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# Wisconsin Legislative Council

## STUDY COMMITTEE MEMO

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**Memo No. 2**

**TO:** MEMBERS OF THE STUDY COMMITTEE ON WISCONSIN NATIONAL GUARD SEXUAL MISCONDUCT PROCEDURES

**FROM:** David Moore, Senior Staff Attorney, and Tom Koss, Staff Attorney

**RE:** Information in Response to Committee Discussion at September 14, 2022, Meeting

**DATE:** October 6, 2022

This memo provides information on topics the committee identified during its September 14, 2022, meeting that it would like to discuss further during its October 13, 2022, meeting. The memo first outlines the information related to sexual assault and harassment that several other states require their National Guards to publicly report. It then describes various changes to the Wisconsin Military Code of Justice (WCMJ) that the committee could consider drafting. Finally, the memo briefly addresses questions related to creating a case management and tracking system.

### **SEXUAL ASSAULT AND HARASSMENT REPORTS**

As discussed in [Memo No. 1](#), some states have enacted legislation in recent years requiring their state National Guards to publicly report various information related to sexual assault and harassment within the Guard. During the committee's September 14, 2022, meeting, the committee requested additional information regarding those requirements to inform further discussion about establishing a requirement that the Wisconsin National Guard make certain information concerning sexual assault and harassment allegations publicly available.

#### **Other States' Requirements**

Although the specific requirements vary from state to state, the states that require their Guards to submit reports with information about sexual assault and sexual harassment generally require: statistics on allegations of sexual assault and harassment; a description of sexual assault prevention training provided to Guard members; and a summary of the current policies and procedures regarding reports of sexual assault, including any changes made in the past year. More detailed information about what specific states require is below.<sup>1</sup>

**California** requires the California Military Department to submit an annual report to the Legislature, Governor, the Attorney General, and the United States Attorney for each district in California. The report must include:

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<sup>1</sup> To provide an example of a report, a link to the Vermont National Guard's 2021 report is included with the study committee materials.

- The policies, procedures, and processes in place or implemented by the SAPR program during that year.
- An assessment of the effectiveness of the Guard's SAPR policies and programs, including an assessment of how the Guard implemented federal Department of Defense (DOD) SAPR priorities.
- Matrices for restricted and unrestricted reports of the number of sexual assaults and sexual harassment allegations involving service members, including case synopses and disciplinary actions taken in substantiated cases and relevant information. For restricted cases, reporting is limited to aggregated statistical data. For unrestricted cases, reporting must also include aggregated statistical data on the types of crimes, types of victims, status of investigations, status of prosecutions, and status of department administrative actions.
- Analyses of the matrices of the number of sexual assaults and sexual harassment involving service members that include an analysis of data and trends in comparison to state data from previous years, and, to the degree possible, comparisons of state data and trends and data and trends from other branches and components of the military.
- Any plans for the prevention of and response to sexual assault and sexual harassment, specifically in the areas of advocacy, healthcare provider and medical response, mental health, counseling, investigative services, legal services, and chaplain response.

**Iowa** requires the Adjutant General to submit an annual report to the Legislature regarding the civilian criminal offenses reported to civilian law enforcement authorities that were committed by members of the Iowa National Guard against other members of the Guard, while both are subject to the Iowa Code of Military Justice.

**Maine** requires the Adjutant General to submit a report to the Legislature, in consultation with the statewide coalition against sexual assault. The report must include:

- Data regarding all reported incidents of sexual assault and sexual harassment within the National Guard in each of the preceding 10 years, including information on the current duty status of victims and the outcome of any state or federal criminal or state proceedings, to the extent that providing the information is legal and does not allow a victim to be identified.
- A description of all sexual assault and sexual harassment prevention training provided in the preceding year.
- A description of the current practices and procedures for preventing and investigating sexual assault and sexual harassment.
- A description of disciplinary actions taken in response to reports of sexual assault and sexual harassment.
- A summary of the activities by any advisory council or special study group regarding sexual assault and sexual harassment within the Guard.

