

environmental health or safety risks addressed by this action present a disproportionate risk to children. The change to the definition of PRR would not affect the overall risk to children posed by boiler emissions. This is because the overall level of emissions, or the emissions mix from boilers, are not expected to change significantly because of the change in definition of PRR and these units remain subject to the protective standards established under CAA section 112.

*H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use*

This action is not a “significant energy action” because it is not likely to have a significant adverse effect on the supply, distribution or use of energy. The selected NHSMs affected by this proposed action would not be generated in quantities sufficient to significantly (adversely or positively) impact the supply, distribution, or use of energy at the national level. Even if 100% of the available PRR were converted to energy (an unlikely best-case scenario), that would translate to a potential increase of only 0.002% to 0.003% in the national energy supply, and these effects would be localized at recycling paper mills.

*I. National Technology Transfer and Advancement Act (NTTAA)*

This action involves technical standards. The EPA proposes to use a 2% by weight limit on the amount of non-fiber content allowed in paper recycling residuals (PRR) when burned as a non-waste fuel. This is based on a voluntary consensus standard set by the Institute of Scrap Recycling Industries (ISRI) in their Scrap Specifications Circular (2021); which identifies a 2% prohibitive material content limit for paper stock used for re-pulping paper. See page 34; <http://www.scrap2.org/specs/>. In the circular, prohibitive material is material which by its presence, in excess of the amount allowed, will make the pack unusable as the grade specified, as well as any material that may be damaging to equipment. In evaluating the grades of paper identified in the circular, the maximum allowance of prohibitive materials in mixed paper (which consists of all paper and paperboard of various qualities not limited to the type of fiber content) is 2%. The Agency proposes that this prohibitive material measure can provide an analogous measure for allowable amounts of non-fiber materials (including polystyrene foam, polyethylene film, other plastics,

waxes, adhesives, dyes and inks, clays, starches and other coating and filler material) contained within PRR.

*J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations*

The EPA believes that this action, if finalized, would not have disproportionately high and adverse human health or environmental effects on minority populations, low-income populations and/or indigenous peoples, as specified in Executive Order 12898 (59 FR 7629, February 16, 1994). The proposed change in definition of PRR is not expected to significantly change the overall level of emissions, or the emissions mix from boilers, and these units remain subject to the protective standards established under CAA section 112.

However, if EPA were to grant the petitioners’ requests, CTRT could be combusted in biomass-only boilers, including biomass boilers that are area sources under the CAA. As discussed earlier, these boilers would have higher emissions when burning CTRT rather than biomass. Emission standards for dioxins, SO<sub>2</sub>, NO<sub>x</sub>, etc. for non-major sources are addressed under the CAA section 129 standards but are not addressed by area source boiler standards under CAA section 112 which require only tune-ups. The risks from increased emissions would most likely be disproportionately borne by minority and low-income communities. In areas within three miles of boilers, the minority share of the population was found to be 33 percent, compared to the national average of 25 percent. For these same areas, the percent of the population below the poverty line (16 percent) is also higher than the national average (13 percent).

**List of Subjects in 40 CFR Part 241**

Environmental protection, Air pollution control, Waste treatment and disposal, Non-Hazardous Secondary Materials.

**Michael S. Regan,**  
*Administrator.*

For the reasons stated in the preamble, the EPA is proposing to amend 40 CFR part 241 of the Code of Federal Regulations as follows:

**PART 241—SOLID WASTES USED AS FUELS OR INGREDIENTS IN COMBUSTION UNITS**

■ 1. The authority citation for part 241 continues to read as follows:

**Authority:** 42 U.S.C. 6903, 6912, 7429.

■ 2. Amend § 241.2 by revising the definition of “paper recycling residuals” to read as follows:

**§ 241.2 Definitions.**

\* \* \* \* \*

*Paper recycling residuals (PRR)* means the secondary material generated from the recycling of paper, paperboard and corrugated containers composed primarily of fibers that are too small or weak to be used to make new paper and paperboard products. PRR that contain more than 2% by weight of non-fiber materials, including polystyrene foam, polyethylene film, other plastics, adhesives, dyes and inks, clays, starches and other coating and filler material are not PRR under this definition.

