



Billing Code 5001-06

DEPARTMENT OF DEFENSE

Office of the Secretary

Government-Industry Advisory Panel; Request for Information on Rights in Technical Data and the Validation of Proprietary Data Restrictions

AGENCY: Department of Defense.

ACTION: Notice.

SUMMARY: The Government-Industry Advisory Panel, a Department of Defense (DoD) advisory committee established in accordance with the Federal Advisory Committee Act (FACA), is seeking information to facilitate a review of sections 2320 and 2321 of Title 10 of the United States Code (U.S.C.), regarding rights in technical data and the validation of proprietary data restrictions.

DATES: Submit written comments to the address shown in the ADDRESSES section on or before **[Insert date 30 days after date of publication in the Federal Register]**.

ADDRESSES: Submit comments to Office of the Assistant Secretary of Defense (Acquisition), ATTN: LTC Andrew Lunoff/Designated Federal Officer (DFO), 3090 Defense Pentagon, Washington, DC 20301-3090; or by email to andrew.s.lunoff.mil@mail.mil.

FOR FURTHER INFORMATION CONTACT: LTC Andrew Lunoff, Office of the Assistant Secretary of Defense (Acquisition), 3090 Defense

Pentagon, Washington, DC 20301-3090; email:
andrew.s.lunoff.mil@mail.mil; phone: 571-256-9004.

SUPPLEMENTARY INFORMATION:

Section 813 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2016 required DoD to establish the Government-Industry Advisory Panel for the purpose of reviewing 10 U.S.C. 2320 and 2321, regarding rights in technical data and the validation of proprietary data restrictions, and the regulations implementing such sections, for the purpose of ensuring that such statutory and regulatory requirements are best structured to serve the interests of the taxpayers and the national defense. The advisory panel is to give appropriate consideration to the following: (1) ensuring that DoD does not pay more than once for the same work; (2) ensuring that the DoD contractors are appropriately rewarded for their innovation and invention; (3) providing for cost-effective re-procurement, sustainment, modification, and upgrades to the DoD systems; (4) encouraging the private sector to invest in new products, technologies, and processes relevant to the missions of the DoD; and (5) ensuring that the DoD has appropriate access to innovative products, technologies, and processes developed by the private sector for commercial use.

The regulatory implementation of 10 U.S.C. 2320 and 2321 are in the Defense Federal Acquisition Regulation Supplement (DFARS)

at subpart 227.71, covering both commercial and noncommercial technical data. This regulatory scheme is also adapted to cover computer software in DFARS subpart 227.72, where nearly all elements of the technical data scheme are applied to noncommercial computer software, but not to commercial computer software. Thus, although the statutory sections apply only to technical data, the regulatory implementation has historically also affected how DoD acquires and manages computer software and, therefore, is another factor to be considered. In addition, a significant streamlining and integration of these DFARS subparts was published for public comment in 2010 entitled "Patent, Data, and Copyrights (DFARS case 2010-D001)" (see 75 FR 59411); the key elements of that proposed revision of regulatory scheme, and the public comments received in response to that proposed rule, may be considered under these efforts.

DoD has also developed a considerable body of policy and guidance to further implement and manage technical data and computer software issues in the context of DoD acquisition programs. Most recently, DoD's Better Buying Power (BBP) activities have included direction to "enforce open system architectures and effectively manage technical data rights," which have spawned numerous key updates to DoD policy and guidance. For example, DoD Instruction 5000.02, "Operation of the Defense Acquisition System," was revised to require program

managers to develop and maintain an Intellectual Property (IP) Strategy throughout the entire program life cycle, with additional guidance on this new requirement being provided in an "Intellectual Property Strategy" guidance document and within DoD's "Guidelines For Creating and Maintaining a Competitive Environment for Supplies and Services in the Department of Defense." DoD has also incorporated IP considerations into its training for the DoD workforce (e.g., through the Defense Acquisition University) and its outreach activities to industry (e.g., white paper entitled "DoD, Innovation, and Intellectual Property in Commercial & Proprietary Technologies").

Links to all of these statutes, regulations, policy, and guidance documents, as well as additional related materials, are provided at

<https://database.faca.gov/committee/committee.aspx?cid=2561>.

As a representative sample of the core elements of the cited DoD policy and guidance, the following guiding principles for a strategic approach to IP management are discussed in more detail in the "Intellectual Property Strategy" guidance document:

1. Anticipate and plan for sustainment and competition over the entire system life cycle.
2. Align and integrate the IP Strategy with other program strategies and plans.

