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DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 225

[Docket ID: DOD-2019-OS-0131]

RIN 0790-AK92

Commissary Credit and Debit Card User Fee

AGENCY: Department of Defense (DoD).

ACTION: Interim final rule.

SUMMARY: This rule implements Section 621 of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 expanding patronage for commissary, exchange, and revenue-generating morale, welfare, and recreation (MWR) facilities. As part of DOD's implementation the Department is required to collect a user fee when these new populations utilize a credit or debit card that creates a cost to the Department of the Treasury for processing these transactions. As it related to this Section, such costs are only generated by credit or debit card transactions at Defense Commissary Agency (DeCA) facilities.

DATES: *Effective date:* This interim final rule is effective on [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

Comment date: Comments will be received by [INSERT 60 DAYS AFTER THE DATE OF PUBLICATION IN THE FEDERAL REGISTER].

Applicability date: Per the deadline in the statute and as implemented in this rule, these user fees go into effect on January 1, 2020.

ADDRESSES: You may submit comments, identified by docket number and or Regulatory Information Number (RIN) and title, by any of the following methods:

- Federal Rulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- Mail: Department of Defense, Office of the Chief Management Officer, Directorate for Oversight and Compliance, 4800 Mark Center Drive, Mailbox #24, Suite 08D09, Alexandria, VA 22350-1700.

Instructions: All submissions received must include the agency name and docket number or RIN. The general policy for comments and other submissions from members of the public is to make these submissions available at <http://www.regulations.gov> as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: Jane Westbay, (571) 372-6579, Jane.A.Westbay.civ@mail.mil.

SUPPLEMENTARY INFORMATION:

Summary of New and Amendatory Regulatory Provisions and Their Impact

This rule implements Section 621 of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (Purple Heart and Disabled Veterans Equal Access Act of 2018), codified at Section 1065 of Title 10, United States Code. Section 621 expands patronage for commissary, exchange, and revenue-generating morale, welfare, and recreation (MWR) facilities. By January 1, 2020, the Department of Defense is directed to:

- Extend commissary and MWR facility privileges, including exchange, military MWR recreation lodging, and other revenue-generating MWR facilities, on the same basis as a

member of the armed forces entitled to retired or retainer pay. Section 621 applies to veterans who

- were awarded the Purple Heart.
 - are Medal of Honor recipients.
 - are former prisoners of war.
 - have a Department of Veterans Affairs-documented service-connected disability rating.
- Impose a user fee on individuals who are eligible solely under the statute to cover any increase in expenses borne by the Department of Treasury (Treasury) on behalf of commissary stores for processing credit or debit cards for payment.
 - Deposit commissary credit/debit card user fees collected in the General Fund of the Treasury.
 - Provide briefing to the Committees on Armed Services of the Senate and House of Representatives on the plan to implement Section 1065 of Title 10, no later than October 1, 2019.

Section 621 also applies to caregivers and family caregivers for veterans as defined in Section 1720G of Title 38, U.S.C.

Background and Legal Basis for This Rule

This rule implements a patronage expansion pursuant to 10 U.S.C. 1065 as modified by Section 621 of the John S. McCain National Defense Authorization Act for Fiscal Year 2019. This Section's provisions apply when using a credit or debit card to pay for commissary purchases. As card network rules place limitations on the user fees that can be set for credit cards and debit cards, the Department has elected to set user fees as a flat rate at or below the current average cost to the Treasury to process credit cards and debit cards. Initially, and in consultation with the

card processing operations of the Treasury, the initial rate established by the Department will be 1.9 percent of an individual's total sales amount for the use of a credit card, and 0.5 percent of an individual's total sales amount for the use of a debit card. On a periodic basis, the Department plans to review with Treasury actual costs incurred by the Treasury on credit card and debit card use by individuals who are eligible solely under the statute and adjust corresponding user fees as necessary. User fees will not be imposed on the use of electronic benefit transfer (EBT) cards like the Supplemental Nutrition Assistance Program or the Women, Infant, and Children as the rate for processing these cards is negligible (0.01 percent) and does not merit imposition of a user fee under the requirements of this legislation. This user fee will also not apply to cash, personal check, or MILITARY STAR card transactions as these forms of payment do not contribute to the expenses of the Treasury for processing card transactions.

In addition to this rule, a corresponding internal policy, "Expansion of Patronage for Certain Veterans and Certain Caregivers for Veterans," will be available at:

<https://www.esd.whs.mil/DD/>.