**Texas** requires the Adjutant General or state sexual offense response coordinator to submit an annual report regarding sexual offense prevention and response to the Governor and Legislature. That report must include:

- The policies and procedures implemented in response to incidents of sexual assault and indecent assault.

- An assessment of the implementation and effectiveness of the program, policies, and procedures on preventing, overseeing, and responding to reports of sexual assault and indecent assault.
- An analysis of the number of incidents of sexual assault and indecent assault involving members of the Texas National Guard.
- Deficiencies in the Texas Military Department's training of the sexual offense response coordinator.

**Vermont** requires the Adjutant General to submit an annual report to the Legislature regarding complaints of sexual assault and harassment. That report may not reveal the name of any person and must contain:

- The number of complaints of sexual assault, sexual harassment, and discrimination based on sexual orientation committed by or against members while in military status or under the jurisdiction of the Vermont National Guard.
- The number of restricted reports of sexual assault, unrestricted reports of sexual assault, reports of sexual harassment, and reports of discrimination, and a summary of the resolution of each case and status of any action taken in each case.
- A summary of the current policies, procedures, and processes regarding the incidence of sexual assault, sexual harassment, or discrimination, and any changes made since the last report.
- All information provided to the Vermont National Guard by the DOD regarding sexual assault, sexual harassment, and discrimination involving Guard members when the Guard is federalized.
- A report on the number of line of duty determinations initiated in the prior fiscal year that arose from a claim of sexual assault, sexual harassment, and discrimination, and the number of individuals referred to outside agencies.

**Wyoming** requires the Adjutant General to submit an annual report to the Governor and Legislature on sexual harassment, discrimination, and sexual assault. The report must include the following information:

- Demographics regarding Wyoming National Guard members and state and federal civilian employees of the Wyoming Military Department.
- Factual information on all incidents, reports, and formal and informal complaints of sexual harassment, discrimination, and sexual assault, including the following:
  - Trends regarding position levels of the status of reporting persons and persons named in reports.
  - Locations of incidents.
  - Incident dates, details, and actions taken, as allowed under privacy laws.
  - Inspector General and congressional complaints known to the Adjutant General.
  - Changes in options for employees and members to report incidents of sexual harassment, discrimination, or sexual assault.
  - Results and comparative results from previous years' external assessments, internal assessments, climate surveys, or group interviews.
  - Assessments, analysis, and policies and procedures implemented in response to incidents of sexual harassment, discrimination, or sexual assault.

- Required annual trainings, corrective action plans, and recommendations for legislative or other actions.

## **Options for Requiring the Wisconsin National Guard to Report**

If the committee wishes to consider drafting a bill that requires the Wisconsin National Guard to publicly report certain information about sexual assault and sexual harassment allegations, it might consider addressing the following questions:

- To whom should the report be sent or provided? Should it be made publicly available on the Guard's website?
- Should the report include information on all restricted and unrestricted reports of sexual assault and all reports of sexual harassment made by members serving under state status?
- Should the Guard be specifically required to prevent the disclosure of parties' identities?
- How frequently should the report be made?
- Should the Guard be required to provide case summaries, in addition to statistics and trends?
- Should the report include a disclosure of the status of each report and any discipline taken, including whether criminal charges were referred or filed?
- Should the report include information on training provided to National Guard members and updates to any applicable policies regarding the prevention of and response to sexual assault or sexual harassment?
- Should the report include information on the duty status of any party involved?

## **WISCONSIN CODE OF MILITARY JUSTICE**

During its meeting on September 14, 2022, the committee discussed changes to the WCMJ that may be beneficial. This section of the memo provides information and considerations relating to these and other possible changes responsive to the committee's discussion. Specifically, this section provides information related to modifying the WCMJ to: codify victims' rights; clarify the rules of evidence that apply to the WCMJ; and address differences between the WCMJ and the Uniform Code of Military Justice (UCMJ) regarding sexual assault, abusive sexual contact, sexual harassment, retaliation, and sexual activity between certain persons in a position of trust and recruits or trainees.