\* \* \* \* \*

[FR Doc. 2022–01074 Filed 1–27–22; 8:45 am]

**BILLING CODE 6560–50–P**

**DEPARTMENT OF DEFENSE**

**Defense Acquisition Regulations System**

**48 CFR Parts 227, 237, 239, and 252**

[Docket DARS–2019–0067]

RIN 0750–AK87

**Defense Federal Acquisition Regulation Supplement: Noncommercial Computer Software (DFARS Case 2018–D018)**

**AGENCY:** Defense Acquisition Regulations System, Department of Defense (DoD).

**ACTION:** Proposed rule.

**SUMMARY:** DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a section of the National Defense Authorization Act for Fiscal Year 2018 that requires DoD to consider all noncommercial computer software and related materials necessary to meet the needs of the agency. In addition to the request for written comments on this proposed rule, DoD will hold a public meeting to hear the views of interested parties.

**DATES:**

*Submission of Comments:* Comments on the proposed rule should be submitted in writing to the address shown below on or before March 29, 2022, to be considered in the formation of a final rule.

*Public Meeting:* A virtual public meeting will be held on March 3, 2022, from 11:00 a.m. to 2:30 p.m. Eastern time. DoD will also reserve 2:30 p.m. to 5:00 p.m. Eastern time on the same day,

if DoD determines additional discussion is necessary. The public meeting will end at the stated time, or when the discussion ends, whichever comes first.

**Registration:** Registration to attend the public meeting must be received no later than close of business on February 24, 2022. Information on how to register for the public meeting may be found under the heading **SUPPLEMENTARY INFORMATION** section of this notice.

**ADDRESSES:**

**Public Meeting:** A virtual public meeting will be held using Zoom video conferencing software.

**Submission of Comments:** Submit written comments identified by DFARS Case 2018–D018, using any of the following methods:

- **Federal eRulemaking Portal:** <https://www.regulations.gov>. Search for “DFARS Case 2018–D018.” Select “Comment” and follow the instructions to submit a comment. Please include “DFARS Case 2018–D018” on any attached documents.

- **Email:** [osd.dfars@mail.mil](mailto:osd.dfars@mail.mil). Include DFARS Case 2018–D018 in the subject line of the message.

Comments received generally will be posted without change to <https://www.regulations.gov>, including any personal information provided. To confirm receipt of your comment(s), please check <https://www.regulations.gov>, approximately two to three days after submission to verify posting.

**FOR FURTHER INFORMATION CONTACT:** Mr. David E. Johnson, telephone 571–372–6115.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

DoD is proposing to amend the DFARS to implement section 871 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2018 (Pub. L. 115–91). Section 871 established new direction at 10 U.S.C. 2322a, Requirement for consideration of certain matters during acquisition of noncommercial computer software. The statute requires that DoD, as part of any negotiation for such software, consider all noncommercial computer software and related materials necessary to meet the needs of the agency. This rule provides direction to DoD both to improve acquisition planning and to identify and negotiate for software deliverables and license rights at a fair and reasonable price before contract award. DoD published an advance notice of proposed rulemaking (ANPR) on January 14, 2020, at 85 FR 2101 and hosted a public meeting on February 18, 2020, to obtain the views of interested

parties. DoD accepted public comments through March 16, 2020. Two respondents submitted public comments in response to the ANPR.

**II. Public Meeting**

DoD is interested in continuing a dialogue with experts and interested parties in Government and the private sector regarding amending the DFARS to implement section 871 of the NDAA for FY 2018, which requires DoD to consider all noncommercial computer software and related materials necessary to meet the needs of the agency.

**Registration:** Individuals wishing to participate in the virtual meeting must register by February 24, 2022, to facilitate entry to the meeting.