Expected Impact of the Interim Rule

As part of the implementation plan for program expansion, DoD performed an impact assessment to identify potential high volume locations based on veteran density and general cost of living. As part of the Department's assessment, DoD gathered veteran data from VA National Center for Veterans Analysis, the VA Office of the Actuary, the DoD Office of the Actuary, U.S. Census Bureau, Defense Manpower Data Center, Defense Commissary Agency, and Military Service exchanges. The Department found a higher impact at locations with a high veterans density (e.g., San Antonio, Tampa, San Diego) as well as a higher impact at locations with a high

cost of living (e.g., Hawaii, Alaska, Puerto Rico, Guam, San Francisco Bay Area, New York City). As such, these locations are informed and preparing for the new volume of usage.

The Department found many conditions impact patronage including the following factors.

- Time, distance, and effort to access installations.
- Time and distance from VA medical facilities (farther=less likely to obtain a Veteran Health Identification Card that would facilitate installation and shopping access).
- Personal mobility/transportation.
- Personal financial circumstances.
- Local economic conditions.
- Off-installation and online shopping competition.
- Established shopping habits and brand loyalty.
- Eligibility of the primary shopper for the household.

Based on DoD's current user patronage, the proximity of these new users to military installations, and established shopping patterns, the Department expects only 30 percent of the 4.1 million newly eligible users (1.23 million actual users=4.1 million x 30%) to shop at DoD commissary stores.

In line with supermarket industry statistics available at <https://www.creditcards.com/credit-card-news/payment-method-statistics-1276.php>, the Department expects 85 percent of these new shoppers (1,045,500 shoppers=1.23 million x 85%) to pay for their purchases with credit or debit cards, causing an increase in processing costs to the Treasury. Of the 1.23 million expected users, 23 percent are expected to pay with credit cards (282,900 credit card users=1.23 million x 23%) and 62 percent are expected to pay with debit cards (762,600 debit card users=1.23 million x 62%). Card network rules prevent charging fees in amounts greater than the average cost to

process transactions, so the Department, in conjunction with the Treasury, analyzed current processing costs for commissary credit and debit card transactions to determine the initial fees (see Table 1 - DECA Payment Card Processing Summary). Rather than charging a different rate for every brand of credit or debit card used, the Department, in conjunction with the Treasury, opted to set one rate for credit and signature debit cards (which are processed like credit cards) and a different fee for personal identification number (PIN) debit cards. If the Department had opted to charge only one fee, then the lowest average card rate that could be used would have been the rate for PIN debit cards (0.51 percent), which would not have recovered a significant portion of the Treasury's processing costs. The credit card fee was set at the lowest average rate of all of the credit card brands (1.9 percent), and the debit card fee was set just below the average debit card rate (0.5 percent). On an average basket of groceries from the commissary (\$66), credit card users would pay \$1.25 ($\$66 \times 1.9\%$) and debit card users would pay \$0.33 ($\$66 \times 0.5\%$). If each new user shopped four times per month, credit card users would pay approximately \$60 annually in fees ($\$1.25 \times 4 \times 12$) and debit card users would pay approximately \$15.84 annually in fees ($\$0.33 \times 4 \times 12$). Total amounts collected for the credit and debit card user fee would be \$29,053,584 ($(\$60 \times 282,900) + (\$15.84 \times 762,600)$).

Even with this user fee, these newly-eligible commissary shoppers will enjoy an average overall grocery basket savings of over 20 percent compared to commercial grocery stores. Commissary stores are required to deliver an average worldwide savings of 23.7 percent over commercial grocery stores, so imposing a 0.5 to 1.9 percent user fee on commercial debit and credit card purchases still nets a 23.2 to 22.8 percent overall savings to the consumer.

The Department of the Treasury, Bureau of the Fiscal Service administers the Card Acquiring Service (CAS) and evaluated DeCA’s FY2018 payment card usage (the most recent annual period at the time of the request) as the best available proxy for projecting card processing costs that would be incurred by the Treasury for the new patron groups. The following data elements for DeCA FY2018 were captured: transaction count and sales volumes by all card types (i.e., credit, debit, EBT/WIC); volume breakout by card brand/network within credit volumes (i.e., American Express, Discover, MasterCard, and Visa); and average per card type/network, sales per transaction (“ticket value”), cost per transaction, and cost per \$1 in sales. These data elements for DeCA’s FY2018 payment card activity are disclosed in the table below. For each card type/network, the data was used to calculate an “effective rate,” which approximates the related processing costs borne by the Treasury.

