

## COMMODITY FUTURES TRADING COMMISSION

### Request for Comment on a Proposal To Exempt, Pursuant to the Authority in Section 4(c) of the Commodity Exchange Act, the Trading and Clearing of Certain Products Related to ETFS Physical Swiss Gold Shares and ETFS Physical Silver Shares

**AGENCY:** Commodity Futures Trading Commission.

**ACTION:** Notice of Proposed Order and Request for comment.

**SUMMARY:** The Commodity Futures Trading Commission (“CFTC” or the “Commission”) is proposing to exempt the trading and clearing of certain contracts called “options” and other contracts called “security futures” on each of ETFS Physical Swiss Gold Shares (“Gold Products”) and ETFS Physical Silver Shares (“Silver Products”) (collectively, “Gold and Silver Products”), which would be traded on national securities exchanges (as to options) and designated contract markets registered with the Securities and Exchange Commission (“SEC”) as limited purpose national securities exchanges (as to security futures), and in either case cleared through the Options Clearing Corporation (“OCC”) in its capacity as a registered securities clearing agency, from the provisions of the Commodity Exchange Act (“CEA”) <sup>1</sup> and the regulations thereunder, to the extent necessary to permit them to be so traded and cleared. Authority for this exemption is found in Section 4(c) of the CEA.<sup>2</sup> The Commission also is requesting comment on whether it should amend all orders issued exempting the trading and clearing of options and futures on gold and silver products from CEA provisions and Commission regulations thereunder, to impose market and large trader reporting requirements under Commission regulations to the trading and clearing of the options in order to assist the Commission in monitoring and addressing, among other things, the effect on designated contract markets of trading in such products.<sup>3</sup>

<sup>1</sup> 7 U.S.C. 1 *et seq.*

<sup>2</sup> 7 U.S.C. 6(c).

<sup>3</sup> The Commission has provided exemptions for gold and silver products on two prior occasions. See Order Exempting the Trading and Clearing of Certain Products Related to SPDR® Gold Trust Shares, 73 FR 31981 (June 5, 2008). Order Exempting the Trading and Clearing of SPDR Gold Futures Contracts, 73 FR 31979 (June 5, 2008), and Order Exempting the Trading and Clearing of Certain Products Related to iShares® COMEX Gold Trust Shares and iShares® Silver Trust Shares, 73 FR 79830 (December 30, 2008) (collectively, the “Previous Orders.”).

**DATES:** Comments must be received on or before May 17, 2010.

**ADDRESSES:** Comments may be submitted by any of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

- *E-mail:* [ETFSShares@cftc.gov](mailto:ETFSShares@cftc.gov). Include “Options and Security Futures on ETFS Gold and Silver Products” in the subject line of the message.

- *Fax:* 202-418-5521.
- *Mail:* Send to David A. Stawick, Secretary, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581.

- *Courier:* Same as mail above. All comments received will be posted without change to <http://www.CFTC.gov/>. All comments must be in English or, if not, accompanied by an English translation.

**FOR FURTHER INFORMATION CONTACT:** Robert B. Wasserman, Associate Director, 202-418-5092, [rwasserman@cftc.gov](mailto:rwasserman@cftc.gov), or Lois J. Gregory, Special Counsel, 202-418-5569, [lgregory@cftc.gov](mailto:lgregory@cftc.gov), Division of Clearing and Intermediary Oversight, Commodity Futures Trading Commission, Three Lafayette Centre, 1151 21st Street, NW., Washington, DC 20581.

#### SUPPLEMENTARY INFORMATION:

##### I. Introduction

The OCC is both a Derivatives Clearing Organization (“DCO”) registered pursuant to Section 5b of the CEA,<sup>4</sup> and a securities clearing agency registered pursuant to Section 17A of the Securities Exchange Act of 1934 (“the ‘34 Act”).<sup>5</sup>

OCC has filed with the CFTC, pursuant to Section 5c(c) of the CEA and Commission Regulations 39.4(a) and 40.5 thereunder,<sup>6</sup> a request for approval of rules and rule amendments that would enable OCC (1) to clear and settle contracts called “options” (“Options”) on Gold and Silver Products traded on national securities exchanges, in its capacity as a registered securities clearing agency (and not in its capacity as a DCO) and (2) to clear and settle contracts called “security futures” (“Security Futures”) on Gold and Silver Products traded on designated contract markets<sup>7</sup> registered with the SEC as limited purpose national securities exchanges pursuant to Section 6(g) of the ‘34 Act<sup>8</sup> (“DCMs”) as security

<sup>4</sup> 7 U.S.C. 7a-1.

