



Victim Notification Requirements for Sexual Assault Offenses and Timely Disposition Requirement for Nonprosecutable Sex-Related Offenses

Background

Sections 538 and 549 of the National Defense Authorization Act for Fiscal Year 2020 (FY20 NDAA) impose new victim notification requirements for all sexual assault offenses. Additionally, Section 540C of the FY20 NDAA imposes a new timely disposition requirement following a determination not to refer a sex-related offense to court-martial due to insufficient evidence. The details pertaining to each of these requirements are articulated below. This Practice Advisory supersedes the Code 20/JMJ Sidebar published in June of 2020. Enclosure (1) to this Practice Advisory is a flow chart which illustrates these requirements.

Section 538, FY20 NDAA

Section 538(a) (Victim Notification of Significant Events): This legislative provision requires that every servicemember-victim of a sexual assault receive notification of each significant event in the military justice process which relates to the investigation, prosecution, and confinement of the servicemember-accused. The specific events which require notification are identified below. **Pursuant to paragraph 0142a of JAGINST 5800.7G (JAGMAN), the LSSS is responsible for ensuring victims receive notifications (through counsel, if represented) of the following events in the military justice process:**

1. Conclusion of the investigation;
2. The initial disposition decision;
3. Pre-trial confinement hearings;
4. Preferral of charges;
5. Article 32, UCMJ hearings;
6. Referral of charges;
7. All court proceedings, including arraignment, motions hearings, and trial dates;
8. Withdrawal of charges;
9. Dismissal of charges;
10. Post-trial hearings;
11. Vacation hearings;
12. Clemency submissions.

Notably, notifications 2-11 above overlap with the existing notification requirements imposed by MCO 5800.14 (Victim-Witness Assistant Program). In due course, MCO 5800.14 will be updated to reflect these additional notification requirements.

Pursuant to the DoD's 29 June 2020 Implementation Memorandum and paragraph 0142a(f) of the JAGMAN, there are four circumstances in which a trial counsel is not required to make these notifications: when necessary to avoid (1) endangering the safety of the individual making the report or another witness; (2) jeopardizing an ongoing investigation; (3) disclosing classified or privileged information; or (4) unduly delaying the disposition of an offense. If

notification does not occur for one of these reasons, that decision must be documented in the electronic case management system. Importantly, these exceptions do not apply to any notification requirements imposed by Article 6b, UCMJ, nor to the right of the victim to confer with the trial counsel pursuant to Article 6b, UCMJ.

Section 538(b) (Documentation of Victim Preference for Jurisdiction): Section 538(b) requires the Services to document the preference of every servicemember-victim of sexual assault, concerning the victim's desired jurisdiction for prosecution, when the offense occurs in the United States. The solicitation for the victim's jurisdictional preference is consistent with the existing requirement under R.C.M. 306(e) and paragraph 0128(a) of the JAGMAN. Additionally, the requirement to document the victim's preference is consistent with paragraph 0128(b) of the JAGMAN which requires the trial counsel, or trial services support personnel, to document the victim's jurisdictional preference for prosecution.

Method of Documentation: Each Section 538(a) notification (listed above), as well as the Section 538(b) victim preference for jurisdiction, must now be documented and maintained in an appropriate system of records. **To meet this requirement for Section 538(a) notifications, the LSSS shall ensure that each Section 538(a) notification is documented utilizing the VWAP tab within the electronic case management system.** This is consistent with paragraph 0142a(d) of the JAGMAN and paragraph 0405 of MCO 5800.16 (LSAM), Volume 16. **Additionally, to meet the requirement of Section 538(b), the trial counsel, or trial services support personnel, shall document the victim's preference for jurisdiction using the standard Victim's Preference Letter (VPL) which shall be signed by the victim and the trial counsel and uploaded into the electronic case management system.** This is consistent with the procedures outlined in paragraph 0128(b) of the JAGMAN and paragraph 050205 of the LSAM, Volume 16. The VPL template is included as Appendix A-1-q of the JAGMAN.

Applicability to Victims of Certain Offenses: Although Congress limited the applicability of section 538 to victims of "sexual assault" offenses, the DoD, through its 29 June 2020 Implementation Memorandum, broadened the scope to include "the sex-related offenses of Articles 120, 130 (Article 120a, if alleged to have been committed prior to January 1, 2019), 120b, 120c, 125 (if alleged to have been committed prior to January 1, 2019), and 80 (attempts of these offenses) of the Uniform Code of Military Justice." Consequently, the Section 538 requirements apply to victims of all offenses within that definition. Notably, this includes Article 120c offenses, which are not considered special victim cases as currently defined in paragraph 050101 of the LSAM, Volume 16. To ensure these 120c case notifications are conducted and documented, the Regional Trial Counsel must ensure that a trial counsel is detailed to 120c cases within 48 hours of notification that such an offense has occurred. **Additionally, pursuant to this Practice Advisory, the Section 538(a) and 538(b) requirements shall also apply to all special victim cases as defined in paragraph 050101 of the LSAM, Volume 16, excluding child pornography cases. In child pornography cases, the trial counsel shall continue to follow the guidance in paragraph 0406 of the LSAM, Volume 16.**