Table 1 - DECA Payment Card Processing Summary FY2018

Card Type/ Network	% of Net Sales	% of Net Sales Amount	Effective Rate	Avg Ticket Value	Avg Cost per Tran	AVG Cost per Dollar
EBT	0.96%	1.25%	0.01%	\$ 85	\$0.01	\$0.0001
PIN	56.09%	55.15%	0.51%	\$ 65	\$0.33	\$0.0051
Amex	4.63%	4.90%	1.90%	\$ 70	\$1.44	\$0.0207
Discover	1.30%	1.51%	2.40%	\$ 76	\$1.82	\$0.0240
Visa	31.97%	31.74%	1.91%	\$ 65	\$1.24	\$0.0191
MasterCard	5.05%	5.46%	1.93%	\$ 71	\$1.37	\$0.0193
	100%	100%	1.13%	\$ 66	\$0.74	\$0.0113

Waiver of Proposed Rulemaking

DoD is issuing this rulemaking as an interim final rule and has determined that, under the Administrative Procedure Act (APA), 5 U.S.C. 553(b)(B), it would be impracticable, unnecessary, and contrary to the public interest to delay a final regulation until a public notice and comment process has been completed.

The conclusion of a public notice and comment period before the rule is finalized would be impracticable because it would impede due and timely execution of DoD's function to provide patronage to these new groups. Since the NDAA was signed August 13, 2018, DOD and the Department of Treasury have worked in coordination on a number of actions necessary to implement the law. Before DoD could begin any rulemaking implementation, an impact assessment requiring data from VA, Commerce, and other agencies as well on ongoing discussions with the Department of the Treasury needed to be completed. This has left DoD with insufficient time to prepare and complete a full public notice and comment rulemaking proceeding and to timely complete a final rule before the statutory start date of January 1, 2020.

To the extent that an NPRM would furnish general public information for the intended new audiences, it is unnecessary in light of the extensive outreach already undertaken by DoD, which provided more specific and more detailed notice to these affected beneficiaries than an NPRM would provide. Outreach included identifying the eligible population; joint efforts with Departments of Veterans Affairs, Homeland Security (Coast Guard) and the Treasury; to communicate with potential new patrons about eligibility, access, and authorized facilities; and development of outreach content to include handouts, news releases, fact sheets, and blog and social media content.

In addition, it is unnecessary as it is a lost opportunity to expand patronage by the effective date of January 1, 2020. Missing this date would result in confusion to the affected population. Not collecting the fee from January 1st would lead to a shortage in reimbursement to the Treasury for the additional expense incurred for processing credit and debit card transactions made by these new users. DoD is required to collect this fee specifically to reimburse the Treasury for the additional expenses incurred for processing credit and debit cards used by this population. The Department has no way to collect the fee retroactively. If the Department does not begin collecting the fee on January 1, new patrons could only pay for their commissary purchases by cash, check, electronic benefit transfer (EBT) card, MILITARY STAR card, or other form of payment that does not cause a cost to the Treasury. This would be difficult for DoD to enforce as supermarket shopper behavior statistics available at <https://www.creditcards.com/credit-card-news/payment-method-statistics-1276.php> reveal that 85 percent of shoppers pay for grocery purchases with credit and debit cards. Imposing a cash or check-only policy for these new patron groups would create an unrealistic and unfair condition for these shoppers. This outcome would be contrary to the public interest.

For these reasons, DoD has determined that the public notice and participation that the APA ordinarily requires would, in this case, be impracticable, unnecessary, and contrary to the public interest and that good cause exists for waiving proposed rulemaking and delaying its solicitation of comments from the public until after it issues an interim final rule. DoD will consider those comments received upon its interim final rulemaking in a subsequent final rule.

Executive Order 12866, “Regulatory Planning and Review” and Executive Order 13563, “Improving Regulation and Regulatory Review”

Executive Orders 13556 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distribute impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule is not a significant regulatory action under section 3(f) of Executive Order 12866.

Executive Order 13771, “Reducing Regulation and Controlling Regulatory Costs”

This rule is not expected to be an EO 13771 action, because it is not significant under EO 12866.

Public Law 96-354, “Regulatory Flexibility Act” (5 U.S.C. 601)

The Department of Defense certifies that this interim final rule is not subject to the Regulatory Flexibility Act (5 U.S.C. 601) because it would not, if promulgated, have a significant economic impact on a substantial number of small entities. Therefore, the Regulatory Flexibility Act, as amended, does not require us to prepare a regulatory flexibility analysis.

