

**Report to Congress
on
Intellectual Property Policy and the Cadre of
Intellectual Property Experts
Section 838 of the National Defense Authorization
Act for Fiscal Year 2020 (P.L. 116-92)**



**Office of the Under Secretary of Defense
for Acquisition and Sustainment**

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1. Introduction

The Department of Defense (DoD) has initiated a significant effort to improve its approach to acquiring, licensing, and managing Intellectual Property (IP). Although these activities are in their earliest stages, highlights of these early efforts include:

- Standing up a DoD-wide IP Cadre—a cross-functional team of IP experts to advise and support DoD programs;
- Creating a unified DoD-wide policy on the acquisition, licensing, and management of IP, as well as DoD Components establishing component-specific IP policies;
- Launching a new approach to revising the IP coverage in DoD acquisition regulations by engaging with industry earlier in the rule drafting process, by publishing drafts of the proposed revisions and holding public meetings to obtain industry views and recommendations in a more interactive manner, in addition to the more traditional written comment process;
- Drafting implementing guidance on IP acquisition, licensing, and management; and
- Performing a comprehensive review to improve the IP education and training available for the acquisition workforce, to better ensure that all members of the workforce have the right training, at the right time; and development of a program for IP credentialing for the acquisition workforce.

This report on DoD's IP efforts fulfills the requirement set forth in section 838 of National Defense Authorization Act (NDAA) for Fiscal Year 2020 (FY20) (Public Law 116-92).¹ More specifically, section 838 requires the Secretary of Defense, acting through the Under Secretary of Defense for Acquisition and Sustainment (USD(A&S)), to submit to the congressional defense committees a report that includes—

- (1) The policy required in subsection (a) of section 2322 of title 10, United States Code (U.S.C.);²
- (2) An identification of each member of the cadre of intellectual property experts required in 10 U.S.C. § 2322(b) and the office to which such member belongs;
- (3) A description of the leadership structure and the office that will manage the cadre of intellectual property experts; and
- (4) A description of the specific activities performed, and programs and efforts supported, by the cadre of intellectual property experts during the 12-month period preceding the date of the report.

This report is structured to respond to each of these four elements in turn, provides a brief preview of key IP activities planned for the forthcoming year, and includes several enclosures containing supporting and supplemental information, such as copies of legal authorities, the new

¹ The full text of section 838 of NDAA for FY 2020 (Public Law 116-92) is provided in Enclosure (1).

² The full text of 10 U.S.C. § 2322 is provided in Enclosure (2).

DoD IP Policy, a list of the DoD IP Cadre lead offices and contacts, and a table summarizing the activities related to revising the IP coverage in the DoD acquisition regulations.

2. The IP Policy Required by 10 U.S.C. 2322(a)

Paragraph (a) of 10 U.S.C. § 2322 requires the Department to develop a policy on the acquisition and licensing of IP to--

- (1) Enable coordination and consistency across the military departments and the Department of Defense in strategies for acquiring or licensing intellectual property and communicating with industry;
- (2) Ensure that program managers are aware of the rights afforded the Federal Government and contractors in intellectual property and that program managers fully consider and use all available techniques and best practices for acquiring or licensing intellectual property early in the acquisition process; and
- (3) Encourage customized intellectual property strategies for each system based on, at a minimum, the unique characteristics of the system and its components, the product support strategy for the system, the organic industrial base strategy of the military department concerned, and the commercial market.

On October 16, 2019, the Department published new DoD Instruction (DoDI) 5010.44, *Intellectual Property (IP) Acquisition and Licensing*.³ This DoDI created a DoD-wide policy to govern and unify the acquisition, licensing, and management of IP, including by implementing the statutory requirements of 10 U.S.C. § 2322(a).⁴

The DoDI 5010.44 enables coordination and consistency throughout the Department by establishing the first-ever DoD-wide policy for the acquisition, licensing, and management of all forms of IP regardless of whether the IP is treated as a product or service. The policy applies to all types of contracts and other legal instruments used to govern such activities, and covers all DoD components without exception. Section 1.2.b. of the policy establishes the following six core principles to govern these activities across the Department:

- (1) Integrate IP planning fully into acquisition strategies and product support strategies to protect core DoD interests over the entire life cycle. Seek to acquire only those IP deliverables and license rights necessary to accomplish these strategies, bearing in mind the long-term effect on cost, competition, and affordability.
- (2) Ensure acquisition professionals have relevant knowledge of how IP matters relate to their official duties. Cross-functional input and coordination is critical to planning and life-cycle objectives.

³ A copy of DoDI 5010.44 is provided in Enclosure (3).

⁴ The statutory objectives are expressly adopted as DoD policy at DoDI 5010.44, section 1.2.a. (Enclosure (3)).

- (3) Negotiate specialized provisions for IP deliverables and associated license rights whenever doing so will more effectively balance DoD and industry interests than the standard or customary license rights. This is most effective early in the life cycle, when competition is more likely.
- (4) Communicate clearly and effectively with industry regarding planning, expectations and objectives for system upgrade and sustainment. Avoid requirements and strategies that limit the DoD's options in accessing vital technology and commercial solutions available from industry.
- (5) Respect and protect IP resulting from technology development investments by both the private sector and the U.S. Government.
- (6) Clearly identify and match data deliverables with the license rights in those deliverables. Data or software deliverables are of no value unless and until the license rights to use it are attached, and the U.S. Government actually obtains and accepts those deliverables.

A critical element for supporting a consistent implementation of these core principles is the establishment of the DoD IP Cadre, a DoD-wide, cross-functional, team of IP experts. As discussed further in Sections (3) and (4) of this report, the DoD IP Cadre is organized using a federated structure. As such, a new office has been established within the Office of the Secretary of Defense (OSD) to coordinate with other offices and functional experts throughout the OSD, the Military Departments (MILDEPs), and other DoD components to advise and support DoD programs and the acquisition workforce. The DoD IP Cadre will also support a more robust approach to early-and-often communications and engagement with industry on IP matters.

The new IP policy also emphasizes the other statutory policy objectives to ensure that program managers are aware of the Government's and contractor's IP rights, and consider and utilize best practices in the acquisition, licensing, and management of IP (see, e.g., DoDI 5010.44 (Enclosure (3)) sections 1.2.a(2), 1.2.b(2) & (3), 2.2, 2.4.b, 4.2.c); and to encourage the use of customized IP strategies that are integrated with other program strategies and balance the needs of the Department and industry (see, e.g., DoDI 5010.44 (Enclosure (3)) sections 1.2.a(3), 1.2.b(1) & (3)-(5), 2.2, 2.4.c and .e, and 4.1).

3. Intellectual Property Cadre—Membership

As discussed further in Section 4 of this report, the Office of the Under Secretary of Defense for Acquisition and Sustainment (OUSDA&S) established the IP Cadre through DoDI 5010.44 using a federated structure.⁵ The overall "DoD IP Cadre" is comprised of the members of a new OSD office (OSD IP Cadre) established for this purpose as well as the team of cross-functional subject matter experts throughout OSD, the MILDEPs and other DoD components that will be coordinating to address IP acquisition, licensing, and management activities. To initiate the standup and initial coordination of this federated structure, the new IP policy requires each DoD

⁵ See Sections 2.4 and 3 of DoDI 5010.44 at Enclosure (3).

Component with acquisition authority or contract administrative responsibilities to identify one or more offices with responsibility to coordinate IP matters with the new OSD IP Cadre.⁶

Because the stand-up of the new OSD IP Cadre is still in the early stages and the establishment or identification of offices and experts throughout the rest of the participating OSD and DoD Components across the DoD enterprise, it is difficult to identify with certainty each of the individuals that should be considered “members” of the DoD IP Cadre. In addition, the Department generally does not identify its individual civilian employees or military members below the level of General Officer/Flag Officer/Senior Executive Service (GO/FO/SES) in a publicly-available report unless those individuals have duties that require engagement with the public in a manner that makes such public identification appropriate.

Accordingly, a table entitled “DoD Intellectual Property Cadre Leadership and Contacts” is provided as Enclosure (4) of this report. This table identifies the individuals serving as the leadership and points of contact for the OSD IP Cadre, and the offices designated by the Department of the Army, Department of the Navy, Department of the Air Force, and the Defense Acquisition University (DAU), that are serving at the GO/FO/SES level, or in positions where such public identification is consistent with DoD policy.

4. Intellectual Property Cadre—Leadership Structure and Management

As shown in Figures 1 and 2, the DoD IP Cadre established by DoDI 5010.44 is organized using a federated structure, including a new OSD office established solely for this purpose (OSD IP Cadre). The OSD IP Cadre will coordinate with other offices and functional subject matter experts throughout the OSD, the MILDEPs, and other DoD components to advise and support DoD programs and the acquisition workforce. At the DoD enterprise level, the overall “DoD IP Cadre” may be best thought of as comprising the members of the new OSD IP Cadre, as well as all of the other cross-functional subject matter experts in various offices throughout the MILDEPs and other DoD components that will be coordinating to address IP acquisition, licensing, and management activities. A key element of this structure is to allow the MILDEPs and other OSD and DoD Components to each determine how best to organize, staff, and resource their activities in this coordinated effort. In combination, the DoD IP Cadre will be a federated team of subject matter experts to address IP issues arising throughout DoD programs in the context of a broad spectrum of underlying functional areas of responsibility, including law, regulation, contracting, acquisition, program management, sustainment, logistics, engineering, industrial base policy, financial analysis (e.g., cost and pricing, IP valuation), cost and pricing, education and training, communications, public affairs, and legislative affairs. For specific subject matters areas for which there may be a lack of pre-existing expertise within the Government, these offices will seek to acquire that expertise through any available mechanism,

⁶ See DoDI 5010.44 (Enclosure (3)), Section 2.4.a.

including those listed in paragraph (b)(4)(A) of 10 U.S.C. § 2322 (e.g., highly qualified experts or contracting for specialized subject matter expertise).

Figure 1: OSD IP Cadre Organizational Chart

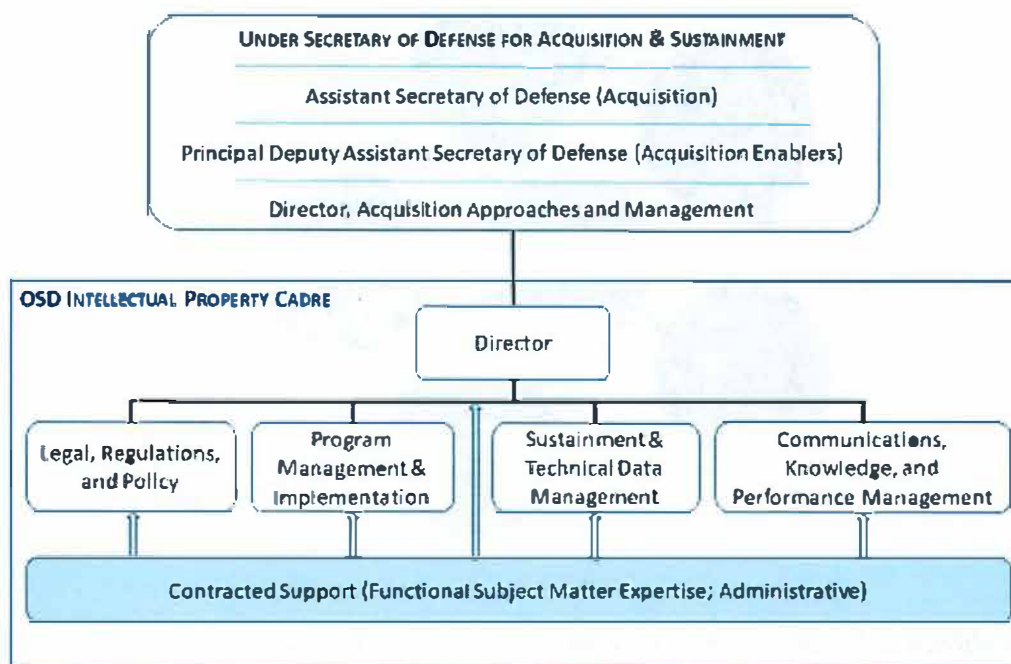


Figure 1 shows the organizational structure of the OSD IP Cadre, established within the office of the Under Secretary of Defense for Acquisition and Sustainment (OUSD(A&S)). DoDI 5010.44 establishes the OSD IP Cadre under the authority, direction, and control of the Assistant Secretary of Defense for Acquisition (ASD(A)), who is also designated as the senior DoD official for implementation of DoD IP policy and guidance.⁷ Within the ASD(A) chain of command, the IP Cadre is organized under Principal Deputy Assistant Secretary of Defense for Acquisition Enablers (PDASD(AE)), and reports through the Director, Acquisition Approaches and Management (AAM). The personnel in this new office will be assigned full-time duties in support of the functions of the DoD IP Cadre.

