



JUN 22 2020

POLICY

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF
COMMANDERS OF THE COMBATANT COMMANDS

SUBJECT: Interim Regulations for Condolence or Sympathy Payments to Friendly Civilians for Injury or Loss That Is Incident to Military Operations

Section 1213 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2020, signed into law on December 20, 2019, provides authority to make certain *ex gratia* payments in the event of property damage, personal injury, or death that is incident to the use of force by (1) the U.S. Armed Forces, (2) a coalition that includes the United States, or (3) a military organization supporting the United States or such coalition.

Funds for implementing Section 1213 are to be derived from funds appropriated to the Office of the Secretary of Defense under the Operation and Maintenance, Defense-wide account.

Section 1213 also provides that, notwithstanding any other provision of law, the authority prescribed in Section 1213 is to be construed as the sole authority available to make *ex gratia* payments in the event of property damage, personal injury, or death that is incident to the use of force by the U.S. Armed Forces.

The following interim regulations implement Section 1213 and establish roles and responsibilities to ensure that the authority may be used in a timely and efficient manner to support mission objectives. These interim regulations will be replaced by a new DoD Instruction or incorporated into an existing DoD Instruction in accordance with DoD Instruction 5025.01, "DoD Issuances Program," before February 25, 2022.

Purpose of *Ex Gratia* Payments Under Section 1213

Subject to these regulations, the authority provided in Section 1213 may be used by authorized commanders, at their discretion, to provide nominal monetary payments to friendly civilians as a means of expressing condolence or sympathy or as a goodwill gesture in the event of property damage, personal injury, or death that is incident to the use of force by (1) the U.S. Armed Forces, (2) a coalition that includes the United States, or (3) a military organization supporting the United States or such coalition.

The principal goal for the use of this authority is to help authorized commanders obtain and maintain friendly relations with and the support of local populations where U.S. forces are operating during major conflicts, low-intensity conflicts, insurgencies, and other military operations involving the use of force, such as counter-terrorism operations. An offer of an *ex gratia* payment is one of several response options to be considered. Other possible response options, which may or may not be compatible with an offer of an *ex gratia* payment, include



public acknowledgment that the property damage, personal injury, or death was incidentally caused by U.S. forces; medical care to the extent authorized by law; or other appropriate measures that may be consistent with mission objectives and applicable law.

This authority may not be used to compensate civilians for burdens and losses that are incident to armed conflict or to try to restore civilians to the situation that existed before the armed conflict or a particular combat operation. In particular, offers of *ex gratia* payments under Section 1213 will not be used to circumvent the “combat exclusion” in the Foreign Claims Act, Chapter 163 of Title 10, U.S. Code (*e.g.*, by trying to compensate recipients for the value of losses (*i.e.*, property damage, personal injury, or death), for what would otherwise be non-compensable under the Foreign Claims Act). Further, Section 1213 does not provide authority to undertake, in any form, humanitarian or disaster assistance or relief, foreign assistance, or civic aid, which is provided for under other statutory authorities.

Offers of *ex gratia* payments under Section 1213 are not legally required, nor may they be construed or considered as an admission or an acknowledgment of any legal obligation to provide compensation, payment, or reparations for property damage, personal injury, or death. Commanders authorized to approve offers of *ex gratia* payments under Section 1213 will take appropriate measures to ensure *ex gratia* payments are made for a proper purpose and the intent of such payments is understood by subordinate commanders, their forces, and relevant non-DoD audiences, including recipients, relevant local populations, and any relevant foreign governments.

In general, U.S. domestic law and the law of war do not require the United States to assume liability and compensate individuals for injuries to their person or personal property caused by its lawful combat operations. The law of war has been developed with special consideration of the circumstances of war and the unfortunate reality that during war civilians are incidentally injured and killed, and civilian property is damaged.

The authority provided in Section 1213 will not be used to:

- pay claims otherwise compensable under the Foreign Claims Act, Chapter 163 of Title 10, U.S. Code, or any other provision of U.S. law or international agreement;
- express condolences or sympathy for loss to civilians that was caused by an enemy armed force, armed group, or person; or
- express condolences or sympathy for loss to civilians or their surviving relatives that resulted from such civilians participating in hostilities or assuming risks inherent in supporting military operations.

Authority to Approve *Ex Gratia* Payments Under Section 1213

The authority to approve *ex gratia* payments under Section 1213 is delegated to geographic Combatant Commanders, subject to the limitations on payment amounts and the procedures prescribed below. Geographic Combatant Commanders may further delegate this authority to subordinate commanders.

