COUNCIL OF DEFENSE AND SPACE INDUSTRY ASSOCIATIONS
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September 30, 2016

Defense Acquisition Regulations System
Attn: Ms. Amy G. Williams
OUSD(AT&L) DPAP/DARS,
Room 3B941, 3060 Defense Pentagon,
Washington, DC 20301–3060

Subject: Defense Federal Acquisition Regulation Supplement: Rights in Technical Data and Validation of Proprietary Data Restrictions (DFARS Case 2012–D022)

Dear Ms. Williams:

On behalf of the undersigned members of the Council of Defense and Space Industry Associations (CODSIA), [1] we offer the following comments to the Defense Federal Acquisition Regulation Supplement: Rights in Technical Data and Validation of Proprietary Data Restrictions (DFARS Case 2012–D022), published in the *Federal Register* on June 16, 2016 ("Proposed Rule"), which implements Section 815 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2012 ("FY12 NDAA"). CODSIA is pleased DoD's implementation is through a proposed rule rather than an interim rule, which was originally offered. [2] CODSIA also appreciates DoD's outreach to industry to collect input prior to publication of the Proposed Rule, and appreciates the grant of an extension of time to respond to September 30, 2016.[3]

CODSIA remains significantly concerned with the policy changes enacted through Section 815. This provision amended 10 U.S.C. 2320 by significantly increasing DoD's access to contractor's data rights. A key change is DoD's authority to release or disclose outside of the Government, a contractor's technical data pertaining to items or processes developed exclusively at private expense if the technical data is necessary for segregation or reintegration of an item or process. Section 815 also established a statutory requirement for "deferred ordering" of a contractor's technical data, including an ability to acquire such technical data "at any time" even if the technical data was only used under the contract, and where Government determines that the technical data pertains to items developed in part with Government funds or is needed for segregation or reintegration of an item or process. Given the numerous negative consequences of Section 815, CODSIA recommends that DoD use its agency discretionary authority to implement section 815 to minimize the negative impact of the legislation. As detailed below, CODSIA believes that in several instances DoD elected to unnecessarily expand applicability of Section 815, and also make changes not required by Section 815.

While the Defense Acquisition Regulations (DAR) Council may consider policy changes outside the scope of the underlying statute, industry has been pointedly urging the DAR Council since 2012 to fashion rules narrowly when drafting rules which impact the value of IP for industry, especially where it

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[1] At the suggestion of the Department of Defense, CODSIA was formed in 1964 by industry associations with common interests in federal procurement policy issues. CODSIA consists of six associations – the Aerospace Industries Association ("AIA"), the American Council of Engineering Companies, the Information Technology Alliance for Public Sector, the National Defense Industrial Association, the Professional Services Council, and the U.S. Chamber of Commerce. CODSIA acts as an institutional focal point for coordination of its members' positions regarding policies, regulations, directives, and procedures that affect them. Combined these associations represent thousands of government contractors and subcontractors. A decision by any member association to abstain from participation in a particular case is not necessarily an indication of dissent.

[2] CODSIA member AIA requested this change from interim to proposed rulemaking in the AIA letter of March 27, 2012 to Mr. Mark Gomersall.

[3] 81 Fed. Reg. 61646-67 (September 7, 2016).

has become a matter of national security to draw innovative technology creators into the DoD orbit. CODSIA believes the Proposed Rule has been drafted much more broadly than is necessary to achieve the specific requirements of Section 815 and harms DoD's ability to increase competition by attracting non-traditional companies to participate in DoD procurements.

Further, a Congressionally-mandated Government-Industry Advisory Panel ("813 Panel"), established under section 813 of the FY2016 NDAA, is currently reviewing sections of 10 U.S.C. 2320 and 2321 and related technical data and computer software policies. CODSIA recommends DoD delay further consideration of the Proposed Rule until the 813 Panel completes its review and makes its recommendations to the Secretary of Defense and Congress.[4]

Further, the unexpected applicability of the Proposed Rule to commercial items should be subject to separate rulemaking. That would allow for better fact-finding and help to ensure that the implementation of Section 815 solves the specific problems and situations Congress was addressing, and does not further diminish the defense acquisition community.

Industry appreciates the opportunity to submit comments on this Proposed Rule and appreciates the work which DoD has put into the Proposed Rule as evidenced by the extensive Discussion and Analysis. While Industry has concerns with aspects of the Proposed Rule as detailed below, Industry acknowledges the complexity of the changes required by Congress in Section 815, and appreciates the public outreach to defense contractors, which preceded the Proposed Rule publication. In accordance with our comments that follow, CODSIA recommends that the Proposed Rule would significantly benefit from continued public engagement and in expectation of the findings and recommendations of the 813 Panel.

I. Proposed Rule Would Benefit from Continued Public Input

Section 815 amended 10 U.S.C. 2320 to significantly change the data rights balance between the Government and DoD contractors. One significant change is a greatly expanded ability for DoD to release or disclose outside of the Government a contractor's technical data pertaining to items or processes developed exclusively at private expense if this is considered technical data needed for segregation or reintegration of an item or process. Section 815 also established a statutory requirement for "deferred ordering" of a contractor's technical data, including an ability to acquire such technical data "at any time" even if the technical data was only used under the contract, and where Government determines that the technical data pertains to items developed in part with Government funds or is needed for segregation or reintegration of an item or process.

The Proposed Rule improperly expands its reach beyond technical data to both commercial and non-commercial items, as well as to computer software.[5] Further, the Proposed Rule presents a myriad of interpretation challenges and significant complexities associated with the implementation at all levels of the supply chain that would follow if the Proposed Rule were adopted in its present form. CODSIA

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[4] CODSIA and the Aerospace Industries Associations previously and independently requested suspension of, or delay in finalizing, any proposed rules under DFARS cases 2012-D022 and 2016-D008 until the 813 Panel issues its findings. CODSIA letter to DPAP Director Claire Grady dated May 31, 2016; AIA letter to DPAP Director Claire Grady dated July 13, 2016. While those requests were considered by DPAP and denied for DFARS case 2016-D008, CODSIA again requests that DoD accept public comments on the final Rule, consider them as needed, but be prepared to change the final rule after the 813 Panel has completed its work and its report is made available to Congress.

[5] Industry has criticized the provisions of Section 815 and noted that any implementing regulations and clauses needed to expressly define segregation and reintegration, clarify the processes for deferred ordering, and also to limit and tailor any applicability to software and commercial items to avoid unintended consequences. AIA letter of March 27, 2012 to Mr. Mark Gomersall.

believes, therefore, that the Proposed Rule should be republished to accommodate a more robust dialogue about balancing data rights between the parties and to understand the problem better and to account for the findings and recommendations of the 813 Panel. Further, the Proposed Rule unexpectedly applied these concepts to commercial items in a way that will have significant effects on all levels of the supply chain that would be difficult for DoD to apply and for offerors and contractors to implement, and therefore should be subject to a separate Advanced Notice of Proposed Rulemaking (ANPRM). The combination of republication and ANPRM would allow for better fact finding and help to ensure that the implementation of Section 815 solves the specific problems and situations Congress was addressing, and not unintentionally cause further degradation of the defense industrial base.

II. Industry Concerns About Proposed Rule:

The following sections of this letter detail our comments on the Proposed Rule.

A. Proposed Rule Should Be Limited to Minimum Statutory Requirements

According to the Discussion and Analysis, "DoD understands that part of the underlying concern that led to the statutory creation of the concept of segregation or reintegration data was based on a number of situations in which DoD and contractors faced challenges in finding mutual agreement regarding what type of data is appropriately characterized as being form, fit, and function data (e.g., the level of technical detail that is required and appropriate)."[6] CODSIA believes the Proposed Rule implementation is an unbalanced approach to isolated, purported instances of such disagreement. No specifics or characteristics of these alleged instances are detailed in the Proposed Rule, nor are they known to industry. Nor is any such trend known to industry. Given the vague and cryptic nature of the rationale for section 815, CODSIA believes it should be implemented in as limited and least harmful fashion as possible. Section 815 injects uncertainty into the contracting process by creating new government powers to use data relating to privately developed technologies in a way that conflicts with a contractor's return on investment model and creates permanent uncertainty and compliance challenges because of an indefinite ordering period for data. For this reason, CODSIA believes the Proposed Rule must be significantly revised to more narrowly implement Section 815, and specifically should not apply to commercial items, computer software, or legacy systems.[7]

B. The Proposed Rule Should Be Tailored to Contract Deliverables and IP Strategy

Section 815 addresses very specific problems, and uses solutions which are not applicable to most contracts. For instance, in most contracts, the DoD orders exactly the data that it needs where it follows the tenets of a basic IP Strategy, which is now required under DoD Instruction 5000.02. Moreover, CODSIA is aware of no circumstances where DoD has required segregation or reintegration of COTS software, such as Adobe Acrobat or Microsoft Windows, which are often provided as part of, and are almost always utilized in the development of, a major weapons system or platform. Given the likelihood of unintended consequences, CODSIA recommends that the Proposed Rule be revised to limit the application to only those situations that Section 815 is intended to address. This would improve contract certainty, allow for more efficient execution of transactional and compliance processes, and be consistent with implementation of modular open systems approaches, which use consensus-based standards of which the contractor is aware.

10 U.S.C. 2320(b)(9) only requires deferred ordering where technical data is needed for "re-procurement, sustainment, modification, or upgrade (including through competitive means) of a major system or subsystem thereof, a weapon system or subsystem thereof, or any noncommercial item or

[6] 81 Fed. Reg. No. 116, P. 39483, columns 2-3 (June 16, 2016).
[7] CODSIA member AIA has requested this formally. AIA letter of March 27, 2012 to Mr. Mark Gomersall.

process." Clearly, not all contracts fall within one of these categories. Therefore, to limit the potential competitive harm caused by such a broad and indefinite deferred ordering clause, the Proposed Rule should be narrowly tailored to only require inclusion in cases where the IP Strategy for the program defines the specific need by part or system, and excludes contracts where deferred ordering would not meet that need.

C. Concerns Regarding Segregation and Reintegration Data

CODSIA has multiple, significant concerns with the segregation and reintegration data aspects of the proposed rule, as addressed in the detailed comments below and as further referenced in subsequent sections.

1. Segregation and Reintegration Data Discourages Investment and Participation in Defense Industrial Base

Companies of all sizes survive on being able to make a profit and must be able to obtain a return on their investments. As a threshold matter, technology investments only provide a return on investment to the extent that the technology is not freely copied by competitors or customers and can also be reasonably amortized by the investing company over and throughout the technology lifespan. Therefore, competitors and customers are not provided broad rights in the data or software associated with the technology to be able to use, modify, or copy it without some level of involvement by the original technology developer and owner. Both commercial and defense markets have well established models to provide the needed predictability for transactions involving licensing and data rights between buyers and sellers of technology. These models facilitate efficient investments and do not provide unfettered rights for customers or competitors to copy and misappropriate the results of technology investments.

CODSIA is concerned with the substantially increased risks and uncertainty that would be introduced into the defense industrial base by the implementation of the segregation and reintegration data concepts in the Proposed Rule, and which are still not adequately or clearly defined in the proposed rules. As will be detailed in subsequent sections below, particularly troubling are the combinations of the segregation and reintegration data concept with unilateral powers of release and authority of deferred ordering.

