount would come from AF’s RDT&E appropriation. To the best of our knowledge, other DoD entities also pay MIT-LL with RDT&E funds; however, it is not currently possible to identify all the different Program Elements that would come into play, or the relevant amounts. Finally, it is unclear what funds are used by MIT-LL’s other Federal customers.

Given these parameters, the notional figures are as follows:

RESOURCE REQUIREMENTS (\$MILLIONS)									
	FY 2023	FY 2024	FY 2025	FY 2026	FY 2027	Appropriation From	Budget Activity	Dash-1 Line Item	Program Element
					(\$100M)	Military Construction, Air Force			
	\$5.6M	\$5.6M	\$5.6M	\$5.6M	\$5.6M	Research, Development, Test, and Evaluation, Air Force			
	\$12.2M	\$12.2M	\$12.2M	\$12.2M	\$12.2M	Research, Development, Test, and Evaluation, Other Department of Defense			
	\$2.2M	\$2.2M	\$2.2M	\$2.2M	\$2.2M	Other Federal customers			
Total	\$20M	\$20M	\$20M	\$20M	\$20M				
Cum Total	\$20M	\$40M	\$60M	\$80M	\$0M				

Changes to Existing Law: This proposal would add a new section to subchapter III of chapter 303 of title 10, United States Code, as set forth in the legislative text above.

1 **SEC. __. EXPANSION OF LEGAL ASSISTANCE ELIGIBILITY.**

2 Section 1044(a) of title 10, United States Code, is amended—

3 (1) by inserting “or non-criminal inquiries and investigations associated with their
4 official duties” after “their personal civil legal affairs”; and

5 (2) by adding at the end the following new paragraphs:

6 “(8) Former civilian employees of the Federal Government, except that the
7 eligibility of such individuals shall be limited to matters within the scope of their official
8 duties while employed by the Federal Government and shall be determined pursuant to
9 regulations prescribed by the Secretary concerned.

10 “(9) Victims of domestic violence when a member or a former member described
11 in paragraph (1), (2), (3), or (4) is the alleged perpetrator, except that the eligibility of
12 such victims shall be determined pursuant to regulations prescribed by the Secretary
13 concerned.”.

[Please note: The “Changes to Existing Law” section below sets out in red-line format how the legislative text would amend existing law.]

Section-by-Section Analysis

This proposal would amend section 1044 of title 10, United States Code (U.S.C.), to expand eligibility to two new categories of clients who are not currently authorized by statute to receive services from the military legal assistance program. The first category consists of victims of domestic violence, subject to eligibility determinations prescribed by the Secretary concerned. Domestic violence victims, as defined by section. 928b of title 10, U.S.C. (article 128b of the Uniform Code of Military Justice (UCMJ)), include spouses, intimate partners, and immediate family members. The intent of this change would be to expand eligibility to those categories of victims.¹ The second category consists of former civilian employees of the Federal Government who are potential subjects, respondents, or witnesses in investigations relating to their former

¹ Article 128b of the UCMJ defines victims of domestic violence as a spouse, an intimate partner, or an immediate family member of the alleged offender. The intent would be to use Article 128b as the basis for each Secretary concerned to promulgate regulations establishing eligibility for legal assistance services subject to the capabilities and resources of each service.

official duties.² Both categories are deserving categories of clients who would benefit from military legal assistance.

For the domestic violence eligibility, only dependents of service members are currently eligible for legal assistance; eligibility is not conferred based on victim-status. Intimate partners and other immediate family members may also be victims of domestic violence at the hands of a service member, but are not automatically eligible for legal assistance under the existing statutory structure. Legal assistance can provide significant support to victims of domestic violence and when the service member is the alleged perpetrator, there is a public interest in providing all possible support and resources. Expanding eligibility to all victims of domestic violence regardless of dependency status will ensure that individuals who need legal advocacy and counseling have access to it. In enacting section 548 of the National Defense Authorization Act for Fiscal year 2020 (Public Law 116-92; 10 U.S.C. 1044 note), Congress intended to assist victims of domestic violence, independent of whether or not the victim is a dependent of a service member. If expanded eligibility to victims of domestic violence is not adopted, it maintains a disparity between the level of services we provide to dependents and other victims of domestic violence. All domestic violence victims, as defined by the UCMJ, are deserving of the advocacy that legal assistance professionals can provide, including those services that may be necessary to safely separate from a dangerous partner or seek appropriate military protective orders.

Similarly, as written, section 1044 authorizes legal assistance eligibility for certain civilian employees of the Federal Government, but does not include former civilian employees, even when they may still be called to participate in investigations that pertain to their former official duties. Without this provision, these employees would have to retain private counsel at their personal expense to address legal matters associated with their prior employment, especially when it is in the interest of the military department concerned to facilitate their participation in appropriate investigations or inquiries. Lack of representation for these former civilian employees could materially impact their willingness to fully participate in the investigative process. By way of recent example, the former Secretary of the Army was identified as a witness in an investigation relating to official actions he took while serving as the Secretary of the Army. However, despite the significance of the issue to the Army and the importance of his testimony, he was not eligible for legal assistance services under current law. Expansion to include certain former civilians participating in investigations related to their former official duties would ensure these employees have access to legal support and may eliminate barriers to their continued participation in investigatory efforts.³

Resource Information: This proposal has no significant impact on the use of resources. Resources affected by this proposal are incidental in nature and amount and are included within the Fiscal Year (FY) 2023 President's Budget request.

² The Army intends to limit the scope of eligibility to only those situations involving former civilian employees of the Federal Government where there is a clear nexus between the activities of the former employee and the matter at issue and where it is clearly in the interest of the Army to provide such legal assistance.

³ This proposal would not afford legal assistance services to individuals who are pending a criminal investigation related to their former official duties or otherwise.

Changes to Existing Law: This proposal would make the following changes to section 1044 of title 10, United States Code:

§1044. Legal assistance

(a) Subject to the availability of legal staff resources, the Secretary concerned may provide legal assistance in connection with their personal civil legal affairs or non-criminal inquiries and investigations associated with their official duties to the following persons:

(1) Members of the armed forces who are on active duty.

(2) Members and former members entitled to retired or retainer pay or equivalent pay.

(3) Officers of the commissioned corps of the Public Health Service who are on active duty or entitled to retired or equivalent pay.

(4) Members of reserve components not covered by paragraph (1) or (2) following release from active duty under a call or order to active duty for more than 30 days issued under a mobilization authority (as determined by the Secretary), for a period of time (prescribed by the Secretary) that begins on the date of the release and is not less than twice the length of the period served on active duty under that call or order to active duty.

(5) Dependents of members and former members described in paragraphs (1), (2), (3), and (4).

(6) Survivors of a deceased member or former member described in paragraphs (1), (2), (3), and (4) who were dependents of the member or former member at the time of the death of the member or former member, except that the eligibility of such survivors shall be determined pursuant to regulations prescribed by the Secretary concerned.

(7) Civilian employees of the Federal Government serving in locations where legal assistance from non-military legal assistance providers is not reasonably available, except that the eligibility of civilian employees shall be determined pursuant to regulations prescribed by the Secretary concerned.

(8) Former civilian employees of the Federal Government, except that the eligibility of such individuals shall be limited to matters within the scope of their official duties while employed by the Federal Government and shall be determined pursuant to regulations prescribed by the Secretary concerned.

(9) Victims of domestic violence when a member or a former member described in paragraph (1), (2), (3), or (4) is the alleged perpetrator, except that the eligibility of such victims shall be determined pursuant to regulations prescribed by the Secretary concerned.

