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The National Guard in the COVID-19 Pandemic Response: Framework for Action

National Guard

The Guard is an adaptable tool at the disposal of State Governors and, when *federalized*, at the disposal of the President to respond to a range of threats to the security of the U.S. populace. There are National Guard entities in each state and one in Guam, Puerto Rico, and the U.S. Virgin Islands, each of which has a governor who serves as its commander-in-chief. The National Guard consists of the Army National Guard (ARNG) and the Air National Guard (ANG) (32 U.S.C. §101). The ARNG and ANG are under the control, direction, and authority of a state chain of command and are subject to state and federal military law and regulation. The District of Columbia National Guard is a federal entity with the President as commander-in-chief.

National Guard and the Reserve Component

The term Reserve Component (RC) means the seven reserve forces of the Armed Forces: the Army, Navy, Air Force, Coast Guard and Marine Corps Reserves (*Reserves*), and the ARNG and ANG. Each reserve force has a national security mission, but the ARNG and ANG are the only ones that are part of a state government and have direct responsibility for responding to domestic disasters, emergencies, and civil disorder.

National Guard and the Posse Comitatus Act

The Posse Comitatus Act (PCA) does not apply to the ARNG or ANG, but it does apply if they are activated under title 10 of the U.S. Code (federal service). The PCA criminalizes the willful use of the Army or Air Force to *execute the law* unless expressly authorized by the Constitution or Congress (PCA includes the Navy, Marine Corps, and Space Force (10 U.S.C. §275)). The PCA prohibition covers civil government or law enforcement functions (18 U.S.C. §1385).

Federal Service

There are five federal statutes that authorize activation of the RC: (1) Full Mobilization (10 U.S.C. §12301(a)); (2) Partial Mobilization (10 U.S.C. §12302); (3) Presidential Reserve Call-up (10 U.S.C. §12304); (4) Domestic Emergency (10 U.S.C. §12304a); and (5) Contingency Operations (10 U.S.C. §12304b). The fourth and fifth statutes, both added in 2011, authorize activation of the *Reserves* to respond to disasters and emergencies for up to 120 days and of the RC to support Combatant Command preplanned missions for up to one year, respectively.

State Service

If not activated in federal service, the National Guard may be activated in state service on state active duty under the authority of state law. It may also be activated in state service on full-time National Guard duty (FTNGD) under

the authority of federal law, pursuant to 32 U.S.C. §502(f) (502(f)). Active service under the federal authority of 502(f) is not federal active duty (10 U.S.C. §101). The state government funds state active duty and the U.S. government funds FTNGD, but both are performed under the control, direction, and authority of a governor pursuant to state law. Claims arising from the negligent acts or omissions of ARNG or ANG members performing state active duty are processed under state law and paid from state funds or insurance. Claims arising when ARNG or ANG members are performing FTNGD are processed under the Federal Tort Claims Act (FTCA) and paid from federal funds.

State Active Duty

The National Guard is the only force among the Armed Forces authorized to perform state active duty, typically performed in response to disasters or emergencies. Federal funds are not obligated for state active duty unless and until the President declares an emergency or a major disaster and the Federal Emergency Management Agency (FEMA) approves a governor's request for assistance under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act). The Stafford Act allows FEMA to reimburse a state for state active duty pay and allowances disbursed.

FTNGD

The National Guard is authorized to perform FTNGD if federal funding is available and it is approved by the Department of Defense (DOD). The purpose of FTNGD must be consistent with the purpose of the federal appropriation that funds it. DOD or a governor can cancel FTNGD orders with superseding federal active duty orders or state active duty orders, respectively. In 2006, Congress amended 502(f) "... to better reflect the nation's continuing reliance on the National Guard ..." and expressly authorized FTNGD for Operational Support (FTNGD-OS) missions undertaken by a "... unit at the request of the President or Secretary of Defense." (H.Rept. 109-452, p. 311.)

National Guard members can only perform duties for mission requirements that are expressly authorized in the FTNGD-OS orders. National Guard members on FTNGD-OS are available for Defense Support of Civil Authorities (DSCA) if a governor makes a formal request for DSCA authority (DOD Instruction (DODI) 3025.22). If approved by the Secretary of Defense, support could occur under §502(f), but the FTNGD-OS must be operational support that is aligned with a federal purpose, not a state purpose.