Applicability to Servicemember and Civilian Victims: Section 538 and the DoD's 29 June 2020 Implementation Memorandum limit the applicability of these requirements to servicemember-victims. However, consistent with the existing notification requirements under MCO 5800.14, and, pursuant to paragraph 0142a of the JAGMAN, **trial counsel are responsible for providing these notifications to both *servicemember and civilian victims*.**

Section 549, FY20 NDAA

Notification of Decision not to Refer a Sexual Assault (Sex-Related) Offense: Section 549 requires that a commander, who makes a determination not to refer a sexual assault allegation to court-martial, periodically notify the victim of the status of a final determination on further action, whether nonjudicial punishment, other administrative action, or no action. In accordance with the DoD's 29 June 2020 Implementation Memorandum and paragraph 0142b(a) and (c) of the JAGMAN, these Section 549 notifications must occur monthly, until a final disposition on the sex-related offense is taken.

Sexual Assault Defined: Although Section 549 limits the applicability of these notifications to “sexual assault” offenses, the DoD, through its 29 June 2020 Implementation Memorandum, defines sexual assault as “the sex-related offenses of Articles 120, 130 (Article 120a, if alleged to have been committed prior to January 1, 2019), 120b, 120c, 125 (if alleged to have been committed prior to January 1, 2019), and 80 (attempts of these offenses) of the Uniform Code of Military Justice.”

Limited to Preferred Charges: Since a commander’s decision not to refer may only be made after a charge is preferred, the Section 549 notification requirements only apply to those offenses for which a non-referral determination has been made concerning a *preferred* sex-related offense. In sum, absent preferal of a sex-related offense, Section 549 notifications are not required. This is consistent with paragraph 0142b(a) of the JAGMAN.

Non-Referral Determination: As explained above, the requirement to conduct monthly Section 549 notifications is triggered upon a non-referral determination concerning a preferred sex-related offense. However, neither the legislation, nor the DoD’s 29 June 2020 Implementation Memorandum, articulate the point in time at which that non-referral determination is made. In accordance with paragraph 0142b(c)(2) of the JAGMAN, a commander’s non-referral determination occurs upon dismissal of a preferred sex-related offense pursuant to R.C.M. 401(c)(1). Therefore, following dismissal, the commander is required to provide the victim with monthly notifications concerning the status of a final determination on further action of the dismissed sex-related offense, whether nonjudicial punishment, other administrative action, or no action. Notably, a final determination may occur prior to, or contemporaneously with, the dismissal of the sex-related offense. In such cases, the commander will satisfy the Section 549 notification requirement by providing the victim with immediate notice of the dismissal and the nature of the final determination concerning the sex-related offense.

Accused’s Collateral Misconduct: Following the commander’s non-referral determination of all preferred sex-related offenses, a commander is not required to conduct monthly notifications regarding the status of any non-sex-related offenses. In such case, the commander’s final determination and the non-referral determination, as executed through dismissal pursuant to R.C.M. 401(c)(1), occur simultaneously. Put differently, the commander will satisfy the Section 549 notification requirement by providing the victim with immediate notice of the dismissal and the nature of the final determination concerning the sex-related offense. This is consistent with paragraph 0142b(c)(2) of the JAGMAN which only requires the commander to provide Section 549 status updates through the final disposition of the sex-related offense.

Commander Responsible for Notification: Pursuant to Article 18, UCMJ, as implemented by R.C.M. 201(f)(1)(D), the following offenses may only be referred to a general court-martial: Article 120(a), 120(b), 120b(a), 120b(b), and attempts thereof under Article 80, UCMJ. This limitation applies only to offenses committed on or after 24 June 2014. For those offenses, only a General Court-Martial Convening Authority (GCMCA) may make the non-referral determination. Accordingly, the GCMCA is ultimately responsible for conducting the Section 549 notifications. For sex-related offenses which are not required to be referred to a general court-martial, the commander with the authority to refer such offenses is ultimately responsible for conducting the Section 549 notifications. Additionally, in accordance with paragraph 0142b(c)(3) of the JAGMAN, these notifications may be provided by the responsible commander or the commander’s designee. Importantly, because Article 120c is considered a sex-related offense, Section 549 notifications are required for victims of Article 120c offenses. **Although no withholding policy exists for these offenses, Staff Judge Advocates should track all 120c offenses within the subordinate units of their GCMCAs, to ensure Section 549 notifications occur, when required.**