<sup>5</sup> 15 U.S.C. 78q-1.

<sup>6</sup> 7 U.S.C. 7a-2(c), 17 CFR 39.4(a), 40.5.

<sup>7</sup> See Section 5 of the CEA, 7 U.S.C. 7.

<sup>8</sup> 15 U.S.C. 78f(g).

futures subject to the CEA and CFTC regulations thereunder governing security futures, in OCC’s capacity as a registered securities clearing agency (and not in its capacity as a DCO).<sup>9</sup> Section 5c(c)(3) provides that the CFTC must approve such rules and rule amendments submitted for approval unless it finds that the rules or rule amendments would violate the CEA.

In each case, the shares of the ETFS Gold Trust and the ETFS Silver Trust are designed to reflect the performance of the price of gold and silver bullion, respectively, less the expenses of Trust operations. The shares of each Trust represent beneficial interest in the Trust which in turn holds physical allocated gold bullion (ETFS Gold Trust) and silver bullion (ETFS Silver Trust). The gold and silver bullion is held in vault by or on behalf of the Trust’s custodian. Each physical bar is properly segregated and allocated to the property of the Trust. All physical gold and silver conforms to the London Bullion Market Association’s rules for good delivery. ETFS Gold Trust Shares and ETFS Silver Trust Shares are listed and traded on NYSEArca.

##### II. Section 4(c) of the Commodity Exchange Act

Section 4(c)(1) of the CEA empowers the CFTC to “promote responsible economic or financial innovation and fair competition” by exempting any transaction or class of transactions from any of the provisions of the CEA (subject to exceptions not relevant here) where the Commission determines that the exemption would be consistent with the public interest.<sup>10</sup> The Commission

<sup>9</sup> See Securities Exchange Act Release No. 61591 (February 25, 2010), 75 FR 9981 (March 4, 2010) (File No. SR-OCC-2009-20 filed with both the Commission and the Securities and Exchange Commission (“SEC”). See also Securities Exchange Act Release No. 61483 (February 3, 2010), 75 FR 6753 (February 10, 2010) (SEC approval of securities exchanges’ listing and trading options on ETFS Gold Trust and ETFS Silver Trust).

<sup>10</sup> Section 4(c)(1) of the CEA, 7 U.S.C. 6(c)(1), provides in full that:

In order to promote responsible economic or financial innovation and fair competition, the Commission by rule, regulation, or order, after notice and opportunity for hearing, may (on its own initiative or on application of any person, including any board of trade designated or registered as a contract market or derivatives transaction execution facility for transactions for future delivery in any commodity under section 7 of this title) exempt any agreement, contract, or transaction (or class thereof) that is otherwise subject to subsection (a) of this section (including any person or class of persons offering, entering into, rendering advice or rendering other services with respect to, the agreement, contract, or transaction), either unconditionally or on stated terms or conditions or for stated periods and either retroactively or prospectively, or both, from any of the requirements

may grant such an exemption by rule, regulation or order, after notice and opportunity for hearing, and may do so on application of any person or on its own initiative.