Geographic Combatant Commanders and authorized subordinate commanders may further authorize bulk draws of funds up to \$5,000, which will be recorded and maintained by a Paying Agent until the bulk fund is closed out at finance. The use of such bulk draws of funds to make *ex gratia* payments under Section 1213 will also be subject to the limitations on payment amounts and applicable procedures, including the procedures prescribed below.

Procedures

In addition to the limitations on payment amounts prescribed below, the following procedures apply to decisions to approve offers of *ex gratia* payments under Section 1213.

A. *Document the Circumstances Related to the Damage, Injury, or Death.* If an authorized commander decides, in his or her discretion, to offer an *ex gratia* payment under Section 1213, details sufficient to demonstrate the propriety of such a payment will be documented. Such information may be documented through:

- (1) significant activity (SIGACT) reports;
- (2) civilian casualty (CIVCAS) credibility assessment reports (CCARs);
- (3) administrative investigations conducted under applicable Military Department regulations (*e.g.*, AR 15-6, JAGINST 5800.7F);
- (4) other documented reviews of incidents; or
- (5) other appropriate means, such as a commander's written report about an incident.

B. *Take Timely Action.* An offer of an *ex gratia* payment will normally be made within 90 days of the relevant incident because the condolences, sympathy, or goodwill it helps convey is normally time-sensitive. These procedures are specifically intended to minimize the time between an incident and offering an *ex gratia* payment.

C. *Consider the Relevant Factors.* Based on the country-level or regional-level assessment, authorized commanders will consider the relevant factors in deciding whether to offer an *ex gratia* payment and how much to offer, which may include:

- (1) the nature and extent of property damage, the severity of personal injury, and/or whether death resulted;
- (2) mission objectives;
- (3) local economic realities;
- (4) cultural norms;
- (5) the feasibility of obtaining and compiling sufficiently reliable information to make the determinations prescribed under these procedures and to document them, as required;

(6) the feasibility of a U.S. representative meeting with prospective recipients in a safe and appropriate setting to express the associated condolences, sympathy, or goodwill;

(7) advice from host nation officials and/or coalition partners;

(8) whether the prospective recipient is located in the country or vicinity where the incident occurred;

(9) whether an offer of an *ex gratia* payment will materially help obtain and maintain friendly relations with, and the support of, local populations where U.S. forces are operating; and

(10) other appropriate factors.

For example, when deciding whether to approve the offer of an *ex gratia* payment, authorized commanders may consider whether the offer would likely be properly understood by the prospective recipient to be part of an expression of condolences, sympathy, or goodwill, or whether the prospective recipient may, under the circumstances, feel antagonized or offended by the gesture. Although *ex gratia* payments may be rare during conventional combat operations, commanders may decide to use such payments more frequently in other types of military operations, such as in counterinsurgency or stability operations, where support of the civilian population is often the center of gravity with respect to mission objectives and U.S. units have day-to-day contact with the local population.

Even though cultural norms are relevant when deciding whether an *ex gratia* payment under Section 1213 should be offered and how much such an offer should be, *ex gratia* payments offered under Section 1213 are not *solatia*. Accordingly, there is no need for there to be evidence that existing local custom establishes an expectation of Section 1213 payments or for such payments to be made in accordance with local custom, as there is with *solatia* payments made under 10 U.S.C. § 2242.

D. Determine the Cause of the Damage, Injury, or Death. An offer of an *ex gratia* payment under Section 1213 may only be authorized if the property damage, personal injury, or death:

(1) was caused by the U.S. Armed Forces, a coalition that includes the United States, or a military organization supporting the United States or such coalition; and

(2) occurred during an operation carried out by the United States, such coalition, or such military organization.

Payments are not authorized for property damage, personal injury, or death to civilians caused by an enemy armed force, armed group, or person. Payments may, nonetheless, be offered to friendly civilians when property damage, personal injury, or death was caused by the United States, such coalition, or such military organization, but the enemy bears *responsibility* for causing the damage, injury, or death, by, for example, using human shields or using populated areas to try to shield their forces, arms, munitions, equipment, or supplies.

Payments also are not authorized for property damage, personal injury, or death to civilians or their surviving relatives that resulted from such civilians participating in hostilities or assuming risks inherent in supporting military operations, such as by being involved in planning or executing attacks or other hostile action that gave rise to the use of force by the United States, such coalition, or such military organization resulting in such property damage, personal injury, or death.