The new office of the OSD IP Cadre is comprised of five new civilian billets: the Director, which is a Senior Level (SL) position for an overall IP subject matter expert, and four additional billets for senior personnel with IP issues in the context of specific cross-functional subject matters. The personnel in these positions will serve as the office’s leads for the areas of: law, regulations, and policy; program management and overall implementation for DoD programs; sustainment and technical data management; and communications, knowledge, and performance management (e.g., public/industry outreach and acquisition workforce). The office will also rely on contractor technical support for functional subject matter expertise, and administrative support.

⁷ See DoDI 5010.44, Sections 2.1 and 3.

Figure 2: DoD IP Cadre Federated Structure and External Engagement Model



The diagram shown in Figure 2 serves two purposes: it depicts the DoD’s federated organizational structure of the overall DoD IP Cadre and the key relationships by which the IP Cadre will accomplish its DoD internal coordination for supporting DoD programs and for communications and engagement with key stakeholders and partners outside of DoD.

The blue circles in the middle and right side of the graphic show the federated structure of the overall DoD IP Cadre, including--

- The OSD IP Cadre as a small centralized office with personnel assigned full-time to supporting the overall function of the DoD IP Cadre;⁸
- The other OSD functional offices having the necessary functional subject matter expertise (e.g., the offices of the Under Secretary of Defense for Research and Engineering (USD(R&E)), the DoD Office of the General Counsel (OGC), the Assistant Secretary of Defense for Sustainment (ASD(S)), the Principal Director, Defense Pricing and Contracting (PD,DPC));
- The MILDEPs and other DoD Components, including those components’ lead offices designated to coordinate on IP matters on behalf of that component,⁹ and the various program offices and functional SMEs that will be both receiving, and providing, support to other DoD offices and organizational units; and

⁸ The OSD IP Cadre organizational structure is shown in more detail in Figure 1.

⁹ The MILDEP offices and leadership identified pursuant to DoDI 5010.44, paragraph

- The DAU and the acquisition workforce, as IP education and training for the acquisition workforce is critically important.

In all of these engagements, many of the DoD organizational elements may be thought of as both supported and supporting organizations. In some cases they will be receiving support and expertise from other DoD elements, and in other cases they will be sharing their expertise to support other DoD organizations.

On the left side of the graphic, the purple circles represent key stakeholders for this activity outside of the DoD, including: other U.S. Government (USG) entities, such as Congress and the Federal civilian departments and agencies; and other non-USG entities, such as universities and other academic institutions, the companies of the Defense industrial base and commercial industry, and the general public. As noted in the DoD IP policy, the Department is placing significant emphasis on earlier, more frequent, and more robust communications and engagement with non-DoD partners and stakeholders.

5. Activities Performed in the Previous Year

Prior to and after the implementation of the DoDI 5010.44 the DoD, the OUSD(A&S), MILDEPs, and other OSD and DoD components have performed and continue to perform many activities to improve acquisition and licensing of IP, consistent with the objectives of 10 U.S.C. §2322. These activities are summarized below and fall into three broad categories: DoD-level policy, guidance, and education; regulatory activity, implementation of statutory changes and government-industry panel recommendations; and specific actions within the MILDEPs. The following list details the various activities performed by the OSD IP Cadre along with those in Military Departments and Components who collaborate and liaise with the OUSD(A&S).

5.1 DoD-level Policy, Guidance, and Education

- The IP Working Group (IPWG). In what could be characterized as a trial run or pilot for how a cadre of IP experts might be organized and function, the OUSD(A&S) established an Intellectual Property Working Group (IPWG). The IPWG was led by the Director, AAM, to coordinate across the Department on the most pressing activities to support the Department's implementation of the requirements of new 10 U.S.C. § 2322, including the development of the IP policy and establishment of the IP Cadre. The IPWG was chartered as a cross-functional team of experts along the same lines as anticipated for the IP Cadre, including representatives from many OSD offices with relevant functional subject matter expertise, including USD(R&E), OGC, ASD(A), ASD(S), DPC, all of the MILDEPs (e.g., cross-functional SMEs in areas analogous to those listed for the OSD offices), and DAU. The IPWG activities were organized across five Lines of Effort: statutory, policy, contracting, human capital, and training. Members of the IPWG coordinated many of the

activities listed below leading up to the publication of the DoD IP policy and establishment of the IP Cadre, which will now lead such efforts.

- **The Section 813 Panel—DoD’s Response.** The first major activity of the IPWG was to coordinate the DoD’s statutorily required response to the reports of the Section 813 Government-Industry Advisory Panel¹⁰ and the Section 875 Independent Review.¹¹ These sections of the FY 2016 NDAA each required DoD to respond with comments and recommendations. Given the similarity in subject matter and timing, DoD consolidated its comments into a single response. This response was provided on behalf of the Department by the USD(A&S) on February 3, 2019, and is provided as Enclosure (5). The Department’s response expressed agreement and support for the general findings and recommendations of both the section 813 and section 875 reports, recognized the formation of the IPWG as the initial mechanism to coordinate the DoD wide efforts to implement the recommendations from those reports, as well as the overarching requirements of 10 U.S.C. § 2322. The Department’s response also summarized several “cross-cutting principles and threads” that would guide the DoD efforts, and which reflect the core principles included in the DoD IP policy, DoDI 5010.44.
- **New DoD IP Policy.** As discussed in more detail in Section 2 of this report, the IPWG led the coordination and publishing of the new DoD IP policy, as DoD Instruction 5010.44 *Intellectual Property (IP) Acquisition and Licensing* (Enclosure (4)), as required by 10 U.S.C. § 2322(a).
- **DoD-level Implementing Guidance.** Subgroups of the IPWG initiated the drafting of implementing guidance to be published at the DoD level, including:
 - Updating to DoD Manual 5010.12-M, to be renamed “Acquisition and Management of Contractor-Prepared Data” (current version, dated May 1993, is entitled “Procedures for the Acquisition and Management of Technical Data”). This manual provides procedures for the acquisition, delivery, receipt, inspection, acceptance, and management of technical data and computer software, and the associated license rights (data rights).
 - Drafting a new “IP 101” Guide for publication on the Defense Acquisition University (DAU) website and targeted to the broad acquisition community. This Guide is intended as an entry and launch site for IP information and a pointer for more detailed policy and procedures as it is developed and refined.
- In coordination with DAU subject matter experts, conducted a comprehensive review of DAU's current IP and Data Rights learning assets to identify new courses and revisions necessary to reflect policy and legislative changes to address IP and emerging technologies, and created an IP and Data Rights website (aka “Community of Practice”) as a one-stop shop educational resource for the DoD acquisition workforce.

¹⁰ See section 813(b) of the NDAA for FY 2016 (Public Law (PL) 114-92), as modified by section 809 of the NDAA for FY2017 (PL 114-328).

¹¹ See section 875 of the NDAA for FY 2016 (Pub. L. 114-92).

- Updated Executive Level Course and Defense Acquisition Executive Overview Workshops to include IP and Data Rights content, and developing IP Strategy Workshops to provide training to Program IPTs.
- Initiated development of a new training course on IP valuation for deployment in the summer of 2020.

5.2 Revision of the IP Coverage in Acquisition Regulations with Enhanced Industry Engagement.

- One of the recommendations of the Section 813 Government-Industry Advisory Panel was that industry and public input should be included earlier in the rulemaking process for acquisition regulation, such as by inviting industry to participate earlier in the rule drafting process and in adjudication of public comments to proposed regulations. As shown in the chart “DFARS Data Rights Cases Early Engagement Expanded Time Line” at Enclosure (6), the Defense Acquisitions Regulation Council (DARC) has implemented this new approach as an exception to the typical rulemaking process that includes –
 - (1) The Department (e.g., through the DARC’s Patents, Data, and Copyright Team (PDCT) of subject matter experts responsible for developing and revising IP coverage in the Defense Federal Acquisition Regulation Supplement (DFARS)) will prepare and publish in the Federal Register, as an Advance Notice of Proposed Rulemaking (ANPR), an initial draft of proposed revisions to the DFARS;
 - (2) The public is invited to submit comments and recommend changes to the draft revisions both through the more traditional submission of written comments, and also by participating in one or more public meetings regarding each published ANPR, hosted by the DARC, to discuss in a more interactive and dynamic manner with the Department’s personnel; and
 - (3) After receiving all public comments through the public meetings and written submissions, the DoD personnel will make any additional revisions to address those comments, and will then initiate the more traditional rulemaking process in which a formal “proposed rule” for the DFARS revisions is published in the Federal Register, and the public will be provided opportunity to submit comments both in writing, and again via direct engagement with DoD personnel at a public meeting (if there is sufficient public interest in holding a meeting at that stage).
- Activity Regarding Specific DFARS Cases. During the deliberations of the Section 813 Panel, the DARC suspended rulemaking activities related to any of the DFARS coverage under review by the Panel, including implementation of various NDAA requirements that had not yet been incorporated into the DFARS. Because the Section 813 Panel initiated its activities in June 2016 and issued its report in November 2018, there were a number of NDAA sections, containing multiple revisions to existing statutes (e.g., 10 U.S.C. §§ 2320 and 2321), and the creation of new U.S. Code sections (e.g., 10 U.S.C. § 2322(a) and

2439) that were pending DFARS implementation. After DoD issued its response to the section 813 and section 875 reports, one of the Department's top priorities was to take immediate action to revive the rulemaking activity to implement these statutory revisions and any related recommendations from the section 813 or 875 reports, followed by other revisions and recommendations (e.g., from the 813/875 reports, or from any other source).

As a result, the Department initiated seven new DFARS cases, and developed a corresponding strategy to initiate the cases as quickly as possible and to process the cases through the new enhanced industry/public engagement process in parallel (e.g., multiple cases all pending simultaneously, with each progressing through the process at different rates due to the complexity of the subject matter involved).¹² The following is a brief summary of the cases that have been initiated, indicating the statutory or regulatory change covered by the case, and a more detailed description of each case, and the specific events (e.g., publications and public meetings) is provided at Enclosure (7), "Summary of Defense Federal Acquisition Regulation Supplement (DFARS) Case Activities Regarding Intellectual Property."

- DFARS Case 2018-D018: (Statutory (S)) Noncommercial Computer Software: Implements new 10 U.S.C. 2322a, *Requirement for consideration of certain matters during acquisition of noncommercial computer software*, added by section 871 of the NDAA for FY 2018.
- DFARS Case 2018-D069: (S) Validation of Proprietary and Technical Data. Implements section 865 of the NDAA for FY 2019.
- DFARS Case 2018-D070: (S) Continuation of Technical Data Rights during Challenges. Implements section 866 of the NDAA for FY 2019 (now closed because section 866 was repealed by section 808 of the NDAA for FY 2020).
- DFARS Case 2018-D071: (S) Negotiation of Price for Technical Data and Preference for Specially Negotiated Licenses. Implements section 835 of the NDAA for FY 2018, and section 867 of the NDAA for FY 2019.
- DFARS Case 2019-D042: (S) Rights Relating to Modular Open System Approaches and Validation of Proprietary Data Restrictions. Implements section 809(a), (b), and (d) of the NDAA for FY17; and section 815(b) of the NDAA for FY 2012.
- DFARS Case 2019-D043: Small Business Innovation Research Program Data Rights. Implements revisions in the Small Business Administration's Policy Directive for the Small Business Innovation Research (SBIR) Program.
- DFARS Case 2019-D044: (S) Rights in Technical Data. Implements section 809(c) of the NDAA for FY2017; and section 815(a) of the NDAA for FY 2012.

¹² Typical time lines for processing DFARS cases, and the expanded time line used for the data rights cases ANPR and early engagement activities, are shown in Enclosure (6).