In enacting Section 4(c), Congress noted that the goal of the provision “is to give the Commission a means of providing certainty and stability to existing and emerging markets so that financial innovation and market development can proceed in an effective and competitive manner.”<sup>11</sup> Permitting Options and Security Futures on Gold and Silver Products to trade on national securities exchanges (as to Options) and DCMs (as to Security Futures) and in either case to be cleared by OCC in its capacity as a securities clearing agency, as discussed above, may foster both financial innovation and competition. In accordance with the Memorandum of Understanding entered into between the CFTC and the SEC on March 11, 2008, and in particular the addendum thereto concerning *Principles Governing the Review of Novel Derivative Products*, the Commission has permitted novel derivative products that implicate areas of potential overlapping regulatory concern to be permitted to trade in either or both a CFTC- or SEC-regulated environment, in a manner consistent with laws and regulations (including the appropriate use of all available exemptive and interpretive authority). The CFTC is requesting comment on whether it should exempt Options and Security Futures on Gold and Silver Products, as described above, that are traded on a national securities exchange or a DCM, respectively, and cleared through OCC in its capacity as a registered securities clearing agency, from the CEA and the Commission’s regulations thereunder, to the extent necessary to permit them to be so traded and cleared. The CFTC previously granted exemptions for similar Options and Security Futures on June 5 and December 30, 2008.<sup>12</sup>

In proposing this exemption, the CFTC need not—and does not—find that Options on the Gold and Silver Products are (or are not) options subject to the CEA, or find that Security Futures on the Gold and Silver Products are (or are not) security futures as defined in

of subsection (a) of this section, or from any other provision of this chapter (except subparagraphs (c)(ii) and (D) of section 2(a)(1) of this title, except that the Commission and the Securities and Exchange Commission may by rule, regulation, or order jointly exclude any agreement, contract, or transaction from section 2(a)(1)(D) of this title), if the Commission determines that the exemption would be consistent with the public interest.

<sup>11</sup> House Conf. Report No. 102–978, 1992 U.S.C.C.A.N. 3179, 3213 (“4(c) Conf. Report”).

<sup>12</sup> See footnote 3, above.

Section 1a(31) of the CEA.<sup>13</sup> During the legislative process leading to the enactment of Section 4(c) of the CEA, the House-Senate Conference Committee noted that:

The Conferees do not intend that the exercise of exemptive authority by the Commission would require any determination beforehand that the agreement, instrument, or transaction for which an exemption is sought is subject to the Act. Rather, this provision provides flexibility for the Commission to provide legal certainty to novel instruments where the determination as to jurisdiction is not straightforward. Rather than making a finding as to whether a product is or is not a futures contract, the Commission in appropriate cases may proceed directly to issuing an exemption.<sup>14</sup>

The Options and Security Futures on Gold and Silver Products described above raise questions involving their nature and the appropriate resulting jurisdiction over them. Given their potential usefulness to the market, however, the Commission believes that this may be an appropriate case for issuing an exemption without making a finding as to the nature of these particular instruments.

*Section 4(c)(2) provides that the Commission may grant exemptions only when it determines:* That the requirements for which an exemption is being provided should not be applied to the agreements, contracts or transactions at issue, and the exemption is consistent with the public interest and the purposes of the CEA; that the agreements, contracts or transactions will be entered into solely between appropriate persons; and that the exemption will not have a material adverse effect on the ability of the Commission or any contract market or derivatives transaction execution facility to discharge its regulatory or self-regulatory responsibilities under the CEA.<sup>15</sup>

The purposes of the CEA include “promot[ing] responsible innovation and

<sup>13</sup> 7 U.S.C. 1a(31).

<sup>14</sup> 4(c) Conf. Report at 3214–3215.

<sup>15</sup> Section 4(c)(2) of the CEA, 7 U.S.C. 6(c)(2), provides in full that:

The Commission shall not grant any exemption under paragraph (1) from any of the requirements of subsection (a) of this section unless the Commission determines that—

(A) The requirement should not be applied to the agreement, contract, or transaction for which the exemption is sought and that the exemption would be consistent with the public interest and the purposes of this Act; and

(B) The agreement, contract, or transaction—

(i) Will be entered into solely between appropriate persons; and

(ii) Will not have a material adverse effect on the ability of the Commission or any contract market or derivatives transaction execution facility to discharge its regulatory or self-regulatory duties under this Act.