E. Determine Whether the Prospective Recipient Is “Friendly to the United States.”

When considering whether to authorize an offer of an *ex gratia* payment under Section 1213, the relevant commander will make good-faith efforts, based on information available at the time, to ensure that any prospective foreign recipient is “friendly to the United States.” Available relevant information from civil affairs and intelligence sources will be considered, as well as relevant information from subordinate commanders whose units may have had recent interactions with the local population in the relevant area, including possibly the prospective recipient in question.

Payments may not be offered to residents of a foreign locality or country where the population of the area as a whole is in a state of armed conflict or war against the United States. Payments also may not be offered where the relevant commander assesses that such payments present an undue risk being used for efforts harmful to the United States, such as to fund insurgent activities or acts of terrorism against the United States or its allies and partners. This can include payments that are likely to be subjected to confiscation, extortion, or unofficial taxation by terrorist or hostile insurgent groups.

F. Obtain Legal Advice. Before authorizing an offer of an *ex gratia* payment under Section 1213, the relevant commander must obtain legal advice. Legal advisers may decide the best way of communicating their advice, in light of the prevailing circumstances. Such advice will include:

(1) whether there is proper legal basis for offering an *ex gratia* payment under Section 1213, given the documented facts and circumstances, including by addressing whether a claim related to the incident would be compensable under the Foreign Claims Act or any other provision of U.S. law or international agreement (*e.g.*, a Status of Forces Agreement);

(2) whether the procedures in these regulations have been followed; and

(3) any other matter the legal adviser deems appropriate.

G. Compile, Maintain, and Submit a Written Record. For any incident in which an offer of an *ex gratia* payment under Section 1213 is approved, regardless of whether the prospective recipient accepts or refuses the payment, a written record of the decision will be compiled and maintained to help identify the factual basis for approved offers of *ex gratia* payments under Section 1213 and to complete the quarterly reports discussed below.

A written record will, at a minimum, include:

(1) a relevant report or reports that describe the property damage, personal injury,

or/and death, and the general circumstances that led to it;

- (2) information about each approved offer of an *ex gratia* payment under Section 1213, including the duty title of the commander who approved the payment, the amounts approved, and to whom the payment was intended to be made; and
- (3) information about when, where, and to whom the payment was made, including whether it was accepted or refused, and an assessment as to the reason or reasons for any such refusal.

A written record is intended to identify the factual basis for approved offers of *ex gratia* payments under Section 1213 and to complete the quarterly reports, as discussed below. Accordingly, a written record does not need to contain every document related to approved offers of *ex gratia* payments under Section 1213, such as internal communications, accounting documents, hand receipts, intelligence reports, and deliberative materials, including the advice and recommendations of subordinate commanders and staff officers.

A written record of any *ex gratia* payment offered, whether accepted or refused, will be submitted by geographic Combatant Commands to the Joint Staff (J-5), according to the schedule for submission of quarterly reports. Records will be submitted with assigned reference numbers.

Limitations on Payment Amounts

Subject to the procedures prescribed above:

- Payments by commanders authorized to approve offers of *ex gratia* payments under Section 1213 to individual civilians, including surviving relatives, are limited to a maximum of \$5,000 per individual civilian injured, killed, or who suffered property damage.
- If the respective Combatant Commander has delegated authority to approve offers of *ex gratia* payments under Section 1213 to Subordinate Subunified Commanders, Service or Functional Component Commanders, or Joint Task Force Commanders, payments to individual civilians, including surviving relatives, are limited to a maximum of \$15,000 per individual civilian injured, killed, or who suffered property damage, with the approval of such commanders or their designees.
- The respective geographic Combatant Commander or the commander's designee is the approval authority for payments to individual civilians or surviving relatives in amounts more than \$15,000 per individual civilian injured, killed, or who suffered property damage.

Within the above limitations on payment amounts, Combatant Commanders and their subordinate commanders authorized to approve offers of *ex gratia* payments under Section 1213 should further refine the limitations on payment amounts to account for the specific circumstances of their use, as informed by the country-level or regional-level assessment.

Limitations on payment amounts may not be circumvented by “splitting” a single payment into multiple payments for the same individual civilian injured, killed, or who suffered property damage.

