The proposed changes have not been coordinated within the Department of Defense under DoD Directive 5500.1, "Preparation and Processing of Legislation, Executive Orders, Proclamations, and Reports and Comments Thereon", May 21, 1964, and do not constitute the official position of the Department of Defense, the Military Departments, or any other government agency.

This notice is provided in accordance with DoD Directive 5500.17, "Review of the Manual for Courts-Martial", January 23, 1985. This notice is intended only to improve the internal management of the Federal government. It is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or any person.

The proposed changes follow in their entirety:

RULE 412.—NONCONSENSUAL SEXUAL OFFENSES; RELEVANCE OF VICTIM'S BEHAVIOR OR SEXUAL PREDISPOSITION

- (a) EVIDENCE GENERALLY INADMISSIBLE—The following evidence is not admissible in any proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):
- (1) Evidence offered to prove that any alleged victim engaged in other sexual behavior.
- (2) Evidence offered to prove any alleged victim's sexual predisposition.
 - (b) EXCEPTIONS—
- (1) In a proceeding, the following evidence is admissible, if otherwise admissible under these rules:
- (A) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury, or other physical evidence; or
- (B) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and
- (C) evidence the exclusion of which would violate the constitutional rights of the accused.
- (c) PROCEDURE TO DETERMINE ADMISSIBILITY—
- (1) A person accused of committing a non-consensual sexual offense who intends to offer evidence under subdivision (b) must—
- (A) file a written motion at least 5 days prior to trial specifically describing the evidence and stating the purpose for which it is offered unless the military judge, for good cause shown, requires a

different time for filing or permits filing during trial; and

(B) serve the motion on the government and the military judge and notify the allowed victim or, when appropriate, the alleged victim's guardian or representative.

- (2) Before admitting evidence under this rule, the military judge must conduct a hearing, which shall be closed. At this hearing the parties may call witnesses, including the alleged victim, and offer relevant evidence. The victim must be afforded a reasonable opportunity to attend and be heard. In a case before a court-martial composed of a military judge and members, the military judge shall conduct the hearing outside the presence of the members pursuant to Article 39(a). The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders
- (3) If the military judge determines on the basis of the hearing described in paragraph (2) that the evidence which the accused seeks to offer is relevant and that the probative value of such evidence outweighs the danger of unfair prejudice, such evidence shall be admissible in the trial to the extent an order made by the military judge specifies evidence which may be offered and areas with respect to which the alleged victim may be examined or cross-examined.
- (d) For purposes of this rule, the term "sexual behavior" means sexual behavior other than the sexual behavior with respect to which a nonconsensual sexual offense is alleged. The term "sexual predisposition" refers to an alleged victim's mode of dress, speech, or lifestyle that does not directly refer to sexual activities or thoughts but that may have a sexual connotation for the factfinder.
- (e) A "nonconsensual sexual offense" is a sexual offense in which consent by the victim is an affirmative defense or in which the lack of consent is an element of the offense. This term includes rape, forcible sodomy, assault with intent to commit rape or forcible sodomy, indecent assault, and attempt to commit such offenses.

The following information shall be added to the end of the Analysis Section for M.R.E. 412 (Appendix 22, M.R.E) as follows:

1995 Amendment: The revisions to Rule 412 reflect changes made to Federal Rule of Evidence 412 by the Violent Crime Control and Law Enforcement Act of 1994. The purpose of the amendments is to safeguard the alleged victim against the invasion of privacy and potential embarrassment

that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the factfinding process.

The terminology "alleged victim" is used because there will frequently be a factual dispute as to whether the sexual misconduct occurred. Rule 412 does not, however, apply unless the person against whom the evidence is offered can reasonably be characterized as a "victim of alleged sexual misconduct."

The term "sexual predisposition" is added to Rule 412 to conform military practice to changes made to the federal rule. The purpose of this change is to exclude all other evidence relating to an alleged victim of sexual misconduct that is offered to prove a sexual predisposition. It is designed to exclude evidence that does not directly refer to sexual activities or thoughts but that the accused believes may have a sexual connotation for the factfinder. Admission of such evidence would contravene Rule 412's objectives of shielding the alleged victim from potential embarrassment and safeguarding the victim against stereotypical thinking. Consequently, unless the an exception under (b)(1) is satisfied, evidence such as that relating to the alleged victim's mode of dress, speech, or lifestyle is inadmissible.

In drafting Rule 412, references to civil proceedings were delegated, as these are irrelevant to court-martial practices. Otherwise, changes in procedure made to the federal rule were incorporated, but tailored to military practice. The military rule adopts a 5day notice period, instead of the 14-day period specified in the federal rule. Additionally, the military judge, for good cause shown, may require a different time for such notice or permit notice during trial. The 5-day period preserves the intent of the federal rule that an alleged victim receive timely notice of any attempt to offer evidence protected by Rule 412. Given the relatively short time period between referral and trial, the 5-day period is more compatible with court-martial practice.

Similarly, a closed hearing was substituted for the *in camera* hearing required by the federal rule. Given the nature of the *in camera* procedure used in Rule 505(g)(4), and that an *in camera* hearing in the district courts more closely resembles a closed hearing conducted pursuant to Article 39(a), the letter was adopted as better suited to trial by courts-martial. Any alleged victim is afforded a reasonable opportunity to attend and be heard at the closed Article 39(a) hearing. The closed hearing, combined with the new