Industry agrees with DoD comments (p. 39483, column 2) that "it is important to identify and clarify how the new term, segregation or reintegration data, relates to the established definition for "form, fit, and function data." As noted below, this has not been accomplished, nor does the definition provide clarity to what is included or excluded from what is segregation or reintegration data. Perversely, the more skilled and technologically advanced an investing contractor is relative to its competitors, the more likely that contractor is to have more details of its technology subject to disclosure to its competitors. The proposed rule provides for this result by virtue of the fact that the relatively less skilled and less advanced competitors (i.e. those that invest less or not at all) would need significantly more source code or detailed manufacturing or process data as 'necessary' to segregate or reintegrate the technology, and any reuse of such source code or detailed manufacturing or process data would likely be in violation of the Governments Restricted Rights or Limited Rights licenses.

CODSIA does not support a framework that essentially penalizes an investing company by allowing more or less free access by third parties to their technology, which conflicts with the traditional contract and licensing models already in place at DoD for technology development and transfer.

Furthermore, because the Proposed Rule is not explicitly limited to new systems in which investments are subject to this new paradigm, CODSIA views this as a retroactive regulatory 'taking' of rights in technology of legacy systems since legacy system contractors (prime and subcontractor) will have little

or no choice when negotiating future contracts to support legacy systems except to agree to the new operative data rights clauses or stop supporting these platforms altogether.

Accordingly, CODSIA recommends that any subsequent rulemaking activity limit application of the rule to new systems and exclude applicability of the rule to legacy items or processes. It is critical for DoD to understand that these new data rights models and clauses were not contemplated by the contracting parties when most legacy systems were in the process of development by contractor data rights owners, in the creation of associated data, or in the various stages of acquisition and never envisioned by any of the parties, including all system, subsystem and component suppliers, to become an open technology system later in the life cycle.

According to the Discussion and Analysis, "DoD understands that part of the underlying concern that led to the statutory creation of the concept of segregation or reintegration data was based on a number of situations in which DoD and contractors faced challenges in finding mutual agreement regarding what type of data is appropriately characterized as being form, fit, and function data (e.g., the level of technical detail that is required and appropriate)." (P. 39483, columns 2-3.) CODSIA believes the Proposed Rule implementation is an unbalanced approach too isolated, purported instances of such disagreement. No specifics or characteristics of these alleged instances have been documented or offered in evidence to industry in the Proposed Rule, nor any trends towards a failure to agree on data classification by the affected parties known to industry.

Therefore, CODSIA recommends the instances be disclosed, redacting details sufficient to protect the identities of the agencies and contractors involved. This disclosure will be an important step in helping industry to understand the problem the Government is attempting to solve, how systemic the problem is, and whether less intrusive solutions could be reached which respect Government needs and industry expectations.

Importantly, there are instances where the Government itself is a competitor. For instance, Government owned depots compete with the OEM for repair services, and Government owned labs compete with the OEM for upgrades. By providing data necessary for segregation or reintegration to the Government, even without providing that data to contractor competitors, DoD is necessarily providing this information to DoD elements which compete with the OEM for future work and often attempt to displace the OEM for such work.

Therefore, CODSIA recommends there be clarifying instructions to Government entities that such use of data necessary for segregation or reintegration of an item are limited solely to that item, and that the contractor be notified when such a facility is provided this data. Such entities are used to utilizing form, fit, function data or data necessary for operations, maintenance, installation or training (other than detailed manufacturing or process data) for their work. Such entities need further guidance that the uses of data necessary for segregation or reintegration are to be limited solely for these purposes for that specific item, and cannot be used to for manufacturing (or repairs which effectively remanufacture) the item.

2. Potential Trade Secret Misappropriation and Perpetual Unlicensed Use of Intellectual Property

The Proposed Rule does not adequately address the issue of the potential unlicensed use of trade secrets or infringement of other intellectual property rights inherently introduced by the mechanism of disclosure and use of 'segregation or reintegration data' by competitors. Industry is familiar with the accommodations in Limited Rights and Restricted Rights definitions to address situations where disclosure to another contractor is necessary for emergency repair and overhaul. In these cases, the unusual occurrence of an emergency (which, by definition is both unexpected and urgent) makes this a

rare event, but most importantly in those cases, the rights in the technical data and updated computer software remain subject to the original contractor's rights limitations after the emergency. In fact, under Limited Rights, "[t]he Government shall require a recipient of limited rights data for emergency repair or overhaul to destroy the data and all copies in its possession promptly following completion of the emergency repair/overhaul and to notify the Contractor that the data have been destroyed." DFARS 252.227-7013(b)(3)(ii).

The disclosure 'necessary for segregation and reintegration' is not analogous because it is intended for a completely different result: a changed configuration using the original contractor's technology in a different way. Specifically, the requirement is either segregating out an item to enable a different/alternative technology to be used in the original system and/or reintegrating an item or process elsewhere, enabling the original technology to be used in a different system and for different purposes. In both situations, the intent is to facilitate access to proprietary technology for DoD transfusion to third parties for the purposes of creating alternatives that directly piggyback on successful technology solutions without having to pay for licenses or otherwise compensate the developers, and not to have the result of such technology transfusion be subject to the original contractor's and DFARS license constraints. It is an understatement to suggest that there is a strong potential that the recipient of the data will use such data in excess of the Government's rights under a Limited Rights, Commercial Rights, or Restricted Rights license.[8]

It is highly probable that any resultant new or alternative item or process developed by a third party out of the use of 'segregation or reintegration data' would include at least a portion of the original 'segregation or reintegration data' or benefit from know how gained from access to such data. Also, as intended, the released 'segregation or reintegration data' will be used by the competitor (which can include DoD's owned depots and laboratories) to develop a substitute item or process and therefore exposes the copyrights and trade secrets included in the 'segregation or reintegration data' and associated know how to a competitor without adequate safeguards. In short, the Proposed Rule provides compliance issues for the recipient contractor resulting in potential trade secret misappropriation, including uses beyond the time frame of the segregation or reintegration activity, in direct contradiction to the existing intellectual property framework.

Accordingly, CODSIA recommends that, in order to make the protections under Limited Rights, Commercial Rights or Restricted Rights for segregation or reintegration data meaningful (e.g., the requirement to destroy the data, as well as all copies and all data created by access to the 'segregation or reintegration data,' promptly following completion of the segregation or reintegration and to notify the Contractor that the data have been destroyed), the segregation or reintegration activities must be very specifically defined in the policy, clauses and in the contract. Likewise, with computer software, if the rule remains applicable to computer software.

Furthermore, given the inherent intended use of the disclosure, CODSIA further recommends that the contractor, depot or laboratory to whom the release was made be further required to disclose how they complied with this provision by detailing the segregated or reintegrated configuration so that the original contractor can understand how its competitor has complied, and also to allow the original contractor a mechanism to ensure that the competitor has complied with applicable Limited Rights, Commercial Rights, or Restricted Rights licenses.

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[8] CODSIA notes that the DoD has had numerous reported incidents where it has failed to adequately track license compliance, leading to major disputes with contractors. Colin Clark, *Army 'Borrowed' Logistics Software; Pays $50M To Apptricity*, Breaking Defense (November 27, 2013) *available at* http://breakingdefense.com/2013/11/army-borrowed-logistics-software-pays-50m-to-apptricity/; Shaun Nichols, *How's this for irony? US Navy hit with $600m software* piracy *claim*, the Register (July 20, 2016) *available at http://www.theregister.co.uk/2016/07/20/navy_software_pirates/.*

3. Elimination of Organizational Conflict of Interest Protections

The Proposed Rule would eliminate current protections that preclude the Government from sharing Restricted Rights software and Limited Rights technical data among direct competitors. The current regulatory provisions enable contractors to invest and offer the technology benefits of those investments to the DoD without concern that the detailed source code, technical and manufacturing details of this technology will be readily available to competitors.

FAR Subpart 9.5 addresses Organizational Conflicts of Interest. FAR 9.505-4 specifically addresses obtaining access to proprietary information, stating in paragraph (a), "When a contractor requires proprietary information from others to perform a Government contract and can use the leverage of the contract to obtain it, the contractor may gain an unfair competitive advantage unless restrictions are imposed. These restrictions protect the information…"

The Proposed Rule does not harmonize this provision with the increased rights in segregation or reintegration data. In essence, it overturns this approach by not only permitting competitors to receive proprietary information (e.g. segregation and reintegration data) of competitors, and to use the leverage of the contract to obtain it, but contrary to protecting the information, discloses for the purposes of "use, modify, reproduce, perform, display, or release or disclose" whatever proprietary features, processes or software content or know how, including detailed manufacturing or process data or source code, is necessary to segregate the item, process or software and/or reintegrate a competing item, process or software.

This effectively undermines the current understandings and practices of Organizational Conflicts of Interest and associated protection of proprietary information. Furthermore, the Proposed Rule fosters significant uncertainty by both including every type of technical data or computer software as potentially being later designated by the Government as segregation and reintegration data and by eliminating the technology owner from the process and insight into how segregation and reintegration data is being used by the recipient.

Finally, one of the most valuable aspects of preventing access to proprietary information is that it prevents the transfer of insight to additional aspects of the valuable technology, the manufacturing level "know how" which is the core of segregation or reintegration data as currently defined. This is very important, as the benefits of know how transfer can be significant in later influencing the thinking, designs and competitive behavior of those that have obtained the know-how. Although the benefits to the recipient are real, the inappropriate uses of know-how can also be difficult for the technology owner to prove. And it will also be difficult for the recipient to effectively firewall those who have received this information from the recipient's design teams who are designing, manufacturing, or repairing competitive goods.

In summary, CODSIA believes that a significantly disrupted regime of protection of proprietary information and of the associated Organizational Conflicts of Interest constraints that are currently applicable to the defense industry are likely to have significant consequences in increased risks to the ability to protect technology investments. CODSIA believes that this will reduce industry investment, substantially reduce availability of commercial technologies to the DoD and increase disputes between contractors and the DoD, and among contractors, regarding misappropriation of innovations and trade secrets due to uses outside of the segregation or reintegration of the item itself.

4. Loss of Protective Process and Engagement with Technology Owner

The Proposed Rule gives DoD unilateral authority to disclose to a competitive field or without notification to a competitor,[9] technical data and computer software providing critical details of privately funded technology. There is no requirement to engage the technology owner, just a requirement in the definition of Limited Rights that the contractor asserting the restriction "is notified". Because there is also no time limit, Contractors would face a perpetual risk that source code and detailed manufacturing or process details could be routinely provided to third parties on the basis that some bidders or others may wish to explore such segregation or reintegration options in their technology baselines or later during contract execution. The Proposed Rule suggests such possibility by including, among the permitted justifications for deferred ordering, that such data is needed for a broad range of development or production purposes.

Furthermore, without clarity that the technology owner agrees with the scope of segregation or reintegration data proposed for disclosure, the Proposed Rule appears to enable DoD to use concurrent notifications, or perhaps just a blanket notification that DoD has and will continue disclosing any data via bidders' libraries without identifying the specific restrictions or limitations to its use. This raises significant concern that technology owners will be unable to police or enforce their rights and ensure its competitors are not misappropriating its technology, except by the drastic action of exiting the defense market or abandoning technology investments in DoD programs.

In order to ensure continued investment in the defense industrial space, and in view of the lack of an emergency need, CODSIA recommends that all proposed releases of Limited Rights, Commercial Rights, or Restricted Rights segregation and reintegration data to every party be subject to regulatory requirements beyond mere notice for coordination and approval of the technology owner, with an express pre-disclosure right for the technology owner to redact technical data or computer software to exclude any content not necessary. Furthermore, CODSIA recommends an appeal process be established, to include appeals to federal courts, prior to release of the data, commensurate with the already available protection of trade secrets including available injunctive remedies, that may be required in cases of disputes where DoD and the technology owner cannot agree on specifics or competitors are misappropriating technology. This recommendation wholly aligns with the view (acknowledged by DoD at p. 39483, column 2) that form, fit and function data is sufficient in "the vast majority of" instances.