Quarterly Reports

Geographic Combatant Commanders whose command receives a funding allocation (as described below in the “Roles and Responsibilities” section) or that otherwise makes an *ex gratia* payment for property damage, personal injury, or death that is incident to the use of force will provide to the Chairman of the Joint Chiefs of Staff quarterly reports concerning: (1) approved offers of *ex gratia* payments under Section 1213, regardless of whether the prospective recipient accepts or refuses the payment; and (2) any other *ex gratia* payment made in the event of property damage, personal injury, or death that is incident to the use of force by the U.S. Armed Forces under any other authority.

Each quarterly report will include the total number of: (1) approved offers of *ex gratia* payments under Section 1213, regardless of whether the prospective recipient accepts or refuses the payment; and (2) any other *ex gratia* payment made in the event of property damage, personal injury, or death that is incident to the use of force by the U.S. Armed Forces under any other authority. With respect to each, geographic Combatant Commanders will report:

- The date of the relevant operation.
- The location of the relevant operation (*i.e.*, country, region, province, as available).
- The type of operation (*i.e.*, air or ground operation).
- The reference number used to track the particular approved offer of each payment.
- Whether a payment was offered, and whether it was accepted or refused by the prospective recipient.
- The amount or value of such payment and the country where such payment was made.
- The source of funds used to make such payment (Section 1213 funding is limited to funds authorized to be appropriated to Operation and Maintenance, Defense-wide, for the Office of the Secretary of Defense).
- The factual basis for each payment (*e.g.*, facts and circumstances documented in the written record).
- The duty title of the official who approved each payment.
- The manner in which each payment was made (*e.g.*, local currency, electronic funds transfer, check).
- An assessment as to the reason or reasons why any payment was refused or a

description of another reason why an approved payment was ultimately not received by the prospective recipient (*e.g.*, inability to locate the prospective recipient, subsequent death of the prospective recipient).

- A brief narrative description of the relevant incident.

If a geographic Combatant Command has received a funding allocation (as described in “Roles and Responsibilities” section) and no *ex gratia* payments under Section 1213 were offered during the respective reporting period, such command will provide an explanation of the general reason or reasons why.

The specific reporting requirements identified above exceed the requirements of Section 1213, but are to be fulfilled to support other reporting requirements. The Department will provide reports by quarter. The first report is due to the Joint Staff on July 10, 2020, and will cover the first and second quarters of calendar year 2020.

The Chairman of the Joint Chiefs of Staff will, as necessary, provide guidance to geographic Combatant Commanders on maintaining written records concerning approved offers of *ex gratia* payments under Section 1213, regardless of whether the prospective recipient accepts or refuses the payment, in sufficient detail to support quarterly reporting requirements.

Roles and Responsibilities

A. Under Secretary of Defense for Policy (USD(P))

- a. Issues and updates these regulations and other guidance.
- b. Identifies allocations of funding authority for each geographic Combatant Commander’s area of responsibility.
- c. Approves an annual allocation of funding authority by Combatant Command, including any allocations by country if required, by December 15 each year. Considers requests for additional allocations of funding, as needed. Tracks all allocations provided.
- d. Provides a memorandum to the Director, Washington Headquarters Services (WHS), in coordination with the Office of the Under Secretary of Defense (Comptroller), authorizing funding allocations by Combatant Command.
- e. If funding allocations are amended, issue a new memorandum identifying new allocations to WHS.

B. Director, WHS

- a. Makes funding allocations identified by the USD(P).

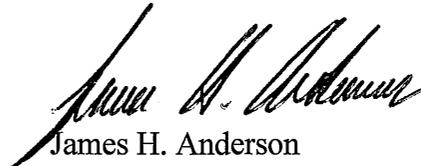
- b. Coordinates with Combatant Command Support Agents (CCSA) that are receiving funding allocations to establish lines of accounting.
- C. DoD Civilian Official Designated Under Section 936 of the NDAA for FY 2019 to Be Responsible for Developing, Coordinating, and Overseeing Civilian Casualty Policy
 - a. Oversees compliance with these regulations and other relevant guidance.
 - b. Consults with the State Department on each country-level or regional-level *ex gratia* assessment provided by the geographic Combatant Commands and the Joint Staff.
 - c. Ensures quarterly reports are submitted to the congressional defense committees, as required under Section 1213.
- D. Chairman of the Joint Chiefs of Staff
 - a. Ensures the Joint Staff recommends to the Office of the USD(P) the allocation of funding authority for the next calendar year, including the amount to be withheld for unplanned requirements, no later than November 30 each year.
 - b. Reviews country-level and regional-level *ex gratia* assessments provided by the geographic Combatant Commands and makes recommendations to the Office of the USD(P).
 - c. Consolidates quarterly reports submitted by the geographic Combatant Commands for further submission to the Office of the USD(P).
- E. Geographic Combatant Commanders
 - a. Submit to the Office of the USD(P), via the Joint Staff, no later than November 1 each year, their requests for funding authority for the following calendar year. Requests should be based upon anticipated operational requirements, in light of prior year expenditures. Request additional allocations of funding, as needed.
 - b. Ensure no payments are made above their respective authorized funding allocation levels. Request an amendment to the funding allocation to the Office of the USD(P), via the Joint Staff, if additional authority is required.
 - c. Promulgate additional implementation guidance, as necessary, including guidance that will facilitate a relatively consistent approach to the circumstances under which *ex gratia* payments under Section 1213 are made within theaters of operation for which the commander is responsible, in light of the relevant factors listed in paragraph C of the “Procedures” section above and the limitations described in the “Limitations on Payment Amounts” section above.