5.3 Specific Actions within the Military Departments

- The Department of Navy has made increased efforts to provide data rights training to acquisition and program office personnel.
- In December 2018, the Secretary of the Army issued Army Directive 2018-26, “Enabling Modernization through the Management of Intellectual Property.” The intent of the policy is to alter the Army’s approach to IP management to align with recent IP law changes.
- As directed by the Army IP policy, the Assistant Secretary of the Army for Acquisition, Logistics, and Technology (ASA(ALT)) issued implementation guidance to accompany the policy in February 2019. The guidance is intended to help practitioners better understand and implement the new policy approach.
- In March 2019, ASA(ALT) initiated five pathfinder programs. This entails a small, focused team of IP subject matter experts working directly with the program offices on “in progress” acquisitions. The intent of this effort is to assist the program offices in developing IP Strategies aligned with the principles of the new policy. These programs will: (1) serve as exemplars for subsequent programs, and (2) help to identify best practices and lessons learned that will be incorporated into future iterations of the ASA(ALT) Implementation Guidance.
- Beginning in September 2019, ASA(ALT) kicked off a series of “roadshows” at key Army installations to educate local-level program, contracting, and legal offices on the new approach. Subsequent roadshows were conducted at Aberdeen Proving Ground in December 2019, at Fort Belvoir, Virginia in February 2020, and at Detroit Arsenal, Michigan in March 2020.
- The Army is also participating in a series of DAU videos that will educate the workforce on the new approach and publicize the initiative. The first of those videos was posted on the DAU website in September 2019. The 15-minute video provides an overview of the Army’s new approach to IP and highlights the key principles of the policy.
- The Air Force created a service-level IP Cadre designed to implement the DoD policy and initiatives, including the new DoDI 5010.44. The “Smart IP Cadre” will be composed of cross functional experts—lawyers, contracting officers, program managers, logisticians and engineers—with the goal to work collaboratively with the IP Cadre, across the Air Force organizations, and with industry to find the best solutions moving forward on IP. The Smart IP Cadre is working with numerous teams on various IP issues in various stages of acquisition.
- In February 2018, the Under Secretary of the Air Force (USECAF) established an IP Cross-Functional team to make recommendations on the acquisition and enforcement of IP rights under Air Force contracts, and to establish an enduring cadre of IP experts. In April 2019, that Team submitted two work products to USECAF: (1) a draft Air Force IP Guide, and (2) a Final Report containing the Team’s recommendations for USECAF’s consideration. The Assistant Secretary of the Air Force (Acquisition, Technology &

Logistics) issued that IP Guide to all Air Force Program Executive Officers. The Guide is structured in an innovative question/answer format to provide guidance to program offices and contracting officers on pre- and post-award IP-related issues. The Team's Final Report also recommended establishing a dedicated cross-functional team of dedicated IP professionals to implement the remaining recommendations discussed in that report. .

- In response to the Air Force IP Cross-Functional Team's recommendation, the Acting Secretary of the Air Force established the Air Force's IP Cadre in June 2019 and created ten new positions (five additional attorneys, the remaining five personnel to possess relevant expertise in contracting, engineering, program management, and logistics). The Chief of the Air Force Smart IP Cadre reports directly to the Deputy Assistant Secretary for Contracting, Office of the Assistant Secretary of the Air Force for Acquisition, Technology & Logistics (SAF/AQC). The Air Force's Director of IP Law serves as the Deputy of the Air Force's IP Cadre, and reports to the Air Force's Deputy General Counsel (Acquisition, Technology & Logistics) (SAF/GCQ).
- In May 2019, SAF/AQC and an Air Force Material Command IP attorney gave two webinars on data rights challenges.
- The Air Force IP Cadre has provided assistance to 16 program offices that report to seven Program Executive Offices on various IP-related matters.
- Within days of enactment of the FY 2020 NDAA, the Air Force's IP Cadre began providing advice on branding, trademark, and copyright issues to the Chief of Space Operations, United States Space Force.

6. On the Horizon: The Section 801 Pilots on IP Evaluation and Valuation Methods

Although not required by Section 838, the Department notes that the forthcoming year will involve a number of significant activities involving the implementation of the new DoD IP policy and scaling up operations of the DoD IP Cadre. In addition to continuing further action on the activities summarized in Section 5 of this report, the Department will be devoting significant effort to launching the IP pilots pursuant to section 801 of the NDAA for FY 2020 (Enclosure (8)).

Section 801 authorizes the Secretaries of Defense and Military Departments to jointly carry out a pilot program to assess IP Evaluation techniques, including commercial valuation methods' benefits on IP strategies, management of IP costs throughout the life cycle, and use of commercial and non-developmental technologies as an alternative to new development for DoD requirements. Specific pilot activities authorized include establishing a team of IP experts (including the DoD IP Cadre) to advise the selected programs; assessing commercial valuation methods, agency-level oversight, contracting mechanisms, acquisition planning for IP delivery

and rights needed over the entire life-cycle; and engaging Industry to develop and assess IP requirements, strategies, and valuation methods.

The Department's objectives and expectations are that the lessons learned from the pilot will—

- Drive IP strategic planning earlier in the program life cycle, with a focus on proactively preserving flexibility and competitive options to address uncertainty in the early assessments of long-term IP needs throughout the entire life cycle;
- Reinforce the critical need for a program's IP Strategy to be tailored to balance the interests of DoD and Industry, including through the use of Specially Negotiated Licenses and Modular Open Systems Approaches (MOSA); and
- Demonstrate the need to identify and tailor IP Strategy models for each pathway in the Adaptive Acquisition Framework – for example, distinguishing IP best practices for software-intensive programs vs. hardware-intensive programs.

7. Enclosures

- (1) Section 838 of the NDAA for FY 2020
- (2) 10 U.S.C. § 2322, *Management of intellectual property matters within the Department of Defense*
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S. 1790—301

(D) The operations of the Office of the Director of Cost Analysis and Program Evaluation.

(E) The operations of the offices of the service acquisition executives of the military departments.

SEC. 838. REPORT ON INTELLECTUAL PROPERTY POLICY AND THE CADRE OF INTELLECTUAL PROPERTY EXPERTS.

(a) IN GENERAL.—Section 802 of the National Defense Authorization Act for Fiscal Year 2018 (Public Law 115–91; 131 Stat. 1450) is amended by adding at the end the following new subsection:

“(c) REPORT.—Not later than December 15, 2019, the Secretary of Defense, acting through the Under Secretary of Defense for Acquisition and Sustainment, shall submit to the congressional defense committees a report that includes—

“(1) the policy required in subsection (a) of section 2322 of title 10, United States Code;

“(2) an identification of each member of the cadre of intellectual property experts required in subsection (b) of such section and the office to which such member belongs;

“(3) a description of the leadership structure and the office that will manage the cadre of intellectual property experts; and

“(4) a description of the specific activities performed, and programs and efforts supported, by the cadre of intellectual property experts during the 12-month period preceding the date of the report.”

(b) LIMITATION.—

(1) IN GENERAL.—Of the funds authorized to be appropriated by this Act or otherwise made available for fiscal year 2020 for the Department of Defense, not more than 75 percent may be obligated or expended for any of the offices described in paragraph (2) until the date on which the Secretary of Defense submits the report required under subsection (c) of section 802 of the National Defense Authorization Act for Fiscal Year 2018 (Public Law 115–91; 131 Stat. 1450), as added by this section.

(2) OFFICES DESCRIBED.—The offices described in this paragraph are as follows:

(A) The Office of the Under Secretary of Defense for Acquisition and Sustainment.

(B) The Office of the Assistant Secretary of the Army for Acquisition, Logistics, and Technology.

(C) The Office of the Assistant Secretary of the Navy for Research, Development, and Acquisition.

(D) The Office of the Assistant Secretary of the Air Force for Acquisition, Technology, and Logistics.

SEC. 839. GUIDANCE AND REPORTS RELATING TO COVERED DEFENSE BUSINESS SYSTEMS.

(a) AMENDMENTS TO GUIDANCE FOR COVERED DEFENSE BUSINESS SYSTEMS.—Section 2222(d) of title 10, United States Code, is amended—

(1) in the matter preceding paragraph (1), by striking “subsection (c)(1)” and inserting “subsection (c)”; and

(2) by adding at the end the following new paragraphs:

10 USC 2322: Management of intellectual property matters within the Department of Defense

Text contains those laws in effect on December 19, 2019

Pending Updates: Pub L. 116-92 (12/20/2019) [\[View Details\]](#)

From Title 10-ARMED FORCES

Subtitle A-General Military Law

PART IV-SERVICE, SUPPLY, AND PROCUREMENT

CHAPTER 137-PROCUREMENT GENERALLY

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§2322. Management of intellectual property matters within the Department of Defense

(a) **POLICY REQUIRED.**-The Secretary of Defense, acting through the Under Secretary of Defense for Acquisition and Sustainment, shall develop policy on the acquisition or licensing of intellectual property-

(1) to enable coordination and consistency across the military departments and the Department of Defense in strategies for acquiring or licensing intellectual property and communicating with industry;

(2) to ensure that program managers are aware of the rights afforded the Federal Government and contractors in intellectual property and that program managers fully consider and use all available techniques and best practices for acquiring or licensing intellectual property early in the acquisition process; and

(3) to encourage customized intellectual property strategies for each system based on, at a minimum, the unique characteristics of the system and its components, the product support strategy for the system, the organic industrial base strategy of the military department concerned, and the commercial market.

(b) **CADRE OF INTELLECTUAL PROPERTY EXPERTS.**-(1) The Secretary of Defense, acting through the Under Secretary of Defense for Acquisition and Sustainment, shall establish a cadre of personnel who are experts in intellectual property matters. The purpose of the cadre is to ensure a consistent, strategic, and highly knowledgeable approach to acquiring or licensing intellectual property by providing expert advice, assistance, and resources to the acquisition workforce on intellectual property matters, including acquiring or licensing intellectual property.

(2) The Under Secretary shall establish an appropriate leadership structure and office within which the cadre shall be managed, and shall determine the appropriate official to whom members of the cadre shall report.

(3) The cadre of experts shall be assigned to a program office or an acquisition command within a military department to advise, assist, and provide resources to a program manager or program executive officer on intellectual property matters at various stages of the life cycle of a system. In performing such duties, the experts shall-

(A) interpret and provide counsel on laws, regulations, and policies relating to intellectual property;

(B) advise and assist in the development of an acquisition strategy, product support strategy, and intellectual property strategy for a system;

(C) conduct or assist with financial analysis and valuation of intellectual property;

(D) assist in the drafting of a solicitation, contract, or other transaction;

(E) interact with or assist in interactions with contractors, including communications and negotiations with contractors on solicitations and awards; and

(F) conduct or assist with mediation if technical data delivered pursuant to a contract is incomplete or does not comply with the terms of agreements.

(4)(A) In order to achieve the purpose set forth in paragraph (1), the Under Secretary shall ensure the cadre has the appropriate number of staff and such staff possesses the necessary skills, knowledge, and experience to carry out the duties under paragraph (2), including in relevant areas of law, contracting, acquisition, logistics, engineering, financial analysis, and valuation. The Under Secretary, in coordination with the Defense Acquisition University and in consultation with academia and industry, shall develop a career path, including development opportunities, exchanges, talent management programs, and training, for the cadre. The Under Secretary may use existing authorities to staff the cadre, including those in subparagraphs (B), (C), (D), and (F).

(B) Civilian personnel from within the Office of the Secretary of Defense, Joint Staff, military departments, Defense Agencies, and combatant commands may be assigned to serve as members of the cadre, upon request of the Director.

(C) The Under Secretary may use the authorities for highly qualified experts under section 9903 of title 5, to hire

Enclosure 2: 10 U.S.C. § 2322

experts as members of the cadre who are skilled professionals in intellectual property and related matters.

(D) The Under Secretary may enter into a contract with a private-sector entity for specialized expertise to support the cadre. Such entity may be considered a covered Government support contractor, as defined in section 2320 of this title.

(E) In establishing the cadre, the Under Secretary shall give preference to civilian employees of the Department of Defense, rather than members of the armed forces, to maintain continuity in the cadre.

(F) The Under Secretary is authorized to use amounts in the Defense Acquisition Workforce Development Fund for the purpose of recruitment, training, and retention of the cadre, including paying salaries of newly hired members of the cadre for up to three years.

(Added Pub. L. 115–91, div. A, title VIII, §802(a)(1), Dec. 12, 2017, 131 Stat. 1450 .)

PRIOR PROVISIONS

A prior section 2322, added Pub. L. 98–525, title XII, §1216(a), Oct. 19, 1984, 98 Stat. 2598 ; amended Pub. L. 100–26, §7(a)(6), Apr. 21, 1987, 101 Stat. 278 ; Pub. L. 100–180, div. A, title XII, §1231(7), Dec. 4, 1987, 101 Stat. 1160 , limited small business set-asides under the Foreign Military Sales Program and provided that the section expired Jan. 17, 1987, prior to repeal by Pub. L. 102–484, div. A, title X, §1052(25)(A), Oct. 23, 1992, 106 Stat. 2500 .

Another prior section 2322 was contained in chapter 138 and was renumbered section 2342 of this title.



DoD INSTRUCTION 5010.44

INTELLECTUAL PROPERTY (IP) ACQUISITION AND LICENSING

Originating Component: Office of the Under Secretary of Defense for Acquisition and Sustainment

Effective: October 16, 2019

Releasability: Cleared for public release. Available on the Directives Division Website at <https://www.esd.whs.mil/DD/>.

Incorporates and Cancels: Paragraph 6.a.(4) of Enclosure 2 of DoD Instruction 5000.02, "Operation of the Defense Acquisition System," January 7, 2015, as amended

Approved by: Ellen M. Lord, Under Secretary of Defense for Acquisition and Sustainment

Purpose: In accordance with the authority in DoD Directive 5134.01 and the July 13, 2018 Deputy Secretary of Defense Memorandum, this issuance:

- Establishes policy, assigns responsibilities, and prescribes procedures for the acquisition, licensing, and management of IP pursuant to Sections 2320, 2321, and 2322(a) of Title 10, United States Code (U.S.C.).
- Establishes the DoD IP Cadre, pursuant to Section 2322(b) of Title 10, U.S.C.
- Designates the Assistant Secretary of Defense for Acquisition (ASD(A)) as the senior DoD official overseeing development and implementation of DoD policy and guidance for acquisition, licensing, and management of IP for DoD.

