



NATIONAL HEADQUARTERS CIVIL AIR PATROL

CAP REGULATION 111-2

13 APRIL 2011

Legal

MEMORANDUM OF UNDERSTANDING

This regulation prescribes policies, procedures, and formats regarding a Memorandum of Understanding or Agreement and a Letter of Agreement.

Through this policy, CAP is better able to meet its responsibilities under Title 36, Section 40302 of the United States Code: “[To] encourage and develop by example the voluntary contribution of private citizens to the public welfare and “To provide an organization of private citizens with adequate facilities to assist in meeting local and national emergencies.”

This regulation should be forwarded to all personnel involved in developing or implementing memoranda of understanding (MOUs) within your command such as unit commanders, legal officers and operations personnel.

SUMMARY OF CHANGES.

This regulation establishes the policy on MOUs and letters of agreement (LOA) in Civil Air Patrol (CAP). It specifies that only the Air Force may assign or authorize an Air Force-assigned mission. It confirms the authority of corporate officers to execute MOUs to be performed under their authority, requires their authorization to negotiate such MOUs, and establishes differences in policy and procedures for operational and non-operational MOUs. This revision includes procedure clarifications. **Note: Shaded areas identify new or revised material.**

1. Definitions.

a. Air Force-Assigned Mission. An Air Force-assigned mission (AFAM) is an operational (see paragraph 1g below) mission of CAP under the direction of the Department of the Air Force and under written authorization by competent authority covering a specific assignment and prescribing a time limit for the assignment.

b. Current MOU. A current MOU is an unexpired MOU processed and approved under the procedures provided in this regulation. (See paragraph 4j.)

c. Corporate MOU Authority. Corporate MOU Authority (CMA) refers to the corporate officer/commander under whose authority the MOU is to be performed. The wing commander is the CMA for local and wing MOUs in his/her wing. The National Commander (CAP/CC) is CMA for National MOUs and the Executive Director (EX) is the CMA for MOUs to be performed solely by CAP employees in his/her reporting structure.

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Approved by: CAP/CC

Notice: CAP publications and forms are available digitally on the National CAP website at: http://members.gocivilairpatrol.com/forms_publications_regulations/.

d. Letter of Agreement. A letter of agreement (LOA) is an MOU in letter form. It is usually informal; short, three pages or less; and not operational in nature.

e. Memorandum of Understanding. An MOU is a written agreement that establishes the basis for mutual cooperation and coordination between CAP and supported organizations and agencies. Ideally, an MOU is not a "contract." That is, it creates no enforceable rights until it is invoked, such as through a request for a mission by a state agency coupled with CAP's acceptance of the mission by a wing commander or his/her representative.

(1) National MOU. An MOU that involves a CAP relationship or activities in more than a single wing or single region is considered a National MOU.

(2) Wing MOU. An MOU that facilitates a recurring operational and/or training relationship between a CAP wing and a state or state agency (including the District of Columbia and the Commonwealth of Puerto Rico), is considered a wing MOU.

(3) Local MOU. An MOU that addresses a relationship between a CAP unit below wing level and a local government below the state level, or another organization, is considered a local MOU.

(4) MOU Registration Number. MOUs approved by General Counsel will be assigned an MOU Registration Number. This number confirms that the MOU has been approved and provides a unique identifier for the document for ready reference and to distinguish it from any and all other MOUs between the same parties.

f. Non-Governmental Organizations. "A non-governmental organization (NGO) is a not-for-profit, voluntary citizens' group, which is organized on a local, national or international level to address issues in support of the public good." (United Nations Department of Public Information, Non-Governmental Organizations Section, <http://www.un.org/dpi/ngosection/brochure.htm>.)