Registration for the virtual meeting will be valid also for the additional discussion time, if DoD determines additional time is needed (see the **DATES** section of this preamble). Interested parties may register for the meeting by sending the following information via email to [osd.dfars@mail.mil](mailto:osd.dfars@mail.mil) and include “Public Meeting, DFARS Case 2018–D018” in the subject line of the message:

- Full name.
- Valid email address, which will be used for admittance to the meeting.
- Valid telephone number, which will serve as a secondary connection method. Registrants must provide the telephone number they plan on using to connect to the virtual meeting.
- Company or organization name.
- Whether the individual desires to make a presentation.

Pre-registered individuals will receive instructions for connecting using the Zoom video conferencing software not more than one week before the meeting is scheduled to commence.

**Presentations:** Presentations will be limited to 5 minutes per company or organization. This limit may be subject to adjustment, depending on the number of entities requesting to present, in order to ensure adequate time for discussion. If you wish to make a presentation, please submit an electronic copy of your presentation via email to [osd.dfars@mail.mil](mailto:osd.dfars@mail.mil) no later than the registration date for the specific meeting. Each presentation should be in PowerPoint to facilitate projection during the public meeting and should include the presenter’s name, title, organization affiliation, telephone number, and email address on the cover page.

**Correspondence, Comments, and Presentations:** Please cite “Public Meeting, DFARS Case 2018–D018” in all correspondence related to the public meeting. There will be no transcription at the meeting. The submitted

presentations will be the only record of the public meeting and will be posted to the following website at the conclusion of the public meeting:

[https://www.acq.osd.mil/dpap/dars/technical\\_data\\_rights.html](https://www.acq.osd.mil/dpap/dars/technical_data_rights.html).

**III. Discussion and Analysis**

DoD reviewed the public comments submitted in response to the ANPR in the development of the proposed rule. One respondent provided a comment that indicated concurrence with the rule. A discussion of the remaining comments and the changes made to the rule as a result of those comments are provided as follows:

**A. Summary of Significant Changes From the ANPR**

DFARS 227.7202–1 and 227.7203–2 were clarified in response to public comments. New text was added to DFARS 227.7203–2 to provide additional guidance on assessing life-cycle needs. Several changes were made to terms in the proposed rule as follows:

- The term “related data” was replaced with related recorded information;
- The description of required software libraries was revised to further clarify its scope; and
- The Government’s minimum needs in DFARS 227.7103–2(b)(1) and 227.7203–2(b)(1) were clarified.

The proposed definition of data at DFARS 227.001 was deleted. DFARS 227.7203–2(b)(1) was revised to align with the text in DFARS 227.7103–2(b)(1). The definition of restricted rights was revised to permit the Government to make and use a reasonable number of copies of computer software for the purposes described in the contract clauses at DFARS 252.227–7014, Rights in Technical Data—Noncommercial Items, and 252.227–7018, Rights in Noncommercial Technical Data and Computer Software—Small Business Innovation Research (SBIR) Program.

**B. Analysis of Public Comments**

**1. Proposed Rule Applies Program Management Elements to Contracting Personnel**

**Comment:** The respondent expresses concern that the rule addresses functions that are normally performed by program managers, engineers, configuration managers, and other program personnel and places those responsibilities on contracting personnel. The respondent recommends that these requirements would be best addressed within a program’s intellectual property (IP) strategy.

*Response:* DoD acknowledges that the requirements for program personnel are currently addressed in DoD instructions (DoDIs), such as DoDI 5000.87, Operation of the Software Acquisition Pathway, and DoDI 5010.44, Intellectual Property (IP) Acquisition and Licensing. DFARS 227.7203–2(a) currently provides for contracting officers to work closely with program personnel when developing requirements to meet the Government’s needs. Currently, DFARS 227.7203–2(b) delineates the responsibilities of data managers in assessing life-cycle needs, and 227.7203–2(c) requires contracting officers to ensure that solicitations and contracts include certain requirements for software deliverables. The rule proposes to revise this language because the statute impacts the direction related to assessments of life-cycle needs, solicitations, and contracts.