(b) Under such regulations as may be prescribed by the Secretary concerned, the Judge Advocate General (as defined in section 801(1) of this title) under the jurisdiction of the Secretary, and within the Marine Corps the Staff Judge Advocate to the Commandant of the Marine Corps, is responsible for the establishment and supervision of legal assistance programs under this section.

(c) This section does not authorize legal counsel to be provided to represent a member or former member of the uniformed services described in subsection (a), or the dependent of such a

member or former member, in a legal proceeding if the member or former member can afford legal fees for such representation without undue hardship.

(d)(1) Notwithstanding any law regarding the licensure of attorneys, a judge advocate or civilian attorney who is authorized to provide military legal assistance is authorized to provide that assistance in any jurisdiction, subject to such regulations as may be prescribed by the Secretary concerned.

(2) Military legal assistance may be provided only by a judge advocate or a civilian attorney who is a member of the bar of a Federal court or of the highest court of a State and, for purposes of service as a Special Victims' Counsel under section 1044e of this title, satisfies the additional qualifications and training requirements specified in subsection (d) of such section.

(3) In this subsection, the term “military legal assistance” includes-

(A) legal assistance provided under this section; and

(B) legal assistance contemplated by sections 1044a, 1044b, 1044c, 1044d, 1044e, 1565b(a)(1)(A), and 2894(b)(4) of this title.

(e) The Secretary concerned shall define “dependent” for the purposes of this section.

1 **SEC. ____. EXTENSION OF SPECIAL EMERGENCY PROCUREMENT AUTHORITY.**

2 Section 1903(a) of title 41, United States Code, is amended—

3 (1) by striking “or” at the end of paragraph (3);

4 (2) by striking the period at the end of paragraph (4) and inserting a semicolon;

5 and

6 (3) by adding at the end the following new paragraphs:

7 “(5) in support of a humanitarian or peacekeeping operation (as the term is
8 defined in section 3015(2)¹ of title 10); or

9 “(6) in support of a request from a combatant commander for purposes of
10 protecting the national security interests of the United States during directed operations
11 that fall below the level of armed conflict.”.

[Please note: The “Changes to Existing Law” section below sets out in red-line format how the legislative text would amend existing law.]

Section-by-Section Analysis

This proposal would amend section 1903(a) of title 41, United States Code, to extend the applicability of the special emergency procurement authorities (SEPA) to include humanitarian or peacekeeping operations as defined at section 3015(2)² of title 10, United States Code, and to include requests from a Combatant Commander (CCDR) to supporting Head(s) of the Contracting Activity (HCA) when necessary to protect national security interests.

Humanitarian or Peacekeeping Operations:

Extension of SEPA applicability is necessary to enhance the acquisition flexibility of the Department of Defense (DoD) and other agencies to expeditiously support humanitarian or peacekeeping operations. These operations generally involve spur-of-the-moment contracting support, often in austere environments. The authorities in section 1903 enable the rapid procurement of mission-critical, life-saving goods and services at the speed of need, and should include humanitarian or peacekeeping operations.

¹ Reference to section 3015(2) of title 10, United States Code, becomes effective as of January 1, 2022, pursuant to section 1801 of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021 (Public Law 116–283)). Previous to that date, the reference is to section 2302(8) of title 10.

² See footnote 1.

Currently SEPA's applicability is limited to the following operations: contingency operations, operations supporting emergencies or major disasters, international disaster assistance, and response from certain attacks. Humanitarian or peacekeeping operations (FAR 18.204) are the only two defined, emergency-type operations, outlined in Federal Acquisition Regulation (FAR) Part 18, Emergency Acquisitions, that are not under the SEPA umbrella.

Notably, the simplified acquisition threshold (SAT) for humanitarian or peacekeeping operations is \$500K (10 U.S.C. 153). This threshold is significantly lower than the SAT for other emergency-type operations, which is currently \$1.5M for contracts to be awarded and performed, or purchases to be made, outside the U.S. Furthermore, for humanitarian or peacekeeping operations, the micro-purchase threshold (MPT) is not authorized to be increased above the non-emergency threshold of \$10K. This is not the case for other emergency-type operations, where the MPT increases to \$35K for contracts to be awarded and performed, or purchases to be made, outside of the U.S. Aligning to the higher MPT associated with other emergency-type operations would enable the swift purchasing of items valued up to \$35K. This proposal would consolidate all emergency-type operations under the same special emergency procurement authority, thereby aligning the SAT and MPT thresholds to improve procurement efficiencies and significantly reduce confusion during execution.

If enacted, extension of the applicability in section 1903 would further streamline the contracting process when responding to humanitarian or peacekeeping operations, allowing for rapid acquisition support to those in critical need. A recent example where extended applicability of SEPA was needed was the DoD's humanitarian response to the aftermath of Hurricane Irma. The U.S. provided urgently needed relief supplies and lifesaving support in the form of transportation, logistics, and engineering services to affected areas in the Caribbean, including non-U.S. and outlying areas. The Department's response would have greatly benefitted from special emergency procurement authorities.

Finally, extending the applicability of SEPA to humanitarian or peacekeeping operations would further DoD's contribution to the interim National Security Strategic Guidance (March 3, 2021, <https://www.whitehouse.gov/briefing-room/statements-releases/2021/03/03/interim-national-security-strategic-guidance/>) by helping strengthen alliances and partnerships as a result of improved DoD response capabilities and reduced acquisition lead times.

Request from a Combatant Commander to Protect National Security Interests:

Extension of SEPA applicability is also necessary to respond to request(s) from a Combatant Commander to supporting Head(s) of the Contracting Activity to protect national security interests. Such authorities would enable the Department to procure and provide mission-critical commercial support capabilities during directed operations that fall below the level of armed conflict (i.e., without a declared contingency).

The relatively new competition continuum, which is defined in Joint Doctrine Note 1-19 (June 3, 2019; https://www.jcs.mil/Portals/36/Documents/Doctrine/jdn_jg/jdn1_19.pdf) and used in the SIPR version of the 2018 National Defense Strategy and the SIPR version of the 2020 Interim National Defense Strategy (documents available upon request), recognizes that

contemporary military operations occur in a world of enduring competition conducted through a mixture of cooperation, competition below armed conflict, and armed conflict.

Competition below armed conflict is a long-term approach that is “supple enough to react to rapid changes in the political, diplomatic, and strategic environment” and involves “gray zone” actions. While not defined in statute, gray zone actions are vital to national security interests and allow the Department to counter adversaries like Russia and China, which operate tirelessly in this space. Addressing competition/aggression through gray zone actions is an emerging deterrent that requires the same rapid reaction as other operations under the SEPA umbrella. Extension of the authorities in section 1903 will enable low-profile, rapid procurement of goods and services at the speed of need, which will enable the U.S. to compete effectively and deter aggressors.

The DoD uses gray zone actions like flexible deterrent options (FDOs, as defined in Joint Publication 3-0, Joint Operations, https://www.jcs.mil/Portals/36/Documents/Doctrine/pubs/jp3_0ch1.pdf; and Joint Publication 5-0, Joint Planning, https://www.jcs.mil/Portals/36/Documents/Doctrine/pubs/jp5_0.pdf) to keep aggressors at bay. The purpose of an FDO is to demonstrate agility of the force to deter adversary aggression. FDOs include pre-positioning of U.S. forces, should implementation of a contingency plan become necessary (e.g., rapid pre-positioning of air defenses, rapid movement of armored battalions, pre-positioning of amphibious readiness groups).