5. Segregation and Reintegration Data is Poorly Defined and Does Not Address Alleged Problem

The proposed rule does little to allay industry's articulated concern over a lack of clarity of the term "segregation or reintegration data".[10] As a general matter, the definition is circular, since DFARS 252.227-7013(a) defines segregation or reintegration data as data needed for segregation or reintegration. It is also so broad that it is hard to understand what contract data would not fall within its ambit or be susceptible to arguments by the DoD aimed at defeating legal limits attached to unlimited or restricted data rights.

As noted above, industry agrees that it was important for the DAR Council to identify and clarify how the new term, "segregation or reintegration data" was distinguishable from the established definition for "form, fit, and function data" and it is thus troubling how conflated the two terms are and how "segregation and reintegration data" is defined as explicitly being all inclusive to the most sensitive details to privately funded technologies.

[9] The competitor is expected to provide this notification directly.
[10] AIA letter of March 27, 2012 to Mr. Mark Gomersall.

Form, fit, and function data is defined to describe the "required overall physical, logical, configuration, mating, attachment, interface, functional and performance characteristics (along with the qualification requirements, if applicable) of an item or process to the extent necessary to permit identification of physically or functionally equivalent items or processes. The term does not include computer software source code, or detailed manufacturing or process data."

Segregation or reintegration data is defined to describe the "physical, logical or operational interface or similar functional interrelationship between the items or processes; and … may include, but would not typically require, detailed manufacturing or process data or computer software source code…" Therefore, both categories are focused on the same physical, logical, interface, functional/operational characteristics. It does not clarify the dividing line between the two to state that it is "more detailed than form, fit and function data." Nor is there any conceptual limit in the definition "it is necessary for the segregation of an item or process from, or the reintegration of that item or process (or a physically or functionally equivalent item or process) with, other items or processes." This is particularly pernicious where detailed manufacturing or process data or computer software source code are explicitly included in the policy guidance at DFARS 227.001 and each of the operative clauses.

Instead of defining a Data Item Description (DID) or citing to an existing DID to provide clarity to the data and computer software scope, the Proposed Rule enables anything beyond form, fit, and function data to be considered segregation or reintegration data. This provides no clarity or assurance to any investing contractor or supplier. Thus, as will be detailed below, in combination with deferred ordering, the traditional policy limits to contract exposure being limited to deliverable technical data or computer software are no longer effective if the Government can unilaterally force the contractor or any of its suppliers to deliver more.

As stated above, such a circular definition will inevitably lead to conflicts between contracting officers and contractors who will have different views of what is needed to accomplish such an objective. Therefore, CODSIA recommends that the definition of segregation and reintegration data be revised to add more meaningful definitions, define the data needed to be in terms of what a "competent manufacturer" would need consistent with the standard MIL-STD-31000, consider adopting standardized CDRLs and DIDs which provide detail on which data deliverables are affected, and specifically, to require contracting officers to identify specific Contract Data Requirements List (CDRL) item numbers for data necessary for segregation and reintegration using instructions in DoD 5010.12M, and update the DFARS 252.227-7013 and 252.227-7014 to establish specific marking requirements for such items so that contractors will be on notice of what data is actually being used for segregation or reintegration.

6. Segregation or Reintegration Data Should be at the End Item Level

The Proposed Rule defines segregation or reintegration data to be "at any practical level, including down to the lowest practicable segregable level." This definition is likely to cause confusion, as the test of practicality for determining private expense development (as defined in DFARS 252.227-7013(a)(8) and 252.227-7014(a)(8)) does not have the same practicality considerations and constraints as segregation or reintegration. Contractors are entitled to identify which portions of a drawing or computer software are restricted using the appropriate markings under DFARS 252.227-7013(f) and DFARS 252.227-7014(f). The test for asserting rights in privately funded technology and associated portion marking does not require that the elements be physically or non-destructively segregable from each other, nor is there any requirement to document details necessary to segregate or reintegrate such particulars of the technology.

Thus, a contractor can mark a subroutine Restricted Rights, and such marking does not indicate whether that subroutine[11] can be operable when removed from the overall computer program. Similarly, a contractor can mark technical data for a part as Limited Rights on a drawing for a larger subsystem and that part would be the only Limited Rights element on the drawing, regardless of whether, in practice, it would be impossible to remove that part without destroying the larger subsystem or requiring substantial remanufacture if a replacement part was inserted. Therefore, portion marking, as allowed under the DFARS 252.227-7013 and 252.227-7014, by its nature is very granular and does not necessarily reflect component parts or computer elements that can be removed and replaced, or which the Government purchases as spares or modules in the context of a modular open systems approach.

While appropriate for funding determinations and portion marking, the concept of lowest practicable and segregable level is therefore not appropriate in defining boundaries between larger items or processes where the DoD needs to perform a technology refresh. For instance, in the context of source code, the lowest practicable or segregable level has been interpreted by industry as a single line of source code since each line of code is a discrete element of development effort. Attempting to provide segregation or reintegration data between lines of source code, especially when unanticipated during the initial coding process, would lead to a significant amount of administrative effort and added cost for the contractor and the government where multiple lines of source code have restrictions. Further, this data would be at too low a level to be useful in integrating software modules with other modules for purposes of open systems architectures and modular open systems approaches as envisioned under Better Buying Power 3.0.[12]

Therefore, CODSIA recommends that the Proposed Rule be revised to clarify that the segregation or reintegration data should not be at the lowest practicable and segregable level, but are at the end item level or higher. This approach better aligns with what could conceivably constitute a "physical, logical or operational interface or similar functional interrelationship between the items or processes" to facilitate agreement on appropriate segregation or reintegration activity and associated, necessary data or software interface content. It also aligns with replacement of an item which the Government actually purchases and supports without remanufacturing: LRUs (line replaceable units) and WRUs (work replaceable units) as an example for hardware; and computer programs and software at the CSCI (computer software configuration item) level.

In view of the requirements of open systems architecture and modular open systems approaches, CODSIA recommends that the level would be more appropriate where the data is needed to integrate between LRUs, WRUs, and CSCIs, as defined in modular open system, or as agreed with industry in a consensus based standard.[13]

7. Segregation or Reintegration Data Needs to Have Been Identified in the Contract

CODSIA notes that the requirements of 10 U.S.C. 2320(a)(2)(D)(i)(II) are that the Government have the ability to provide privately developed technical data to third parties only if that data "is necessary for the segregation of an item or process from, or the reintegration of that item or process (or a physically or functionally equivalent item or process)." In the Proposed Rule, this requirement is included verbatim in

[11] While the Proposed Rule uses subroutines as an example of the lowest practicable segregable level consistent with DFARS 227.7203-4, industry is not aware of a restriction which prevents lines of code within the subroutine from being claimed as separate development.
[12] BBP 3.0 Implementation Memorandum (9 April 2015), *available at* http://bbp.dau.mil/docs/BBP3.0ImplementationGuidanceMemorandumforRelease.pdf.
[13] CODSIA recommends the adoption of the major system interface level as the appropriate segregation and reintegration level as set forth in the proposed section 1701 of the House Version of the FY2017 NDAA, H.R. 4909.

the definition of Limited Rights under DFARS 252.227-7013(a), Commercial Rights under DFARS 252.227-7015(a), and Restricted Rights under DFARS 252.227-7014(a). However, such automatic inclusion does not reflect the Congressional requirement that DoD must have identified what this data is going to be for a particular contract. Specifically, Congress requires this new use to only exist where DoD has a reasonable belief that a particular piece of data would be *necessary* for integrating an item or process with another item or process. By implication, some data must thus not be necessary for segregation or reintegration, and would likely not be even useful for such purposes. Since this term provides a broad new power to use privately developed data between competitors, this broad new power should be tailored to an IP Strategy required under DoD Instruction 5000.02, and there be a requirement that the contractor be put on notice as too which CDRLs will potentially be shared between contractors. Such notice would be entirely consistent with a modular open systems approach where it is clear that there will be a need for basic sharing of interfaces and Application Programming Interfaces (APIs) to enable the overall system to work.

Segregation and reintegration data is necessary only for integration with other items or processes. As such, where this data is not necessary to fulfill a contractually required purpose, the ability to release such data only creates an additional, unnecessary risk to all parties that does not further DoD's policy objectives. To bring contractual certainty, DoD could require contracting officers to identify specific Contract Data Requirements List (CDRL) item numbers for data necessary by a competent manufacturer for segregation and reintegration using instructions in DoD 5010.12M, and the DFARS could establish specific marking requirements for such items so that contractors will be on notice of what data is actually being used for segregation or reintegration. This would improve contract certainty, allow for more efficient execution of transactional and compliance processes, and be consistent with implementation of modular open systems approaches, which use consensus-based standards of which the contractor is aware.

Therefore, CODSIA recommends that the Proposed Rule be updated to clarify the definition and related policies and clauses to require that any data deemed necessary for segregation or reintegration be expressly identified in the contract, be separately identified by marking, and that such identification is pursuant to a program IP Strategy, as defined in modular open system, or as agreed with industry in a consensus based standard.

8. <u>Segregation or Reintegration Data is not Needed Where the Government is not Acquiring an Item or has no IP Strategy for Re-Procurement, Sustainment, Modification, or Upgrade of the Item</u>

As noted above, the Government's need for segregation or reintegration data only applies where the Government has a specific need for an item. Where the Government has no such need, such as for a service contract or a prototype contract where the prototype will not be maintained, the Government need not include any of the operative clauses in its contract. As also noted above, CODSIA believes such an undefined term creates market entry barriers to commercial and non-traditional contractors who will be confused by such baseless requirements and/or appropriately view it as a risk to protection of intellectual property investments that could otherwise make contract performance more efficient or lower price.

Therefore, CODSIA recommends that the Proposed Rule be revised so clauses do not include the segregation and reintegration use of Limited Rights or Restricted Rights data in all contracts and instead would only be used where the contracting officer is acquiring an end item and also has a realistic belief that the Government will have a need for re-procurement, sustainment, modification, or upgrade of the end item, for instance, where such an approach is set out in the acquisition IP Strategy. CODSIA suggests that, instead of including this requirement in all contracts containing DFARS 252.227-7013, 252.227-7014, and 252.227-7015, one possible mechanism would be to use an

Alternative (Alt.) clause to be used in specified situations, an approach used by DoD in other IP clauses such as FAR 52.227-1 and FAR 52.227-3, and by non-DoD contracting officers using FAR 52.227-14.

9. Defining Segregation and Reintegration Should Not Have the Same Definition for Technical Data and Computer Software

One of the strengths of the DFARS data rights approach (in comparison to the FAR) is that it recognizes and embraces the differences between technical data and computer software. The current DFARS does not attempt the awkward meshing of these two significantly different types of intellectual property, which are governed by very different considerations, but instead provide a practical and workable approach that uniquely addresses each of the two types of IP. In contrast, the proposed definition of "segregation and reintegration data" is a step backwards and reintroduces the unwieldy combination of the two types of IP by inserting "or computer software" into a definition that otherwise is clearly designed to define categories of technical data and has no reasonable applicability to computer software. Thus, the proposed definition and approach undermines the workable and practical delineation between technical data and computer software reflected in the current DFARS. Given the current approach taken in DFARS 252.227-7013 and 7014, it would be both logical and practical to have different definitions of "segregation and reintegration data" for each type of IP.