### **Victims' Rights**

Both the Wisconsin Constitution and Wisconsin Statutes grant crime victims a variety of rights. These protections date back to 1980, when the Legislature created ch. 950, Stats., titled Rights of Victims and Witnesses of Crime, which included the nation's first victim's bill of rights. [Ch. 219, Laws of 1979.] Subsequently, voters approved amendments to the Wisconsin Constitution providing constitutional rights to crime victims on two occasions, most recently in April, 2020.<sup>2</sup> A full enumeration of the rights Wisconsin law provides to crime victims is beyond the scope of this memo, but among others, they

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<sup>2</sup> The most recent amendment to the Wisconsin Constitution is commonly called "Marsy's Law." In *Wisconsin Justice Initiative v. Wisconsin Elections Commission*, case number 2020AP2003, Wisconsin Supreme Court is currently considering a challenge to whether the amendment was submitted to voters in the proper form.

include the rights to speedy disposition of the case in which the victim is involved, notification of court proceedings, protection from the accused, and the opportunity to seek restitution or compensation.

Although crime victims are afforded a variety of constitutional and statutory rights under current law, there may be some uncertainty about the extent to which these rights apply to victims of offenses under the WCMJ.<sup>3</sup> During the committee's September 14, 2022, meeting, members expressed interest drafting a bill to more clearly codify the rights of victims of offenses under the WCMJ.

### **Definition of Victim**

As a threshold question, the committee may wish to consider how to define "victim" for purposes of codifying victims' rights under the WCMJ. The WCMJ does not currently define this term; however, the UCMJ was amended in 2013 to codify rights to victims of offenses under that code and defines "victim of an offense under this chapter" as "an individual who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of an offense under this chapter." [[10 U.S.C. 806b](#).]

For the purposes of ch. 950 of the Wisconsin statutes, "victim" is defined generally as "a person against whom a crime is committed." [s. [950.02 \(1\) \(a\) 1](#).] This term may be confusing to apply within the context of the WCMJ, however, because the WCMJ does not classify the code's punitive articles by attaching criminal liability to violations of some and not to others. Rather, under the WCMJ, whether a violation of any punitive article is considered a criminal conviction<sup>4</sup> depends on how the conviction is enforced. A conviction by a general court-martial is a felony conviction, a conviction by a special court-martial is a misdemeanor, and a conviction by a summary court-martial is not a criminal conviction.<sup>5</sup> [s. [322.056](#), Stats.] For that reason, there may be some ambiguity with respect to whether a person who is the victim of conduct prohibited by the WCMJ is a person against whom a crime is committed, particularly if the prohibited conduct lacks an analogue under state criminal law and the actor is not convicted by a general or special court-martial.

### **Applicability of Specific Rights Under ch. 950, Stats., to the WCMJ**

Chapter 950, Stats., generally articulates the rights provided to crime victims within the context of the civilian criminal justice system and, as such, refers to various types of court proceedings and actors within this system. The committee may wish to consider whether it would be beneficial to draft a bill that either specifies how these rights should be applied in a proceeding under the WCMJ or separately articulates the rights of victims for the purposes of proceedings under the WCMJ.

Additionally, as indicated above, the UCMJ was amended in 2013 to provide various rights to victims of offenses under that code. Specifically, [10 U.S.C. 806b](#) provides to a victim of an offense under the UCMJ all of the following:

- The right to be reasonably protected from the accused.

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<sup>3</sup> Section [322.0001 \(1\)](#), Stats., titled "Criminal code interaction," specifically enumerates certain chapters within the criminal code that do not apply to proceedings under the WCMJ. It does not include ch. 950 among these chapters, which may suggest that chapter applies to proceedings under the WCMJ. But, as is discussed in more detail in the body of this memo, there may nevertheless exist some uncertainty with respect to how it applies to the WCMJ because ch. 950, Stats., is generally written within the context of the civilian criminal justice system.

<sup>4</sup> Section [322.0001 \(2\)](#), Stats., specifies that a crime under this code is a crime under s. [939.12](#), Stats. Under s. [939.12](#), Stats., a crime is "conduct which is prohibited by state law and punishable by fine or imprisonment or both. Conduct punishable only by a forfeiture is not a crime."

<sup>5</sup> Although the code does not say so explicitly, it would follow that a violation enforced through nonjudicial punishment would also not be considered a criminal conviction.