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SECTION 1: GENERAL ISSUANCE INFORMATION

1.1. APPLICABILITY. This instruction:

a. Applies to:

(1) OSD, the Military Departments, the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Combatant Commands, the Office of the Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities within the DoD (referred to collectively in this instruction as the “DoD Components”).

(2) Acquisition, licensing, and management of IP that is acquired, created by or for, or used by or on behalf of the DoD for purposes relating to the acquisition, operation, maintenance, modernization, and sustainment of defense products and services, regardless of the legal instrument governing such activities, and regardless of whether the IP is treated as a product or a service.

b. Does not apply to:

(1) Licensing or other technology transfer of U.S. Government-owned IP or technology covered by DoD Directive 5535.03 and DoD Instruction 5535.8.

(2) Branding and trademark licensing by DoD Components covered by DoD Directive 5535.09 and DoD Instruction 5535.12.

1.2. POLICY. Weapon and information systems acquired by DoD in support of the warfighter are, and will be, increasingly dependent on technology for its operation, maintenance, modernization, and sustainment. Acquiring and licensing the appropriate IP is vital for ensuring the systems will remain functional, sustainable, upgradable and affordable. Because balancing the interests of the U.S. Government and industry in IP can be difficult, early and effective understanding, planning, and communications between the U.S. Government and industry is critical, as is ensuring delivery, acceptance, and management of the necessary IP deliverables (e.g., technical data and computer software), with appropriate license rights. The DoD requires fair treatment of IP owners, and seeks to create conditions that encourage technologically advanced solutions to meet DoD needs.

a. It is DoD policy to acquire, license, and manage IP to:

(1) Enable coordination and consistency across DoD Components in developing and implementing strategies for acquiring and licensing IP and communicating with industry.

(2) Ensure that program managers are aware of the rights and obligations of the Federal Government and contractors in IP, and that program managers fully consider and use all available techniques and best practices for acquiring and licensing IP early in the acquisition process.

(3) Encourage customized IP strategies for each system based on, at a minimum, the unique characteristics of the system and its components, the product support strategy for the system, the organic industrial base strategy of the military department concerned, and the commercial market.

b. The following core principles govern the DoD acquisition, licensing, and management of IP:

(1) Integrate IP planning fully into acquisition strategies and product support strategies to protect core DoD interests over the entire life cycle. Seek to acquire only those IP deliverables and license rights necessary to accomplish these strategies, bearing in mind the long-term effect on cost, competition, and affordability.

(2) Ensure acquisition professionals have relevant knowledge of how IP matters relate to their official duties. Cross-functional input and coordination is critical to planning and life-cycle objectives.

(3) Negotiate specialized provisions for IP deliverables and associated license rights whenever doing so will more effectively balance DoD and industry interests than the standard or customary license rights. This is most effective early in the life cycle, when competition is more likely.

(4) Communicate clearly and effectively with industry regarding planning, expectations and objectives for system upgrade and sustainment. Avoid requirements and strategies that limit the DoD's options in accessing vital technology and commercial solutions available from industry.

(5) Respect and protect IP resulting from technology development investments by both the private sector and the U.S. Government.

(6) Clearly identify and match data deliverables with the license rights in those deliverables. Data or software deliverables are of no value unless and until the license rights to use it are attached, and the U.S. Government actually obtains and accepts those deliverables.

SECTION 2: RESPONSIBILITIES

2.1. ASD(A). Under the authority, direction, and control of the Under Secretary of Defense for Acquisition and Sustainment, the ASD(A):

a. Serves as the senior DoD official overseeing development and implementation of DoD IP policy and guidance for DoD.

b. Manages a cadre of personnel who are experts in the acquisition, licensing, and management of IP, coordinating their development and activities, including:

(1) Establishing an appropriate leadership structure and office for the IP Cadre.

(2) Ensuring the Cadre has the appropriate number of staff and such staff possesses the necessary skills, knowledge, and experience to carry out the duties in Paragraph 3.3., including in relevant areas of law, program management, contracting, acquisition, logistics, configuration management, engineering, financial analysis, and valuation.

2.2. PRESIDENT, DEFENSE ACQUISITION UNIVERSITY (DAU). Under the authority, direction, and control of the ASD(A), the President, DAU:

a. In collaboration with the IP Cadre lead, develops and updates IP curricula and reference materials, making use of IP lessons learned from actual case studies to derive experiential learning materials for the acquisition workforce.

b. Provides IP training to help the U.S. Government identify, acquire, and license IP at the earliest appropriate time and at the most affordable cost, while treating industry fairly and providing incentives to participate in the defense marketplace.

c. Provides and continuously improves training and education tailored to the various disciplines that must implement and manage IP acquisition and licensing activities.

2.3. GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE. Pursuant to Section 140 of Title 10, U.S.C., and DoD Instruction 1442.02, the General Counsel of the Department of Defense, as the chief legal officer of the DoD, and as Director, Defense Legal Services Agency, provides legal advice and services in support of this issuance and in support of the IP Cadre established in Section 3.

2.4. DOD COMPONENT HEADS WITH ACQUISITION AUTHORITY OR CONTRACT ADMINISTRATIVE RESPONSIBILITIES. The DoD Component heads with acquisition authority or contract administrative responsibilities:

a. Oversee implementation of this issuance, and identify one or more offices with responsibility to coordinate matters related to the functions described below with the IP Cadre.

b. Ensure that program personnel engaged in all stages of the acquisition life cycle have relevant knowledge of the rights and obligations of the Federal Government and contractors regarding IP matters, IP law and regulations, program management, logistics, contracts, data management, valuation, and other disciplines as appropriate. Program personnel must fully consider and use all available techniques and best practices early in the acquisition process for identifying, acquiring, licensing, and enforcing the U.S. Government's rights to IP necessary to support operation, maintenance, modernization, and sustainment.

c. Incorporate consideration of types of IP deliverables and level of associated license rights into source selection evaluation factors, and as negotiation objectives in sole-source awards, as appropriate. Ensure there is sufficient clarity in contractors' identification and assertion of restrictions on IP rights to enable the U.S. Government to assess how those assertions may affect DoD interests over the life cycle, e.g., by requiring contractors to align assertions to specific IP deliverables, to particular system components or processes, and to development or modernization funding.

d. Facilitate coordination and consistency across the DoD in strategies for determining the IP deliverables and IP rights necessary for operation, maintenance, modernization, and sustainment.

e. Incorporate IP planning elements into acquisition strategies, emphasizing the criticality of long-term analysis and planning during the earliest phases of the program, while preserving flexibility to address developments in the program sustainment strategy. Planning before solicitation for programs will address costs and benefits of procuring required IP and IP rights in light of corresponding investment and the government's means to reuse and adapt same. This includes configuration management planning that considers how mixes of contractor and government changes impacting delivered IP and data reuse and the ability to compete life-cycle support.

f. Communicate clearly and effectively with industry on IP matters early in the program life cycle. When both DoD and industry are making and planning technology investments, IP considerations will be critical to recognizing a return on such investments. For example, DoD Component heads will ensure IP matters are prioritized and included in such things as industry days, draft solicitations, one-on-one meetings with potential offerors, and presolicitation notices.

g. When communicating with industry, explore ways to share appropriate details about the program's IP strategy and product support strategy. During such communications, address the need for competitive and affordable product support and upgrades while providing appropriate protections for privately developed IP.

h. Acquire the necessary IP deliverables and associated license rights at fair and reasonable prices, while supporting the product support and reuse strategy. Improve the quality and consistency of financial analysis and valuation practices for determining fair and reasonable prices and appropriate needs for IP and IP rights in order to develop program budgets and evaluate proposals.

i. Ensure that IP strategies identify and enable actions to ensure return on U.S. Government investment in IP developed in whole or in part at U.S. Government expense, including by

negotiating for delivery of that IP and acquiring the appropriate associated license rights, preferably at the time of development of the technology.

j. Ensure IP deliverables (e.g., technical data and computer software) and associated license rights are acquired and managed as necessary to support the use of modular open systems approaches pursuant to Chapter 144B of Title 10, U.S.C.

k. Establish and maintain IP management procedures to ensure that time-sensitive actions are executed as appropriate to avoid an unintentional loss of IP rights, e.g., inspection and acceptance of IP deliverables, challenge and validation of asserted restrictions on deliverable IP, exercise of time-limited contract options for IP deliverables or IP rights.

SECTION 3: THE IP CADRE

3.1. CADRE PURPOSE. The IP Cadre facilitates the development and use of a highly competent and consistent approach across the DoD for acquiring, licensing, and managing IP, by providing timely expert advice, assistance, and resources to the acquisition workforce on IP matters. IP Cadre members will advise, assist, and provide resources to DoD Components on IP matters at various stages of the life cycle of a system.

3.2. ORGANIZATION AND MANAGEMENT. The IP Cadre is established under the authority, direction, and control of the ASD(A). It will consist of a director, and such subordinate organizational elements and members as established within resources assigned. The IP Cadre will interact with the DoD Components to facilitate a highly competent and consistent approach to assigned areas. In performance of assigned functions and responsibilities, the director of the IP Cadre will:

- a. Provide oversight and coordination on all acquisition and licensing policy and procedures for DoD IP.
- b. Coordinate actions and exchange information with other DoD organizations that have collateral or related functions.
- c. Identify and distribute best practices.
- d. Interface on assigned functions with Congress, industry, academia, as well as organizations throughout the DoD engaged in activities throughout the life-cycle of programs.
- e. Support development of requirements for training and credentialing the acquisition workforce.
- f. Provide assistance, when requested by the DoD Components, within the scope of the IP Cadre roles and responsibilities.

3.3. ROLES AND RESPONSIBILITIES. Members of the IP Cadre:

- a. Issue and interpret policies relating to acquisition, licensing, and management of IP, consistent with law and regulation.
- b. Advise and assist in the development of an acquisition strategy, product support strategy, and IP strategy for a system.
- c. Conduct or assist with the financial analysis and valuation of IP.
- d. Assist program offices in drafting relevant IP provisions in solicitations, contracts, other transaction agreements, and licenses.

- e. Assist contracting officers in interactions with contractors, including communications and negotiations with contractors regarding solicitations and awards.
- f. Assist contracting officers in the conduct of challenges to contractors’ asserted restrictions on IP or if IP deliverables are incomplete or do not comply with the terms of a contract.
- g. Coordinate with the DAU, academia, and industry to develop and update IP curricula and reference materials, including guidance, training courses, and case studies.
- h. Address the management of IP deliverables and IP rights to support the creation and sustainment of a competitive environment, from program inception through sustainment.
- i. Facilitate coordination and consistency across the DoD in strategies for determining the IP deliverables and IP rights necessary for operation, maintenance, modernization and sustainment.

SECTION 4: IP IMPLEMENTATION GUIDANCE

4.1. IP STRATEGY. Each DoD program will have a robust IP strategy to identify and manage the full spectrum of IP and related matters (e.g., technical data and computer software deliverables, patented technologies, and license rights) from the inception of a program and updated throughout entire product life cycle—initially as part of the acquisition strategy, and during the operations and support phase as part of the life-cycle sustainment plan.

a. The IP strategy will describe, at a minimum:

(1) How program management will assess long-term program requirements, and total ownership costs of IP deliverables and associated license rights necessary for competitive and affordable operation, maintenance, modernization, and sustainment over the entire product life cycle. This includes integrating, for all systems, the IP planning elements required by Paragraph (S-70) of Section 207.106 of the Defense Federal Acquisition Regulation Supplement for major weapon systems and subsystems thereof.

(2) How IP and related matters necessary to support the program’s use of modular open systems approaches, including in accordance with Sections 2320 and 2446a through 2446c of Title 10, U.S.C., will be addressed. This includes providing guidance for how solicitations and contracts will:

(a) Identify and require all major systems interfaces to be based on widely supported and consensus-based standards (if available and suitable), which are preferably non-proprietary.

(b) Include requirements to acquire the appropriate IP rights in such major systems interfaces.

(c) Include appropriate requirements for other non-major systems interfaces (e.g., interfaces necessary to segregation and reintegration activities).

b. Customize IP strategies based on, at a minimum, the common, shared, and unique characteristics of the system and its components, the system architecture and interfaces, the product support strategy, the organic industrial base strategy of the DoD Component concerned, whether the item can be found in the commercial market, and whether the standard commercial licensing terms meet DoD needs.

c. IP strategies must consider the use of specially negotiated licenses to acquire customized IP deliverables (e.g., technical data, computer software) and associated license rights appropriate for particular elements of the product support strategy.