fair competition among boards of trade, other markets and market participants.”<sup>16</sup> It may be consistent with these and the other purposes of the CEA, with the public interest, with the CFTC–SEC Memorandum of Understanding of March 11, 2008, and with the addendum thereto, for the mode of trading and clearing the Options and Security Futures on Gold and Silver Products—whether the mode applicable to options on securities or commodities, or to security futures or futures—to be determined by competitive market forces. Accordingly, the Commission proposes to use its authority under Section 4(c) of the Act to exempt the trading of Options on Gold and Silver Products on national securities exchanges and clearing thereof by OCC in its capacity as a registered securities clearing agency from the CEA and the Commission’s regulations thereunder to the extent necessary to permit them to be so traded and cleared. In addition, the Commission proposes to use its authority under Section 4(c) of the Act to exempt the trading and clearing of Security Futures on Gold and Silver Products from those provisions of the Act and the Commission’s regulations thereunder that, if the underlying were considered to be a commodity that is not a security, would be inconsistent with the trading and clearing of Security Futures on Gold and Silver Products as security futures. The proposed exemption would require that transactions in such contracts comply with the requirements established for transactions in security futures by the CEA and the Commission’s regulations thereunder. The CFTC is requesting comment as to whether these exemptions from the requirements of the CEA and regulations thereunder should be granted in the context of these transactions.

Section 4(c)(3) includes within the term “appropriate persons” a number of specified categories of persons, and also in subparagraph (K) thereof “such other persons that the Commission determines to be appropriate in light of \* \* \* the applicability of appropriate regulatory protections.” National securities exchanges and OCC, as well as their members who will intermediate Options on Gold and Silver Products, are subject to extensive and detailed regulation by the SEC under the ‘34 Act. Similarly, DCMs and OCC, as well as their members who will intermediate

<sup>16</sup> CEA 3(b), 7 U.S.C. 5(b). See also CEA 4(c)(1), 7 U.S.C. 6(c)(1) (purpose of exemptions is “to promote responsible economic or financial innovation and fair competition.”).

Security Futures on Gold and Silver Products, are subject to regulation by the SEC and CFTC. The CFTC is requesting comment as to whether all persons trading Options and Security Futures on Gold and Silver Products on national securities exchanges and DCMs, respectively, and clearing such products on OCC, are appropriate persons.

The Commission held a public meeting on March 25, 2010 to examine the trading of futures and options in the precious and base metals market and analyze how the Commission regulates futures and options markets on commodities of finite supply. The Commission is considering the views expressed at that meeting. For the time being, the Commission continues to decline to determine whether certain products underlain by physical commodities, such as the subject Gold and Silver Products, are subject to the Commission's jurisdiction as commodity options and futures contracts. However, the Commission may make such jurisdictional determinations in the future, and such determinations may inform the Commission's approach to consideration of exemptive orders, and of assessing the rules of registered entities.

### III. Large Trader Reporting; Market and Financial Surveillance

The Commission is considering the question of whether exemptions such as the one discussed herein, as well as those issued previously on substantially similar options and futures on gold and silver products, may interfere with the Commission's ability to discharge its regulatory responsibilities under the CEA or with the self-regulatory duties of contract markets. Options and Security Futures on gold and silver products can be used by those trading them for the same economic purposes served by entering into commodity options and security futures on gold and silver. As a result of highly interconnected physical and derivatives gold and silver markets, the trading of Gold and Silver Products that are options on national securities exchanges, if traded in sufficient volumes, can significantly affect the price discovery function of related commodity futures and option contracts. In addition, the pools of physical gold and silver aggregated by these funds can materially affect supplies that are deliverable under the terms and conditions of related commodity futures and options contracts. In order to preserve the integrity of the price discovery and risk management functions of Commission

regulated markets, it may be that national securities exchanges that list the options should comply with market reporting requirements and brokers and traders that carry accounts or trade in options on gold and silver products should comply with large trader reporting requirements.<sup>17</sup> Positions on security futures contracts on gold and silver products are currently required to be reported to the Commission by DCMs and intermediaries.<sup>18</sup> However, there is no such reporting requirement with respect to options on gold and silver products that are exempted from being treated as commodity options. Thus, the Commission seeks comment as to whether such reporting should be required. Such information might enhance the Commission's ability to collect and analyze market data concerning trading in the markets for gold and silver, and its ability effectively to monitor the trading activity and financial risk exposure of market participants and thus the risk exposure of any DCO, such as OCC, clearing as central counterparty (although in its capacity as a registered securities clearing agency). If the Commission determines to impose such requirements as to the gold and silver products that are the subject of the current proposed order, or those that were the subjects of the Previous Orders, a separate notice and request for comments will be issued setting forth proposed specifics of such requirements.