CODSIA therefore recommends that the Proposed Rule be revised to create separate definitions for segregation and reintegration data based upon whether this data is technical data or computer software, and in terminology which is understood by each industry.

D. Concerns Regarding Deferred Ordering

CODSIA has Multiple, Significant Concerns with the Deferred Ordering Aspects of the Proposed Rule.

1. The Proposed Rule Goes Beyond what is Required in the Statute

As a threshold matter, subsection (b)(9) of the statute only requires deferred ordering be included in the DFARS "whenever practicable" (as set forth generally in 10 U.S.C. 2320(b)). However, as implemented in the Proposed Rule, "the new statutory deferred ordering scheme is deemed to be required in all contracts for which the deferred ordering criteria could be met." Therefore, the clause is prescribed for use in all solicitations and contracts using other than FAR part 12 procedures and in those using FAR part 12 procedures for the acquisition of commercial items that are being acquired for (i) a major system or subsystem thereof, or (ii) a weapon system or subsystem thereof. This approach unnecessarily removes discretion from Contracting Officers, who are better situated to identify contracts in which deferred ordering is not practicable, such as, for example, where it is desired to contract for products or services that will require the use of highly sensitive data or software that the Government may have no interest in obtaining and that the prospective Contractor may not be willing or permitted to expose to deferred ordering.

The clause prescribed at 252.227-7029, Deferred Ordering of Technical Data or Computer Software, applies evidently to "technical data or computer software," whereas subsection (b)(9) of the statute calls for the regulations to require deferred ordering only of certain technical data. As noted in the Discussion and Analysis accompanying the Proposed Rule, it is longstanding DoD policy to flow all technical data requirements from 10 U.S.C. 2320 to equivalent or analogous software requirements. However, this approach is not appropriate in the case of mandatory deferred ordering, particularly in view of the expansion in applicability beyond that of the current optional deferred ordering clause. As noted below, there are several aspects of this expanded applicability that are particularly incongruent when applied to computer software.

The clause prescribed at 252.227-7029 (in subsection (b)(2)) also folds in contracts for basic and applied research, whereas subsection (b)(9) of the statute calls for the regulations to require deferred ordering only in contracts for supplies or services (again as set forth more generally in 10 U.S.C. 2320(b)). However, according to 252.227-7029(a), "applied research" is defined at FAR 35.001. There, the term expressly "does not include efforts whose principal aim is the design, development, or testing of specific items or services to be considered for sale." Therefore, the purported application of 252.227-7029 to applied research (much less basic research) would appear to reach contracts other than those that are described in the statute.

In addition, subparagraphs (A) and (B) of subsection (b)(9) of the statute require that certain criteria be satisfied, as a prerequisite to making a deferred order. However, 252.227-7029(b)(2) waives the requirement at subparagraph (A) of subsection (b)(9) (i.e., that the technical data is needed for sustainment of a major system, weapon system, or noncommercial item) in the case of basic or applied research contracts, where it would be highly improbable that the Government could make the required determination that any such data or computer software was needed for the purposes described in the statute. As a purported explanation for this approach, the Discussion and Analysis accompanying the Proposed Rule indicates that DoD "concluded that it was unlikely that the legislative intent was to completely preclude the Government from having any form of deferred ordering right in such contracts." However, there is a vast difference between omitting basic or applied research contracts from a more-or-less mandatory deferred ordering clause such as 252.227-7029 and "preclud[ing] the Government from having any form of deferred ordering right in such contracts." The former by no means results in the latter.

More fundamentally, "basic" and "applied" research and the term "development" have specific meanings and it is thus unclear that the deferred ordering clause is mandatory for research or development contracts, whether or not DoD classifies R&D as services, or whether the clause merely relieves the institution from performing the requisite file determination documenting the need for the deferred ordering clause. Therefore, the deferred ordering clause should not be included in contracts or subcontracts for basic or applied research as defined in FAR 35.001 since the Government has no intention of maintaining the result of such basic or applied research.

As noted, subparagraphs (A) and (B) of subsection (b)(9) require that certain criteria be satisfied, as a prerequisite to making a deferred order. However, 252.227-7029(b)(1)(i) provides alternatives to those prerequisites, which are not called for in the statute. For example:

Prerequisite for Deferred Ordering Required in Statute	Alternative Finding Permitted in Proposed Rule
Technical data is needed for the purpose of re-procurement, sustainment, modification, or upgrade of …	Technical data or computer software is needed for the purpose of development or production of ...
…a major system/subsystem, a weapon system/subsystem, or any noncommercial item or process	… or any portion of a commercial item that was either developed exclusively with Government funds or developed with mixed funding or (any portion of a commercial item) that was a modification made at Government expense
and either	and either

pertains to an item or process developed in whole or in part with Federal funds, or	[data] was generated either exclusively with Government funding or mixed funding …when contract performance did not involve item/process development, or
is necessary for the segregation of an item or process from, or the reintegration of that item or process (or a physically or functionally equivalent item or process) with, other items or processes	is form, fit, and function data

The proposed deferred ordering clause thus would permit the Government, at any time, to demand delivery of data without meeting the statutory prerequisites, thereby reaching data either that are of a type not contemplated by the statute or for purposes not contemplated by the statute. This would include, for example, data pertaining to any minor modification to a commercial item or a privately funded technology using any Government funding.

It would appear, and is important to note, that these alternative justifications are intended in part to reach at least some items that are not developed using any Government funds. If data is determined [under 252.227-7029(b)(1)(i)(D)] to be needed for the purpose of development, production, re-procurement, sustainment, modification, or upgrade (including through competitive means) of even a "portion of a commercial item" that "was a modification made at Government expense" and [under 252.227-7029(b)(1)(ii)(B)] to have been generated with at least some Government funding, the Proposed Rule would permit it to be deferred ordered despite the fact that the commercial item to which it pertains was not developed using Government funds and the modification did not constitute development.

This is especially troubling in the defense and aerospace industries, where (1) it would be extremely rare to be able to apply any technology – no matter how mature – to a particular platform or application without any modification, and (2) it can be very expensive to implement and document even the most straightforward modifications. Unlike the commercial aerospace, shipbuilding and vehicle marketplaces, DoD contractors would be faced with the prospect of having to invest their own funds to adapt their own technology to the Government's particular use and to generate the documentation required by the Government pertaining to the adapted technology, or risk exposing the resulting data to deferred ordering.

2. The Proposed Rule is Unnecessarily Broad

The problems associated with a mandatory deferred ordering clause are exacerbated by (1) the broad definition of "segregation or reintegration data," (2) the broad scope of "or utilized," and (3) the broad flow-down requirements. Such a broad policy overreach is contrary to overarching Federal and DoD policy pertaining to the acquisition of commercial technical data and commercial computer software, which requires that the Government will generally acquire the same deliverables, and the same associated license rights, that are customarily provided to the public, as long as those customary practices are consistent with Federal law and satisfy the agency's needs.

a. As broadly defined, segregation or reintegration "may be performed at any practical level, including down to the lowest practicable segregable level, e.g., a sub-item or subcomponent level, or any segregable portion of a process, computer software (e.g., a software subroutine that performs a specific function)." This raises the prospect that deferred ordering can reach

deep into the subcomponents or software that reside within a privately-funded "black box" or another proprietary item. In fact, the definition specifically indicates that the data provides more detail than form, fit, and function data and may include detailed manufacturing or process data or computer software source code.

b. The problems associated with a mandatory deferred ordering clause are also exacerbated by the broad scope of "or utilized" as implemented in the Proposed Rule. As set forth in DFARS 252.227-7029(a), deferred ordering would apply to technical data or computer software that either:

> is used to provide services in the performance of the contract or any subcontract thereunder, or
>
> (with the narrow exception of commercially available off-the-shelf software) is necessary to access, use, reproduce, modify, perform, display, release, or disclose any of the technical data or computer software identified in [the preceding paragraph].

(Emphasis added.)

This exceedingly broad scope would appear to be intended to reach the highly sensitive, privately funded, proprietary and/or commercial manufacturing processes and technology that many contractors employ in their performance of DoD contracts. It also would reach software provided by third party vendors that would never permit the Contractor to turn over any details, much less source code, to a customer.

Such an approach arguably might be understandable where the government is fully funding the development of an item from scratch in which all tooling is provided as government property. However, DoD needs industry investment to support the warfighter needs, including investment in software tools unique to each contractor or procured commercially. Such a framework would allow the government to essentially access, and declare rights in, privately developed and owned tools used to create end item supplies or services, but that were not specially identified in the contract as deliverables.

c. The Proposed Rule requires that the deferred ordering clause be flowed down to "contractual instruments" with subcontractors "or suppliers" at any tier, including all subcontracts for commercial items unless only for commercial items and not for either major systems/subsystems or weapons systems/subsystems. CODSIA notes that the flow down language in these data rights clauses is much broader than the flow down language in other FAR and DFARS clauses which have been made applicable to the commercial supply chain because of the explicit application to "suppliers." CODSIA opposes mandatory flow-downs to commercial item providers as unenforceable, un-scalable and as creating high risk of liability.

This flow-down prescription also conflates "subcontractor" with "supplier" and wrongly assumes the terms are interchangeable as applied to contractor supply chains. As with other recent regulatory situations where the government has required clause flow-down to the commercial supply chain, government is unfairly shifting the risk of subcontract and supplier non-compliance to the prime contractor, which creates high risk of cost liability and performance failures. Like those, this proposed flow-down requirement is unenforceable and also un-scalable for the commercial supply chain and CODSIA recommends the DAR Council carve-out all commercial item suppliers, both "subcontractors" (as that term is defined in the FAR and DFARS) and "suppliers" (which is not defined as a term of art in the FAR or DFARS) from this rule. As alluded to earlier in this letter, there is also no basis in the statute for such application and the

justification offered under the heading of 41 U.S.C. 1906/1907 presented in the rule's preamble is simply a fig leaf allowing the regulators top cover to apply the deferred ordering clause to the supply chain without further justification.

Moreover, on major DoD system acquisitions, there are thousands of commercial suppliers throughout the supply chain that sell commercial items that may (or may not) ultimately be integrated into such systems and to which the commercial supplier has no insight into that disposition. This requirement would penalize commercial suppliers operating under pre-existing, long-term commercial agreements providing items that are not identifiable to any specific commercial sale or government prime contract.

Even ignoring the implications of extending deferred ordering to data/software that is merely used in the performance of a contract or subcontract (which would multiply the non-compliance risk geometrically), producers of such complex systems will not be able to compel many first-tier subcontractors, much less their entire supply chains, to accept such a deferred ordering clause. Therefore, a prime or lower tier subcontractor in the mandatory flow-down supply chain may have to face the choice of entering into an agreement with which it cannot comply or declining doing business with the DoD.

d. The Proposed Rule attempts to address issues with this phrase by deferring to "persons reasonably skilled in the art" regarding the "nature, quality and level of technical detail" necessary for segregation or reintegration. With rare exception, OEMs, as developers and manufacturers of the technology in question, would have the most relevant knowledge regarding what data is necessary for segregation or reintegration. In contrast, DoD as user, or worse, OEM competitors as re-integrators unfamiliar with OEM items, would likely take a more expansive view of the "nature, quality and level of technical detail" of this data. At a minimum, some deference should be given to the OEM to determine the universe of such data. Therefore, consistent with DoD's current practices in regards to obtaining technical data packages, the adequacy of the data should be in accordance with a competent manufacturer standard as defined in MIL-STD-31000.

e. The Proposed Rule also raises issues for contractors in determining the universe of data and software that could be subject to deferred ordering. Subparagraph -7029(b)(1)(i) establishes requirements for deferred ordering of data, including that the data "[i]s needed for development, production, re-procurement, sustainment, modification, or upgrade". No guidance or objective criteria are provided regarding how one determines whether a "need" for such data truly exists. DoD should at least be required to establish a bona fide need for delivery of data that may include a Contractors most sensitive information. DoD should also be required to identify its needs with specificity to avoid "shopping expeditions" of useful data or software. Any such determination should be required to identify the exact requirement that will be addressed and that other alternatives to deferred ordering were considered prior to requiring contractors and their supply chain to deliver any data subject to the rule.