Method of Notification: In accordance with paragraph 0142b of the JAGMAN, the notifications must be made through counsel, if represented, and may be provided verbally or in writing. However, the victim’s acknowledgment of receipt of the notification shall be documented in writing. Additionally, if the victim elects not to receive status updates, the commander will document that decision in writing. **Pursuant to this Practice Advisory, Staff Judge Advocates should ensure that the victim’s acknowledgment of the monthly Section 549 notification, as well as the victim’s election not to receive updates, is uploaded into the electronic case management system.**

Relationship to DoDI 6495.02 Notifications: In many circumstances, Section 549 notifications will overlap with the notifications and updates provided to a victim pursuant to the requirements of DoDI 6495.02 (Sexual Assault Prevention and Response). These notifications often occur at the installation's Case Management Group meetings. However, the Section 549 notifications are distinct from the DoDI 6495.02 notifications in two important ways. First, the monthly notifications pursuant to DoDI 6495.02 are conducted by the *victim's* commander. *See* DoDI 6495.02, Enclosure 5 at paragraph 3.g.(2), Enclosure 9 at paragraph 2.f. In contrast, Section 549 notifications must be made by the *accused's* commander—the commander making the non-referral determination. Second, the notifications required pursuant to DoDI 6495.02 do not apply “to victims of sexual assault perpetrated by a spouse or intimate partner ... or military dependents under the age of 18 who are sexually assaulted.” *See* DoDI 6495.02, paragraph 2.b. However, Section 549 notification must be made to those categories of victims. Accordingly, the notifications made pursuant to DoDI 6495.02, in many cases, will not satisfy the Section 549 notification requirements.

Section 540C, FY20 NDAA

Timely Disposition of Nonprosecutable Sex-Related Offenses: Section 540C of the FY20 NDAA broadly requires the Secretary of Defense to implement a policy to ensure the timely disposition of nonprosecutable sex-related offenses. The legislation defines “nonprosecutable” as an offense that a convening authority has declined to refer to general or special court-martial due to a determination that there is insufficient evidence to support prosecution of the sex-related offense. On 14 September 2020, the DoD published a memorandum implementing that policy. Additionally, paragraph 0128(i) of the JAGMAN implements this policy for the Department of the Navy. The DoD's 14 September 2020 Implementing Memorandum and paragraph 0128(i) of the JAGMAN require the following: **When a commander decides not to refer a preferred sex-related offense, based upon insufficient evidence, the commander, when practicable, must make any further disposition decision or disposition recommendation, including no action, within 60 days of a non-referral determination regarding a sex-related offense.** Notably, the non-referral determination may also trigger the monthly Section 549 notifications detailed above.