### IV. Request for Comment

The Commission requests comment on all aspects of the issues presented by this proposed order.

### V. Related Matters

#### A. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 ("PRA")<sup>19</sup> imposes certain requirements on Federal agencies (including the Commission) in connection with their conducting or sponsoring any collection of information as defined by the PRA. The proposed exemptive order would not, if approved, require a new

<sup>17</sup> See Parts 15 through 21 of the Commission's regulations.

<sup>18</sup> Under Commission Regulation Section 15.03(b), 17 CFR § 15.03(b), the number of contracts that constitute a reportable level for security futures products on an individual equity security is 1,000. In the instant case, when measured in terms of ounces, reporting levels for Security Futures on Gold and Silver Products would be significantly less than that for futures contracts on gold and silver currently trading on Comex. Thus, visibility with respect to the Security Futures may be greater than it would under large trader reporting requirements.

<sup>19</sup> 44 U.S.C. 3507(d).

collection of information from any entities that would be subject to the proposed order.

#### B. Cost-Benefit Analysis

Section 15(a) of the CEA,<sup>20</sup> as amended by Section 119 of the Commodity Futures Modernization Act of 2000, requires the Commission to consider the costs and benefits of its action before issuing an order under the CEA. By its terms, Section 15(a) as amended does not require the Commission to quantify the costs and benefits of an order or to determine whether the benefits of the order outweigh its costs. Rather, Section 15(a) simply requires the Commission to "consider the costs and benefits" of its action.

Section 15(a) of the CEA further specifies that costs and benefits shall be evaluated in light of five broad areas of market and public concern: Protection of market participants and the public; efficiency, competitiveness, and financial integrity of futures markets; price discovery; sound risk management practices; and other public interest considerations. Accordingly, the Commission could in its discretion give greater weight to any one of the five enumerated areas and could in its discretion determine that, notwithstanding its costs, a particular order was necessary or appropriate to protect the public interest or to effectuate any of the provisions or to accomplish any of the purposes of the CEA.

The Commission is considering the costs and benefits of this proposed order in light of the specific provisions of Section 15(a) of the CEA, as follows:<sup>21</sup>

1. *Protection of market participants and the public.* National securities exchanges, OCC, and their members who would intermediate the above-described Options and Security Futures on Gold and Silver Products are subject to extensive regulatory oversight.

2. *Efficiency, competition, and financial integrity.* The proposed exemption may enhance market efficiency and competition since it could encourage potential trading of Options and Security Futures on Gold and Silver Products through modes other than those normally applicable; that is, designated contract markets or derivatives transaction execution facilities. Financial integrity will not be affected since the Options and Security Futures on Gold and Silver Products

<sup>20</sup> 7 U.S.C. 19(a).

<sup>21</sup> See also Previous Orders, 73 FR at 31982 (June 5, 2008), 73 FR at 3 FR at 31980 (June 5, 2008), and 73 FR at 79832 (December 30, 2008).

will be cleared by OCC, a DCO and SEC-registered clearing agency, intermediated by SEC-registered broker-dealers.

3. *Price discovery.* Price discovery may be enhanced through market competition.

4. *Sound risk management practices.* The Options and Security Futures on Gold and Silver Products will be subject to OCC's current risk-management practices including its margining system.

5. *Other public interest considerations.* The proposed exemption may encourage development of derivative products through market competition without unnecessary regulatory burden.

After considering these factors, the Commission has determined to seek comment on the proposed order as discussed above. The Commission invites public comment on its application of the cost-benefit provision.

Issued in Washington, DC, on April 9, 2010 by the Commission.