There also appear to be internal ambiguities in subparagraph -7029(b)(1) which, broadly stated, establishes two requirements. The first requirement, the "need" stated above (subparagraph -7029(b)(1)(i)(C)-(D)), applies to "any noncommercial item" and commercial items, or portions thereof, that are developed or modified at government expense. The second requirement (subparagraph -7029(b)(1)(ii)(C)) provides that the data pertains to an item or process developed or generated with government funds or the data is "form, fit, and function data, or segregation or reintegration data." The Proposed Rule does not make clear the causal connection between these two requirements. In other words, there does not seem to be a need for the "segregation and reintegration" data of (ii)(C) to be related to segregation or reintegration

of the "items" referenced in (i)(C)-(D). The Proposed Rule should be amended to clearly state the nexus between these two requirements.

f. The proposed -7029 clause also presents document retention challenges for contractors. Notwithstanding the language in subsection (d) regarding the absence of unreasonable preservation obligations, the proposed clause has no temporal limitations: See subparagraph -7029(b) ("…the Government may at any time order ...") (Emphasis added). The Proposed Rule at subparagraph -7029(b) also permits the Government to include a contract requirement to preserve covered technical data or computer software for a specific period, but does not prescribe what that period will be. Given all the uncertainty around what the data retention requirements will be, prudent contractors that will, by necessity, be forced to retain technical data or software (along with records to justify any rights assertions they may make pertaining to such data or software) for the useful life of any item to which the data or software pertains. The DAR Council must align the proposed non-preservation, "reasonable period" retention policy with the right of the government to order technical data or software "at any time".

   There are multiple other causes for concern with the proposed clause. For example, how would a contractor respond to deferred orders for data that it doesn't possess, either because the data was destroyed or was never generated (but presumed to be "utilized" in the performance of a contract)? Would the data warranty of 252.246-7001, which applies to any data "delivered under this contract" for up to three years after "completion of the delivery of the line item of data" or "any longer period specified in the contract" apply to data ordered years after completion of the contract? Moreover, since the contractor is to be compensated for data so ordered, how will the Government appropriate money to make such an order when the original money used for the contract has long since expired?

g. 10 U.S.C. 2320(b)(9) only requires deferred ordering where technical data is needed for "re-procurement, sustainment, modification, or upgrade (including through competitive means) of a major system or subsystem thereof, a weapon system or subsystem thereof, or any noncommercial item or process." Clearly, not all contracts fall within one of these categories. Where DoD is procuring an item which it does not plan to sustain or upgrade, such as a prototype or where DoD is purchasing a COTS item, contracts are not required to contain a deferred ordering clause by this provision. The same is true for services because the contractor is not providing an item or process at all. Therefore, to limit the potential competitive harm caused by a vague and ill-defined indefinite deferred ordering clause, the Proposed Rule should be narrowly tailored to only require inclusion in cases where the IP Strategy for the program requires a specific part number to be sustained, and only where an item is entering the Government inventory.

3. The Proposed Validation Procedures Are Unclear and Unfair

According to the Proposed Rule, the validation procedures of DFARS 252.227-7019 and -7037 will apply where a contractor asserts that technical data or computer software order under DFARS 252.227-7029, which is "or may" be covered by a funding determination in either subparagraph (b)(1)(ii)(A) or (B) of 252.227-7029, pertains to an item or process developed exclusively at private expense. Apparently, those procedures will apply without regard to the time limits set forth in -7019 or -7037.

The Proposed Rule does not appear to contain any requisites for a Government determination under subparagraph (b)(1)(ii)(A) that data pertains to an item or process that was developed in whole or in part with Government funds or (B) that the data itself was generated in whole or in part with Government funds. Once that determination is made, without having even examined the data in

question, the Government would have grounds to challenge the validity of the assertion prior to receipt of the data if the contractor cannot provide a timely or sufficient response to the Government's request for information to evaluate the assertion, which seems more likely than under the current, time-bounded procedures.

On the other hand, and again despite the passage of time, any written responses that a contractor does make once the validity of a data rights assertion is challenged, will be considered a claim and is required to be certified, with the resulting exposure to penalties (not to mention the potential for costly litigation and relationship harm).

Thus, in addition to retaining data for a perhaps-to-be-determined time period in anticipation of a possible deferred order, contractors also must maintain records sufficient to justify the validity of the rights they would assert and the markings they would apply should the deferred order ever come. Otherwise, their only option is to cede the eventual validity challenge.

Given the scope of data that is potentially exposed to deferred ordering, this is an enormous (and potentially enormously expensive) undertaking.

4. The Proposed Dispute Resolution Procedures Conflict with the Processes in 10 U.S.C. 2321(d)

Further, under 10 U.S.C. 2321, a validation process can only be initiated after receipt of the technical data and only where the Government has specific grounds to challenge. Specifically, 10 U.S.C. 2321(d)(1) permits a challenge under 10 U.S.C. 2321(d)(3) only where there is a finding that "(A) reasonable grounds exist to question the current validity of the asserted restriction; and (B) the continued adherence by the United States to the asserted restriction would make it impracticable to procure the item to which the technical data pertain competitively at a later time." Under 10 U.S.C. 2321(d)(3), the DoD must provide an explanation as to the grounds and give the contractor 60 days to respond with a justification under 10 U.S.C. 2321(d)(3). As such, the contractor, by the statutory process, is not required to provide any justification until the DoD has fulfilled its initial fact finding per 10 U.S.C. 2321(d)(1) and (3). In contrast, under DFARS 252.227-7029(c), the contractor must furnish "information sufficient for the Contracting officer to evaluate the assertion" prior to any fact finding or notice required under 10 U.S.C. 2321(d)(1) and (3). Therefore, DFARS 252.227-7029(c) needs to be revised to require the contracting officer to fulfill the basic fact finding and detailed notice and due process requirements of 10 U.S.C. 2321(d) prior to demanding "information sufficient for the Contracting officer to evaluate the assertion."

While the proposed DFARS 252.227-7029(c) dispute process requires that the assertion be governed by DFARS 252.227-7019 and 252.227-7037, DFARS 252.227-7029(c) creates a separate challenge process prior to beginning the DFARS 252.227-7019 and 252.227-7037 processes. As noted above, DFARS 252.227-7029(c) requires that, where the contractor believes that ordered data (which the government has not seen when it made the order) was developed exclusively at private expense, the contractor's assertion shall "include information sufficient for the Contracting Officer to evaluate the assertion." However, while DFARS 252.227-7019 and 252.227-7037 use a pre-challenge request for information similar to what is proposed in DFARS 252.227-7029(c), the contractor is not required to respond to the pre-challenge request for information and is not required to provide any information to the contracting officer at this stage. Therefore, DFARS 252.227-7029(c) is in conflict with the basic processes set forth in DFARS 252.227-7019 and 252.227-7037 and 10 U.S.C. 2321 in requiring information when such information is optional under DFARS 252.227-7019 and 252.227-7037.

Further, the proposed DFARS 252.227-7029(c) is unclear in its relationship to the processes set forth in DFARS 252.227-7019 and 252.227-7037. Specifically, the proposed requirement in DFARS 252.227-

7029(c) is written as if it is a condition predicate for initiating the processes in DFARS 252.227-7019 and 252.227-7037. Since DFARS 252.227-7019 and 252.227-7037 already clearly recite the challenge process, the summarizing in DFARS 252.227-7029(c) merely adds confusion.

CODSIA recommends that the dispute provisions of DFARS 252.227-7029(c) only refer to the DFARS 252.227-7019 and 252.227-7037 processes as opposed to specifying requirements for information in conflict with these processes.

5. The Proposed Rule is Ambiguous

In the Proposed Rule, there are numerous terms and phrases, either new or utilized in a new manner, that introduce considerable ambiguity for contractors. As noted elsewhere in this letter, this ambiguity can result in a chilling effect on government contractors and have significant unintended consequences since the deferred ordering process under DFARS 252.227-7029 relies upon unknown terminology, orders data which may or may not exist any longer, and is usable to order data even when the Government reasonably anticipated would be needed (or even contractually agreed would not be ordered). This ambiguity harms the Government's ability to bring non-traditional contractors into the Government procurement market, and also creates a false impression within DoD that they do not need to identify and order necessary data as a CDRL since they will always be able to order this data at some future point. CODSIA recommends that any changes to introduce new matter into the definition necessary for segregation or reintegration be included in DFARS 252.227-7029, and further that the Proposed Rule highlights the risk of relying on DFARS 252.227-7029 to obtain necessary data as a contract CDRL.

6. The Proposed Rule is Likely to have Unintended Consequences

As written, the Proposed Rule will create several unintended consequences.

Contractors will have to factor deferred ordering into the prices of the products or systems being acquired and will have to price out the risk accordingly for an indefinite period. DoD should not underestimate the cost for a contractor to be under contract indefinitely and not assume that the value of such deferred ordering will be limited to the cost to reproduce any documents or software simply because they say there is such a limit.

The possibility that DoD can defer order – at any time – the delivery of any technical data that has merely been "utilized" in performance of a DoD contract (as scoped in the Proposed Rule, i.e., including contractor internally developed or owned tools and processes unrelated to the acquisition in question) is inconsistent with global business practices and the history of federal procurement. This framework could pose a risk that, in many cases, will outweigh the perceived benefits for contractors and commercial vendors to pursue DoD business. In other cases, contractors with substantial commercial and military portfolios may reconsider the extent to which they leverage cutting edge commercial processes and technology improvements across their military programs. This would lead to unintended consequences and situations where DoD is unable to access valuable, breakthrough technologies available in the commercial marketplace. Thus, the proposed implementation of deferred ordering will have the effect of defeating the Government's desire for competition and using existing commercial products. It also could substantially increase the prices paid for commercial items and create a barrier to attracting commercial and non-traditional contractors to doing business with the DoD.

While there may be certain cases where deferred ordering will be practicable, making it mandatory in almost all cases will remove an important tool in contracting officers' toolbox. Without the discretion to determine whether and how to utilize a deferred ordering clause (i.e., to determine when deferred ordering is in fact "practicable"), contracting officers will find it much more difficult to obtain certain

products or services, e.g., those for which contractors use highly sensitive technical data or computer software that the contractors are not willing or do not have the authority to expose to deferred ordering.

The practice of a contractor using its own proprietary and commercial best practices and technology developed exclusively at private expense is more efficient, reduces overall costs, and enables DoD to benefit from commercial, private investments made by the industrial base. Making deferred ordering mandatory in virtually all procurements will force some contractors to choose between foregoing participation in such procurements or finding a way to participate without using their most valuable technology. Either way, the DoD will benefit less from commercial, private investments made by the industrial base.