A recent example highlighting the need for extended applicability of SEPA occurred when the Secretary of Defense required an armored battalion to deploy forward in the Atlantic Resolve joint operations area to deter adversary aggression in the U.S. European Command (USEUCOM) area of responsibility. A commercial line-haul contract was required to rapidly move the armored battalion. Without SEPA, simplified acquisition procedures could not be used, and the contracting processes delayed execution of the FDO. Specifically, the contract took approximately 90 days to award instead of an estimated 10 days using SEPA. An extended SEPA would have enabled the Department to rapidly meet the Combatant Commander’s mission objective, without signaling our intent to move the armored battalion to our adversaries. Given the Department’s reliance on contracted commercial capabilities for military operations, extending SEPA to include requests from a Combatant Commander to the supporting Head(s) of the Contracting Activity would vastly improve the Department’s ability to compete below armed conflict.

Finally, the extended applicability of this authority for FDOs and other “gray zone” actions directly supports the National Security Strategy. If enacted, it would help restore America’s competitive edge by adding a tool in the deterrence of global rivals like Russia and China. Empowering the Department to quickly leverage commercial capabilities during competition is critical to achieving this goal.

Resource Information: This proposal has no significant impact on the use of resources. Resources affected by this proposal are incidental in nature and amount and are included within the Fiscal Year (FY) 2023 President’s Budget request.

Changes to Existing Law: This proposal would amend section 1903(a) of title 41, United States Code, as follows:

§1903. Special emergency procurement authority

(a) **APPLICABILITY.**—The authorities provided in subsections (b) and (c) apply with respect to a procurement of property or services by or for an executive agency that the head of the executive agency determines are to be used—

(1) in support of a contingency operation (as defined in section 101(a) of title 10);

(2) to facilitate the defense against or recovery from cyber, nuclear, biological, chemical, or radiological attack against the United States;

(3) in support of a request from the Secretary of State or the Administrator of the United States Agency for International Development to facilitate the provision of international disaster assistance pursuant to chapter 9 of part I of the Foreign Assistance Act of 1961 (22 U.S.C. 2292 et seq.); ~~or~~

(4) in support of an emergency or major disaster (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122));

(5) in support of a humanitarian or peacekeeping operation (as the term is defined in section 3015(2)) of title 10); or

(6) in support of a request from a combatant commander for purposes of protecting the national security interests of the United States during directed operations that fall below the level of armed conflict.

(b) **INCREASED THRESHOLDS AND LIMITATION.**—For a procurement to which this section applies under subsection (a)—

(1) the amount specified in section 1902(a), (d), and (e) of this title shall be deemed to be-

(A) \$15,000 in the case of a contract to be awarded and performed, or purchase to be made, in the United States; and

(B) \$25,000 in the case of a contract to be awarded and performed, or purchase to be made, outside the United States;

(2) the term “simplified acquisition threshold” means-

(A) \$750,000 in the case of a contract to be awarded and performed, or purchase to be made, in the United States; and

(B) \$1,500,000 in the case of a contract to be awarded and performed, or purchase to be made, outside the United States; and

(3) the \$5,000,000 limitation in sections 1901(a)(2) and 3305(a)(2) of this title and section 2304(g)(1)(B) of title 10 is deemed to be \$10,000,000.

(c) **AUTHORITY TO TREAT PROPERTY OR SERVICE AS COMMERCIAL ITEM.**—

(1) **In general.**—The head of an executive agency carrying out a procurement of property or a service to which this section applies under subsection (a)(2) may treat the

property or service as a commercial item for the purpose of carrying out the procurement.

(2) Certain contracts not exempt from standards or requirements.—A contract in an amount of more than \$15,000,000 that is awarded on a sole source basis for an item or service treated as a commercial item under paragraph (1) is not exempt from—

- (A) cost accounting standards prescribed under section 1502 of this title; or
- (B) cost or pricing data requirements (commonly referred to as truth in negotiating) under chapter 35 of this title and section 2306a of title 10.

1 **SEC. ____ . IMPLEMENTATION OF ARRANGEMENTS TO BUILD TRANSPARENCY,**
2 **CONFIDENCE, AND SECURITY.**

3 Section 2241(a) of title 10, United States Code, is amended by adding at the end the
4 following new paragraph:

5 “(8) Travel, transportation, and subsistence expenses for meetings and
6 demonstrations hosted by the Department of Defense for the implementation of the
7 Vienna Document 2011 on Confidence- and Security-Building Measures (or any
8 successor arrangement).”.

[Please note: The “Changes to Existing Law” section below sets out in red-line format how the legislative text would amend existing law.]

Section-by-Section Analysis

The Vienna Document, a politically important commitment to building transparency, confidence, and security, requires that “[t]he State arranging the event [e.g., air base/military facility visit, weapons demonstration] will cover travel arrangements and expenses from the place of assembly and to the place of departure – possibly the same as the place of assembly – as well as appropriate civil or military board and lodging in a location suitable for carrying out the event.”

Section 1345 of title 31, United States Code, prevents the execution of budgeted funds for travel, board, and lodging expenses of non-U.S. Government personnel and expenditures required by the Vienna Document. The Vienna Document, as a political commitment, does not override the constraint of section 1345.

This proposal would authorize combatant commands and military department to use operation and maintenance (O&M) funding that is already budgeted annually in budgets for arms control and for building transparency, confidence, and security. This proposal seeks to provide a legal basis for the Department of Defense to continue implementation of the Vienna Document. There is no additional budget impact for this proposal, as the money is already budgeted each year in the O&M funding for the combatant commands and the military departments for arms control implementation. This proposal would improve Department of Defense business practices for greater performance and efficiency.

Hosting required Vienna Document events supports the National Defense Strategy and the National Military Strategy, demonstrates U.S. leadership and commitment that deters competitors and assures allies, and is a collateral requirement to sustaining the requisite lethal force posture in Europe (e.g., deploying new weapons systems to Europe triggers Vienna

Document requirement to host a weapons demonstration). Other countries reciprocally pay for U.S. personnel when they host events.

If the United States does not implement the portions of the Vienna Document that contemplate payment for foreign nationals’ expenses, we will be out of compliance with our political commitments and subject to political consequences within the Organization for Security and Cooperation in Europe (OSCE), a 57-country international organization that includes the Russian Federation and all NATO allies. Furthermore, failing to host required Vienna Document events cedes to Russia the strategic narrative over the deterioration of European security and arms control, in light of U.S. withdrawals from the Intermediate-range Forces Treaty (INF) and Open Skies Treaty, New START negotiations, and tripartite arms control efforts.

Resource Information: The resources required are reflected in the table below and are included within the Fiscal Year (FY) 2023 President’s Budget.

RESOURCE IMPACT (\$MILLIONS)									
Program	FY 2023	FY 2024	FY 2025	FY 2026	FY 2027	Appropriation	Budget Activity	BLI/SAG	Program Element (for all RDT&E programs)
Vienna Document events	0.1	0.1	0.1	0.1	0.1	Operation & Maintenance, Army (base)	Op. Forces BA-01	Various	
Vienna Document events	0.0	0.0	0.1	0.0	0.0	Operation & Maintenance, Air Force (base)	Mission Support	Various	
Total	0.1	0.1	0.2	0.1	0.1				

Changes to Existing Law: This proposal would amend section 2241 of title 10, United States Code, as follows:

§ 2241. Availability of appropriations for certain purposes

(a) OPERATION AND MAINTENANCE APPROPRIATIONS.—Amounts appropriated to the Department of Defense for operation and maintenance of the active forces may be used for the following purposes:

- (1) Morale, welfare, and recreation.
- (2) Modification of personal property.
- (3) Design of vessels.
- (4) Industrial mobilization.
- (5) Military communications facilities on merchant vessels.
- (6) Acquisition of services, special clothing, supplies, and equipment.
- (7) Expenses for the Reserve Officers' Training Corps and other units at educational institutions.