- The right to reasonable, accurate, and timely notice of various types of proceedings, to confer with the counsel representing the government at these proceedings, and, subject to one exception, the right not to be excluded from these proceedings.
- The right to be reasonably heard at certain types of proceedings.
- The right to restitution as provided in law.
- The right to proceedings free from unreasonable delay.
- The right to be informed in a timely manner of any plea agreement, separation-in-lieu-of-trial agreement, or non-prosecution agreement relating to the offense, unless an exception applies.
- The right to be treated with fairness and with respect for the dignity and privacy of the victim.

The committee could consider whether these provisions should be incorporated into the WCMJ, and if so, whether any modifications may be necessary or beneficial to more closely align the rights provided by the UCMJ with those state law currently provides to crime victims.

### **Enforceability of Victims' Rights Under the WCMJ**

Under current law, a crime victim has the right to assert, in a court in the county in which the alleged violation occurred, his or her statutory or constitutional rights as a crime victim. A district attorney may also assert a crime victim's statutory or constitutional rights in a criminal case or in a proceeding or motion. [s. [950.105](#), Stats.]

The statutes provide certain remedies for violations of these rights. If a crime victim's right is denied, a complaint may be filed with the Crime Victims' Rights Board (the board). Based on its review of the complaint, the board may do any of the following: (1) issue private and public reprimands of public officials, employees, or agencies; (2) refer appropriate cases to the Judicial Commission; (3) seek appropriate equitable relief on behalf of a victim if such relief is necessary to protect the rights of the crime victim (though it may not seek to appeal, reverse, or modify a judgment of conviction or a sentence in a criminal case); or (4) with certain exceptions, bring civil actions to assess a forfeiture of not more than \$1,000 against a public official, employee, or agency that intentionally fails to provide a right to a crime victim.

The committee might wish to consider whether to draft a bill that designates a specific officer or board to receive complaints from victims of offenses under the WCMJ and what actions, if any, that officer or board may take if a victim's rights have been violated.

### **Specify Rules of Evidence Applicable to Proceedings Under the WCMJ**

In response to questions from committee members regarding the discoverability of statements made to a sexual assault response coordinator, Captain Leigh Neville-Neil, Deputy Brigade Staff Judge Advocate, 32<sup>nd</sup> IBCT, Wisconsin Army National Guard, told the committee that Military Rule of Evidence 513 protects these statements. But she also suggested that the WCMJ could be amended to specify that the Military Rules of Evidence apply to eliminate any ambiguity regarding the rules of evidence that apply to proceedings under the WCMJ.

Section [322.036](#), Stats., provides that the Governor may prescribe pretrial, trial, and post-trial procedures, including modes of proof, for courts-martial cases arising under the WCMJ, "which shall apply the principles of law and the rules of evidence generally recognized in military criminal cases in the courts of the armed forces but which may not be contrary to or inconsistent with [the WCMJ]." The

committee could consider drafting a bill to amend this provision to more clearly state the rules of evidence that apply to proceedings under the WCMJ.

## **Elements of Sexual Assault and Abusive Sexual Contact**

During the committee's September 14, 2022, meeting, Vice-Chair Wimberger observed that the WCMJ does not prohibit nonconsensual sexual contact<sup>6</sup> without qualification. That is, for nonconsensual sexual contact to be punishable under the code, an additional element, such as that the victim was unconscious or incapable of consenting, must be present. Upon review, it appears the WCMJ also does not prohibit committing a nonconsensual act<sup>7</sup> without qualification. In this regard, the WCMJ's treatment of both offenses does not align with the UCMJ.