If a contractor does decide to participate in a procurement, the contractor will not know what technical data or computer software the Government may eventually request under deferred ordering. Therefore, contractors either must assume that the government will request delivery of all technical data and computer software "generated or utilized" during performance, or assess which data and software the government is most likely to request. Either way, given that a contractor shall be compensated only for reasonable costs incurred for converting and delivering the technical data or computer software into the required form, contractors will have to price into the baseline contract the broad release and use rights the Government would have in some of the data it has the potential to deferred order. Collectively, this will have the impact of driving up costs to the Government.

Similarly, if a contractor intends to "utilize" third-party computer software during performance, the contractor must now secure the necessary rights from the third party (i.e., the right to deliver segregation or reintegration source code) to fulfill the contractor's obligations to the government. Assuming the contractor is able to secure the necessary rights, it is likely to come at a price, again driving up the price to the Government.

The requirement that deferred ordering be flowed down to "contractual instruments" with subcontractors "or suppliers" at any tier and to most subcontracts for commercial items (i.e., unless only for commercial items and not for either major systems/subsystems or weapons systems/subsystems) will in most instances require the reopening of terms and conditions of countless pre-existing commercial supplier agreements and/or software licenses across the industrial base. This exercise will be extremely disruptive to commercial operations, will undoubtedly increase costs on both contractors and the Government, and will put all other commercial terms and conditions, including pricing models, at risk.

In the relevant industries, it is not unusual for a company to make an investment in a technology or a program, with the expectation that the payback on that investment will take a decade or even decades. In the commercial context, a vendor has the ability to use the resulting intellectual property rights to help to secure the downstream OEM, aftermarket and sustainment income that is critical to realizing that payback. The overly broad approach taken in the Proposed Rule to implement the statutory deferred ordering scheme will undermine contractors' ability to secure that long-term ROI expectation. This will have the impact of dis-incentivizing contractors from making significant, long term IR&D investments in defense technologies. Over time, this is likely to result in greatly diminished private R&D spending in favor of Government-funded contract research and development (CRAD) R&D spending in the defense sector.

7. Recommendations re Deferred Ordering

In summary and an addition to the above recommendations, CODSIA makes the following recommendations regarding the proposed implementation of deferred ordering under 10 U.S.C. 2320(b)(9):

1) Provide contracting officers with discretion to determine whether to omit or limit the reach of the deferred ordering where its use is not practicable. As currently written, the Proposed Rule contemplates that the Government and the contractor can agree on the nature, quality, and level of technical detail necessary for segregation/reintegration data. It should also permit the Government and the contractor to restrict the classes of data to which the deferred ordering clause applies or to omit the clause altogether.

2) Preclude use of the deferred ordering clause in contractor or subcontracts where DoD is procuring an item that requires a specific part number that is not addressed in the IP Strategy for the program, and then only where an item is entering the Government inventory based on a plan to sustain or upgrade the item, such as a prototype or where DoD is purchasing a COTS item.
3) Preclude use of the deferred ordering clause where the contractor or subcontractor is only providing services.

4) To encourage clarity in contracting and to foster private investment, recognize that deferred ordering is practicable as a rule only in the cases of modular open systems architectures in major weapon systems and only when applied to data pertaining to external interfaces among, or necessary for the segregation/ reintegration of, top-level end-items in those systems. Therefore, mandate deferred ordering only in such cases and only when applied to such data.

5) Preclude use of deferred ordering to obtain software source code.

6) Preclude use of deferred ordering to reach data pertaining to lower level components or interfaces for components in systems where such components are not purchased directly from the component manufacturer.

7) Establish clear boundaries protecting a contractor's "black box" against deferred ordering in order to protect proprietary information and to encourage use of commercial and privately-funded technologies to create competition for the major system components.

8) Preclude use of deferred ordering of software utilized *in performance* of a contractor subcontract.

9) Preclude use of deferred ordering in basic and applied research contracts as defined in FAR 35.001 since the Government has no intention of maintaining the result of such basic or applied research.

10) Align the prerequisites for deferred ordering with those set forth in the statute. Therefore, the following alternative grounds should be removed as possible justifications for deferred ordering under the clause:
    a. needing data for development or production;
    b. needing data for the statutorily prescribed purposes insofar as they pertain to either (i) portions of a commercial item that was either developed exclusively with Government funds or developed with mixed funding or (ii) portions of a commercial item that was a modification made at Government expense;
    c. that the data is form, fit, and function data, to the extent not necessary for segregation or reintegration; or
    d. that the data or software was generated with Government funding when the contract did not involve item/process development.

11) Eliminate the requirement to flow down the clause to "contractual instruments" with "suppliers" that are not subcontractors.

12) Eliminate the requirement to flow down the clause to subcontracts for commercial items.

13) Require the Government to articulate objectively reasonable and documented bases for a determination that the data pertains to an item developed in whole or in part with Government funds.

14) Require the Government to articulate objectively reasonable and documented bases for a determination that the data was generated in whole or in part with Government funds.

15) Require that the deferred ordering of data necessary for segregation or reintegration purposes be made only in response to a specific identified and objectively reasonable segregation/reintegration need, and then only after consideration of all other alternatives (such as the use of form, fit and function data, reverse engineering, and other strategies as outlined in DFARS 227.71 03-5(d)(2)).

16) Set a cap on the time period for which contractors will have to retain data and justification records.

17) In validation proceedings prompted by a deferred ordering request made more than three years after all data delivery requirements for a given contract have been met, eliminate the requirement that written responses shall be considered a claim and shall be certified.

18) Clearly state the nexus between the requirements for a need for the "segregation and reintegration" data of subparagraph 7029(b)(ii)(C) and the segregation or reintegration of the "items" referenced in subparagraphs 7029(b)(i)(C)-(D).

19) Clarify that there is no obligation to generate data that does not exist or cannot be located at the time of the deferred order.

20) Clarify that no data warranties attach to data the delivery of which was not specifically contemplated in the contract.

21) Make the -7029 clause mandatory only for estimated contract values over $500,000,000 and optional for all other contracts subject to the determinations and other administrative requirements contained in the clause prescriptions.

E. Concerns Regarding Application of Section 815 to Computer Software

1. Proposed Rule does not use Terms Familiar to Software Industry

By policy, DoD has traditionally implemented the technical data requirements specified in 10 U.S.C. 2320 in the non-commercial software clause in DFARS 252.227-7014. At the same, time, DoD has traditionally adapted these requirements to account for the unique nature of computer software and computer programs as compared to technical data, which is related to hardware. The Proposed Rule diverges from this policy of adapting technical data practices to account for software industry standards and practices. Therefore, as noted in greater detail below, CODSIA believes that the Proposed Rule should be revised such that any implementation would be understandable to the software industry.

a) Form fit function data has no software analog

The Proposed Rule defines and uses the concept of "form, fit, function data" in DFARS 252.227-7014. The concept of form, fit, function data has been used in the technical data clause for decades, and is a concept which relates to the measurable physical attributes of hardware. Since computer software lacks physical attributes, it was appropriate not to use the concept of form fit function data in the DFARS 252.227-7014 clause since it would only cause confusion. However, the Proposed Rule has taken this form, fit function data concept and added the words "computer software" without removing the hardware constructs in the definition. For instance, for purposes of computer software, the Government would have unlimited rights in data that describes the physical, mating, attachment, interface characteristics, and that to the extent that the data is needed to permit "physical or functionally equivalent items or processes." None of this terminology has a direct analog in the software industry.

Further, while ostensibly form fit function does not include computer software or detailed manufacturing or process data, the concept of form fit function data is defined to include interface, functional, and performance characteristics. While such data is physically observable and measurable from the exterior of a hardware black box without revealing the construction of the hardware black box, this data is more detailed in the software industry. Thus, even to the extent that the software industry uses the same terminology such as an "interface", the data used for an interface may be much more detailed in describing a software program element as compared to the data used to describe the physical and electrical connections of a hardware element.

Lastly, the concept of form, fit function data is defined to exclude detailed manufacturing or process data. However, the concept of detailed manufacturing or process data is one exclusively used in the technical data clause (DFARS 252.227-7013), and is not defined in the Proposed Rule. In DFARS 252.227-7013(a), detailed manufacturing or process data is "technical data that describe the steps, sequences, and conditions of manufacturing, processing or assembly used by the manufacturer to produce an item or component or to perform a process." By this definition, computer software is detailed manufacturing or process data, so it is unclear what would be considered form fit function data after extraction of the detailed manufacturing or process data.[14] Given this new construct, it is almost a certainty that Contracting Officer will misapply these definitions and make demands for software inconsistent with how FFF data is defined or with commercial software practice and out of context to the remainder of the operative clauses.

Therefore, CODSIA recommends that the Proposed Rule be revised to replace the "form fit function data" concept to analogous terms familiar to the software industry and which have a like-level of data normally associated with form fit function data when applied to hardware.

b) Segregation or reintegration data has no software analog

The Proposed Rule also creates a new definition for segregation or reintegration data which is identical in both the technical data clause (DFARS 252.227-7013) and the software clause (DFARS 252.227-7014). These concepts do not have a ready equivalent in the software industry, or in computer software as a technology. For instance, the definition of segregation or reintegration data is data "that is necessary for the segregation of an item or process from, or the reintegration of that item or process". This definition is not clear or comprehensible when viewed in the context of computer software and computer programs.

[14] AIA members have reported to CODSIA that certain DoD contracts have attempted to apply the concept of detailed manufacturing or process data to computer software, and that it creates considerable conflict on this very issue.

Further, technical data is licensed separately from the hardware produced using the technical data. In contrast, under the DFARS, the computer software is licensed in the same clause under which the computer program is produced using the computer software licensed. For this reason, DFARS 252.227-7014(a) has specific definitions for computer software and computer programs,[15] and treats licenses to computer software differently from computer program.[16] For computer software or computer programs, the concepts of physical separation depend on the format (source code versus object code), and whether the separation is being accomplished at the CSCI level. As examples, in the software source code context, it is unclear what data is needed to separate a single line of code from surrounding lines of code; and it is unclear whether software payloads or encryption/decryption programs used between CSCIs would be included as segregation or reintegration data, and whether such are licensed as computer programs or computer software.

Therefore, to the extent that segregation or reintegration data is being applied to DFARS 252.227-7014 by policy, CODSIA recommends that the Proposed Rule define this data in terms for computer software and computer programs consistent with how DFARS 252.227-7014 licenses these items, and that the definition rely on terms more consistent with terms used by industry when integrating software.[17]

c) Restricted rights in segregation or reintegration programs

Under the existing Restricted Rights definition, DFARS 252.227-7014(a)(15)(i) expressly states that restricted rights computer programs can only be used on a single computer, and where modifications are made to the computer software, this same number of authorized copies are made.[18] The Proposed Rule provides third parties access to restricted rights computer software for purposes of performing reintegration or segregation, but solely under the condition that the number of computer programs not increase beyond what is allowed in DFARS 252.227-7014(a)(15)(i). To the extent such third party compiles computer software contained in the segregation or reintegration data or this data itself includes computer programs (such as an encryption program) for use with the third party computer program, the Proposed Rule does not address how such third party should be obtaining the additional copies of the restricted rights computer programs required under DFARS 252.227-7014(a)(15)(i).