4.2. DOD COMPONENT IP REQUIREMENTS.

a. Program management offices will use both direct competition at various levels and indirect means, such as best value considerations over the life cycle, to create competitive environments that encourage improved performance and cost control. Strategies to be

considered include, but are not limited to, competitive prototyping, dual sourcing, modular open systems approaches that enable competition for upgrades, acquisition of complete technical data packages for selected systems and components, competition at the subsystem level, and opportunities for small business and organizations employing the disabled.

b. Regarding IP developed at private expense, in whole or on part, the DoD Components will use all available techniques and best practices for developing and continuously refining requirements for the acquisition and licensing of IP and IP rights necessary for operation, maintenance, modernization, and sustainment, showing preference for modular open system approaches. The DoD Components will negotiate specialized licenses and delivery requirements whenever doing so will more effectively balance DoD and industry interests than the more limited standard license categories.

c. DoD Components will consider and use all available techniques and best practices, including modular open systems approaches when cost effective and feasible. Doing so will ensure visibility into the U.S. Government’s and industry’s relative investments in the development of the IP, and the approach to managing the associated IP rights as part of a strategy for return on such investments. This approach will reduce the risk of paying more than once for IP and IP rights. DoD Components will ensure these efforts account for IP rights that are not based on the source of development funding, e.g., technical data necessary for operation, maintenance, installation, and training; form, fit, and function data.

d. Information systems used to provide authorized access, retention, integration, sharing, transferring, and conversion of IP deliverables throughout their programs’ life cycles must support product configuration management, data loss prevention, and data sharing or exchange.

GLOSSARY

G.1. ACRONYMS.

ASD(A)	Assistant Secretary of Defense for Acquisition
DAU	Defense Acquisition University
IP	intellectual property
U.S.C.	United States Code

G.2. DEFINITIONS. These terms and their definitions are for the purpose of this issuance.

IP. Information, products, or services that are protected by law as intangible property, including data (e.g., technical data and computer software), technical know-how, inventions, creative works of expression, trade names.

IP deliverables. Products or services (including information products and services) that are required to be delivered or provided to the U.S. Government by contract or other legal instrument and that include or embody IP (e.g., technical data and computer software).

IP rights. The legal rights governing IP, including ownership as well as license or other authorization to engage in activities with IP (e.g., make, use, sell, import, reproduce, distribute, modify, prepare derivative works, release, disclose, perform, or display IP). When the IP involves access to classified information, DoD Directive 5535.02, DoD Instruction 2000.03, and Volume 2 of DoD Manual 5220.22 may apply.

REFERENCES

- Defense Federal Acquisition Regulation Supplement, current edition
- Deputy Secretary of Defense Memorandum, "Establishment of the Office of the Under Secretary of Defense for Research and Engineering and the Office of the Under Secretary of Defense for Acquisition and Sustainment," July 13, 2018
- DoD Directive 5134.01, "Under Secretary of Defense for Acquisition, Technology, and Logistics (USD(AT&L)), December 9, 2005, as amended
- DoD Directive 5535.02, "DoD Patent Security Review Process," March 24, 2010, as amended
- DoD Directive 5535.03, "DoD Domestic Technology Transfer (T2) Program," May 21, 1999, as amended
- DoD Directive 5535.09, "DoD Branding and Trademark Licensing Program," December 19, 2007
- DoD Instruction 1442.02, "Personnel Actions Involving Civilian Attorneys," September 30, 2010
- DoD Instruction 2000.03, "International Interchange of Patent Rights and Technical Information," January 17, 2006, as amended
- DoD Instruction 5535.8, "DoD Technology Transfer (T2) Program," May 14, 1999, as amended
- DoD Instruction 5535.12, "DoD Branding and Trademark Licensing Program Implementation," September 13, 2013
- DoD Manual 5220.22, Volume 2, "National Industrial Security Program: Industrial Security Procedures for Government Activities," August 1, 2018
- United States Code, Title 10

Enclosure (4): DoD Intellectual Property Cadre Leadership and Contacts

Component	Name	Title	Department/Office
Office of the Secretary of Defense IP Cadre			
Primary/ Lead	Mr. Richard Gray	Director, IP Cadre	Assistant Secretary of Defense (Acquisition)/Acquisition Enablers/Acquisition Approaches and Management/IP Cadre
Contact/ Alternate	Mr. Phil Rodgers	Director, Acquisition Approaches and Management	Assistant Secretary of Defense (Acquisition)/Acquisition Enablers/Acquisition Approaches and Management
Department of the Army			
Primary/ Lead	Mr. Brian Raftery	Acting Deputy Assistant Secretary of the Army (Strategy and Acquisition Reform)	Deputy Assistant Secretary of the Army (Strategy and Acquisition Reform) (DASA-SAR)
Contact/ Alternate	Ms. Glenna Downes	Acquisition Policy Specialist	DASA-SAR
Department of the Navy			
Primary/ Lead	Mr. Daniel Nega	Deputy Assistant Secretary of the Navy (Air/Ground)	Deputy Assistant Secretary of the Navy (Air/Ground)
Contact/ Alternate	Mr. Richard Tschampel	Deputy Assistant General Counsel, Research, Development & Acquisition	Office of the General Counsel
Department of the Air Force			
Primary/ Lead	Ms. Angayurkanni (Kanna) Annamalai-Brown	Chief of the Air Force Smart IP Cadre	Assistant Secretary of the Air Force (Acquisition), Smart IP Cadre
Contact/ Alternate	Mr. Matt Bailey	Director, Intellectual Property Law	Office of the General Counsel, Acquisition Law Division
Defense Acquisition University			
Primary/ Lead	Ms. Vicki Allums	Learning Director, Intellectual Property	Foundational Learning Directorate
Contact/ Alternate	Mr. Mark Dvorscak	Professor of Acquisition Management (Intellectual Property)	Defense Systems Management College



ACQUISITION
AND SUSTAINMENT

THE UNDER SECRETARY OF DEFENSE

3010 DEFENSE PENTAGON
WASHINGTON, DC 20301-3010

FEB - 3 2019

The Honorable Nita M. Lowey
Chairwoman
Committee on Appropriations
United States House of Representatives
Washington, DC 20515

Dear Madam Chairwoman:

Sections 813 and 875 of the National Defense Authorization Act (NDAA) for FY 2016 (Public Law (P.L.) 114-92) each require the Secretary of Defense to submit to the congressional defense committees any comments or recommendations on the findings contained in the separate reports created pursuant to those sections by a joint Government-industry advisory panel and an independent entity, respectively, regarding the statutes, regulations, policies, and practices related to the Department's acquisition of intellectual property (IP). Given the close nexus between the subject matters of these independent reports, the Department is consolidating its comments in this response letter, as stated in our letter to the committees on May 24, 2017.

Overview of the Section 813 and 875 Reviews

The Section 813 Government-Industry Advisory Panel

Section 813(b) of the NDAA for FY 2016, as amended by section 809 of the NDAA for FY 2017 (P.L. 114-328), directed the Secretary of Defense to establish a Government-Industry Advisory Panel (813 Panel) to review, and provide recommendations for any changes to, sections 2320 and 2321 of title 10, U.S.C., and the implementing regulations regarding rights in technical data and validation of proprietary data restrictions. The 813 Panel was charged to ensure the governing statutes and regulations are best structured to serve the interests of the taxpayers and the national defense, including by giving appropriate consideration to—

- Ensuring that the Department does not pay more than once for the same work;
- Ensuring that Department of Defense (DoD) contractors are appropriately rewarded for their innovation and invention;
- Providing for cost-effective procurement, sustainment, modification, and upgrades to DoD systems;
- Encouraging the private sector to invest in new products, technologies, and processes relevant to DoD missions;
- Ensuring that the Department has appropriate access to innovative products, technologies, and processes developed by the private sector for commercial use; and
- Ensuring that the Department and DoD contractors have the technical data rights necessary to support the Modular Open System Approach (MOSA) requirement set forth in title 10, U.S.C., section 2446a, taking into consideration the distinct characteristics of

major system platforms, major system interfaces, and major system components developed exclusively with Federal funds, exclusively at private expense, and with a combination of Federal funds and private expense.

The panel began its work in June 2016, with a balanced membership of panelists from industry and the Government. In accordance with the Federal Advisory Committee Act (FACA), the panel's meetings, information collected and generated, and other deliberative activities, were open to the public and are publicly available at <https://www.facadatabase.gov/FACA/apex/FACAPublicCommittee?id=a10t0000001gzjuAAA>. The panel's final report, "Government-Industry Advisory Panel on Technical Data Rights," dated November 13, 2018, was submitted to my office, as well as to the congressional defense committees, in mid-November 2018.

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Section 875 of the NDAA for FY 2016 required the Secretary of Defense to contract with an "independent entity" to review DoD regulations, practices, and sustainment requirements related to Government access to and use of IP rights of private sector firms, as well as DoD practices related to the procurement, management, and use of IP rights to facilitate competition in sustainment of weapon systems throughout their life-cycle. The independent entity was also required to consult with the National Defense Technology and Industrial Base Council (*see* title 10, U.S.C., section 2502) and each Center of Industrial and Technical Excellence (*see* title 10, U.S.C., section 2474). On March 2, 2016, the Department awarded a contract to the Institute for Defense Analyses (IDA), a nonprofit corporation that operates three federally funded research and development centers, to conduct this independent study. As a result of the review, IDA reached eight conclusions, identified four "broader challenges," and made six recommendations, in its final report entitled "Department of Defense Access to Intellectual Property for Weapon Systems Sustainment," dated May 2017, which we forwarded to the congressional committees on May 24, 2017, and although this independent review was not subject to FACA, the report is publicly available at

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Department of Defense Comments and Recommendations

The Department agrees with and supports the general findings and recommendations in both the section 813 and section 875 reports. We recognize that a foundational challenge in this area is that the Department has insufficient organizational capacity to provide expertise in the acquisition of IP to support program managers throughout their programs' lifecycles (as well as other staff involved in weapon systems acquisition). This has hindered our ability to facilitate procurement, sustainment, modification, and upgrades to DoD systems throughout their lifecycle. We also recognize that fostering innovation for both national security and the economy overall must be a central tenet of our IP policy and procedures.

To address these challenges, I have formed an Intellectual Property Working Group (IPWG) at the Department level, including cross-functional representation (e.g., acquisition, sustainment, research & development, engineering, contracting, legal) from the Office of the Secretary of Defense and the Military Departments. In addition to further assessing and implementing the statutory, regulatory, policy, and practical recommendations from the section 813 and 875 reports, the IPWG will also coordinate Department-wide efforts to implement the requirements of title 10, U.S.C., section 2322, (resulting from section 802 of the NDAA for FY 2018), which align with and support the overall recommendations of those reports.

Statutory and Legislative Recommendations

The Department generally supports the statutory and legislative recommendations by the section 813 Panel to amend title 10, U.S.C., section 2320 and 2321, and for additional legislation not directed to those sections. Regarding the three tension points for which the section 813 Panel did not reach consensus, the Department supports the panel's majority position, and believes that the concerns identified in the minority position can be effectively addressed through appropriate implementation of the policy, regulatory, and practical recommendations.

We also note and support the two statutory recommendations from the section 813 Panel report that have already been addressed in recent NDAs: The recommendation (paper # 22) to form a cadre of IP experts was addressed in section 802 of the NDAA for FY 2018 (P.L. 115-91), now codified at title 10, U.S.C., section 2322; and the recommendation (paper # 19) to clarify the mandatory presumption of development at private expense for commercial items in the procedures for challenging and validating asserted restrictions on technical data was addressed in section 865 of the John S. McCain NDAA for FY 2019 (P. L. 115-232) (amending title 10, U.S.C., section 2321(f)).

Regulatory, Policy, and Practical Recommendations

During the short term, while the statutory recommendations are pending in the legislative process, the IPWG will focus its efforts on implementation of the section 813 and 875 regulatory, policy, and practical recommendations. Specific attention will focus on requirements of existing statutes, including title 10, U.S.C., section 2322, and recent changes to title 10, U.S.C., section 2320 and 2321 that have not yet been fully implemented, as well as addressing the concerns raised by the 813 Panel's minority positions for three tension points where the panel failed to reach consensus.

The Department will address the contracting recommendations primarily through the Defense Federal Acquisition Regulation Supplement (DFARS) rulemaking process. As recommended by the 813 Panel, and as an exception to the most common rulemaking procedures, industry will be invited to participate earlier than usual in the rulemaking via public meetings, which will provide an opportunity for industry to participate in the actual drafting of both the proposed and final rules.

Regarding the policy recommendations, the Department will review existing policy guidance to identify revisions necessary to accommodate the gaps and emerging issues identified in the 813 and 875 reports. In addition, we will identify new and potentially more effective ways to communicate IP policy. For example, the Department of the Army recently issued its new IP policy, Army Directive 2018-26, "Enabling Modernization Through the Management of Intellectual Property," dated December 7, 2018 (available at https://armypubs.army.mil/epubs/DR_pubs/DR_a/pdf/web/ARN14261_AD2018_26_Final.pdf), and will be issuing implementing guidance early in 2019, which may serve as a model for not only the other military departments, but also for an overarching Department-level policy and guidance issuances.