Under the UCMJ, a person who commits a sexual act upon another person without the consent of the other person is guilty of sexual assault. A person who commits or causes sexual contact upon another person without the other person's consent is guilty of abusive sexual contact. [[10 U.S.C. 920 \(b\) and \(c\).](#)]

The WCMJ lacks analogous provisions. Under the WCMJ, a person is guilty of sexual assault if any of the following apply:

- He or she commits a sexual act upon another person without consent by doing any of the following:
  - Threatening or placing that other person in fear.
  - Causing bodily harm to that other person.
  - Making a fraudulent representation that the sexual act serves a professional purpose.
  - Inducing a belief by any artifice, pretense, or concealment that the person is another person.
- He or she commits a sexual act upon another person when the person knows or reasonably should know that the other person is asleep, unconscious, or otherwise unaware that the sexual act is occurring.
- He or she commits a sexual act upon another person when the other person is incapable of consenting due to the following:
  - Impairment by any drug, intoxicant, or other similar substance, and that condition is known or reasonably should be known by the person.
  - A mental disease or defect or a physical disability, and that condition is known or should be known by the person.

Also under the WCMJ, a person who commits or causes sexual contact on another person, under circumstances that would violate the offense of sexual assault had the contact instead been a sexual act,

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<sup>6</sup> The WCMJ defines "sexual contact" as any of the following: (1) touching, or causing another person to touch, either directly or through the clothing, the genitalia, anus, groin, breast, inner thigh, or buttocks of any person, with an intent to abuse, humiliate, or degrade any person; or (2) any touching, or causing another person to touch, either directly or through the clothing, any body part of any person, if done with an intent to arouse or gratify the sexual desire of any person. [s. 322.120 (1) (f), Stats.]

<sup>7</sup> The WCMJ defines "sexual act" as any of the following: (a) contact between the penis and the vulva or anus or mouth, and for purposes of this definition contact involving the penis occurs upon penetration, however slight; or (b) the penetration, however slight, of the vulva or anus or mouth, of another by any part of the body or by any object, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person. [s. 322.120 (1) (e), Stats.]

is guilty of abusive sexual contact. The committee might consider drafting a bill to align the WCMJ with the UCMJ to prohibit the commission of a nonconsensual sexual act or nonconsensual sexual contact without qualification.

## Sexual Harassment

As discussed in Memo No. 1, the National Defense Authorization Act (NDAA) for fiscal year 2022 required the President to establish sexual harassment as an offense that is punishable under the UCMJ. The NDAA specifies that a person commits sexual harassment if all of the following apply:

- The person knowingly made sexual advances, demands, or requests for sexual favors or knowingly engaged in other conduct of a sexual nature.
- The person's conduct was unwelcome.
- Either of the following apply:
  - Under the circumstances: (1) the conduct would cause a reasonable person to believe that submission to that conduct would be made a term or condition of that person's job, pay, career, benefits, or entitlements or would be used as a basis for decisions affecting that person's job, pay, career, benefits, or entitlements; and (2) the person to whom the conduct was directed did believe submission to that conduct would be used in such a manner.
  - Under the circumstances, the conduct was so severe, repetitive, or pervasive that: (1) a reasonable person would perceive an intimidating, hostile, or offensive work environment; and (2) the person to whom the conduct was directed perceived the conduct in that manner.
- Under the circumstances, the accused's conduct was prejudicial to the good order and discipline of the military or brought discredit upon the military, or both.

If the committee elects to draft a bill amending the WCMJ to codify sexual harassment as a punitive article within that code as well, the committee should consider whether the elements described above accurately describe the conduct it wishes to prohibit.

## Retaliation

The NDAA for fiscal year 2016 added retaliation as a punitive article to the UCMJ. This change is not reflected in the WCMJ.

Under the UCMJ, a person is guilty of retaliation if he or she wrongfully takes or threatens to take an adverse personnel action against any person or withholds or threatens to withhold a favorable personnel action against any person, if done with the intent to: (1) retaliate against any person for reporting or planning to report a criminal offense; (2) retaliate against any person for making or planning to make a protected communication;<sup>8</sup> or (3) discourage any person from reporting a criminal offense or making a protected communication. [[10 U.S.C. s. 932.](#)]

The committee might consider whether the WCMJ should be amended to incorporate this change.