## 2. Application to Commercial Computer Software

*Comment:* The respondent asserts that the plain language in paragraphs (a) and (b) of 10 U.S.C. 2322a make it clear that Congress intended for the provision to only apply to noncommercial computer software.

*Response:* Although the statute relates to the acquisition of noncommercial computer software, the statute also discourages reliance on “external or additional computer software or technical data” with no limitations with respect to commerciality. DoD revised DFARS 227.7203–2(c)(6) to clarify that the proposed rule is limited to noncommercial computer software, except in cases where the software relies on additional internal or external commercial computer software or technical data. The proposed rule permits reliance on additional internal or external computer software when such software is commercially available with the necessary license rights. DFARS 227.7202–1 and 227.7203–2 have been revised to address the relationship between noncommercial software and commercial software while maintaining the policies set forth in DFARS 227.7202–1(c).

## 3. Proposed Changes to DFARS 227.7203–2 Encourage Acquisition of All Forms of Noncommercial Computer Software in All Instances

*Comment:* The respondent expresses concern that the proposed rule could be interpreted as requiring the contracting officer to acquire all forms of noncommercial computer software in all instances, rather than tailoring acquisitions to meet DoD’s actual needs. The respondent recommends an

emphasis on the life-cycle needs for a program or system, including software maintenance.

*Response:* DFARS 227.7203–1(a) provides that DoD may acquire only the computer software and computer software documentation, and the rights in such software or documentation, necessary to satisfy agency needs. This direction remains unchanged. The proposed rule does require the assessment of life-cycle needs to address acquisition of software at appropriate times in the life cycle of a product, program, or system.

## 4. DFARS 227.7203–2 Should Consider Whether the Software Was Developed at Private Expense

*Comment:* The respondent recommends that the rule consider whether the software was developed at private expense to incentivize investment of private funds into noncommercial software development to meet DoD needs. The respondent also recommends DoD consider alternatives to the delivery of source code and related software design details.

*Response:* DoD concurs with the comment and revised DFARS 227.7203–2(b)(2)(ii) to include consideration of alternatives to the delivery of source code and related software design details for privately developed noncommercial computer software.

## 5. References to Necessary or Associated License Rights May Be Subject to Misinterpretation

*Comment:* The respondent states that the proposed DFARS 227.7203–2 should not refer to “necessary” or “associated” license rights when discussing the need to acquire specific types of software. There is a risk that this could be misinterpreted as requiring a separate licensing scheme that is not subject to the existing noncommercial software licensing policies in DFARS 227.7203–1.

*Response:* Existing policies in DFARS 227.7203–1 and 227.7203–2 address these concerns. Contracting officers must ensure consistency with DFARS 227.7203–1(c), which prohibits a contractor from being required to sell or relinquish to DoD greater rights than required under DFARS 227.7203–5(a)(3) through (6).

## 6. New Terms Introduced in the ANPR

*Comment:* The respondent states a concern that the proposed new definition for data is not needed to implement 10 U.S.C. 2322a and would ultimately cause confusion within the acquisition workforce. The respondent also expresses concerns about the new

term “related data” and recommends “related computer software documentation” instead.

*Response:* DoD concurs and has removed the definition of data from the proposed rule. To avoid confusion about the scope of the term “related data” and better align with the broader scope of the term “related materials” in 10 U.S.C. 2322a, “related data” has been changed to “related recorded information,” which is more consistent with 10 U.S.C. 2302(4) and existing DFARS terminology.

## 7. Use of Terms Consistent With Other Acquisition Documents

*Comment:* The respondent asserts that DFARS 227.7203–2 should use terminology used in other acquisition documents, such as those contained in a Data Item Description (DID). The respondent expresses concerns with the terms “required software libraries” and “software revision history.”

*Response:* The term “required software libraries” is intended to implement the term “required libraries” in 10 U.S.C. 2322a. DFARS 227.7203–2(b)(2)(i) and 227.7203–2(c)(6)(ii) have been revised to include examples of required software libraries. The term “software revision history” has been changed to “software version history” consistent with the term “software version” used in the “Software Version Description” DID, DI–IPSC–81442A.