g. Operations. "Operations" refers to activities intended to achieve something beyond mere academic or administrative functions. Examples of operations include air and ground search and rescue, Counterdrug missions, and training for same. Examples of non-operations include classroom instruction, research conducted in an office-like environment (e.g. library, classroom), presentations, and negotiations. Incidental ground transportation (e.g. between classroom, lodging, and dining facilities) does not make an activity an "operation." Flying and off-road four-wheel-drive activities are presumed to be "operations." Questions about whether activities contemplated constitute "operations" may be submitted for resolution to the National Legal Officer or his/her designee.

h. Recommended. Recommended terms or actions are those which may be omitted only upon written justification submitted to NHQ with the proposed MOU by the CMA.

i. Recurring Need for CAP Services and Support. For operational MOUs, this means the parties anticipate CAP performing approximately 12 or more missions per year.

j. Request for Assistance. A request for assistance (RFA) is typically a one page letter or short e-mail message to a Federal agency that requests assistance and sets forth the legal authority for granting the assistance. A sample RFA is provided at http://members.gocivilairpatrol.com/cap_national_hq/general_counsel/request_for_assistance_form.cfm.

k. Suggested. Terms, practices, or actions offered to commanders solely for consideration are "suggested." They include, but are not limited to, preferred practices.

2. Background.

a. History. MOUs between wings and states were initially used as a tool to encourage development of CAP relations with state governments as a form of institutional marketing. Subsequently, MOUs, when approved and signed by the Commander of CAP-USAF (HQ CAP-USAF/CC), were intended to establish AFAM status for missions there under. Today, AFAM status is not established by an MOU alone.

b. Purposes. MOUs today are a tool for:

(1) **Institutional Marketing** – developing and maintaining relationships between CAP and state governments and organizations selected by corporate officers.

(2) **Managing and Administering Operations** – facilitating the conduct of recurring missions for other organizations, most typically NGOs, through operational MOUs.

3. Policy.

a. MOUs in General.

(1) **Purpose.** An operational MOU is appropriate when an organization or agency has a recurring need for CAP services and support. A non-operational MOU is appropriate when a corporate officer has determined that an ongoing relationship between CAP and the entity would be mutually beneficial.

(2) **Required and Optional MOUs.** It is presumed that every state has a recurring need for CAP services and support. Therefore, every CAP wing is required to maintain a current MOU with the state in which it operates. Each wing that does not have a current MOU with the state must submit a statement of reasons through its region commander to the CAP/CC with a copy to National Headquarters General Counsel (NHQ/GC). If the reasons for the absence of a current MOU in any particular state change, even if such change does not result in the execution of a state-level MOU, the wing must submit a new statement of reasons in accordance with this paragraph. All other MOUs are optional at the discretion of the CMA in accordance with this regulation. It is recommended that CAP negotiate local operational MOUs only when (a) there is a recurring need for CAP services and support (See paragraph 1i above.) and (b) the supported entity requests or requires one.

(3) **Alternatives to an Operational MOU.** The National Operations Center (NOC) is able to support mission requests without an MOU. As an alternative to creating an operational MOU, the entity seeking support should be encouraged to contact the NOC toll free at (888) 211-1812 or opscenter@capnhq.gov. A formal RFA may be used by the entity to request assistance for a short time or as needed over a longer period, such as a fiscal or calendar year.

(4) Authority.

(a) **Negotiations.** An MOU may be negotiated only as authorized by the CMA. Wing commanders are encouraged to issue wing supplements to this regulation to provide procedures for negotiating and obtaining MOUs, establishing criteria for engaging in such negotiations and delegating authority in accordance with those criteria.

(b) **Approval.** The NHQ/GC must approve MOUs before they are submitted to other parties for signature. Wing MOUs must be authorized by the wing commander before submitting to GC for approval.

(c) **Signatures.** MOU signatures on behalf of Civil Air Patrol may be rendered only by a corporate officer. With rare exceptions (to be approved by CAP/GC), MOUs are executed on behalf of CAP by the CMA.