Congressional Review Act

The Congressional Review Act, 5 U.S.C. § 801 et seq., as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. DoD will submit a report containing this rule and other required information to the U.S. Senate, the

U.S. House of Representatives, and the Comptroller General of the United States.. This interim final rule is not a “major rule” as defined by 5 U.S.C. § 804(2).

Sec. 202, Public Law 104-4, “Unfunded Mandates Reform Act”

This interim final rule will not mandate any requirements for State, local, or tribal governments, nor will affect private sector costs.

Public Law 96-511, “Paperwork Reduction Act” (44 U.S.C. Chapter 35)

It has been determined that 32 CFR part 225 does not impose reporting or recordkeeping requirements under the Paperwork Reduction Act of 1995.

Executive Order 13132, “Federalism”

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has Federalism implications. This interim final rule will not have a substantial effect on State and local governments.

List of Subjects in 32 CFR Part 225

Commissary, Credit, Debit, User fee

Accordingly 32 CFR Part 225 is added to read as follows:

PART 225 – Commissary Credit and Debit Card User Fee

Sec.

225.1 Purpose.

225.2 Applicability.

225.3 Definitions.

225.4 Policy.

225.5 Responsibilities.

225.6 Procedures.

Authority: 10 U.S.C. 1065

§225.1 Purpose.

This part establishes policy, assigns responsibilities, and provides procedures for the implementation of patronage expansion pursuant to 10 U.S.C. 1065.

§225.2 Applicability.

This part applies to veterans who are Purple Heart recipients, veterans who are former prisoners of war, veterans who have a Department of Veterans Affairs-documented service-connected disability rating between 0-90 percent, and individuals approved and designated as the caregiver or family caregiver of an eligible veteran under a formalized Department of Veterans Affairs caregiver program (as of January 1, 2020, authorized caregivers are the primary family caregiver of an eligible veteran under the Program of Comprehensive Assistance for Family Caregivers).

§225.3 Definitions.

Unless otherwise noted, these terms and their definitions are for the purpose of this part.

Caregiver. Defined in 38 U.S.C. 1720G(d)

Family Caregiver. Defined in 38 U.S.C. 1720G(d)

Former POW. Defined in 38 U.S.C. 101 .

Service-connected. Defined in 38 U.S.C. 101

Veteran. Defined in 38 U.S.C. 101

§225.4 Policy.

In accordance with 10 U.S.C. 1065, the following new patron groups are authorized access to DoD commissary, exchange, and morale, welfare, and recreation (MWR) revenue generating activities on the same basis as a member of the Military Services entitled to retired or retainer pay, effective January 1, 2020:

(a) Veterans who were awarded the Purple Heart.

- (b) Veterans who are former prisoners of war (POWs).
- (c) Veterans classified by the Department of Veterans Affairs (VA) as having a service-connected disability rating below 100 percent.
- (d) Caregivers or family caregivers for veterans under the VA caregiver program. These caregivers are only eligible for these privileges during their period of active enrollment as the caregiver or family caregiver for a veteran.

§225.5 Responsibilities.

DIRECTOR, DeCA. Under the authority, direction, and control of the Under Secretary of Defense for Personnel and Readiness through the Assistant Secretary of Defense for Manpower and Reserve Affairs, the Director, DeCA:

- (a) Establishes processes and updates systems necessary to collect and deposit with U.S. Treasury, user fees related to commercial debit/credit card use in commissaries in accordance with section 225.6 of this part.
- (b) Implements commissary credit/debit card user fee requirements.

§225.6 Procedures.

- (a) *Commissary Credit/Debit Card User Fee.* (1) Only patrons of groups newly authorized privileges by this part must pay a user fee when using a credit or debit card to pay for commissary purchases to offset additional costs charged to the U.S. Treasury associated with credit or debit card use.
- (2) The user fee will be set as a transaction-based flat rate, calculated within a range of the average annual rates of credit and debit card transaction costs incurred by the Department of Treasury on behalf of DeCA and in compliance with applicable card network rules. One rate will be set for credit and signature debit card transactions, which are processed as credit cards.

Another rate will be set for personal identification number debit card transactions. These rates will be reviewed annually and adjustments may be made as necessary to meet the requirements of 10 U.S.C. 1065.

(3) Purchases made with electronic benefit transfer cards (e.g., Women, Infants, and Children or Supplemental Nutrition Assistance Program) and the MILITARY STAR card are not subject to this credit/debit card user fee.

(4) No user fee reimbursement will be made on customer return of merchandise.

(5) All credit/debit card user fee amounts collected in commissary stores will be deposited in the General Fund of the Treasury.

(b) [Reserved]

Dated: December 20, 2019.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

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