



## MANDATORY SEPARATION PROCESSING FOR SEXUAL MISCONDUCT

### *Background*

The Marine Corps Separation and Retirement Manual (MCO 1900.16 CH 2) incorporated numerous statutory changes to include updating requirements for mandatory administrative separation processing. Several offices have asked for clarification regarding processing requirements for sexual misconduct offenses, particularly extramarital affairs. This advisory provides that clarification.

### *MCO 1900.16 CH 2 – Marine Corps Separation and Retirement Manual*

Paragraph 6210.4 of the Marine Corps Separation and Retirement Manual (MARCORSEPMAN) mandates separation processing for Marines convicted of a sex offense under the guidelines of the Sex Offender Registration and Notification Act (SORNA), 34 U.S.C. § 20911 et seq. That paragraph further defines sexual misconduct by referencing a table of UCMJ Articles, some of which could be violated by consenting adults (e.g., Article 134 – Extramarital Sexual Conduct). Violation of a listed Article, however, must also “result in sex offender processing per reference (v) DoDI 1325.07 appendix 4 to enclosure (2)” before it triggers mandatory administrative separation processing.

### *DoDI 1325.07 – Administration of Military Correctional Facilities and Clemency and Parole Authority*

Department of Defense Instruction 1325.07 (DoDI), amended in 2018, captures a 2015 change to SORNA which required DoD to submit sex offender information to a national registry. In Table 4, the instruction lists sex offenses requiring registration, however, the table does not reflect UCMJ changes made pursuant to the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016) [hereinafter MJA16]. Furthermore, not all listed offenses listed in the DoDI require sex offender registration:

“Notwithstanding the offenses listed in Table 4, offenses under Articles 120 or 134 of the UCMJ that constitute only public sex acts between consenting adults do not require sex offender registration (i.e., indecent exposure). An offense involving consensual sexual conduct between adults is not a reportable offense, unless the adult victim was under the custodial care of the offender at the time of the offense. Additionally, an offense involving consensual sexual conduct is not a reportable offense if the victim was at least 13 years old and the offender was not more than 4 years older than the victim (as determined by date of birth).”

### *Paragraph 6, Appendix 4, Enclosure (2), DoDI 1325.07.*

Part 1 of the Adam Walsh Act is commonly known as SORNA. The DoDI language noted above comes directly from SORNA as codified at 34 U.S.C. § 20911. That statutory provision exempts adult consensual sexual conduct from the definition of sex offense **unless the adult was under the custodial authority of the offender at the time of the offense, or if the victim was at least 13 years old and the offender was not more than 4 years older than the victim** (*emphasis added*).

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## **Summary**

In 2015, changes to SORNA required DoD to implement procedures that would comply with the Act's sex offender registration requirements. DoDI 1325.07, modified in 2018, spelled out the procedures DoD would use to conform with SORNA and listed offenses that would normally trigger sex offender registration requirements but did not incorporate changes mandated by the MJA16. The MARCORSEPMAN revision in 2019 captured the MJA16 changes when it listed offenses that could require administrative separation processing, but any offense listed in the MARCORSEPMAN must also require the offender to register as a sex offender. Under SORNA and the DoDI, consensual sexual conduct does not require sex offender registration unless an aggravating factor exists. If such registration is not required, then administrative separation processing is not mandated.

Custodial relationship is an aggravating factor. Sexual conduct between consenting adults would require sex offender registration and administrative separation processing if the offender has custodial authority over one of the participants at the time of the offense. As an example, a married Marine engaging in a consensual, extramarital affair with a 17-year-old niece in his custody might have to register as a sex offender and be processed for administrative separation.

The age of the parties involved in the relationship may also be an aggravating factor. An offense involving consensual sexual conduct is not a registerable offense if the victim was at least 13 years old and the offender was not more than 4 years older than the victim (as determined by date of birth). On its surface, this provision appears to protect teenagers engaged in consensual sex from facing potential sex offender registration requirements as long as both parties are at least 13 and neither is more than 4 years older than the other. An 18-year-old Marine engaged in a consensual sexual relationship with a 15-year-old could be in violation of the UCMJ but arguably not required to register as a sex offender nor be processed for administrative separation. A 20-year-old Marine also in a relationship with a 15-year-old could face UCMJ charges and, if convicted, be required to register as a sex offender and be processed for administrative separation due to the age difference (greater than 4 years).

Given these factual nuances, Staff Judge Advocates (SJA) should review DoDI 1325.07 and 34 U.S.C. § 20911 closely when determining whether administrative separation processing is mandatory in a sexual misconduct case. For those cases involving offenses not listed in DoDI 1325.07 (including extramarital sexual conduct), if a command has questions as to whether sex offender registration would be required, the cognizant SJA should contact the office listed below. If sex offender registration is required, then administrative separation processing is mandatory. In an instance where processing is not mandated, neither the law nor regulations preclude pursuing administrative separation processing if the commander deems it appropriate.

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