(d) **Air Force-Assigned Missions (AFAMs).** Only the Air Force may assign an AFAM. Planning for an MOU with any agency of the Federal Government, or purporting to grant AFAM status, must involve CAP-USAF at its earliest stages with involvement beginning with the closest representative of the CAP-USAF Commander (CAP-USAF/CC) (e.g. a state director, liaison region commander, or CAP-USAF Director of Operations (CAP-USAF/XO)). **MOUs that grant AFAM status are not authorized by this regulation.**

(5) **Finance.** MOUs are also a tool for administering financial records and transactions.

(a) **Program Income.** Funds received through the use of assets procured with Federal funds are considered "program income" and, in accordance with Department of Defense Regulations, must be used only for "program" expenses. Accounting for these funds should be clear and precise. These funds shall be treated the same as reimbursement for AFAMs. Therefore, they may be commingled with AFAM reimbursement funds, provided the source is clearly shown. For further guidance on program income, contact CAP NHQ/FM.

(b) **Amount of Payment.** MOUs calling for payment for non-AFAMs to CAP need not be limited to the rates established in attachment 1 of Civil Air Patrol Regulation (CAPR) 173-3, *Payment for Civil Air Patrol Support*.

1. Federal Agencies. Under 10 U.S.C. §9442, CAP is the Air Force Auxiliary when performing a mission for the Federal government. Missions for Federal agencies should be considered AFAMs and MOUs with them provide for reimbursement in accordance with CAPR 173-3.

2. State or Local Governments. MOUs that provide assistance requested by state or local governmental authorities to perform disaster relief missions and activities, other emergencies missions and activities, and non-emergency missions and activities may be performed at a rate less than the rates charged by private sector sources for equivalent services.

3. Non-Governmental Organizations (NGOs). For all NGO missions, the MOU must specify a rate at least equal to the rates charged by private sector sources for equivalent services.

b. Operational vs. Non-Operational MOUs. Operational MOUs involve greater risks and therefore are subject to more requirements and closer examination than non-operational MOUs, as is discussed later in this regulation.

c. National MOUs. The CAP/CC and Executive Director (EX) shall consult with one another and, if circumstances warrant, with the Board of Governors (BoG) on National MOUs being negotiated and prepared for signing. The EX shall inform the BoG of new National MOUs executed by CAP/CC, EX and the CAP-USAF/CC no later than the BoG meeting next following the execution of same.

(2) **Other State or Local Agencies.** Other agencies of State or local governments within States that request CAP assistance may submit an abbreviated MOU (such as a letter signed by both parties) that incorporates the terms and conditions of this MOU by reference. An abbreviated MOU should refer to the MOU Registration Number on the cover page of this agreement and attach a copy of this MOU.

d. Wing and Local MOUs. Normally, each CAP wing has only one wing MOU with its parent state, although it is sometimes necessary for a wing to negotiate separate agreements or an abbreviated MOU with several state agencies. To the extent reasonably possible, it is preferred that a single MOU address all of CAP's responsibilities to a state and its agencies.

e. Content.

(1) Required in General. MOUs must include the following:

(a) Names. The legal name of the contracting parties. MOUs should identify CAP as: "Civil Air Patrol by and through its *Anystate* Wing" and not simply, "*Anystate* Wing Civil Air Patrol" because there is no such legal entity as "*Anystate* Wing Civil Air Patrol."

(b) Description. A full and complete description of activities the MOU is intended to support or the parties are to perform. Operational MOUs shall include a description of missions CAP is to perform and how they are to be financed.

(c) Finances. Whatever payments are authorized by the MOU shall be explicitly and categorically stated. If no payments are authorized, the MOU shall state: "No payments between parties are authorized by this MOU." If payments are authorized, the MOU shall include a prohibition on double billing (expenses may be charged only once) and state that expenses paid under the MOU may not also be reimbursed from NHQ/FM (e.g. (a) "*Anystate* shall reimburse CAP for flying at the rate of \$200 per hour for aircraft maintenance and insurance." - This is double billing as insurance and major maintenance are paid with appropriated funds. (b) "*Anystate* shall pay CAP for flying at the rate of \$200 per hour." - This is not double billing. Funds shall be administered in accordance with paragraph 3a(5) above and may be used for "program" expenses).