- d. Ensure subordinate commanders who are authorized to approve *ex gratia* payments under Section 1213, and their supporting judge advocates, receive training on the use of the authority and the associated procedures.
 - e. Develop and provide to the Office of the USD(P), via the Joint Staff, “assessments” for each country or region where each geographic Combatant Commander plans to use *ex gratia* payments under Section 1213 to support U.S. military objectives, in light of the purpose of *ex gratia* payments under Section 1213 and the limitations on payment amounts prescribed above. Each assessment should include a description of cultural appropriateness related to expressing condolences, sympathy, or goodwill in the country or region and the prevailing economic conditions relevant to assessing the nature, types, and amounts of payments that would appropriately help express such condolences, sympathy, or goodwill. Assessments should be developed in consultation with the relevant U.S. Embassy Country Team or Teams.
 - f. Submits quarterly *ex gratia* reports to the Joint Staff no later than ten days after the end of the quarter.
- F. Deputy Assistant Secretary of Defense for Stability and Humanitarian Affairs
- a. In consultation with the Secretary of State or the Secretary of State’s representative, approves country-level or regional-level *ex gratia* assessments provided by the Combatant Commands and the Joint Staff.

Accounting Procedures

- A. All funds supporting Section 1213 will be derived from funds authorized to be appropriated to the Office of the Secretary of Defense, in the Operation and Maintenance, Defense-wide account.
- B. Funds will be provided to the geographic Combatant Commands from WHS, based on the allocations approved by the USD(P), as described in the “Roles and Responsibilities” section.
- C. Paying Agents responsible for making *ex gratia* payments under Section 1213 will be appointed consistent with Volume 5, Chapter 2, “Disbursing Offices, Officers, and Agents,” of DoD 7000.14-R, Defense of Defense Financial Management Regulation. The same individual must not serve as the Paying Agent, the Certifying Officer, and the commander approving the offer of the *ex gratia* payment. Paying Agents will be DoD military or civilian personnel. Payments may not be paid by foreign government, nongovernmental organization, or other non-DoD U.S. personnel.
- D. Except as provided in paragraph E below, all payments will be monetary in nature. Payments should normally be made in the local currency of the country where the prospective recipient is located at the time of payment. Payments may also be made through an electronic funds transfer or a check drawn against a limited depository account.

- E. As the sole exception to the requirement that payments be monetary in nature, Combatant Commanders and their subordinate commanders authorized to approve offers of *ex gratia* payments under Section 1213 may, in the limited circumstance where a monetary payment would not be culturally appropriate, authorize payment in the form of a tangible item of *de minimis* value (defined to be an item costing no more than the amount specified for “minimal value” pursuant to 5 U.S.C. § 7432, currently \$415.00) as an expression of condolence or sympathy or as a goodwill gesture in lieu of any monetary payment.
- F. Personnel assigned to make payments will make clear to the recipient that the offer of the *ex gratia* payment is part of an expression of condolences, sympathy, or goodwill in the event of property damage, personal injury, or death, rather than as a means of compensation or reparation.
- G. Payments up to \$5,000 may be made from a bulk draw of funds. Payments using a bulk draw of funds will not be obligated when the funds are drawn. A DA Form 3953, “Purchase Request & Commitment,” document annotating a bulk funds draw will generate a commitment in the financial system. Each type of bulk funding must be recorded and maintained by the Paying Agent until the bulk fund is closed out at finance.


James H. Anderson
Acting