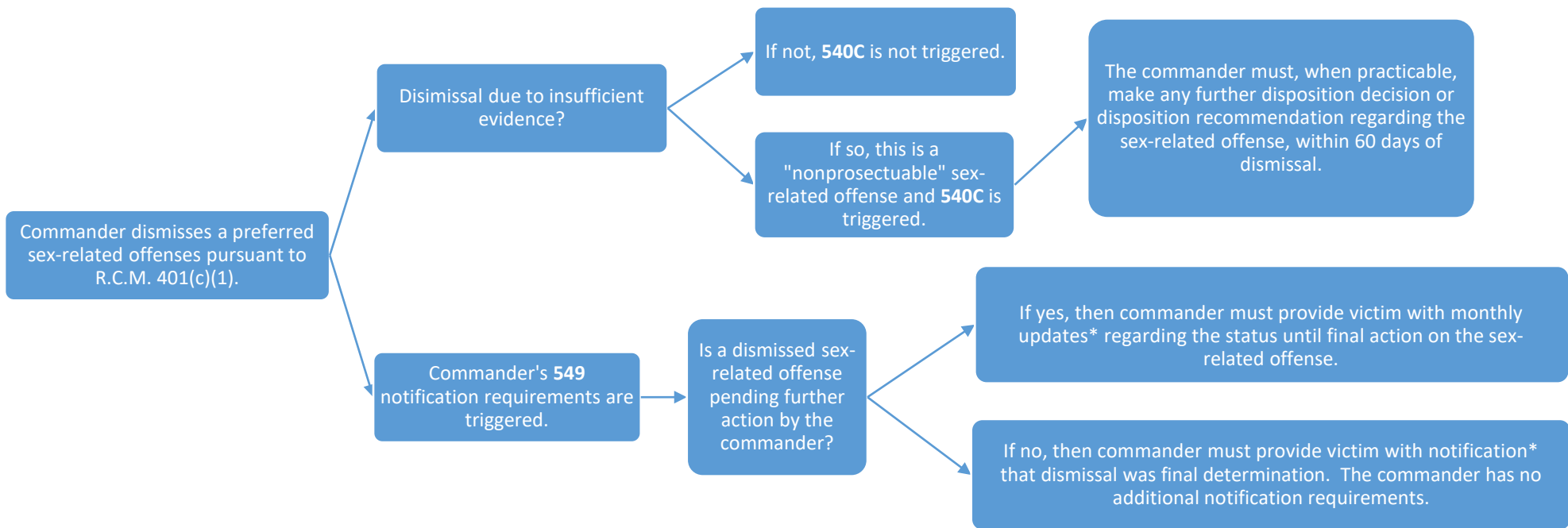
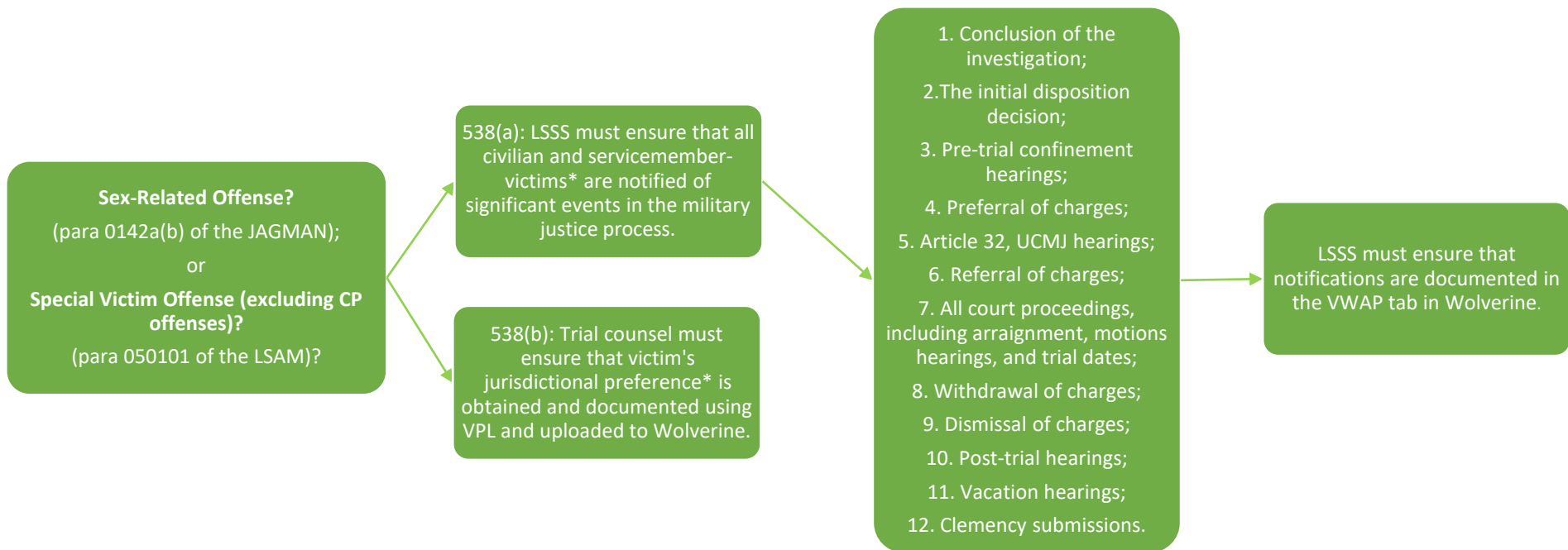
When Not Practicable: Consistent with the DoD's 14 September 2020 Implementing Memorandum and paragraph 0128(i) of the JAGMAN, if it is not practicable for the disposition decision or disposition recommendation to be made within 60 days, then, at or before the 60-day mark, and for each successive 30-day period until the disposition decision or disposition recommendation is made, the reason for the delay must be explained and memorialized in the notice to the alleged victim. Any memorialized notice should be uploaded into the electronic case management system.

Sex-Related Offense: For purposes of this requirement, the DoD's 14 September 2020 Implementing Memorandum defines “sex-related offenses” as the offenses of Articles 120, 130 (Article 120a, if alleged to have been committed prior to January 1, 2019), 120b, 120c, 125 (if alleged to have been committed prior to January 1, 2019), and 80 (attempts of these offenses) of the Uniform Code of Military Justice.”

Non-Referral Determination: Pursuant to paragraph 0128(i) of the JAGMAN, the non-referral determination occurs when the commander dismisses the sex-related offense pursuant to R.C.M. 401(c)(1). Consequently, the 60-day clock begins upon dismissal of the sex-related offense.

Points of Contact

Direct any questions about this Practice Advisory to the JMJ Branch Head, Lieutenant Colonel Adam King, at (703) 693-9005, the JMJ Deputy Branch Head, Major Gable Hackman, at (703) 693-9299, or Trial Counsel Assistance Training Program (TCAP) Director, Lieutenant Colonel Geoffrey Shows, at (703) 693-9008.



***All victim communications must be made through counsel if the victim is represented.**