## 8. Policy Changes to DFARS 239.101 Should Require a Written Determination by the Head of the Contracting Activity

*Comment:* The respondent recommends that a parenthetical should be added to ensure the policy change of DFARS 239.101 is only used where there is a written determination by the “head of the contracting authority.”

*Response:* DFARS 239.101(1) currently requires a written determination by the head of the contracting activity.

## 9. Future Rulemaking Should Address Recommendations Presented by the 2018 Government-Industry Advisory Panel on Technical Data Rights

*Comment:* Although the respondent acknowledges that this recommendation is not within the scope of implementing 10 U.S.C. 2322a, the respondent recommends that DoD’s future rulemaking address the specific Government-industry recommendations included in the 2018 Report submitted by the Government-Industry Advisory Panel on Technical Data Rights (the “Section 813 Panel Final Report”).

*Response:* To the extent that such recommendations align with other

proposed revisions made to implement 10 U.S.C. 2322a, DoD considered recommendations in the Section 813 Panel Final Report. DoD is proposing various DFARS revisions that adopt recommendations made in the Section 813 Panel Final Report.

#### C. Other Changes

DFARS 227.7100 and 227.7200 were revised to remove a reference to 10 U.S.C. 2325 that was revoked in 1994 (Pub. L. 103–355) and to correct the citation to Executive Order 12591. DFARS 227.7100 and 227.7200 were also revised to emphasize the importance of assessing life-cycle needs.

DFARS 227.7203–2(b)(2)(i)(B) through (D) were revised to be consistent with acquisition policies in section 3.2 of DoDI 5000.87, which is closely aligned with the subject matter of this case. DFARS 227.7203–2(c)(6) was also revised to clarify the contracting officer's responsibilities with respect to this section. DFARS 237.102 was revised to add references to 227.7202 and 227.7203, emphasizing the need to consider this guidance in service contracts.

The definition of technical data in the contract clauses at DFARS 252.227–7013, 252.227–7015, and 252.227–7018 has been revised to clarify the types of information excluded from the definition in 10 U.S.C. 2302.

#### IV. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-the-Shelf Items

This proposed rule does not create any new solicitation provisions or contract clauses. It does not change the applicability of any existing provisions or clauses included in solicitations and contracts valued at or below the simplified acquisition threshold or for commercial items, including commercially available off-the-shelf items.

#### V. Executive Orders 12866 and 13563

E.O.s 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of

E.O. 12866, Regulatory Planning and Review, dated September 30, 1993.

#### VI. Congressional Review Act

As required by the Congressional Review Act (5 U.S.C. 801–808) before an interim or final rule takes effect, DoD will send a copy of the interim or final rule and the “Submission of Federal Rules Under the Congressional Review Act” form to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States. A major rule under the Congressional Review Act cannot take effect until 60 days after it is published in the **Federal Register**. This rule is not anticipated to be a major rule under 5 U.S.C. 804.

#### VII. Regulatory Flexibility Act

DoD does not expect this proposed rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the statutory requirements are directed at the internal processes of the Government rather than contractors. However, an initial regulatory flexibility analysis has been performed and is summarized as follows:

DoD is proposing to implement section 871 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2018 (Pub. L. 115–91). Section 871 established new direction at 10 U.S.C. 2322a, Requirement for consideration of certain matters during acquisition of noncommercial computer software. The statute requires that DoD, as part of any negotiation for such software, consider all noncommercial computer software and related materials necessary to meet the needs of the agency.

The objective of the rule is to ensure that the Government identifies and acquires all software necessary to meet its needs at appropriate times in the life cycle of a product, program, or system. The legal basis for the rule is section 871 of the NDAA for FY 2018.

The rule may impact small entities that are awarded DoD contracts for noncommercial computer software, to include contracts under the Small Business Innovation Research and Technology Transfer Programs. Based on data from the Federal Procurement Data System (FPDS) and the Electronic Data Access (EDA) for FY 2019 through FY 2020, DoD estimates that an average of 6,263 unique small entities are awarded an average of 30,146 contract actions for noncommercial software annually.