Regarding the practical recommendations, this may be the area in which the most significant improvements can be made. Regardless of how well-crafted the statutory, regulatory, and policy framework, the Department recognizes that a critical element in addressing the identified issues and challenges is in ensuring that our personnel are provided with all the necessary tools to make it all work in the real world.

Cross-cutting Principles and Threads

Throughout these efforts to address the regulatory, policy, and practical recommendations, there are a number of key principles and threads that cut across all of these activities, which the Department will be relying on to guide its efforts. These include:

- **Delivery Requirements—Not Just Data Rights.** The Department must reemphasize the importance of addressing its detailed requirements for the delivery of technical data and computer software, as a necessary complement to the license rights. The DFARS coverage focuses almost entirely on allocating license rights, leaving the issue of delivery requirements to be addressed on a case-by-case in each individual contract. As one element to address these challenges, the Department will update and clarify its guidance on managing data delivery requirements, including DoD Manual 5010.12, "Procedures for the Acquisition and Management of Technical Data."

- **Timing: Start Early, Plan for Later.** The Department's long-standing policy has been to address IP issues early in the program life cycle, and to plan to meet the Department's future needs, e.g., for reprocurement, sustainment, and upgrades. Too frequently, when faced with challenges of long-term planning without ready access to a crystal ball, programs succumb to this uncertainty by either deferring the decision regarding delivery requirements until later in the life cycle when plans are more certain, or by "asking for everything" up-front in order to preserve flexibility. Neither of these approaches is the best answer. The Department must emphasize the criticality of long-term planning during the earlier, more competitive phases of the program, while preserving flexibility to address developments in the program sustainment strategy. For example, by more widespread and consistent use of conditional or contingency-based mechanisms such as priced contract options, and escrow arrangements.
- **Modular Open Systems Approaches (MOSA).** Addressing IP requirements is a critical element of utilizing MOSA, including in meeting the statutory requirements at title 10, U.S.C., section 2446a *et seq.* In addition, MOSA is a natural complement to the DoD data rights legal and regulatory framework, which for decades has used a modular licensing scheme (a.k.a. the "doctrine of segregability"). More widespread use of MOSA will better enable the balancing of Government's desire for greater competition with industry's critical need to protect their proprietary IP interests, e.g., by allowing proprietary modules within a system to be treated as a "black box." In addition, several recent statutory changes that better enable MOSA (e.g., addressing interfaces necessary for segregation and reintegration activities, and major systems interfaces), have not yet been implemented in the DFARS, and thus will be a focus of the Department's efforts going forward.
- **Specially Negotiated Licenses.** Another core thread in recent legislative revisions that is further emphasized in the section 813 and 875 reports is to increase emphasis on specially negotiated licenses, rather than relying on the more limited number of standard license categories. In addition to presenting the opportunity for a tailored set of deliverables and associated license rights that better balance the parties' interests, such case-by-case negotiations are more consistent with commercial practices, and should be more effective at attracting non-traditional sources to do business with the Department. A key challenge in encouraging greater use of specially negotiated licenses is the need to train appropriate elements of the acquisition workforce regarding effective IP negotiations, which can become complex. See also, title 10, U.S.C., section 2320(f), and 2439.
- **IP Strategies.** The Department requires programs to establish and maintain an IP Strategy to identify and manage the full spectrum of IP issues from the inception of a program and throughout the life cycle. The IP strategy is a critical tool for synthesizing the various considerations and tradeoffs when managing a program's IP issues, and can provide a framework for more effectively communicating the Departments' approach to program IP with industry (e.g., industry days, draft solicitations), and for evaluating IP during source selection. The Department has been working to develop additional guidance for the acquisition workforce regarding the creation and continuous management of effective IP

Strategies, and will be working to finalize and publish this new guidance as part of these implementation activities. See also, title 10, U.S.C., section § 2320(e), 2322(a)(3) and (b)(3)(B), and 2431a(c)(2)(F).

- **Education and Training.** The Department recognizes the critical need to provide better training for its acquisition workforce to address IP issues. The Defense Acquisition University will review its curriculum to identify additional training opportunities, through integrating IP topics into existing courses, or developing additional IP focused training, as appropriate. The Department will seek to find the appropriate balance of broad-based training for all relevant functional areas in the acquisition workforce to enable earlier and more effective identification and resolution of the most common IP issues, combined with developing and leveraging a cadre of IP experts (see title 10, U.S.C., section § 2322(b)) to help programs address the more sophisticated challenges. In all of these efforts, the Department will seek to move away from training merely for the traditional acquisition workforce certifications, toward an approach that focuses on currency and just-in-time learning, and results in educating our workforce to exercise sound judgment, rather than merely training on topics, techniques, and tactics.

Conclusion

We recognize that Government and Industry have different views of IP and data rights. However, both are united in the desired outcome of our acquisition system delivering to the warfighter state of the art systems to defend the nation. A balanced IP approach that meets the needs of the warfighter while incentivizing private sector participation towards that end, is our goal. We will implement specific changes based on the recommendations that achieve that balance.

An identical letter has been sent to the other congressional defense committees.

Sincerely,



Ellen M. Lord

cc:

The Honorable Kay Granger
Ranking Member



ACQUISITION
AND SUSTAINMENT

THE UNDER SECRETARY OF DEFENSE

3010 DEFENSE PENTAGON
WASHINGTON, DC 20301-3010

FEB - 3 2019

The Honorable Adam Smith
Chairman
Committee on Armed Services
United States House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

Sections 813 and 875 of the National Defense Authorization Act (NDAA) for FY 2016 (Public Law (P.L.) 114-92) each require the Secretary of Defense to submit to the congressional defense committees any comments or recommendations on the findings contained in the separate reports created pursuant to those sections by a joint Government-industry advisory panel and an independent entity, respectively, regarding the statutes, regulations, policies, and practices related to the Department's acquisition of intellectual property (IP). Given the close nexus between the subject matters of these independent reports, the Department is consolidating its comments in this response letter, as stated in our letter to the committees on May 24, 2017.

Overview of the Section 813 and 875 Reviews

The Section 813 Government-Industry Advisory Panel

Section 813(b) of the NDAA for FY 2016, as amended by section 809 of the NDAA for FY 2017 (P.L. 114-328), directed the Secretary of Defense to establish a Government-Industry Advisory Panel (813 Panel) to review, and provide recommendations for any changes to, sections 2320 and 2321 of title 10, U.S.C., and the implementing regulations regarding rights in technical data and validation of proprietary data restrictions. The 813 Panel was charged to ensure the governing statutes and regulations are best structured to serve the interests of the taxpayers and the national defense, including by giving appropriate consideration to—

- Ensuring that the Department does not pay more than once for the same work;
- Ensuring that Department of Defense (DoD) contractors are appropriately rewarded for their innovation and invention;
- Providing for cost-effective procurement, sustainment, modification, and upgrades to DoD systems;
- Encouraging the private sector to invest in new products, technologies, and processes relevant to DoD missions;
- Ensuring that the Department has appropriate access to innovative products, technologies, and processes developed by the private sector for commercial use; and
- Ensuring that the Department and DoD contractors have the technical data rights necessary to support the Modular Open System Approach (MOSA) requirement set forth in title 10, U.S.C., section 2446a, taking into consideration the distinct characteristics of

major system platforms, major system interfaces, and major system components developed exclusively with Federal funds, exclusively at private expense, and with a combination of Federal funds and private expense.

The panel began its work in June 2016, with a balanced membership of panelists from industry and the Government. In accordance with the Federal Advisory Committee Act (FACA), the panel's meetings, information collected and generated, and other deliberative activities, were open to the public and are publicly available at <https://www.facadatabase.gov/FACA/apex/FACAPublicCommittee?id=a10t0000001gzjuAAA>. The panel's final report, "Government-Industry Advisory Panel on Technical Data Rights," dated November 13, 2018, was submitted to my office, as well as to the congressional defense committees, in mid-November 2018.

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Sincerely,



Ellen M. Lord

cc:

The Honorable William M. "Mac" Thornberry
Ranking Member



ACQUISITION
AND SUSTAINMENT

THE UNDER SECRETARY OF DEFENSE

3010 DEFENSE PENTAGON
WASHINGTON, DC 20301-3010

FEB - 3 2019

The Honorable Richard C. Shelby
Chairman
Committee on Appropriations
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

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- Ensuring that the Department and DoD contractors have the technical data rights necessary to support the Modular Open System Approach (MOSA) requirement set forth in title 10, U.S.C., section 2446a, taking into consideration the distinct characteristics of

major system platforms, major system interfaces, and major system components developed exclusively with Federal funds, exclusively at private expense, and with a combination of Federal funds and private expense.

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Department of Defense Comments and Recommendations

The Department agrees with and supports the general findings and recommendations in both the section 813 and section 875 reports. We recognize that a foundational challenge in this area is that the Department has insufficient organizational capacity to provide expertise in the acquisition of IP to support program managers throughout their programs' lifecycles (as well as other staff involved in weapon systems acquisition). This has hindered our ability to facilitate reprocurement, sustainment, modification, and upgrades to DoD systems throughout their lifecycle. We also recognize that fostering innovation for both national security and the economy overall must be a central tenet of our IP policy and procedures.

To address these challenges, I have formed an Intellectual Property Working Group (IPWG) at the Department level, including cross-functional representation (e.g., acquisition, sustainment, research & development, engineering, contracting, legal) from the Office of the Secretary of Defense and the Military Departments. In addition to further assessing and implementing the statutory, regulatory, policy, and practical recommendations from the section 813 and 875 reports, the IPWG will also coordinate Department-wide efforts to implement the requirements of title 10, U.S.C., section 2322, (resulting from section 802 of the NDAA for FY 2018), which align with and support the overall recommendations of those reports.

Statutory and Legislative Recommendations

The Department generally supports the statutory and legislative recommendations by the section 813 Panel to amend title 10, U.S.C., section 2320 and 2321, and for additional legislation not directed to those sections. Regarding the three tension points for which the section 813 Panel did not reach consensus, the Department supports the panel's majority position, and believes that the concerns identified in the minority position can be effectively addressed through appropriate implementation of the policy, regulatory, and practical recommendations.

We also note and support the two statutory recommendations from the section 813 Panel report that have already been addressed in recent NDAs: The recommendation (paper # 22) to form a cadre of IP experts was addressed in section 802 of the NDAA for FY 2018 (P.L. 115-91), now codified at title 10, U.S.C., section 2322; and the recommendation (paper # 19) to clarify the mandatory presumption of development at private expense for commercial items in the procedures for challenging and validating asserted restrictions on technical data was addressed in section 865 of the John S. McCain NDAA for FY 2019 (P. L. 115-232) (amending title 10, U.S.C., section 2321(f)).

Regulatory, Policy, and Practical Recommendations

During the short term, while the statutory recommendations are pending in the legislative process, the IPWG will focus its efforts on implementation of the section 813 and 875 regulatory, policy, and practical recommendations. Specific attention will focus on requirements of existing statutes, including title 10, U.S.C., section 2322, and recent changes to title 10, U.S.C., section 2320 and 2321 that have not yet been fully implemented, as well as addressing the concerns raised by the 813 Panel's minority positions for three tension points where the panel failed to reach consensus.

The Department will address the contracting recommendations primarily through the Defense Federal Acquisition Regulation Supplement (DFARS) rulemaking process. As recommended by the 813 Panel, and as an exception to the most common rulemaking procedures, industry will be invited to participate earlier than usual in the rulemaking via public meetings, which will provide an opportunity for industry to participate in the actual drafting of both the proposed and final rules.

Regarding the policy recommendations, the Department will review existing policy guidance to identify revisions necessary to accommodate the gaps and emerging issues identified in the 813 and 875 reports. In addition, we will identify new and potentially more effective ways to communicate IP policy. For example, the Department of the Army recently issued its new IP policy, Army Directive 2018-26, "Enabling Modernization Through the Management of Intellectual Property," dated December 7, 2018 (available at https://armypubs.army.mil/epubs/DR_pubs/DR_a/pdf/web/ARN14261_AD2018_26_Final.pdf), and will be issuing implementing guidance early in 2019, which may serve as a model for not only the other military departments, but also for an overarching Department-level policy and guidance issuances.

Regarding the practical recommendations, this may be the area in which the most significant improvements can be made. Regardless of how well-crafted the statutory, regulatory, and policy framework, the Department recognizes that a critical element in addressing the identified issues and challenges is in ensuring that our personnel are provided with all the necessary tools to make it all work in the real world.