(8) Travel, transportation, and subsistence expenses for meetings and demonstrations hosted by the Department of Defense for the implementation of the Vienna Document 2011 on Confidence- and Security-Building Measures (or any successor arrangement).

(b) NECESSARY EXPENSES.—Amounts appropriated to the Department of Defense may be used for all necessary expenses, at the seat of the Government or elsewhere, in connection with communication and other services and supplies that may be necessary for the national defense.

(c) ACTIVITIES OF THE NATIONAL COMMITTEE FOR EMPLOYER SUPPORT OF THE GUARD AND RESERVE.—Amounts appropriated for operation and maintenance may, under regulations prescribed by the Secretary of Defense, be used by the Secretary for official reception, representation, and advertising activities and materials of the National Committee for Employer Support of the Guard and Reserve to further employer commitments to their employees who are members of a reserve component.

1 **SEC. ____ . PERMANENT AUTHORITY FOR NONCOMPETITIVE APPOINTMENTS**
2 **OF MILITARY SPOUSES BY FEDERAL AGENCIES.**

3 (a) REPEAL OF SUNSET PROVISION.—Section 573(e) of the John S. McCain National
4 Defense Authorization Act for Fiscal Year 2019 (Public Law 115–232; 5 U.S.C. 3330d note) is
5 repealed.

6 (b) EFFECTIVE DATE.—The repeal made by subsection (a) shall be deemed to take effect
7 on the earlier of August 12, 2023, or the date of the enactment of this Act.

**[Please note: The “Changes to Existing Law” section below sets out in red-line format how
the legislative text would amend existing law.]**

Section-by-Section Analysis

This proposal would remove the sunset date in section 573 of the John S. McCain National Defense Authorization Act for Fiscal Year (FY) 2019, which temporarily amended section 3330d of title 5, United States Code (U.S.C.), to authorize Federal agencies to noncompetitively appoint spouses of active duty Service members regardless of whether the spouse is geographically relocating due to the Service member receiving military reassignment orders. When this temporary amendment expires on August 13, 2023, the prior provisions of section 3330d of title 5, U.S.C., which limited such appointments to relocating spouses and imposed geographic and other restrictions on use of the authority, will be restored or revived as if section 573 had not been enacted. Removing the sunset date would make the authority provided by section 573 permanent.

A permanent authority to noncompetitively appoint spouses of active duty Service members supports military retention efforts. This authority not only increases the number of military spouses eligible for such appointments, it also allows relocating spouses to apply for vacancies in advance of the Service member receiving orders for an anticipated move and assists spouses of active duty Service members who are deployed or serving on an unaccompanied tour overseas to seek federal employment during the separation. Importantly, the authority assists military spouses to pursue not just a job, but a career with the Federal government, while supporting the career of the Service member. Finally, it streamlines the evaluation criteria used by human resources officials to establish eligibility to use this noncompetitive appointing authority, making it more easily used by Federal agencies to support military spouse employment consistent with Executive Order 13832, “Enhancing Noncompetitive Civil Service Appointments of Military Spouses,” May 9, 2018. Although DoD is unaware of the extent of its use by other agencies, the hiring authority is frequently used in DoD to quickly bring talented military spouses into vacant positions. In FY 2021, the Department of Defense (DoD) used this authority to hire 2,364 military spouses. In the first half of FY 2022, DoD has used this authority to hire

1,047 military spouses and expects this number to significantly increase when large numbers of military personnel relocate during the summer.

Resource Information: This proposal has no significant impact on the use of resources.

Changes to Existing Law: This proposal would amend section 573 of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (Public Law 115–232; 5 U.S.C. 3330d note) as follows:

SEC. 573. TEMPORARY EXPANSION OF AUTHORITY FOR NONCOMPETITIVE APPOINTMENTS OF MILITARY SPOUSES BY FEDERAL AGENCIES.

(a) EXPANSION TO INCLUDE ALL SPOUSES OF MEMBERS OF THE ARMED FORCES ON ACTIVE DUTY.—Section 3330d of title 5, United States Code, is amended—

(1) in subsection (a)—

(A) by striking paragraphs (3), (4), and (5); and

(B) by redesignating paragraph (6) as paragraph (3);

(2) by striking subsections (b) and (c) and inserting the following new subsection

(b):

“(b) APPOINTMENT AUTHORITY.—The head of an agency may appoint noncompetitively—

“(1) a spouse of a member of the Armed Forces on active duty; or

“(2) a spouse of a disabled or deceased member of the Armed Forces.”;

(3) by redesignating subsection (d) as subsection (c); and

(4) in subsection (c), as so redesignated, by striking “subsection (a)(6)” in paragraph (1) and inserting “subsection (a)(3)”.

(b) Clerical Amendment.—The table of sections at the beginning of chapter 33 of such title is amended by striking the item relating to section 3330d and inserting the following new item:

“3330d. Appointment of military spouses.”.

(c) HEADING AMENDMENT.—The heading of such section is amended to read as follows:

1 **“§ 3330d. Appointment of military spouses”.**

(d) OPM LIMITATION AND REPORTS.—

(1) RELOCATING SPOUSES.—With respect to the noncompetitive appointment of a relocating spouse of a member of the Armed Forces under subsection (b)(1) of section 3330d of title 5, United States Code, as amended by subsection (a), the Director of the Office of Personnel Management—

(A) shall monitor the number of such appointments;

(B) shall require the head of each agency with authority to make such appointments under such section to submit an annual report to the Director on such appointments, including information on the number of individuals so appointed, the types of positions filled, and the effectiveness of the authority for such appointments; and

(C) not later than 18 months after the date of the enactment of this Act, shall submit a report to the Committee on Oversight and Government Reform of the House of Representatives and the Committee on Homeland Security and Government Affairs of the Senate on the use and effectiveness of such authority.

(2) NON-RELOCATING SPOUSES.—With respect to the noncompetitive appointment of a spouse of a member of the Armed Forces other than a relocating spouse described in paragraph (1), the Director of the Office of Personnel Management—

(A) shall treat the spouse as a relocating spouse under paragraph (1); and

(B) may limit the number of such appointments.

~~(e) SUNSET.—Effective on the date that is 5 years after the date of the enactment of this Act—~~

~~(1) the authority provided by this section, and the amendments made by this section, shall expire; and~~

~~(2) the provisions of section 3330d of title 5, United States Code, amended or repealed by such section are restored or revived as if such section had not been enacted.~~

1 **SEC. ___. EXTENSION OF AUTHORITY TO PROVIDE SUPPORT TO CERTAIN**
 2 **GOVERNMENTS FOR BORDER SECURITY OPERATIONS.**

3 Section 1226(h) of the National Defense Authorization Act for Fiscal Year 2016 (22
 4 U.S.C. 2151 note) is amended by striking “December 31, 2023” and inserting “December 31,
 5 2024”.

[Note: The “Changes to Existing Law” section below sets out in red-line format how the legislative text above would amend existing law.]

Section-by-Section Analysis

This proposal would extend the authority to provide support on a reimbursement basis for certain border security operations until December 31, 2024.

Resource Information: The resources impacted by this proposal are reflected in the table below and are included within the Fiscal Year (FY) 2023 President’s Budget.

RESOURCE IMPACT (\$MILLIONS)									
	FY 2023	FY 2024	FY 2025	FY 2026	FY 2027	Appropriation From	Budget Activity	Dash-1 Line Item	Program Element
Border Security	\$520					0100 (Operations and Maintenance, Defense Wide)	04	4GTD	
Total	\$520								

Changes to Existing Law: This proposal would make the following changes to section 1226 of the National Defense Authorization Act for Fiscal Year 2016 (22 U.S.C. 2151 note):

SEC. 1226. SUPPORT TO CERTAIN GOVERNMENTS FOR BORDER SECURITY OPERATIONS.