(d) Term. Each MOU must state its term and the term shall be for no more than 5 years. It is optional that the MOU expire or require renewal in intervals of 3 years or less (See sub-paragraph 1b and paragraph 4j).

(e) Authorized Agents. The MOU must be signed by an authorized agent of each party. Typically, the CMA signs on behalf of CAP.

(2) Requirements of Operational MOUs. MOUs that authorize missions (i.e. operations) must include language that addresses the following issues:

(a) Protection of Air Force Interests. Unless otherwise approved by competent Air Force Authority (such as for MOUs with Federal agencies,) operational MOUs shall include language to the effect that:

1. AFAMs may be authorized only by competent Air Force Authority.

2. The subject MOU is between CAP as a corporation under 36 U.S.C. §40301 et. seq. and not an agreement with CAP as the Air Force Auxiliary under 10 U.S.C. §9442.

3. The United States Air Force has priority in the use of CAP equipment bought with appropriated funds. The priority for utilizing CAP resources is, in order: USAF, other DoD departments and agencies, other Federal departments and agencies, state agencies and local agencies.

4. CAP volunteers flying missions under this MOU are not eligible for Federal Tort Claims Act or Federal Employees Compensation Act benefits.

5. No Air Force-Assigned Missions (AFAM) will be assigned pursuant to this MOU.

6. CAP is not deemed an instrumentality of the United States for any missions that are not Air Force-assigned. CAP is the Air Force Auxiliary and is only deemed an instrumentality when performing missions assigned by the Secretary of the Air Force or his/her designee.

7. Missions flown and funded under this MOU are not eligible for payment by the Federal government.

8. Air Force provisions may not be amended.

(b) Identify Limitations. Limitations are identified in detail to maintain goodwill by ensuring that our "customer" does not have expectations outside the law or CAP's capabilities. Specific limitations recommended for inclusion are set forth in the sample MOU at http://members.gocivilairpatrol.com/cap_national_hq/general_counsel/sample_mou.cfm.

(c) Non-members Aboard CAP Aircraft. If the MOU provides for flying of non-members, it must acknowledge that flying non-members in CAP aircraft is authorized only as specifically provided in CAPR 60-1, *CAP Flight Management*, and state that pre-approval of each non-member flight must to be obtained from NHQ/NOC in accordance with CAPR 60-1.

(d) Right to Withdraw. CAP is a volunteer organization and retains the right to withdraw its resources without reason and, when it deems appropriate, for the safety of its members and/or others.

(e) Maintaining Command and Control. Operational MOUs must ensure that command and control remains with CAP; however, this language may be negotiable in order to qualify CAP and its members for workers' compensation protections.

(f) Liability and Workers Compensation Protections. Liability and insurance are among the most frequent concerns of state and local governments when negotiating an MOU with CAP. It is mandatory to properly identify who will provide general liability and workers' compensation coverage for CAP members performing under the MOU. If such coverage is not provided by the supported organization, the MOU must clearly so state. CAPR 900-5, *CAP Insurance/Benefits Program*, contains information regarding CAP liability and workers' compensation insurance issues. The language incorporated into the sample MOU found at http://members.gocivilairpatrol.com/cap_national_hq/general_counsel/sample_mou.cfm is designed to clarify liability issues arising from CAP activities performed in accordance with a state/local MOU. Although it is not mandatory that the supported organization provide liability insurance or workers' compensation coverage in an operational MOU, the supported organization or agency should be highly encouraged to provide liability and workers' compensation protections for CAP and CAP members. These protections may be offered by the supported organization in different ways. For example, protection might be afforded by inclusion of CAP as a state agency for the purposes of the state tort claims act, statutory immunity or deeming CAP and its members to be employees of the state for workers' compensation and liability purposes. Any protections provided should be documented in the MOU.