Cross-cutting Principles and Threads

Throughout these efforts to address the regulatory, policy, and practical recommendations, there are a number of key principles and threads that cut across all of these activities, which the Department will be relying on to guide its efforts. These include:

- **Delivery Requirements—Not Just Data Rights.** The Department must reemphasize the importance of addressing its detailed requirements for the delivery of technical data and computer software, as a necessary complement to the license rights. The DFARS coverage focuses almost entirely on allocating license rights, leaving the issue of delivery requirements to be addressed on a case-by-case in each individual contract. As one element to address these challenges, the Department will update and clarify its guidance on managing data delivery requirements, including DoD Manual 5010.12, "Procedures for the Acquisition and Management of Technical Data."

- **Timing: Start Early, Plan for Later.** The Department's long-standing policy has been to address IP issues early in the program life cycle, and to plan to meet the Department's future needs, e.g., for procurement, sustainment, and upgrades. Too frequently, when faced with challenges of long-term planning without ready access to a crystal ball, programs succumb to this uncertainty by either deferring the decision regarding delivery requirements until later in the life cycle when plans are more certain, or by "asking for everything" up-front in order to preserve flexibility. Neither of these approaches is the best answer. The Department must emphasize the criticality of long-term planning during the earlier, more competitive phases of the program, while preserving flexibility to address developments in the program sustainment strategy. For example, by more widespread and consistent use of conditional or contingency-based mechanisms such as priced contract options, and escrow arrangements.
- **Modular Open Systems Approaches (MOSA).** Addressing IP requirements is a critical element of utilizing MOSA, including in meeting the statutory requirements at title 10, U.S.C., section 2446a *et seq.* In addition, MOSA is a natural complement to the DoD data rights legal and regulatory framework, which for decades has used a modular licensing scheme (a.k.a. the "doctrine of segregability"). More widespread use of MOSA will better enable the balancing of Government's desire for greater competition with industry's critical need to protect their proprietary IP interests, e.g., by allowing proprietary modules within a system to be treated as a "black box." In addition, several recent statutory changes that better enable MOSA (e.g., addressing interfaces necessary for segregation and reintegration activities, and major systems interfaces), have not yet been implemented in the DFARS, and thus will be a focus of the Department's efforts going forward.
- **Specially Negotiated Licenses.** Another core thread in recent legislative revisions that is further emphasized in the section 813 and 875 reports is to increase emphasis on specially negotiated licenses, rather than relying on the more limited number of standard license categories. In addition to presenting the opportunity for a tailored set of deliverables and associated license rights that better balance the parties' interests, such case-by-case negotiations are more consistent with commercial practices, and should be more effective at attracting non-traditional sources to do business with the Department. A key challenge in encouraging greater use of specially negotiated licenses is the need to train appropriate elements of the acquisition workforce regarding effective IP negotiations, which can become complex. See also, title 10, U.S.C., section 2320(f), and 2439.
- **IP Strategies.** The Department requires programs to establish and maintain an IP Strategy to identify and manage the full spectrum of IP issues from the inception of a program and throughout the life cycle. The IP strategy is a critical tool for synthesizing the various considerations and tradeoffs when managing a program's IP issues, and can provide a framework for more effectively communicating the Departments' approach to program IP with industry (e.g., industry days, draft solicitations), and for evaluating IP during source selection. The Department has been working to develop additional guidance for the acquisition workforce regarding the creation and continuous management of effective IP

Strategies, and will be working to finalize and publish this new guidance as part of these implementation activities. See also, title 10, U.S.C., section § 2320(e), 2322(a)(3) and (b)(3)(B), and 2431a(c)(2)(F).

- Education and Training. The Department recognizes the critical need to provide better training for its acquisition workforce to address IP issues. The Defense Acquisition University will review its curriculum to identify additional training opportunities, through integrating IP topics into existing courses, or developing additional IP focused training, as appropriate. The Department will seek to find the appropriate balance of broad-based training for all relevant functional areas in the acquisition workforce to enable earlier and more effective identification and resolution of the most common IP issues, combined with developing and leveraging a cadre of IP experts (see title 10, U.S.C., section § 2322(b)) to help programs address the more sophisticated challenges. In all of these efforts, the Department will seek to move away from training merely for the traditional acquisition workforce certifications, toward an approach that focuses on currency and just-in-time learning, and results in educating our workforce to exercise sound judgment, rather than merely training on topics, techniques, and tactics.

Conclusion

We recognize that Government and Industry have different views of IP and data rights. However, both are united in the desired outcome of our acquisition system delivering to the warfighter state of the art systems to defend the nation. A balanced IP approach that meets the needs of the warfighter while incentivizing private sector participation towards that end, is our goal. We will implement specific changes based on the recommendations that achieve that balance.

An identical letter has been sent to the other congressional defense committees.

Sincerely,



Ellen M. Lord

cc:

The Honorable Patrick J. Leahy
Vice Chairman



ACQUISITION
AND SUSTAINMENT

THE UNDER SECRETARY OF DEFENSE
3010 DEFENSE PENTAGON
WASHINGTON, DC 20301-3010

The Honorable James M. Inhofe
Chairman
Committee on Armed Services
United States Senate
Washington, DC 20510

FEB - 3 2019

Dear Mr. Chairman:

Sections 813 and 875 of the National Defense Authorization Act (NDAA) for FY 2016 (Public Law (P.L.) 114-92) each require the Secretary of Defense to submit to the congressional defense committees any comments or recommendations on the findings contained in the separate reports created pursuant to those sections by a joint Government-industry advisory panel and an independent entity, respectively, regarding the statutes, regulations, policies, and practices related to the Department's acquisition of intellectual property (IP). Given the close nexus between the subject matters of these independent reports, the Department is consolidating its comments in this response letter, as stated in our letter to the committees on May 24, 2017.

Overview of the Section 813 and 875 Reviews

The Section 813 Government-Industry Advisory Panel

Section 813(b) of the NDAA for FY 2016, as amended by section 809 of the NDAA for FY 2017 (P.L. 114-328), directed the Secretary of Defense to establish a Government-Industry Advisory Panel (813 Panel) to review, and provide recommendations for any changes to, sections 2320 and 2321 of title 10, U.S.C., and the implementing regulations regarding rights in technical data and validation of proprietary data restrictions. The 813 Panel was charged to ensure the governing statutes and regulations are best structured to serve the interests of the taxpayers and the national defense, including by giving appropriate consideration to—

- Ensuring that the Department does not pay more than once for the same work;
- Ensuring that Department of Defense (DoD) contractors are appropriately rewarded for their innovation and invention;
- Providing for cost-effective procurement, sustainment, modification, and upgrades to DoD systems;
- Encouraging the private sector to invest in new products, technologies, and processes relevant to DoD missions;
- Ensuring that the Department has appropriate access to innovative products, technologies, and processes developed by the private sector for commercial use; and
- Ensuring that the Department and DoD contractors have the technical data rights necessary to support the Modular Open System Approach (MOSA) requirement set forth in title 10, U.S.C., section 2446a, taking into consideration the distinct characteristics of

major system platforms, major system interfaces, and major system components developed exclusively with Federal funds, exclusively at private expense, and with a combination of Federal funds and private expense.

The panel began its work in June 2016, with a balanced membership of panelists from industry and the Government. In accordance with the Federal Advisory Committee Act (FACA), the panel's meetings, information collected and generated, and other deliberative activities, were open to the public and are publicly available at <https://www.facadatabase.gov/FACA/apex/FACAPublicCommittee?id=a10t0000001gzjuAAA>. The panel's final report, "Government-Industry Advisory Panel on Technical Data Rights," dated November 13, 2018, was submitted to my office, as well as to the congressional defense committees, in mid-November 2018.

The panel's final report is comprised primarily of a collection of thirty white papers, each focused on a particular topic that the panel characterized as a "tension point" between the Department and industry. The report's Executive Summary categorizes the white papers into eight broad areas: business model, acquisition planning and requirements, source selection and post source selection IP licensing, balancing the interests of the parties, implementation, compliance/administrative, data acquisition, and MOSA. In most cases, the individual papers conclude with the panel's consensus recommendations regarding policy, regulatory, or practical action to address the issues raised in each paper; however, eight of the papers include statutory recommendations for specific revisions to title 10, U.S.C., section 2320 and 2321 (Appendix A of the report consolidates all of the individual consensus/majority recommendations in redlined versions of those sections), and three papers recommend legislative action not directed to those sections (e.g., provisions recommended for inclusion in a forthcoming NDAA). For three of the tension points with statutory recommendations (papers 14, 19, and 24), the panel did not reach consensus and thus the report includes two papers for each topic – one representing the panel's majority position, and the other representing the minority position.

The Section 875 Independent Review of Government Access to IP of Private Sector Firms

Section 875 of the NDAA for FY 2016 required the Secretary of Defense to contract with an "independent entity" to review DoD regulations, practices, and sustainment requirements related to Government access to and use of IP rights of private sector firms, as well as DoD practices related to the procurement, management, and use of IP rights to facilitate competition in sustainment of weapon systems throughout their life-cycle. The independent entity was also required to consult with the National Defense Technology and Industrial Base Council (*see* title 10, U.S.C., section 2502) and each Center of Industrial and Technical Excellence (*see* title 10, U.S.C., section 2474). On March 2, 2016, the Department awarded a contract to the Institute for Defense Analyses (IDA), a nonprofit corporation that operates three federally funded research and development centers, to conduct this independent study. As a result of the review, IDA reached eight conclusions, identified four "broader challenges," and made six recommendations, in its final report entitled "Department of Defense Access to Intellectual Property for Weapon Systems Sustainment," dated May 2017, which we forwarded to the congressional committees on May 24, 2017, and although this independent review was not subject to FACA, the report is publicly available at

https://www.ida.org/idamedia/Corporate/Files/Publications/IDA_Documents/SFRD/2017/P-8266.pdf. IDA's recommendations may all be characterized as directed to policy, regulatory, or practical matters, and do not include any specific statutory or legislative recommendations.

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- **IP Strategies.** The Department requires programs to establish and maintain an IP Strategy to identify and manage the full spectrum of IP issues from the inception of a program and throughout the life cycle. The IP strategy is a critical tool for synthesizing the various considerations and tradeoffs when managing a program's IP issues, and can provide a framework for more effectively communicating the Departments' approach to program IP with industry (e.g., industry days, draft solicitations), and for evaluating IP during source selection. The Department has been working to develop additional guidance for the acquisition workforce regarding the creation and continuous management of effective IP

Strategies, and will be working to finalize and publish this new guidance as part of these implementation activities. See also, title 10, U.S.C., section § 2320(e), 2322(a)(3) and (b)(3)(B), and 2431a(c)(2)(F).

- Education and Training. The Department recognizes the critical need to provide better training for its acquisition workforce to address IP issues. The Defense Acquisition University will review its curriculum to identify additional training opportunities, through integrating IP topics into existing courses, or developing additional IP focused training, as appropriate. The Department will seek to find the appropriate balance of broad-based training for all relevant functional areas in the acquisition workforce to enable earlier and more effective identification and resolution of the most common IP issues, combined with developing and leveraging a cadre of IP experts (see title 10, U.S.C., section § 2322(b)) to help programs address the more sophisticated challenges. In all of these efforts, the Department will seek to move away from training merely for the traditional acquisition workforce certifications, toward an approach that focuses on currency and just-in-time learning, and results in educating our workforce to exercise sound judgment, rather than merely training on topics, techniques, and tactics.

Conclusion

We recognize that Government and Industry have different views of IP and data rights. However, both are united in the desired outcome of our acquisition system delivering to the warfighter state of the art systems to defend the nation. A balanced IP approach that meets the needs of the warfighter while incentivizing private sector participation towards that end, is our goal. We will implement specific changes based on the recommendations that achieve that balance.

An identical letter has been sent to the other congressional defense committees.