(a) **AUTHORITY TO PROVIDE SUPPORT.**—

(1) **IN GENERAL.**—The Secretary of Defense, with the concurrence of the Secretary of State, is authorized to provide support on a reimbursement basis as follows:

(A) To the Government of Jordan for purposes of supporting and enhancing efforts of the armed forces of Jordan to increase security and sustain increased security along the border of Jordan with Syria and Iraq.

(B) To the Government of Lebanon for purposes of supporting and enhancing efforts of the armed forces of Lebanon to increase security and sustain increased security along the border of Lebanon with Syria.

(C) To the Government of Egypt for purposes of supporting and enhancing efforts of the armed forces of Egypt to increase security and sustain increased security along the border of Egypt with Libya.

(D) To the Government of Tunisia for purposes of supporting and enhancing efforts of the armed forces of Tunisia to increase security and sustain increased security along the border of Tunisia with Libya.

(E) To the Government of Oman for purposes of supporting and enhancing efforts of the armed forces of Oman to increase security and sustain increased security along the border of Oman with Yemen.

(F) To the Government of Pakistan for purposes of supporting and enhancing efforts of the armed forces of Pakistan to increase security and sustain increased security along the border of Pakistan with Afghanistan.

(2) FREQUENCY.—Support may be provided under this subsection on a quarterly basis.

* * * * *

(h) EXPIRATION OF AUTHORITY.—No support may be provided under the authority of subsection (a) after ~~December 31, 2023~~ December 31, 2024.

1 **SEC. __. UPDATING INDEMNIFICATION OF TRANSFEREES OF CLOSING**
2 **DEFENSE PROPERTY.**

3 (a) IN GENERAL.—Section 330 of the National Defense Authorization Act for Fiscal Year
4 1993 (10 U.S.C. 2687 note) is amended—

5 (1) in subsection (a)—

6 (A) by striking paragraph (1) and inserting the following new paragraph:

7 “(1) Except as provided in paragraph (3) and subject to subsection (b), the Secretary of
8 Defense shall hold harmless and indemnify in full the persons and entities described in paragraph
9 (2) from any suit, liability, or judgment arising out of any claim for personal injury or property
10 damage (including death, illness, or loss of or damage to property) that results from the release of
11 any hazardous substance or pollutant or contaminant as a result of Department of Defense
12 activities at any military installation (or portion thereof) that is closed pursuant to a base closure
13 law.”; and

14 (B) in paragraph (3), by striking “or threatened release”;

15 (2) in subsection (b)(4), by striking “defending or”;

16 (3) in subsection (c)(1)—

17 (A) by striking “payments to” and all that follows through “referred to in”
18 and inserting “payments under”; and

19 (B) by striking “or defend”; and

20 (4) in subsection (d)—

21 (A) by striking “or threatened release”; and

22 (B) by striking “or petroleum or petroleum derivative”.

1 (b) SOURCE OF FUNDS.—Subsection (c) of such section is further amended by adding at
2 the end the following new paragraph:

3 “(3)(A) The Secretary of Defense shall pay a claim settled by the Secretary under this
4 section—

5 “(i) for an amount of \$100,000 or less, from funds made available to the
6 Department of Defense; and

7 “(ii) for an amount in excess of \$100,000, from funds made available under
8 section 1304 of title 31, United States Code.

9 “(B) Notwithstanding any other provision of law, funds made available under section
10 1304 of title 31, United States Code, shall be available to pay claims in excess of \$100,000 that
11 are otherwise payable under this section.”.

12 (c) RELATIONSHIP TO FEDERAL CLEANUP LAW.—Subsection (e) of such section is
13 amended to read as follows:

14 “(e) RELATIONSHIP TO OTHER LAW.—Nothing in this section shall be construed as
15 affecting or modifying in any way any provision of the Comprehensive Environmental
16 Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601 et. seq.). Any claim for
17 environmental remediation or cleanup costs or natural resource damages may not be pursued
18 under this section.”.

**[Please note: The “Changes to Existing Law” section below sets out in red-line format how
the legislative text would amend existing law.]**

Section-by-Section Analysis

This proposal would update and clarify Section 330 of the National Defense Authorization Act for Fiscal Year 1993. Section 330 provides indemnification to eligible entities for personal injury or property damage claims resulting from identified past Department of Defense activities at military installations closed under the base closure law. This proposal

addresses four sources of confusion and administrative delays in implementing the statute: 1) the source of funding for indemnification under the statute; 2) the duty to defend requirement under the statute; 3) distinction between “personal injury and real property” claims under this statute and cleanup costs under a separate cleanup statute; and 4) the types of substances that trigger indemnification under the statute.

Funding of Section 330 Payments

This proposal provides a specific source of funding for Section 330 claim payments and establishes that DoD funds will be used to pay the first \$100,000 of a claim, with the Department of Treasury’s Judgment Fund available to pay amounts of claims that exceed this \$100,000 threshold. Section 330 and its legislative history are silent as to the source of funds appropriate to pay indemnity costs. In 2018, DoD issued regulations on the Section 330 administrative claim process at 32 CFR 175.1-.6, but those regulations are also silent on the source of funds to be used in paying claims. Despite not providing clarity on the appropriate source of funds, the 2018 regulations have created the perception among claimants that DoD funds are available to pay valid claims.

Given that DoD has certified that no DoD funds are available to settle claims brought pursuant to Section 330, those claims and judgments instead have been paid from the Department of Treasury’s Judgment Fund. The Judgment Fund is a permanent, indefinite appropriation that is generally available to pay amounts owed by the United States, under judgments, compromise settlements and certain administrative awards. 73 Comp. Gen. 46 (1993). Although use of the Judgment Fund in this manner is appropriate, the lack of clear statutory direction in dealing with Section 330 claims has resulted in confusion within DoD and DOJ, as well as by claimants, and it has resulted in delays in processing legitimate Section 330 claims. These delays have been in part due to the Judgment Fund’s general requirement of imminent litigation, which is not always present in the context of Section 330 claims, as a claimant may present a valid administrative claim to DoD without raising the threat of a lawsuit.

To clarify the appropriate funding source of Section 330 claims, DoD proposes to insert a new subsection (c)(3) into Section 330 that allows the use of DoD funds to settle meritorious Section 330 claims up to \$100,000 and clarifies that the Judgment Fund shall be available to pay Section 330 claim amounts that exceed that \$100,000 threshold. This language would adopt the funding allocation framework in 10 U.S.C. §2733, which established a similar structure for personal injury and property damage claims against DoD. Specifically, section 2733 authorizes the Secretaries of the Military Departments, as well as SECDEF, to “settle, and pay... an amount not more than \$100,000” for personal injury and property damage claims against the United States and to certify “meritorious amounts in excess of \$100,000” for payment by the Judgment Fund. Because that Section 2733 allocation structure has resulted in efficient management of those types of claims, DoD proposes that Congress adopt the same structure for Section 330 claims. The proposed funding allocation framework also is similar to that provided in the Federal Tort Claims Act, 28 U.S.C. §2672, which provides for funding of claims from agency appropriations or from the Judgement Fund, depending on the settlement amount.

Clarifying the duty to defend

Since its passage over twenty-five years ago, DoD has received occasional requests to “defend” a private party identified in subsection (a)(2). DoD, however, is not authorized to represent these private or State parties, as it lacks independent litigation authority.¹ The Department of Justice (DOJ) generally represents DoD in litigation, and it has been posited that Sec. 330’s duty to defend transfers to DOJ. But even if that interpretation is correct, DOJ has determined that it is unable to defend the enumerated entities in Section 330 due to inherent conflicts of interest. For these reasons, DoD is proposing to delete the duty to defend requirement from subsections (a)(1) and (b)(4) in Section 330, as it cannot be implemented practically. The duty to “hold harmless and indemnify in full” would remain in Section 330, and thus the deletion of the duty to defend would not result in a coverage gap where a legitimate Section 330 claimant would be at risk of not being made whole.