This proposed rule does not impose any new reporting, recordkeeping or other compliance requirements.

This proposed rule does not duplicate, overlap, or conflict with any other Federal rules.

There are no known alternatives which would accomplish the stated objectives of the applicable statute.

DoD invites comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (DFARS Case 2018–D018), in correspondence.

#### VIII. Paperwork Reduction Act

Although the Paperwork Reduction Act (44 U.S.C. chapter 35) applies to this rule, these changes to the DFARS do not impose additional information collection requirements to the paperwork burden previously approved under Office of Management and Budget (OMB) Control Number 0704–0369, entitled “DFARS Subpart 227.71, Rights in Technical Data; and Subpart 227.72, Rights in Computer Software and Computer Software Documentation, and related provisions and clauses.”

#### List of Subjects in 48 CFR Parts 227, 237, 239, and 252

Government procurement.

**Jennifer D. Johnson,**  
*Editor/Publisher, Defense Acquisition Regulations System.*

Therefore, 48 CFR parts 227, 237, 239, and 252 are proposed to be amended as follows:

■ 1. The authority citation for 48 CFR parts 227, 237, 239, and 252 continues to read as follows:

**Authority:** 41 U.S.C. 1303 and 48 CFR chapter 1.

#### PART 227—PATENTS, DATA, AND COPYRIGHTS

■ 2. Revise the heading for subpart 227.71 to read as follows:

##### Subpart 227.71—Technical Data and Associated Rights

■ 3. Amend section 227.7100 by revising paragraph (a) to read as follows:

##### 227.7100 Scope of subpart.

\* \* \* \* \*

(a) Prescribes policies and procedures for the acquisition of technical data and the rights to use, modify, reproduce,

release, perform, display, or disclose technical data. It implements the following laws and Executive order:

- (1) 10 U.S.C. 2302(4).
- (2) 10 U.S.C. 2305(d)(4).
- (3) 10 U.S.C. 2320.
- (4) 10 U.S.C. 2321.
- (5) 10 U.S.C. 7317.
- (6) 17 U.S.C. 1301, *et seq.*
- (7) Public Law 103–355.
- (8) Executive Order 12591 (subsection 1(b)(7)).

\* \* \* \* \*

■ 4. Amend section 227.7103–2 by revising paragraph (b)(1) to read as follows:

**227.7103–2 Acquisition of technical data.**

\* \* \* \* \*

(b)(1) Data managers or other requirements personnel are responsible for identifying the Government's life-cycle needs for technical data. Technical data needs must be established giving consideration to the contractor's economic interests in technical data pertaining to items, components, or processes that have been developed at private expense; the Government's costs to acquire, maintain, store, retrieve, and protect the technical data; reprocurement needs; repair, maintenance and overhaul philosophies; spare and repair part considerations; and whether procurement of the items, components, or processes can be accomplished on a form, fit, or function basis. When it is anticipated that the Government will obtain unlimited or government purpose rights in technical data that will be required for competitive spare or repair parts procurements, such data should be identified as deliverable technical data items. Reprocurement needs may not be a sufficient reason to acquire detailed manufacturing or process data when items or components can be acquired using performance specifications, form, fit, and function data, or when there are a sufficient number of alternate sources that can reasonably be expected to provide such items on a performance specification or form, fit, or function basis.

\* \* \* \* \*

■ 5. Revise the heading for subpart 227.72 to read as follows:

**Subpart 227.72—Computer Software, Computer Software Documentation, and Associated Rights**

■ 6. Revise section 227.7200 to read as follows:

**227.7200 Scope of subpart.**

(a) This subpart—

(1) Prescribes policies and procedures for the acquisition of computer software

and computer software documentation, and the rights to use, modify, reproduce, release, perform, display, or disclose such software or documentation. It implements the following laws and Executive order:

- (i) 10 U.S.C. 2302(4).
- (ii) 10 U.S.C. 2305(d)(4).
- (iii) 10 U.S.C. 2320.
- (iv) 10 U.S.C. 2321.
- (v) 10 U.S.C. 2322a.
- (vi) Executive Order 12591

(subsection 1(b)(7)).