3. Just do it: delivery now to ensure return on investment (ROI) for DoD-funded development (or prior acquisition).

4. But don't make an unnecessary "grab" for deliverables or license rights for "proprietary" IP.

5. Before and after: up-front evaluation and back-end validation of IP deliverables and license rights assertions.

In order to facilitate the panel's review of 10 U.S.C. 2320 and 2321 and the regulations implementing these sections, public comment is requested, using the factors and additional considerations summarized in this notice, on the following:

1. Any issues, concerns, benefits, and/or appropriateness of 10 U.S.C. 2320 and/or 2321.

2. Any issues, concerns, benefits, and/or appropriateness of the current implementing DFARS regulations (subparts 227.71 and 227.72, and associated clauses), including the extent to which these regulations are consistent with and effective in implementing 10 U.S.C. 2320 and 2321.

3. Any issues, concerns, benefits, and/or appropriateness of DoD's policy and guidance on IP strategy and management, including the extent to which such DoD policy and guidance is consistent with and effective in further implementing the cited governing statutes and regulations.

4. Any issues/concerns associated with whether and how DoD personnel are prepared and equipped to implement DoD's IP policy

and guidance, and/or the governing statutes and regulations, including via DoD's training curriculum, or otherwise.

5. The current approach in regulation (DFARS 227.71 and 227.72) of extending and adapting the scheme of 10 U.S.C. 2320 and 2321 to apply to computer software, including the approach whereby most of the statutory scheme is applied to noncommercial computer software but not to commercial computer software.

6. The current approach in regulation of treating "Rights in Technical Data" and "Rights in Computer Software and Computer Software Documentation" as two separate topics/subparts (i.e., DFARS 227.71 and 227.72, respectively), or whether they should be merged into a single topic/subpart.

7. The applicability of 10 U.S.C. 2320 and 2321, and the implementing DFARS requirements and clauses, to contracts and subcontracts for commercial items.

8. Practices used by DoD in acquiring IP from non-traditional contractors, commercial contractors, and traditional contractors. The request isn't limited to where the law or regulations require a specific practice, but also includes where the Department uses a practice not required by law/regulation. For example, any of the following:

- a. What worked?
- b. What didn't work?
- c. What was fair?

- d. What wasn't fair?
- e. What practices encourage or discourage non-traditional contractors from entering the defense marketplace?
- f. What practices encourage or discourage commercial contractors from entering the defense marketplace?
- g. What practices encourage or discourage traditional contractors from privately investing in new products, technologies, and processes relevant to the missions of the DoD?

9. IP acquisition practices used by DoD that encourage or discourage use of commercial technologies. For example, any of the following:

- a. What practices encourage or discourage vendors from providing DoD access to innovative products, technologies, and processes that have been developed for commercial use?

- b. What practices encourage or discourage the transition of Defense specific technologies into the commercial marketplace?

10. Any issues, concerns, benefits, and/or appropriateness of DoD's policy, guidance, and practices that link technical data management and other IP considerations with open systems architectures (OSA), and/or modular open systems approaches (MOSA).

11. Any issues, concerns, benefits, and/or appropriateness with sections 1701 (Modular Open System Approach in Development

of Major Weapon Systems) and 1705 (Amendments Relating to Technical Data Rights) of the House Armed Services Committee markup of H.R. 4909, the NDAA for FY 2017.

Commenters are requested to include specific citations to law, regulations, DoD policy and/or guidance, as well as examples and supporting data (e.g., specific DoD solicitations and/or contracts that demonstrate DoD practices) to support their comments, to the extent available. Because the Panel is subject to the FACA, materials will be made available to the public when provided to the Panel members.

Comments submitted in response to this request for information will be used solely for the review of 10 U.S.C. 2320 and 2321 and the current implementing regulations by the Government-Industry Advisory Panel, pursuant to section 813 of the NDAA for FY 2016.

Please note that the Defense Acquisition Regulation System has separately published for public comment the following proposed rules to amend the DFARS regarding rights in technical data:

- Rights in Technical Data (DFARS case 2016-D008) (see 81 FR 28812-28816; published May 10, 2016)
- Rights in Technical Data and the Validation of Proprietary Data Restrictions (DFARS case 2012-D022) (see 81 FR 39482-39503; published June 16, 2016)

Comments on these proposed DFARS rules must be submitted in accordance with the specific instructions published in each proposed rule in order to be considered in the formation of any final rule resulting therefrom.

Dated: June 16, 2016.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

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