Clarifying the scope of Sec. 330 indemnity

This proposal also clarifies the scope of Section 330’s indemnity provisions, as several court cases have interpreted that provision in a manner that exceeds the plain meaning of the statute’s terms, that extends Section 330’s scope to the point where it becomes redundant to other federal laws, and that has created additional administrative burden on the Department. Those court cases have extended the scope of Section 330’s indemnification to include reimbursement for cleanup costs, even though the statutory language is limited to “any claim for personal injury or property damage.” Additionally, these cases unnecessarily created a redundant claim mechanism, allowing claimants to seek cleanup costs under Section 330, even when those costs already are compensable through the federal cleanup law, the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), which provides its own cost recovery process. Cases such as *Indian Harbor Ins. Co. v. U.S.*, 704 F.3d 949 (Fed. Cir. 2013), and *Richmond Am. Homes of Colo., Inc. v. U.S.*, 75 Fed. Cl. 376 (2007), allowed reimbursement for environmental cleanup costs under Section 330, by pointing to phrases such as “cost or other fee,” “economic loss,” “demand or action,” or “threatened release.” In addition to deleting these phrases to clarify the intent of Section 330 and remove redundancies with CERCLA, subsection (e) of section 330 will clarify that claims for environmental remediation or cleanup costs must be pursued under CERCLA and not under Section 330.

Consistency with CERCLA as to the scope of substances relevant to the indemnity provision

¹ President Clinton’s signing statement for the FY1993 NDAA contained a disclaimer concerning Section 330’s duty to defend under the law. See Presidential signing statement accompanying the 1993 National Defense Authorization Act, Public Law 102-484 (“I also note that section 330, under which the Secretary of Defense may ‘settle or defend’ certain claims, should not be understood to detract from the Attorney General’s plenary litigating authority. Accordingly, to the extent provided in current law, the Secretary of Defense will ‘settle or defend’ claims in litigation through attorneys provided by the Department of Justice.”). See also, 83 Fed. Reg. 34471, 34472 (July 20, 2018) (stating that, for litigation under section 330, “it is understood that the DoD will act through the [DOJ] when appearing before the courts”).

Finally, the proposal also deletes “or petroleum or petroleum derivative” in order to make the provision consistent with CERCLA.

Changes to Existing Law: This proposal would make the following changes to section 330 of the National Defense Authorization Act for Fiscal Year 1993 (10 U.S.C. 2687 note):

SEC. 330. INDEMNIFICATION OF TRANSFEREES OF CLOSING DEFENSE PROPERTY.

(a) IN GENERAL.—(1) Except as provided in paragraph (3) and subject to subsection (b), the Secretary of Defense shall hold harmless, ~~defend,~~ and indemnify in full the persons and entities described in paragraph (2) from ~~and against~~ any suit, ~~claim, demand or action,~~ liability, ~~or judgment, cost or other fee~~ arising out of any claim for personal injury or property damage (including death, illness, or loss of or damage to property ~~or economic loss~~) that results from, ~~or is in any manner predicated upon,~~ the release ~~or threatened release~~ of any hazardous substance or pollutant or contaminant, ~~or petroleum or petroleum derivative~~ as a result of Department of Defense activities at any military installation (or portion thereof) that is closed pursuant to a base closure law.

(2) The persons and entities described in this paragraph are the following:

(A) Any State (including any officer, agent, or employee of the State) that acquires ownership or control of any facility at a military installation (or any portion thereof) described in paragraph (1).

(B) Any political subdivision of a State (including any officer, agent, or employee of the State) that acquires such ownership or control.

(C) Any other person or entity that acquires such ownership or control.

(D) Any successor, assignee, transferee, lender, or lessee of a person or entity described in subparagraphs (A) through (C).

(3) To the extent the persons and entities described in paragraph (2) contributed to any such release ~~or threatened release~~, paragraph (1) shall not apply.

(b) CONDITIONS.—No indemnification may be afforded under this section unless the person or entity making a claim for indemnification—

(1) notifies the Department of Defense in writing within two years after such claim accrues or begins action within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the Department of Defense;

(2) furnishes to the Department of Defense copies of pertinent papers the entity receives;

(3) furnishes evidence or proof of any claim, loss, or damage covered by this section; and

(4) provides, upon request by the Department of Defense, access to the records and personnel of the entity for purposes of ~~defending or settling~~ the claim or action.

(c) AUTHORITY OF SECRETARY OF DEFENSE.—(1) In any case in which the Secretary of Defense determines that the Department of Defense may be required to make indemnification payments ~~to a person under this section for any suit, claim, demand or action, liability, judgment, cost or other fee arising out of any claim for personal injury or property damage~~

~~referred to in~~ under subsection (a)(1), the Secretary may settle ~~or defend~~, on behalf of that person, the claim for personal injury or property damage.

(2) In any case described in paragraph (1), if the person to whom the Department of Defense may be required to make indemnification payments does not allow the Secretary to settle ~~or defend~~ the claim, the person may not be afforded indemnification with respect to that claim under this section.

(3)(A) The Secretary of Defense shall pay a claim settled by the Secretary under this section—

(i) for an amount of \$100,000 or less, from funds made available to the Department of Defense; and

(ii) for an amount in excess of \$100,000, from funds made available under section 1304 of title 31, United States Code.

(B) Notwithstanding any other provision of law, funds made available under section 1304 of title 31, United States Code, shall be available to pay claims in excess of \$100,000 that are otherwise payable under this section.

(d) ACCRUAL OF ACTION.—For purposes of subsection (b)(1), the date on which a claim accrues is the date on which the plaintiff knew (or reasonably should have known) that the personal injury or property damage referred to in subsection (a) was caused or contributed to by the release ~~or threatened release~~ of a hazardous substance or pollutant or contaminant ~~or petroleum or petroleum derivative~~ as a result of Department of Defense activities at any military installation (or portion thereof) described in subsection (a)(1).

(e) RELATIONSHIP TO OTHER LAW.—Nothing in this section shall be construed as affecting or modifying in any way ~~section 120(h)~~ any provision of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. ~~9601 et. seq. 9620(h)~~). Any claim for environmental remediation or cleanup costs or natural resource damages may not be pursued under this section.

(f) DEFINITIONS.—In this section:

(1) The terms “facility”, “hazardous substance”, “release”, and “pollutant or contaminant” have the meanings given such terms under paragraphs (9), (14), (22), and (33) of section 101 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, respectively (42 U.S.C. 9601 (9), (14), (22), and (33)).

(2) The term “military installation” has the meaning given such term under section 2687(e)(1) of title 10, United States Code.

(3) The term “base closure law” means the following:

(A) The Defense Base Closure and Realignment Act of 1990 (10 U.S.C. 2687 note).

(B) Title II of the Defense Authorization Amendments and Base Closure and Realignment Act (10 U.S.C. 2687 note).

(C) Section 2687 of title 10, United States Code.

(D) Any provision of law authorizing the closure or realignment of a military installation enacted on or after the date of the enactment of this Act.

1 **SEC. ___. WAIVER OF COST-SHARING FOR THREE MENTAL HEALTH**
2 **OUTPATIENT VISITS.**

3 (a) TRICARE SELECT.—Section 1075(c) of title 10, United States Code, is amended by
4 adding at the end the following new paragraph:

5 “(4) Under requirements to be prescribed by the Secretary, cost-sharing may be
6 waived for the first three outpatient mental health visits of a covered beneficiary each
7 year. Such requirements shall be consistent with the other provisions of this chapter.”.