CODSIA recommends that the guidance in DFARS 227-7203 be revised to require that, where additional copies of a restricted rights computer program are made temporarily during segregation or reintegration activities, the required number per DFARS 252.227-7014(a)(15)(i) not be exceeded. Further, such guidance needs to expressly caution the receiving contractor that it is not to incorporate into its computer software any computer software or computer program elements it receives from the Government as segregation or reintegration data to ensure that the required number of copies per DFARS 252.227-7014(a)(15)(i) will not be exceeded.

d) Application of segregation or reintegration to commercial software providers

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[15] DFARS 252.227-7014(a)(4) (“Computer software means computer programs, source code, source code listings, object code listings, design details, algorithms, processes, flow charts, formulae, and related material that would enable the software to be reproduced, recreated, or recompiled.”); DFARS 252.227-7014(a)(3) (“Computer program means a set of instructions, rules, or routines, recorded in a form that is capable of causing a computer to perform a specific operation or series of operations.”)

[16] As an example, DFARS 252.227-7014(a)(15) provides, for Restricted Rights, increased rights to use computer software (as opposed to computer programs licensed on a per machine model) in order to ensure interoperability.

[17] While not definitive, ICDs and APIs may be terminology more consistent with segregation and reintegration data concepts.

[18] DFARS 252.227-7014(a)(15)(iv) cites to DFARS 252.227-7014(a)(15)(i)

While segregation/reintegration data is only directly applied to noncommercial software in the proposed DFARS 252.227-7014, the Proposed Rule does attempt to force this definition onto the commercial software supply base. DFARS 227.7202-3 suggests that the DoD "may require" such additional rights to segregation or reintegration data in licenses for commercial computer software. Further, commercial suppliers may potentially have to make this data available under the proposed new deferred ordering clause in DFARS 252.227-7029(j). CODSIA believes that attempting to include this provision in all commercial software licenses is contrary to the preference for using commercial terms in 10 U.S.C. 2377, and will further harm DoD's ability to leverage the commercial market. Moreover, terms such as "may require" are vague and introduce contractual uncertainty that will discourage commercial suppliers from doing business with DoD.

CODSIA recommends that the Proposed Rule should not, by policy, include commercial computer software in the proposed deferred ordering clause and should not require commercial software licenses to have a provision requiring segregation or reintegration per DFARS 227.7202-3(b)(1).

e) Definition of Commercial Computer Software

The Proposed Rule defines commercial computer software in DFARS 252.227-7014(a) using the same definition as FAR 2.101. Under the existing clause, DFARS 252.227-7014(a)(1) created its own definition of commercial computer software which was in potential conflict with the definition of FAR 2.101. CODSIA agrees that this change is appropriate and supports this simplification and harmonization.

2. Recommendations Regarding the Treatment of Software Under the Proposed Rule

CODSIA recommends that the Proposed Rule be revised as follows:

a) Replace the "form fit function data" with analogous terms familiar to the software industry and computer programmers, and which have a like level of data normally associated with form fit function data when applied to hardware;

b) Remove the concept of segregation or reintegration data from the computer software clause DFARS 252.227-7014 since this concept should not be extended to DFARS 252.227-7014 by policy, or at the very least define segregation or reintegration data in terms used by the computer software industry;

c) Separately license segregation or reintegration data depending on whether the data is considered computer software or computer programs as defined in DFARS 252.227-7014;

d) Clarify that the segregation or reintegration data should not be at the lowest practicable and segregable level, but should be at a level consistent with simple replacement of computer programs (as opposed to recoding discrete software elements), such as between CSCIs, as defined in modular open system, or as agreed with industry in a consensus-based standard;

e) Remove the requirement for modifying commercial software licenses to obtain segregation or reintegration data; and

f) Modify DFARS 227-7203 to require that, where additional copies of a restricted rights computer program are required per DFARS 252.227-7014(a)(15)(i) due to a third party incorporation of such computer program in the third party's computer program, the third party will obtain the necessary additional licenses from the original supplier.

F. Concerns Regarding Application of Section 815 to Commercial Items

In addition to the comments above relating to commercial computer software, we provide the following additional comments related to commercial items.

1. 10 U.S.C. 2320 does not Mandate Applicability of the Data Rights Clauses to Commercial Items

In the proposed amendments to DFARS 212.301, DoD prescribed the applicability of the clause at 252.227-7013, Rights in Technical Data—Noncommercial Items, and the new clause at 252.227–7029, Deferred Ordering of Technical Data or Computer Software, to commercial items, in order "to comply with" 10 U.S.C. 2320 (p. 39487). CODSIA does not agree that the changes are required to comply with statute.

First, 10 U.S.C. 2320 does not expressly require the applicability of 10 U.S.C. 2320 to commercial items procured at either the contract or subcontract levels. Moreover, CODSIA has found nothing in the legislative record to support a conclusion that Congress intended the statute to apply to the determination of rights in, or the deferred ordering of, commercial technical data or computer software. In fact, the *Federal Register* notice for the Proposed Rule is internally contradictory on this point. Page 39486 of the *Federal Register* notice discusses 41 U.S.C. 1906 and 1907, and states the following:

> *"DoD is proposing to prescribe the new clause that implements 10 U.S.C. 2320(b)(9) and (10) for use in solicitations and contracts using FAR part 12 procedures for the acquisition of commercial items that are being acquired for (i) a major system or subsystem thereof, or (ii) a weapon system or subsystem thereof. DoD will make the final determination with regard to application to commercial items after receipt and analysis of public comments." (Emphasis added).*

Such a justification is inadequate for such an important and radical change to the data rights policies, especially where the statute does not require application to commercial items. The DAR Council has not provided more than conclusory statements about this extension, and needs to provide the public with the facts underlying their determination that Section 815 implementation should apply to commercial items. Like previous regulatory cases, DoD has stated their intent to make a final determination based on the comments received in response to the proposed rulemaking; this approach violates the statute because the limitation on applying new statue or rules to commercial items is automatic and reliant on the determination being performed pre-rule publication so the public has notice of the benefits and burdens. A determination made post facto, whether included in the final rulemaking or not, tends to be curt and self-serving and typically does not include any of the detailed analysis required in the statute.

The public has not traditionally been given access to, and has been repeatedly denied, any post facto DoD 1906/1907 determinations. CODSIA recommends that if DoD republishes the rule, that the analysis and facts underlying the decision to apply Section 815 to commercial items be included. If not, CODSIA urges the DAR Council to include any analysis in a supplement to this rule prior to finalization or, in the worst case, provide the facts and detailed justification to the public as part of the final rulemaking.

2. Deferred Ordering Should Not be a Mandatory Flowdown to Commercial Subcontracts

CODSIA believes that it is not in the best interest of the Government to flow-down the new deferred ordering clause to all tiers of subcontractors and suppliers for major systems or major weapon systems. Specifically, CODSIA strongly disagrees with the proposed approach in the new deferred ordering clause at DFARS 252.227-7029(j) to flow-down the clause to all "subcontractors" and "suppliers" – at any tier – for the acquisition of commercial items for major systems, weapon systems, or subsystems thereof. Section 815 does not mandate such an action, and such a requirement does not exist even in the deferred ordering clause in DFARS 252.227-7027. This flow-down language undermines the protections Congress has intended for items which meet the "commercial item" definition. It also undermines current congressional defense acquisition reform efforts and DoD Better Buying Power policy efforts to encourage companies to sell commercial items to the DoD and improve DoD's access to innovative commercial technologies.

In addition to the proposed flow-down approach in DFARS 252.227-7029(j), CODSIA strongly disagrees with the commercial item flow-down language in the existing data rights clauses at DFARS 252.227-7013, DFARS 252.227-7015 and DFARS 252.227-7037, which is broader than other FAR or DFARS clauses, even though commercial companies, including those in Silicon Valley (and elsewhere) that DoD is specifically targeting via DIUx outreach efforts, have consistently identified intellectual property concerns as a primary impediment to their willingness to sell innovative commercial technologies to DoD.

DIUx outreach efforts cannot be viewed in a vacuum as being unrelated to this Proposed Rule simply because DIUx is primarily executing other transaction agreements which are not subject to the underlying technical data statutes and the implementing DFARS regulations. Such a view is shortsighted and fails to consider the long-term reality that if the DoD wants to insert such commercial technologies into major systems, weapon systems or subsystems thereof, and sustain them over a system's lifecycle, a procurement contract subject to the technical data statutes and the implementing regulations will inevitably be required.

3. Mandating Flow-Down Too Commercial "Subcontractors" and "Suppliers" is Overly Broad

While CODSIA disagrees with the applicability of the new deferred ordering clause to all commercial items, CODSIA members are also disturbed by the apparent intent to extend such flow-down requirements to separate commercial supply chain agreements which are not identifiable to any specific prime contract, sale or order (in other words, such agreements are not "subcontracts" awarded pursuant to a specific prime contract). CODSIA notes that Section 861 of the Senate version of the FY17 National Defense Authorization Act currently in conference (S.2943) establishes a line that finally and formally distinguishes a federal "subcontractor" from a supplier that provides items for contractor inventory or items not purchased exclusively for use on a specific federal contract. While there is no certainty the provision will pass, the mandatory flow-down to "suppliers at any tier" may not comply with the new statutory language.

Such supply chain agreements are often long term (generally ranging from a few years to 20 years) and placed for the purposes of acquiring supplies to support company-wide operations, to develop multiple product lines, to support commercial production rates or for spares inventory. Sourcing decisions for such commercial supply chain agreements are most often made long before any specific government contract requirements (for commercial items) are even known to the prime contractor. In some cases, the supply chain agreements are structured as "life of program" buys with no opportunity to re-open the agreements to flow down unique government clauses. Most importantly, such supply chain agreements enable the government to benefit from economies of scale and pricing efficiencies achieved only in the commercial marketplace.

Commercial suppliers operating under such agreements have agreed to commercial pricing prior to the award of any prime contract, and such commercial prices are not entered into with authority to accept unknown future prime contract flow-down clauses that impose unique government rights, assertion requirements, marking requirements, records-keeping requirements or an unbounded right for the Government to compel the future delivery of commercial technical data or software necessary for segregation or reintegration.

To illustrate the significant cost and schedule impacts that such overly broad flow-down language could have on a major system or weapon system, one CODSIA member has indicated that there are over 500 first-tier commercial suppliers on one major weapon system program at the system level, with almost 25% of these commercial suppliers qualifying as small businesses. It is possible that the total number of commercial suppliers at all tiers for this program exceeds 1000.

4. Buying Commands Routinely Refuse to Negotiate Commercial Flow-Down Requirements

CODSIA members are further concerned about such overly broad flow-down requirements because buying commands are generally unwilling to negotiate deviations to mandatory flow-down requirements, or are otherwise unwilling to undertake the effort required to pursue individual deviations from DPAP pursuant to DFARS 201.402(1)(ii) (DPAP is the approval authority within DoD for any individual or class deviation from DFARS Subpart 227.4, Rights in Data and Copyrights.) In cases where prime contractors attempt to negotiate flow-down language, DoD customers expect prime contractors to offer concessions in exchange for negotiating deviations, even though limiting flow-down impacts leads to lower prices, which primarily benefits the government.

5. Extending Flow-Down Requirements to Commercial Suppliers May Exceed the Intent of Congress

CODSIA encourages the DAR Council to explore congressional intent regarding the applicability and flow down of laws and regulations to commercial supply chain agreements or other “contractual instruments” which are not identifiable to, or awarded pursuant to, government prime contracts. For example, 41 U.S.C. 1906 and 1907 use only the terms “contract” and “subcontract,” with the latter term generally used in practice to refer to contractual relationships established for the purposes of fulfilling prime contract requirements.