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<sup>8</sup> A "protected communication" is a lawful communication to a member of Congress or Inspector General or a communication to certain individuals or organizations in which a member of the military complains of, or discloses information that may constitute evidence of, a violation of law or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health and safety. [[10 U.S.C. s. 932 \(b\) \(1\).](#)]



## Prohibited Activities with Recruit or Trainee

The NDAA for fiscal year 2016 also modified the UCMJ to prohibit certain persons from engaging in sexual activity with a recruit or trainee. This change is not reflected in the WCMJ, but the Wisconsin National Guard court-martialed a recruiter who engaged in similar conduct for violations of Articles 92 (failure to obey an order or regulation), 93 (cruelty and maltreatment), and 134 (conduct prejudicial to good order and discipline) of the WCMJ.<sup>9</sup>

The UCMJ prohibits persons in a position of special trust from engaging in prohibited sexual activity with a military recruit or trainee. Prohibited sexual activity is defined to include any sexual act or sexual contact, as defined by Article 120 of the UCMJ. [AR 27-10, s. 29-2 d. and AFI 36-2909, s. 4.7.4.]

Specifically, the following conduct is punishable by court-martial:

- An officer, noncommissioned officer, or petty officer who is in a training leadership position<sup>10</sup> with respect to specially protected junior member<sup>11</sup> of the armed forces and engages in prohibited sexual activity with such specially protected junior member.
- A military recruiter who engages in prohibited sexual activity either with an applicant for military service or with a specially protected junior member of the armed forces who is enlisted under a delayed entry program.

[[10 U.S.C. s. 893a.](#)]

The committee might consider whether the WCMJ should be amended to incorporate this change.

## CASE MANAGEMENT AND TRACKING SYSTEM

During the committee's September 14, 2022, meeting, the Department of Military Affairs told the committee that although its current processes work and meet requirements, the department would like to explore improving the technology it uses to track and manage casework related to misconduct within the Guard. Committee members discussed exploring whether existing state technology infrastructure, such as the infrastructure used to develop the district attorneys' case management system,<sup>12</sup> could be utilized to develop a system specific to the department's needs.

In response to outreach from committee staff subsequent to the meeting, Department of Administrative (DOA) staff provided committee staff with general information regarding services that agency may be able to provide. According to DOA:

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<sup>9</sup> General Court-Martial Case of Jesse T. Riemer, 2017 WI App 48.

<sup>10</sup> "Training leadership position" means any drill instructor position or other leadership position in a basic training program, an officer candidate school, a reserve officer's training corps unit, a training program for entry into the armed forces, or any program that is identified as a training program for initial career qualification or faculty and staff of the federal service academies. [[10 U.S.C. s. 893a \(d\) \(2\).](#)]

<sup>11</sup> "Specially protected junior member of the armed forces" means a member of the armed forces who is assigned to, or is awaiting assignment to, basic training or other initial active duty for training; a cadet, midshipman, officer candidate, or student in any other office qualification program; and a member in any program that is identified as a training program for initial career qualification. [[10 U.S.C. s. 893a \(d\) \(1\).](#)]

<sup>12</sup> The "Prosecutor Technology for Case Tracking" or PROTECT system is a case management and tracking system developed for the Wisconsin district attorneys.

The Department of Administration's (DOA) Division of Enterprise Technology (DET) maintains a list of services that can be consumed by any Executive Branch Agency, participating counties, municipalities, or school districts. Those Agencies are free to make independent decisions around how they use those services. Each Agency procures or develops applications to address their specific business needs. Collectively, the Agencies work together to build the necessary business applications to address each of their missions to efficiently serve the residents of Wisconsin. DOA may provide the 'foundational building blocks' to serve and support those applications and business needs, ranging from enterprise contracts that can be utilized by others to fundamental services like email and collaboration tools, networking, perimeter security, and overarching guidance on security and best practices for creating secure and efficient applications.<sup>13</sup>

DOA staff further advised that typical practice "is to have agencies utilize the support from DOA/DET to work collaboratively to identify any existing contracts or solutions that best fits the specific needs for this project."<sup>14</sup>

The committee could consider drafting a bill to assist the Department of Military Affairs develop a case management tracking system. The committee might also consider whether further information from the DOA may be necessary to help the committee develop that legislation.

DM:TK:ksm

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<sup>13</sup> E-mail from Carly Michiels, Legislative Liaison, DOA, to David Moore and Tom Koss, Committee Staff (September 30, 2022).

<sup>14</sup> *Id.*