**David A. Stawick,**

*Secretary of the Commission.*

[FR Doc. 2010-8630 Filed 4-14-10; 8:45 am]

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## CONSUMER PRODUCT SAFETY COMMISSION

### Sunshine Act Meetings

**TIME AND DATE:** Wednesday, April 21, 2010, 9 a.m.–11 a.m.

**PLACE:** Hearing Room 420, Bethesda Towers, 4330 East West Highway, Bethesda, Maryland.

**STATUS:** Commission Meeting—Open to the Public.

**MATTERS TO BE CONSIDERED:** Pending Decisional Matters: Testing and Labeling to Product Certification—Notice of Proposed Rulemaking (NPR) and Testing Component Parts—Notice of Proposed Rulemaking (NPR).

A live webcast of the Meeting can be viewed at <http://www.cpsc.gov/webcast/index.html>.

For a recorded message containing the latest agenda information, call (301) 504-7948.

**CONTACT PERSON FOR MORE INFORMATION:** Todd A. Stevenson, Office of the Secretary, U.S. Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814, (301) 504-7923.

Dated: April 13, 2010.

**Todd A. Stevenson,**

*Secretary.*

[FR Doc. 2010-8805 Filed 4-13-10; 4:15 pm]

BILLING CODE 6355-01-P

## DEPARTMENT OF DEFENSE

### Office of the Secretary

[Docket ID DOD-2010-OS-0048]

### Privacy Act of 1974; System of Records

**AGENCY:** Defense Security Cooperation Agency, DoD.

**ACTION:** Notice to alter a system of records.

**SUMMARY:** The Office of the Secretary of Defense proposes to alter a system of records to its inventory of record systems subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended.

**DATES:** This proposed action would be effective without further notice on May 17, 2010 unless comments are received which result in a contrary determination.

**ADDRESSES:** You may submit comments, identified by docket number and title, by any of the following methods:

- *Federal Rulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.
- *Mail:* Federal Docket Management System Office, 1160 Defense Pentagon, Washington, DC 20301-1160.

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

**FOR FURTHER INFORMATION CONTACT:** Ms. Cindy Allard at (703) 588-6830.

**SUPPLEMENTARY INFORMATION:** The Office of the Secretary of Defense notices for systems of records subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the Chief, OSD/JS Privacy Office, Freedom of Information Directorate, Washington Headquarters Services, 1155 Defense Pentagon, Washington DC 20301-1155.

The proposed system report, as required by 5 U.S.C. 552a(r) of the Privacy Act of 1974, as amended, was submitted on March 31, 2010, to the

House Committee on Oversight and Government Reform, the Senate Committee on Governmental Affairs, and the Office of Management and Budget (OMB) pursuant to paragraph 4c of Appendix I to OMB Circular No. A-130, "Federal Agency Responsibilities for Maintaining Records About Individuals" dated February 8, 1996 (February 20, 1996; 61 FR 6427).

Dated: April 12, 2010.

**Mitchell S. Bryman,**

*Alternate OSD Federal Register Liaison Officer, Department of Defense.*

### DSCA 01

#### SYSTEM NAME:

International Affairs Personnel Initiatives Database. (November 23, 2005; 70 FR 70789).

#### CHANGES:

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#### CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Delete entry and replace with "Civilians and military personnel employed with the Department of Defense who wish to become certified by the DoD International Affairs Certification Program, a voluntary program sponsored by the Defense Security Cooperation Agency and Departments of the Army, Navy and Air Force."

#### CATEGORIES OF RECORDS IN THE SYSTEM:

Delete entry and replace with "Full name; e-mail address; work mailing address, telephone and fax numbers.

Employment and education information that includes if individual is civilian or military; major command and mailing address, name of organization, office symbol/code, job title, job function, grade/rank, job series, military specialty, start date, total months in International Affairs related work, billet information, current certification level, highest education completed, and field of study. Supervisor Information that consists of first and last name, e-mail address, organization, office symbol, work phone and fax number."

#### AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Delete entry and replace with "10 U.S.C. 134, Under Secretary of Defense for Policy and DoD Directive 5105.65, Defense Security Cooperation Agency."

#### PURPOSE(S):

Delete entry and replace with "International Affairs Personnel Initiatives Database (IAPID) is a single central facility with the Department of Defense (DoD) that maintains and