6. Separately Gather Commercial Item Impact Statements

CODSIA members are unaware of any DAR Council outreach to gather impact statements from the defense industrial base or commercial suppliers (to include “Silicon Valley-type” companies), as part of its efforts to determine, pursuant to 41 U.S.C. 1906, whether it is in the best interest of the government to apply and flow down elements of this proposed rulemaking, including the new deferred ordering clause, to contracts and subcontracts for commercial items. We question whether a proposed rule is the appropriate mechanism to gather such impact statements from commercial industry, especially since they do not routinely review *Federal Register* notices for DoD rulemaking activities. Moreover, CODSIA members are disappointed that the DAR Council would rely on the public comment period for this Proposed Rule to “make the final determination with regard to application to commercial items” when it appears that the initial determination has been made without any input from the defense industrial base or its commercial suppliers.

7. Two Contract Clauses for Commercial Items

Even though the commercial item definition does not require items to be developed exclusively at private expense, the current regulatory scheme prescribing the applicability of both commercial and noncommercial clauses to technical data pertaining to commercial items essentially adds the private expense development requirement for IP purposes. The result is that a commercial item determination provides highly confusing IP protection unless the commercial item is a commercially-available-off-the-shelf item. The current framework is at odds with the reality that the government rarely purchases sophisticated COTS items for incorporation into major weapon systems without some form of tailoring or adaptation. This creates a complex scenario whereby DoD insists by policy in DFARS 227.7104-4 that DFARS 252.227-7013 governs the technical data pertaining to any portion of a commercial item that was developed in any part at Government expense, and the clause at DFARS 252.227-7015 governs the technical data pertaining to any portion of the same commercial item that was developed exclusively at private expense. We believe that this approach is an overreach of 10 U.S.C. 2320, is contrary to the clause wording as it appears in the contract, and ignores the intent of the Federal Acquisition Streamlining Act of 1994 to limit applicability of Government-unique laws and regulations to commercial item subcontracts.

The application of two clauses has led to considerable confusion in the implementing regulations, leading DoD to impose a more complicated marking framework on commercial item vendors than it does on traditional vendors. The current regulatory framework for commercial items which are modified to meet unique government requirements is more complex than the framework for noncommercial items.

To simplify the process and ensure certainty in the contracting process for commercial items, CODSIA proposes that the DFARS 252.225-7015 clause should apply to contracts for commercial items so long as the modified item being delivered under the contract qualifies as a commercial item in accordance with 41 U.S.C. 103 and within the definition of FAR 2.101. There should be a bright line standard applied; if the contract is for commercial items, use DFARS 252.225-7015. If the contract is for noncommercial items, use DFARS 252.227-7013. Paragraph (e) should be revised accordingly. A similar bright line should be established for commercial software.

Accordingly, CODSIA recommends the removal of all aspects of this Proposed Rule which impact commercial items, in favor of a specific targeted information gathering with commercial industry to gather robust impact statements that could be used in making the determination required by 41 U.S.C. 1906.

G. Concerns Regarding Form Fit Function Changes

1. Form, Fit, Function Data Concept Does Not Harmonize with FAR 52.227-14 and is Unnecessary

While Section 815 introduced the concept of segregation or reintegration data, Section 815 did not introduce any particular requirements to change other statutory definitions which have remained largely unchanged in DFARS 252.227-7013 for decades. Specifically, under the Proposed Rule, form, fit, function data (FFF) would further include logical, configuration, and mating characteristics. This expansion of FFF, as explained in the Comments, was purely to harmonize with the definition in FAR 52.227-14(a).[19] However, unlike FAR 52.227-14, which provides separate definitions of FFF for technical data and computer software, the Proposed Rule places them both in the same sentence which naturally comingles concepts applicable to hardware and software.

[19] See 81 Fed. Reg. No. 116, pp. 39483-484 (June 16, 2016).

CODSIA believes that such a change is unnecessary for purposes of implementing Section 815. Further, to the extent that such harmonization is needed, CODSIA recommends that the Proposed Rule adopt the separate definitions concept used in FAR 52.227-14 by maintaining the same definition currently used for DFARS 252.227-7013 and DFARS 252.227-7015, and create a new definition of FFF for DFARS 252.227-7014.

2. Revisions to FFF Change Existing Rights Without Compensation

Including new types of data as FFF (which carry unlimited rights) will have the greatest effect on contractors that will, or have already, delivered items with Limited/Restricted Rights on current performing/previously performed contracts that, due to the change in definition to FFF, would change to Unlimited Rights. The Proposed Rule is silent as to whether such a change would be retroactive and, on implementation, impact deliveries under current contracts having the new clause where the delivery is the same technical data or computer software previously delivered under the prior FFF definition. Further, the Proposed Rules does not address how such a change will affect subtier suppliers in existing contracts if the Prime Contract clause is updated, but existing suppliers are performing under prior clauses.

Therefore, CODSIA recommends that the implementing regulations recognize prior FFF definitions, and allow contractors whose data is redefined as FFF under the Proposed Rule, maintain the prior non-FFF status when redelivering under a new contract containing the Proposed Rule's provisions, and only apply any final rules prospectively to data first generated under the new contract.

H. Concerns Regarding Validation Changes

1. The Proposed Dispute Resolution Procedures in DFARS 252.227-7019 and 252.227-7019 Introduces a New Undefined Term

In the Proposed Rule, DFARS 252.227-7037 and DFARS 252.227-7019 have changed the terminology from markings that assert restrictions to "asserted restrictions". Further, in the context of what asserted restrictions need to be justified, the justification is required for data which is delivered, required to be delivered, or otherwise provided to the Government under the contract. As an initial point, under 10 U.S.C. 2321(j), an asserted restriction relates solely to restrictions based on delivery. Specifically, 10 U.S.C. 2321(j) defines a ''use or release restriction'' as being "with respect to technical data delivered to the United States under a contract subject to this section". As such, the definition of what data is even subject to a challenge is based on delivered data, as opposed to data which is provided outside of delivery.[20] The Proposed Rule changes the scope of data for which a justification may be required to include non-deliveries, which is outside of the scope of 10 U.S.C. 2321 or any logical extension thereof.

Further, the term "assertion" is often associated with assertion lists under DFARS 252.227-7017, which is a notification of what is likely to be delivered with restrictions as opposed to a certainty that such a restriction will occur. Thus, the use of the term "asserted restriction" in place of "markings that assert restrictions" will likely cause confusion with the Government customer, and delays in program execution since contracting officers may feel that they can challenge the submission of data assertion lists under DFARS 252.227-7017 or updates under DFARS 252.227-7013(e) or DFARS 252.227-7014(e). The change in terminology is also unnecessary for implementing the changes required under Section 815, which relate to timing.

[20] The "required to be delivered" element of the justification also appears to be a long-standing but improper extension of the definitions required under 10 U.S.C. 2321(j).

Therefore, CODSIA believes that the definitional changes in DFARS 252.227-7019 and 252.227-7037 will not increase contractual clarity, is not required under Section 815, and should not be changed from their present definition.

2. The Proposed Rule Creates an Unbounded Record Keeping Requirement that Conflicts with the Six Year Term in Proposed DFARS 252.227-7019 and 252.227-7037

In the Proposed Rule, the Government has implemented the change from three years to six years for the period during which the Government can challenge an assertion based on funding. However, the Proposed Rule, in combination with the unlimited timeframe in which the Government can order new data under DFARS 252.227-7029, effectively requires that the contractor maintain funding records indefinitely. By way of example, under proposed DFARS 252.227-7037(i), the duration to challenge is "the period within 6 years of final payment on a contract or within 6 years of delivery of the technical data to the Government, whichever is later." Since the contractor is also potentially subject to deliver data at any time under DFARS 252.227-7029 and to justify if such other data is not subject to the scope of the proposed DFARS 252.227-7029 due to its being developed exclusively at private expense, the combination effectively requires the contractor to maintain records indefinitely.

CODSIA does not believe the intent of Section 815 was to create an unbounded record retention requirement. Specifically, 10 U.S.C. 2321 was amended merely to extend the duration of requirements under an existing contract, and was done so that the contractor would be relieved of such long term record keeping requirements. If Congress had intended an unlimited duration, Section 815 would have simply done away with the duration entirely. Since Congress maintained a duration for this obligation, Congress clearly intended that this requirement must be bounded for clauses implementing deferred ordering in10 U.S.C. 2320.

Further, this potential indefinite extension and risk will require industry (prime and all suppliers) to have longer storage periods, increase in IT resource needs and personnel resources whereby all data/software (not just deliverable items) that could have been generated during the performance of the contract are maintained in the event of a deferred ordering call. This will increase industry overhead expenses (all tiers), and the likelihood of keeping contracts in closeout for a longer period of time (depending on whether it is six years after performance end, six years after final payment, or six years after final delivery of any data ordered under DFARS 252.227-7029).

CODSIA recommends that the duration in DFARS 252.227-7019 and DFARS 252.227-7037 be limited to the later of six years after final payment on a contract or within six years after delivery of the technical data delivered under a CDRL, where the delivery of the technical data for purposes of validation expressly excludes orders under DFARS 252.227-7029 that occur after these periods.

I. Training for Acquisition and Contracting Personnel

While not included in the Proposed Rule, CODSIA suggests that any implementation of Section 815 will require substantial training for DoD personnel, especially as this implementation is in conjunction with the IP Strategy requirements of DoD Instruction 5000.02 and DoD 5010.12M. As we have identified in extensive detail herein, technical data rights law and regulation are an extremely complex subject and is a highly sensitive one for both Government and Industry. CODSIA believes that DoD acquisition and contracting personnel may not have sufficient understanding of the policies, the clause requirements, the technical terms of art and/or the reason DoD is implementing the new rules, and the current subject matter training framework for IP is lacking at the traditional DoD providers such as DAU. For the most part, rights in technical data contract enforcement is typically, if not universally, managed by agency IP or Contract Counsel with whom the acquisition and contracting personnel interact, which is efficient to

some extent, but reflects a disconnect in knowledge between the experts and rank and file who will be quickly overcome by the number of new requirements required under the proposed rules.

Where such a broad expansion of rights to the government create massive new obligations for rank and file acquisition functions and contracting personnel, it is reasonable to conclude that contracts containing the operative clauses will require continual post-award and post-performance administrative actions pursuant to the clauses that are well beyond the scope of knowledge or capability of the personnel most likely to be responsible for those actions, including Procurement and Administrative Contracting Officers. CODSIA recommends that prior to any final implementation, DoD work with industry to create a structured and comprehensive training regime encompassing technical data and other IP concepts aimed at desk level personnel and require such training at increasingly higher levels of knowledge for all acquisition and contracting personnel up through full performance level in all the appropriate disciplines.

Without comprehensive training in IP principles, and more complete knowledge about the limits to DoD rights and contractor obligations, it is easy to contemplate that DoD contracts subject to the clauses will never be complete, be endlessly entangled in useless and costly litigation, and discourage technology innovators and their proxies in the DoD industrial base from engaging in DoD business.

III. Conclusion

As evidenced by our comments, the Proposed Rule creates significant uncertainty and confusion for industry and government alike. In view of the nature and extent of these comments, CODSIA recommends that DoD conduct additional public outreach on the Proposed Rule. Therefore, we re-emphasize our opposition to the approach being suggested in the Proposed Rule and the importance of revising the Proposed Rule in accordance with these comments. The Department should also wait for the final recommendations of the 813 Panel and any Congressional action on the FY2017 NDAA.

CODSIA looks forward to working with you to help maintain and sustain a robust, innovative and incentivized industrial base and thanks you for consideration of these comments.

Should you have any questions, or need further information, please contact Ronald J. Youngs at the Aerospace Industries Association (AIA), the CODSIA Case manager at 703-358-1045 or via email at ronald.youngs@aia-aerospace.org.

Sincerely,

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