Sincerely,



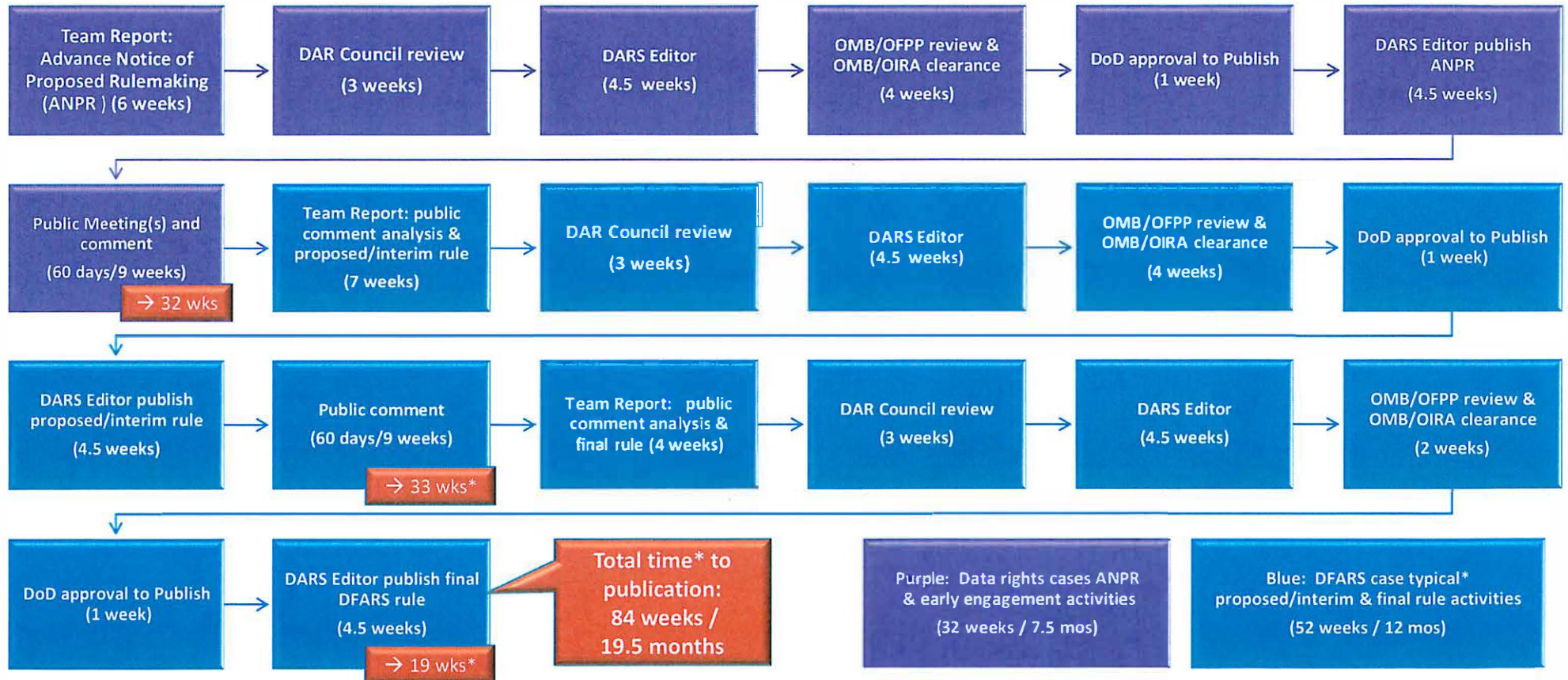
Ellen M. Lord

cc:

The Honorable Jack Reed
Ranking Member

Enclosure (6) DFARS Data Rights Cases Early Engagement Expanded Time Line

NOTE: Individual cases may have longer or shorter time lines, depending on the complexity of the case.



* It is not yet clear whether the early engagement activities will reduce the time required for some elements in later stages of rulemaking

**Enclosure (7): Summary of Defense Federal Acquisition Regulation Supplement (DFARS)
Case Activities Regarding Intellectual Property**

<i>DFARS Case</i>	<i>Description</i>	<i>Advance Notice of Proposed Rulemaking (ANPR)</i>	<i>Proposed Rule</i>
2018-D018 (S) Noncommercial Computer Software	Implements section 871 of the NDAA for FY 2018. Section 871 adds new section 2322a to title 10 of the U.S. Code, Requirement for consideration of certain matters during acquisition of noncommercial computer software.	10/02/2019: Team report submitted to DAR Council. 10/16/2019: DAR Council agreed to ANPR. 01/14/2020: ANPR published in Federal Register. Public comments due 03/16/2020. 02/18/2020: Public meeting held.	TBD
2018-D069 (S) Validation of Proprietary and Technical Data	Implements section 865 of the NDAA for FY 2019. Section 865 provides for a presumption of development exclusively at private expense under a contract for commercial items, unless DoD demonstrates the item was not developed exclusively at private expense.	07/10/2019: Team report submitted to DAR Council. 07/24/2019: DAR Council agreed to ANPR. 09/13/2019: Published in Federal Register. 11/15/2019: Public meeting held.	02/05/2020: Team report submitted. 02/26/2020: DAR Council to discuss proposed rule. TBD: Publication in Federal Register. TBD: Public meeting to be held.
2018-D070 (S) Continuation of Technical Data Rights during Challenges	Implements section 866 of the NDAA for FY 2019. Section 866 provides for, in certain circumstances, continued Government use of technical data that is the subject of a dispute under the contract dispute statute.	Case closed with no action due to repeal of section 866 by section 808 of the NDAA for FY 2020.	Not applicable.
2018-D071 (S) Negotiation of Price for Technical Data and	Implements section 835 of the NDAA for FY 2018 and section 867 of the NDAA for FY 2019. Section 835 adds 10 U.S.C. 2439, Negotiation of price for technical data before development or production of major	08/28/2019: Team report submitted to DAR Council. 09/03/2019: DAR Council agreed to ANPR.	03/18/2020: Team report due. TBD: Publication in Federal Register.

Preference for Specially Negotiated Licenses	weapon systems, and amends 10 U.S.C. 2320 to establish a preference for specially negotiated licenses. Section 867 amends 10 U.S.C. 2439 to require DoD to negotiate a price for technical data before selecting a contractor for production or sustainment of a major weapon system.	11/12/2019: Published in Federal Register. 11/21/2019 & 12/20/2019: Public meetings held.	TBD: Public meeting to be held.
2019-D042 (S) Rights Relating to Modular Open System Approaches and Validation of Proprietary Data Restrictions	Implements section 809(a), (b), and (d) of the NDAA for FY 2017, which addresses rights relating to items or processes developed exclusively at private expense. Also implements section 815(b) of the NDAA for FY 2012, which addresses validation of proprietary data restrictions. (Note: includes everything from sections 809 and 815 except deferred ordering. Prior cases: 2017-D006, 2012-D022)	04/08/2020: Team report due. TBD: Publication in Federal Register. TBD: Public meeting to be held.	TBD
2019-D043 Small Business Innovation Research Program Data Rights	Implements changes related to data rights in SBA's SBIR Policy Directive, published in the <i>Federal Register</i> on April 2, 2019 (84 FR 12794). (Non-statutory)	03/25/2020: Team report due. TBD: Publication in Federal Register. TBD: Public meeting to be held.	TBD
2019-D044 (S) Rights in Technical Data	Implements section 809(c) of the NDAA for FY 2017 and section 815(a) of the NDAA for FY 2012, which address deferred ordering of technical data. (Prior cases: 2017-D006, 2012-D022)	04/01/2020: Team report due. TBD: Publication in <i>Federal Register</i> . TBD: Public meeting to be held.	TBD

S. 1790—284

(1) IN GENERAL.—Not later than October 15, 2020, the Under Secretary of Defense for Acquisition and Sustainment, in consultation with the secretaries of the military departments and other appropriate officials, shall report on the use of the authority under this section using the initial guidance issued under subsection (d).

(2) ELEMENTS.—The report required under paragraph (1) shall include the following elements:

(A) The final guidance required by subsection (d)(2), including a description of the treatment of use of the authority that was initiated before such final guidance was issued.

(B) A summary of how the authority under this section has been used, including a list of the cost estimate, schedule for development, testing and delivery, and key management risks for each initiative conducted pursuant to such authority.

(C) Accomplishments from and challenges to using the authority under this section, including organizational, cultural, talent, infrastructure, testing, and training considerations.

(D) Recommendations for legislative changes to the authority under this section.

(E) Recommendations for regulatory changes to the authority under this section to promote effective development and deployment of software acquired or developed under this section.

SEC. 801. PILOT PROGRAM ON INTELLECTUAL PROPERTY EVALUATION FOR ACQUISITION PROGRAMS.

(a) PILOT PROGRAM.—Not later than 180 days after the date of the enactment of this Act, the Secretary of Defense and the Secretaries of the military departments may jointly carry out a pilot program to assess mechanisms to evaluate intellectual property (such as technical data deliverables and associated license rights), including commercially available intellectual property valuation analysis and techniques, in acquisition programs for which each such Secretary is responsible to better understand the benefits associated with these mechanisms on—

(1) the development of cost-effective intellectual property strategies;

(2) the assessment and management of the value and acquisition costs of intellectual property during acquisition and sustainment activities (including source selection evaluation factors) throughout the acquisition lifecycle for any acquisition program selected by such Secretary; and

(3) the use of a commercial product (as defined in section 103 of title 41, United States Code, as in effect on January 1, 2020), commercial service (as defined in section 103a of title 41, United States Code, as in effect on January 1, 2020), or nondevelopmental item (as defined in section 110 of title 41, United States Code) as an alternative to a product or service to be specifically developed for a selected acquisition program, including evaluation of the benefits of reduced risk regarding cost, schedule, and performance associated with commercial products, commercial services, and nondevelopmental items.

S. 1790—285

(b) **ACTIVITIES.**—Activities carried out under the pilot program may include the following:

(1) Establishment of a team of Department of Defense and private sector subject matter experts (which may include the cadre of intellectual property experts established under section 2322(b) of title 10, United States Code) to—

(A) recommend acquisition programs to be selected for the pilot program established under subsection (a);

(B) recommend criteria for the consideration of types of commercial products, commercial services, or nondevelopmental items that can be used as an alternative to a product or service to be specifically developed for a selected acquisition program; or

(C) identify, to the maximum extent practicable at each milestone established for each selected acquisition program, intellectual property evaluation techniques to obtain quantitative and qualitative analysis of intellectual property during the procurement, production and deployment, and operations and support phases for the each selected acquisition program.

(2) Assessment of commercial valuation techniques for intellectual property for use by the Department of Defense.

(3) Assessment of the feasibility of agency-level oversight to standardize intellectual property evaluation practices and procedures.

(4) Assessment of contracting mechanisms to speed delivery of intellectual property to the Armed Forces or reduce sustainment costs.

(5) Assessment of agency acquisition planning to ensure procurement of appropriate intellectual property deliverables and intellectual property rights necessary for Government-planned sustainment activities.

(6) Engagement with the private sector to—

(A) support the development of strategies and program requirements to aid in acquisition planning for intellectual property;

(B) support the development and improvement of intellectual property strategies as part of life-cycle sustainment plans; and

(C) propose and implement alternative and innovative methods of intellectual property valuation, prioritization, and evaluation techniques for intellectual property.

(7) Recommendations to the relevant program manager of an acquisition program selected under subsection (a), including evaluation techniques and contracting mechanisms for acquisition and sustainment activities.

(c) **REPORT.**—Not later than November 1, 2020, and annually thereafter through November 1, 2023, the Secretary of Defense, in coordination with the Secretaries concerned, shall submit to the congressional defense committees a joint report on the pilot program conducted under this section. The report shall, at a minimum, include—

(1) a description of the acquisition programs selected by the Secretary concerned;

(2) a description of the specific activities in subsection (c) that were performed under each program;

(3) an assessment of the effectiveness of the activities;

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(4) an assessment of improvements to acquisition or sustainment activities related to the pilot program; and

(5) an assessment of the results related to the pilot program, including any cost savings and improvement to mission success during the operations and support phase of the selected acquisition program.

SEC. 802. PILOT PROGRAM TO USE ALPHA CONTRACTING TEAMS FOR COMPLEX REQUIREMENTS.

(a) **IN GENERAL.**—(1) The Secretary of Defense shall select at least 2, and up to 5, initiatives to participate in a pilot to use teams that, with the advice of expert third parties, focus on the development of complex contract technical requirements for services, with each team focusing on developing achievable technical requirements that are appropriately valued and identifying the most effective acquisition strategy to achieve those requirements.

(2) The Secretary shall develop metrics for tracking progress of the program at improving quality and acquisition cycle time.

(b) **DEVELOPMENT OF CRITERIA AND INITIATIVES.**—(1) Not later than February 1, 2020, the Secretary of Defense shall establish the pilot program and notify the congressional defense committees of the criteria used to select initiatives and the metrics used to track progress.

(2) Not later than May 1, 2020, the Secretary shall notify the congressional defense committees of the initiatives selected for the program.

(3) Not later than December 1, 2020, the Secretary shall brief the congressional defense committees on the progress of the selected initiatives, including the progress of the initiatives at improving quality and acquisition cycle time according to the metrics developed under subsection (a)(2).

SEC. 803. FAILURE TO PROVIDE OTHER THAN CERTIFIED COST OR PRICING DATA UPON REQUEST.

Section 2306a(d) of title 10, United States Code, is amended—

(1) in paragraph (1), by adding at the end the following: “Contracting officers shall not determine the price of a contract or subcontract to be fair and reasonable based solely on historical prices paid by the Government.”;

(2) by redesignating paragraph (2) as paragraph (3); and

(3) by inserting after paragraph (1) the following new paragraph:

“(2) **INELIGIBILITY FOR AWARD.**—(A) In the event the contracting officer is unable to determine proposed prices are fair and reasonable by any other means, an offeror who fails to make a good faith effort to comply with a reasonable request to submit data in accordance with paragraph (1) is ineligible for award unless the head of the contracting activity, or the designee of the head of contracting activity, determines that it is in the best interest of the Government to make the award to that offeror, based on consideration of pertinent factors, including the following:

“(i) The effort to obtain the data.

“(ii) Availability of other sources of supply of the item or service.

“(iii) The urgency or criticality of the Government’s need for the item or service.