COVID-19 Pandemic Response

The Stafford Act allows the U.S. government to provide assistance to state and local governments after a disaster or during an emergency, to include funding National Guard state active duty for a state mission or FTNGD-OS for a federal mission. DOD's DSCA policy allows it to assist states if reimbursed by another federal agency, such as FEMA (DOD Directive (DODD) 3025.18).

502(f) Activation Authority

COVID-19 Pandemic and 502(f) activation milestones in 2020 include:

- 11 March – World Health Organization (WHO) classifies COVID-19 outbreak as a pandemic.
- 13 March – President declares COVID-19 pandemic is a National Emergency.
- 19 March – Council of Governors asks the Secretary of Defense to establish a separate DSCA 502(f) activation authority approval process for governors.
- 22 March – President Donald J. Trump issues a memorandum (President's Memorandum) directing FEMA reimbursement of DSCA 502(f) activation authority for some states.
- 23 March – DOD information paper explains there is no change to DODI 3025.22 DSCA 502(f) activation authority approval process.
- 27 March – DOD statement modifies DODI 3025.22 DSCA 502(f) activation authority approval process.
- 30 March – FEMA guidance explains the process for adding states to the President's memorandum.

The President's memorandum contained two directives:

- FEMA will fund National Guard activities in response to the COVID-19 Pandemic.
- DOD will authorize 502(f) activation for the California, New York, and Washington National Guard on a reimbursable basis and request their governors activate the National Guard under 502(f) to fulfill FEMA missions assigned to DOD.

The President later added Guam, Florida, Louisiana, Maryland, New Jersey, Puerto Rico, and Massachusetts to the second directive.

502(f) Activation Authority Approval

DOD's March 23 information paper describing the President's memorandum states: (1) DOD can only authorize 502(f) activation for National Guard forces performing a DOD mission or providing DSCA on a reimbursable basis; and (2) DOD cannot authorize 502(f) activation for a state mission. DOD approval of a FEMA mission assignment request will only result in a 502(f) activation if reimbursement is available and DOD determines National Guard forces are the best option to fulfill an assigned FEMA mission, which is consistent with DODI 3025.22. DOD retains its discretion to deny a FEMA mission assignment request or to refuse to fulfill a request with personnel and equipment from the active duty, 502(f) activated National Guard, or activated RC (including the ARNG and ANG on active duty in federal service).

Modified 502(f) Activation Authority Approval

Four days after issuing the information paper, DOD modified the DSCA process to allow 502(f) activation authority approval similar to the separate process requested by the Council of Governors. According to DOD's March 27 statement, the modification creates a conditional pre-authorization in response to a FEMA mission assignment request to DOD and ensures accelerated federal funding for National Guard 502(f) activation "... to aid in whole-of-government COVID-19 response efforts." DOD designated FEMA's National Response Coordination Center as the single point of entry for all requests for assistance. A pre-authorization is subject to these conditions:

- The states and territories or FEMA must identify specific requirements for COVID-19 support in accordance with the Stafford Act.
- For requirements originating from the states and territories, these requests must be submitted to FEMA.
- FEMA provides DOD with a fully reimbursable mission assignment.

The Secretary of Defense delegated authority to the Assistant Secretary of Defense for Homeland Defense and Global Security (ASD(HD&GS)) to approve mission assignment requests meeting these conditions.

502(f) Funding Approval

The President's memorandum requesting specific governors to activate their National Guard under 502(f) appears to harmonize the purpose of state service in a FTNGD-OS duty status with the purpose of federal funding for a *national* response to the COVID-19 pandemic. FEMA's March 30 guidance explains the Administration's process for including additional states in the President's memorandum. The Administration will consider adding states to this memorandum if a state's request for 502(f) authority is based on certain criteria:

- A state must have an approved major disaster declaration for the COVID-19 response or have a major disaster declaration request pending with FEMA.
- A state must have 500 members or 2 percent of its National Guard on state active duty for a COVID-19 response.
- A state must submit a request through the FEMA Regional Administrator to the FEMA Administrator for 502(f) reimbursement that identifies emergency support activities the National Guard will conduct for COVID-19 support, consistent with the Stafford Act.
- FEMA will issue a fully reimbursable mission assignment to DOD, including reimbursement for FTNGD-OS that fulfills the mission, for states approved under these criteria.

The U.S. government will fund a state's 502(f) activation for 30 days from the date the Administration adds the state to the President's memorandum. The Administration will work with states approved under these criteria to assess the need for extending 502(f) activation authority.

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