(2) Does not apply to—

(i) Computer software or computer software documentation acquired under GSA schedule contracts; or

(ii) Releases of computer software or computer software documentation to litigation support contractors (see subpart 204.74).

(b) See PGI 227.7200(b) for guidance and information in DoD issuances.

■ 7. Amend section 227.7202–1 by adding paragraph (d) to read as follows:

**227.7202–1 Policy.**

\* \* \* \* \*

(d) When establishing contract requirements and negotiation objectives to meet agency needs, the Government shall consider the factors identified in 227.7203–2(b) and (c) for commercial computer software and computer software documentation, as applicable in paragraph (c) of this section.

■ 8. Amend section 227.7203–2 by—

■ a. Revising the section heading and paragraphs (b) and (c)(4) and (5); and

■ b. Adding paragraph (c)(6).

The revisions and addition read as follows:

**227.7203–2 Acquisition of noncommercial computer software and computer software documentation and associated rights.**

\* \* \* \* \*

(b)(1) Data managers or other requirements personnel are responsible for identifying the Government's life-cycle needs for computer software and computer software documentation. See PGI 227.7203–2(b) for further guidance on assessing life-cycle needs. In addition to desired software performance, compatibility, or other technical considerations, identification of life-cycle needs should consider such factors as—

(i) The contractor's economic interests in software that has been developed at private expense;

(ii) The Government's costs to acquire, maintain, store, retrieve, and protect the computer software and computer software documentation;

(iii) Multiple site or shared use requirements;

(iv) Whether the Government's software maintenance philosophy will

require the right to modify or have third parties modify the software; and

(v) Any special computer software documentation requirements.

(2)(i) *Procurement planning.* To the maximum extent practicable, when assessing the life-cycle needs, data managers or other requirements personnel will address in the procurement planning and requirements documents (*e.g.*, acquisition plans, purchase requests) the acquisition at appropriate times in the life cycle of all computer software, related recorded information, and associated license rights necessary to—

(A) Reproduce, build, or recompile the software from its source code and required software libraries (*e.g.*, software libraries called, invoked, or linked by the computer software source code that are necessary for the operation of the software);

(B) Conduct required computer software testing and evaluation;

(C) Integrate and deploy computer programs on relevant hardware including developmental, operational, diagnostic, training, or simulation environments; and

(D) Sustain and support the software over its life cycle.

(ii) *Delivery of alternatives to source code and related software design details.* The assessment of life-cycle needs should consider alternatives to the delivery of source code and related software design details for privately developed computer software as necessary to meet the Government's needs, such as—

(A) Technical data and computer software sufficient to implement a modular open system approach or a similar approach (see PGI 227.7203–2(b)(2)(ii)(A) for guidance on alternatives to source code and related software design details);

(B) Access to technical data or computer software; see PGI 227.7203–2(b)(2)(ii)(B) and (C) for guidance on use of access agreements to contractor source code and related software design details;

(C) Software support and maintenance provided directly from the contractor; or

(D) Other contracting or licensing mechanisms including priced options, specially negotiated licenses, direct licensing between contractors for qualifying second sources, data escrow agreements, deferred delivery solutions, and subscription agreements. See PGI 227.7203–2(b)(2)(ii)(D) for guidance on use of escrow agreements.

(3) When reviewing offers received in response to a solicitation or other request for computer software or computer software documentation, data

managers must balance the original assessment of the Government's needs with prices offered.