(3) Requirements of Non-Operational MOUs. Non-Operational MOUs must explicitly state "No operational missions are authorized by this MOU."

4. Procedure.

a. Initiation and Negotiation. Learning about local emergency services operations, how CAP might fit into the process in case of a disaster, and being aware of organizations with goals similar to CAP's, is useful to furthering CAP's missions and is to CAP's advantage. However, making promises or assuring/inviting commitment should be undertaken only with the express authority of the wing commander. Negotiation of such relationships, especially in the form of MOUs, is solely within the authority of the wing commander and he/she may choose to delegate that authority. Those negotiating new or revised MOUs should utilize legal officer services to the greatest extent possible.

b. Drafting. Non-operational MOUs may vary widely in form because of the variations in subject matter and scope. However, operational MOUs should use the sample MOU found at http://members.gocivilairpatrol.com/cap_national_hq/general_counsel/sample_mou.cfm in order to ensure prompt approval. An electronic version of the sample MOU may be obtained from gc@capnhq.gov and edited using MS Words "track changes." The sample MOU describes the basic missions the CAP may perform for the state which have been pre-authorized. Accordingly, use of the sample MOU (especially using "track changes") will simplify NHQ review and expedite approval.

c. Routing/Transmission.

(1) Do not provide any wing MOU to a state official for signing until after it has been reviewed and recommended by NHQ. Any drafts submitted to state officials for review or negotiation purposes should be clearly marked "DRAFT" on all pages and the word "DRAFT" inserted in all signature lines. Use electronic copies and "track changes" wherever possible.

(2) Electronic transmission of MOUs between CAP headquarters is recommended.

(3) Wing and Local MOUs must be approved by the wing commander and forwarded to NHQ/GC (e-mail submissions to gc@capnhq.gov are preferred) along with documentation of that approval (e.g., an affirmative statement by the officer in charge that the wing commander has seen and approved the MOU or other documentation as specified by the wing commander), for staffing and approval (see paragraph 3a(4)(b) above). A copy must also be provided simultaneously to the region commander.

d. Approval. Draft MOUs shall, with the authorization of the wing commander, be forwarded to NHQ/GC for staffing, coordination, and approval.

e. Review. NHQ/GC shall provide CAP-USAF with a copy and a reasonable opportunity to review an MOU before submitting the MOU to the appropriate corporate officer for signature.

f. Transmission to CMA. The NHQ coordination and review will be submitted to the CMA along with the approved MOU (where appropriate) with an MOU registration number. The CMA may then obtain the signature(s) of an appropriate official(s.)

g. Post Signing and Filing. The CMA must return a signed copy to GC for filing and distribution to CAP-USAF/JA within a reasonable time. A copy of each signed MOU and all subsequent certifications must be filed with the NHQ/GC.

h. Retention of Original. The CMA (and his or her successor in office) shall retain the original of any MOU currently in force or shall write a memo for record indentifying the party in possession of the original MOU.

i. Access. NHQ/GC may maintain copies of current National MOUs on the National web page. Commanders and their representatives may request copies from NHQ/GC. Wing commanders are encouraged to establish and maintain similar accessibility for MOUs under their authority.

j. Review and Certification. CMAs shall review each MOU every 3 years, along with this regulation, to ensure MOUs are current, correct, and that no changes are required. A memo for record signed by the CMA identifying the MOU, confirming the review, and citing the date of the regulation and original MOU shall be considered a "certification" of the continued effectiveness and validity of the MOU. Copies of certifications must be provided to NHQ/GC and distributed in the same manner as the original MOU, even though the certification distributed might not have original signatures. (See paragraph 4g.)

k. Revisions. A revision or amendment requires the same process as the initial MOU. However, changes in administrative details (e.g. telephone contact numbers) for MOUs may be made upon the authorization of the CMA without the necessity of following the entire approval process.