8 (b) TRICARE PRIME.—Section 1075a(a) of title 10, United States Code, is amended by
9 adding at the end the following new paragraph:

10 “(4) Under requirements to be prescribed by the Secretary, cost-sharing may be
11 waived for the first three outpatient mental health visits of a covered beneficiary each
12 year. Such requirements shall be consistent with the other provisions of this chapter.”.

Section-by-Section Analysis

This proposal would waive cost-sharing for up to three outpatient mental health visits for TRICARE beneficiaries each calendar year. As used in this proposal, the term “outpatient” refers to services provided by individual professional providers, i.e. non-institutional providers. The term “mental health visits” refer to sessions intended to diagnose a mental disorder or treat a primary diagnosis of mental disorder, according to the criteria listed in the current edition of the Diagnostic and Statistical Manual for Mental Disorders (DSM) or a mental health diagnosis in the International Classification of Diseases, 10th Revision, Clinical Modification, or subsequent issuances, including substance use disorder. Examples of outpatient mental health visits may include individual or group psychotherapy, psychological testing, administration of psychotropic drugs, and medication assisted treatment. Mental health visits must be with TRICARE-authorized providers and be otherwise covered under the TRICARE program in order to be eligible for waived cost-sharing under this proposal (e.g., unproven care is excluded).

Mental illness, especially untreated mental illness, is an enormous and costly issue in the United States. According to the Substance Abuse and Mental Health Services Administration (SAMHSA), 21 percent of adults in the United States experience mental illness (although not all are formally diagnosed), and 5.6 percent of adults experience serious mental illness. However, only 46.2 percent and 64.5 percent of adults with mental illness and serious mental illness

receive treatment.¹ Similarly, according to the National Survey of Children's Health, 16.5 percent of individuals ages six to seventeen experience mental illness, but only 50.6 percent of these individuals receive treatment.² Besides the direct costs of treating mental illnesses, the indirect cost of mental health and the cost of untreated or delayed mental health are massive. Serious mental illness is associated with nearly \$200 billion in lost earnings in 2008 dollars.³ Because this estimate does not include all mental illnesses or account for inflation through 2022, it is likely the current amount is much higher. A 2016 study also estimated that the costs of untreated depression and anxiety disorders alone result in \$148 billion in lost productivity across 10 high-income countries.⁴ However, this study also found that the net value of investing in adequate mental health treatment would result in benefit-cost ratio of 5.3 and 4.0 for depression and anxiety, respectively, including economic returns, cases averted, and disability-adjusted life-years averted. These costs do not include personal and social costs that are more difficult to quantify such as strained personal relationships, difficulties with school or work, and social well-being. Mental illnesses tend to be highly co-morbid with other mental illnesses and untreated mental illnesses are more likely to lead to serious mental illnesses. Mental health may also lead to non-mental health conditions, especially costly chronic diseases. Individuals with depression have a 40 percent higher risk of developing cardiovascular and metabolic diseases; those with serious mental illness are twice as likely to develop these diseases.⁵

Mental illness disproportionately affects Active Duty Service Members (ADSMs), Veterans, and their families. A 2014 study published in *JAMA Psychiatry* found that prevalence of DSM psychiatric disorders is four times higher in ADSMs than in civilian populations.⁶ Major depressive disorder is five times as high in ADSMs compared to civilians, intermittent explosive disorder is six times as high, and post-traumatic stress disorder (PTSD) is fifteen times as high. Moreover, in 2004, only 23-40 percent of ADSMs returning from deployment who met strict diagnostic criteria for any mental health condition received any type of mental health treatment in the past year.⁷ This percentage has increased despite recent mental health initiatives aimed towards ADSMs and their families. According to a 2020 Department of Defense Inspector General Report, 53 percent of ADSMs and their dependents whose primary care physicians identified as needing mental health care and who were subsequently referred to the private sector care system did not ultimately receive care.⁸ Likewise, according to the 2020 Blue Star Families Annual Report, 21 percent of Active Duty family members (ADFMs) reported that they would like to receive mental health care but do not receive such care.⁹ Children of deployed ADSMs are also more likely to experience increased maladaptive behaviors, as well as higher stress levels, higher anxiety, depressive symptoms, psychosocial issues, and self-reported

¹ <https://www.samhsa.gov/data/sites/default/files/reports/rpt35325/NSDUHFFRPDFWHTMLFiles2020/2020NSDUHFFR1PDFW102121.pdf>

² <https://jamanetwork.com/journals/jamapediatrics/fullarticle/2724377?guestAccessKey=f689aa19-31f1-481d-878a-6bf83844536a>

³ <https://pubmed.ncbi.nlm.nih.gov/18463104/>

⁴ [https://www.thelancet.com/journals/lanpsy/article/PIIS2215-0366\(16\)30024-4/fulltext](https://www.thelancet.com/journals/lanpsy/article/PIIS2215-0366(16)30024-4/fulltext)

⁵ <https://www.thelancet.com/commissions/physical-health-in-mental-illness>

⁶ <https://jamanetwork.com/journals/jamapsychiatry/fullarticle/1835338>

⁷ <https://pubmed.ncbi.nlm.nih.gov/25211433/>

⁸ https://media.defense.gov/2020/Aug/12/2002475605/-1/-1/1/DODIG-2020-112_REDACTED.PDF

⁹ https://bluestarfam.org/wp-content/uploads/2021/12/BSF_2020_AnnualReport.pdf

or professionally diagnosed mental illnesses.¹⁰ Lastly, spouses of ADSMs face higher rates of stress, anxiety, and depression,¹¹ and 29 percent of military wives ages 18 to 40 experienced mental illness within the past year of being surveyed (compared to nearly 20 percent of non-military wives in the same age range).¹²

The purpose of this proposal is to incentivize beneficiary initiation of mental health treatment. It is crucial to diagnose and treat mental illness as early as possible, due to the serious impact of mental illness on the well-being of patients and on the costs to society in general, as discussed above. Co-payments and cost-shares may represent a burden that prevent some beneficiaries from seeking medically necessary care. According to the Colorado Health Institute, over half of those surveyed who stated they need but do not receive mental health care cited the cost of treatment as their primary barrier to receiving treatment.¹³ The applicability of this survey to the TRICARE population is not known; cost-shares may represent a burden to beneficiaries but may be less of a burden than to the general U.S. population due to TRICARE’s relatively low out-of-pocket costs.

TRICARE SPECIALTY CARE OUTPATIENT VISIT COST-SHARES/COPAYMENTS				
TRICARE PRIME				
	ADFM		RETIREE	
	GROUP A	GROUP B	GROUP A	GROUP B
Specialty Care Outpatient Visits (CY 2018)	\$0	\$0	\$33	\$33
TRICARE SELECT COST				
	ADFM		RETIREE	
	GROUP A	GROUP B	GROUP A	GROUP B
Specialty Care Visits (CY 2018), In-Network	\$38	\$28	\$50	\$44
Specialty Care Visits (CY 2018), Out-Of-Network	20% of allowable charge	20% of allowable charge	25% of allowable charge	25% of allowable charge

The chart above illustrates TRICARE cost-shares for calendar year (CY) 2022. All TRICARE Select ADFM and retiree beneficiaries must also meet their deductible before co-pays and cost-shares apply while all TRICARE Prime ADFM and retiree beneficiaries may pay point-of-service fees for out-of-network outpatient mental health care. Additionally, only ADSMs require referrals to outpatient mental health care (except for psychoanalysis, which may require a referral).