(c) \* \* \*

(4) Include delivery schedules and acceptance criteria for each deliverable item;

(5) Specifically identify the place of delivery for each deliverable item; and

(6) Specify in the negotiated terms that any required noncommercial computer software, related recorded information, and associated license rights identified in the assessment of life-cycle needs in paragraph (b) of this section shall, to the extent appropriate—

(i) Include computer software delivered in a digital format compatible with applicable computer programs on relevant system hardware;

(ii) Not rely on additional internal or external noncommercial or commercial technical data and software, unless such technical data or software is—

(A) Included in the items to be delivered with all necessary license rights; or

(B) Commercially available with all necessary license rights; and

(iii) Include sufficient information, with all necessary license rights, to support maintenance and understanding of interfaces and software version history when the negotiated terms do not allow for the inclusion of the external or additional noncommercial or commercial technical data and software.

**PART 237—SERVICE CONTRACTS**

■ 9. Add section 237.102–XX to read as follows:

**237.102–XX Acquisition of computer software and computer software documentation under services contracts.**

(a) See 227.7202 for policy on the acquisition of commercial computer software and commercial computer software documentation for services contracts that require the development or modification of commercial computer software.

(b) See 227.7203 for policy on the acquisition of noncommercial computer software and noncommercial computer software documentation for services contracts that require the development or modification of noncommercial computer software.

**PART 239—ACQUISITION OF INFORMATION TECHNOLOGY**

■ 10. Amend section 239.101 by adding paragraph (4) to read as follows:

**239.101 Policy.**

\* \* \* \* \*

(4) See 227.7203 for policy on the acquisition of noncommercial computer software and noncommercial computer software documentation.

**PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES**

■ 11. Amend section 252.227–7013 by revising the section heading, the date of the clause, and paragraph (a)(15) to read as follows:

**252.227–7013 Rights in Technical Data—Noncommercial Items.**

\* \* \* \* \*

**Rights in Technical Data—Noncommercial Items (DATE)**

(a) \* \* \*

(15) *Technical data* means recorded information, regardless of the form or method of the recording, of a scientific or technical nature (including computer software documentation). The term does not include computer software or financial, administrative, cost or pricing, or management information, or information incidental to contract administration.

\* \* \* \* \*

■ 12. Amend section 252.227–7014 by revising the section heading, the date of the clause, and paragraph (a)(15)(iii) to read as follows:

**252.227–7014 Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation.**

\* \* \* \* \*

**Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation (DATE)**

(a) \* \* \*

(15) \* \* \*

(iii) Make and use a reasonable number of copies of the computer software for safekeeping (archive), backup, development, testing, evaluation, integration, or modification purposes, or diagnosing and correcting deficiencies or vulnerabilities in a computer program;

\* \* \* \* \*

■ 13. Amend section 252.227–7015 by revising the section heading, the date of the clause, and paragraph (a)(5) to read as follows:

**252.227–7015 Technical Data—Commercial Items.**

\* \* \* \* \*

**Technical Data—Commercial Items (DATE)**

(a) \* \* \*

(5) *Technical data* means recorded information, regardless of the form or method of recording, of a scientific or technical nature (including computer software documentation). The term does not include computer software or financial, administrative, cost or pricing, or management information, or information incidental to contract administration.

\* \* \* \* \*

■ 14. Amend section 252.227–7018 by revising the section heading, the date of the clause, and paragraphs (a)(18)(iii) and (a)(20) to read as follows:

**252.227–7018 Rights in Noncommercial Technical Data and Computer Software—Small Business Innovation Research (SBIR) Program.**

\* \* \* \* \*

**Rights in Noncommercial Technical Data and Computer Software—Small Business Innovation Research (SBIR) Program (DATE)**

(a) \* \* \*

(18) \* \* \*

(iii) Make and use a reasonable number of copies of the computer software for safekeeping (archive), backup, development, testing, evaluation, integration, or modification purposes, or diagnosing and correcting deficiencies or vulnerabilities in a computer program;

\* \* \* \* \*

(20) *Technical data* means recorded information, regardless of the form or method of the recording, of a scientific or technical nature (including computer software documentation). The term does not include computer software or financial, administrative, cost or pricing, or management information, or information incidental to contract administration.

\* \* \* \* \*