¹⁰ <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3312898/>

¹¹ https://www.armed-services.senate.gov/imo/media/doc/Roth-Douquet_03-08-16.pdf

¹² <https://www.samhsa.gov/data/sites/default/files/NSDUH-MilitaryFamily-2015/NSDUH-MilitaryFamily-2015.htm#:~:text=In%20the%20past%20year%2C%20an,combination%20of%20counseling%2C%20treatment%2C%20and>

¹³ <https://www.mentalhealthcolorado.org/removing-barriers-mental-health-care-access/>

This proposal may incentivize beneficiaries to begin mental health treatment by eliminating beneficiary cost-sharing for up to three mental health outpatient visits each year. The goal of this proposal is to encourage the uptake and continuation of mental health treatment, including psychiatric care and counseling. Additionally, this provision allows the Secretary of Defense to establish and detail additional requirements, provided those requirements do not violate any laws or regulations.

Budgetary Implications: The table below details resource requirements associated with this proposal. The resources reflected in the table below are included within the Fiscal Year (FY) 2023 President's Budget.

RESOURCE REQUIREMENTS (\$MILLIONS)						
	FY 2023	FY 2024	FY 2025	FY 2026	FY 2027	Appropriation From
Defense Health	0	46.2	72.0	79.1	78.8	Operation and Maintenance, Defense Health Program

The table above details resource requirements associated with this proposal including both health care costs (i.e., costs of waiving cost-shares for mental health outpatient visits) and administrative costs. The assumed effective date for this proposal is January 1, 2024 and DHA estimates \$33.4 million (M) in FY 2024 in direct costs to the Government of absorbing cost-sharing and deductible shares related to the waived mental health visits, as well as \$400,000 in administrative start-up costs. The total estimated cost of this proposal in FY 2024 is \$46.2M. This estimate was achieved by analyzing the number of outpatient mental health visits in previous years, the average cost-share for each type of visit and for each category of beneficiary, and calculating induced demand for outpatient mental health visits (discussed in the next paragraph). Additional adjustments were made to account for currently unenrolled beneficiaries who are expected to migrate to enrollment in and use of TRICARE, and because the incidence rate for mental health visits is expected to increase compared to previous years studied, due to increased telehealth availability and effects of the pandemic. Subsequent years include increases in cost due to projected inflation and increases in the number of covered beneficiaries in each plan type.

This estimate assumes an increase in outpatient mental health visits due to induced demand for beneficiaries enrolled in health plans that have in-network cost-sharing. The estimated impact of induced demand is \$2.9M in FY 2024. This estimate also assumes that half of beneficiaries that newly initiate outpatient mental health treatments will continue visits past their first three visits (i.e., an average of four visits per each beneficiary who would not have initiated mental health treatment in the absence of this proposal). The estimated impact of this increase in visits is \$2.7M in FY 2024. This estimate likewise accounts for beneficiaries who already receive one or two outpatient mental health visits who would have a second or third visit due to waived cost-sharing under this proposal, and the portion of this group who would receive further outpatient mental health visits past the third visit. The estimated impact of these increases in visits are \$3.9M and \$1.6M, respectively, in FY 2024. Lastly, this estimate assumes that 50 percent of beneficiaries who newly initiate outpatient mental health treatments will also use one or more

prescription drugs to treat their mental health condition. While this proposal does not waive pharmacy cost-shares, this estimated increase in pharmaceutical drug utilization would increase Government costs by \$1.3M in FY 2024. We further estimate that 50 percent of the induced demand effect will occur in FY 2024, 80 percent will occur in FY 2025, and 100 percent of induced demand will be realized in FY 2026; these figures are included in the estimated costs for each year in the above table.

This estimate assumes the waiving of cost-shares for in-network and out-of-network providers. This estimate does not include any potential cost offsets due to reductions in other services (e.g., institutional care or emergency department visits) due to earlier mental health interventions. Additionally, the induced demand captured in this cost estimate does not account for other barriers to receiving outpatient mental health treatment, such as provider shortages, lack of transportation, and lack of childcare. This estimate also assumes that deductible, co-pay, and cost-sharing amounts will remain as specified under current policy through FY 2028, and that cost shares are waived only for visits to a mental health provider, for which specialty care cost shares apply.

Changes to Existing Law: This section would amend sections 1075 and 1075a of title 10, United States Code, as follows:

§ 1075. TRICARE Select

(a) ESTABLISHMENT.—(1) Not later than January 1, 2018, the Secretary of Defense shall establish a self-managed, preferred-provider network option under the TRICARE program. Such option shall be known as “TRICARE Select”.

(2) The Secretary shall establish TRICARE Select in all areas. Under TRICARE Select, eligible beneficiaries will not have restrictions on the freedom of choice of the beneficiary with respect to health care providers.

(c) COST-SHARING REQUIREMENTS.—The cost-sharing requirements under TRICARE Select are as follows:

(1) With respect to beneficiaries in the active-duty family member category or the retired category by reason of being a member or former member of the uniformed services who originally enlists or is appointed in the uniformed services on or after January 1, 2018, or by reason of being a dependent of such a member, the cost-sharing requirements shall be calculated pursuant to subsection (d)(1).

(2)(A) Except as provided by subsection (e), with respect to beneficiaries described in subparagraph (B) in the active-duty family member category or the retired category, the cost-sharing requirements shall be calculated as if the beneficiary were enrolled in TRICARE Extra or TRICARE Standard as if TRICARE Extra or TRICARE Standard, as the case may be, were still being carried out by the Secretary.

(B) Beneficiaries described in this subparagraph are beneficiaries who are eligible to enroll in the TRICARE program by reason of being a member or former member of

the uniformed services who originally enlists or is appointed in the uniformed services before January 1, 2018, or by reason of being a dependent of such a member.

(3) With respect to beneficiaries in the reserve and young adult category, the cost-sharing requirements shall be calculated pursuant to subsection (d)(1) as if the beneficiary were in the active-duty family member category or the retired category, as applicable, except that the premiums calculated pursuant to section 1076d, 1076e, or 1110b of this title, as the case may be, shall apply instead of any enrollment fee required under this section.

(4) Under requirements to be prescribed by the Secretary, cost-sharing may be waived for the first three outpatient mental health visits of a covered beneficiary each year. Such requirements shall be consistent with the other provisions of this chapter.

§ 1075a. TRICARE Prime: cost sharing

(a) COST-SHARING REQUIREMENTS.—The cost-sharing requirements under TRICARE Prime are as follows:

(1) There are no cost-sharing requirements for beneficiaries who are covered by section 1074(a) of this title.

(2) With respect to beneficiaries in the active-duty family member category or the retired category (as described in section 1075(b)(1) of this title) by reason of being a member or former member of the uniformed services who originally enlists or is appointed in the uniformed services on or after January 1, 2018, or by reason of being a dependent of such a member, the cost-sharing requirements shall be calculated pursuant to subsection (b)(1).

(3)(A) With respect to beneficiaries described in subparagraph (B) in the active-duty family member category or the retired category (as described in section 1075(b)(1) of this title), the cost-sharing requirements shall be calculated in accordance with the other provisions of this chapter without regard to subsection (b).

(B) Beneficiaries described in this subparagraph are beneficiaries who are eligible to enroll in the TRICARE program by reason of being a member or former member of the uniformed services who originally enlists or is appointed in the uniformed services before January 1, 2018, or by reason of being a dependent of such a member.

(4) Under requirements to be prescribed by the Secretary, cost-sharing may be waived for the first three outpatient mental health visits of a covered beneficiary each year. Such requirements shall be consistent with the other provisions of this chapter.
