

The Pros and Cons of the Senate's DoD Data Rights Plan

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Agenda

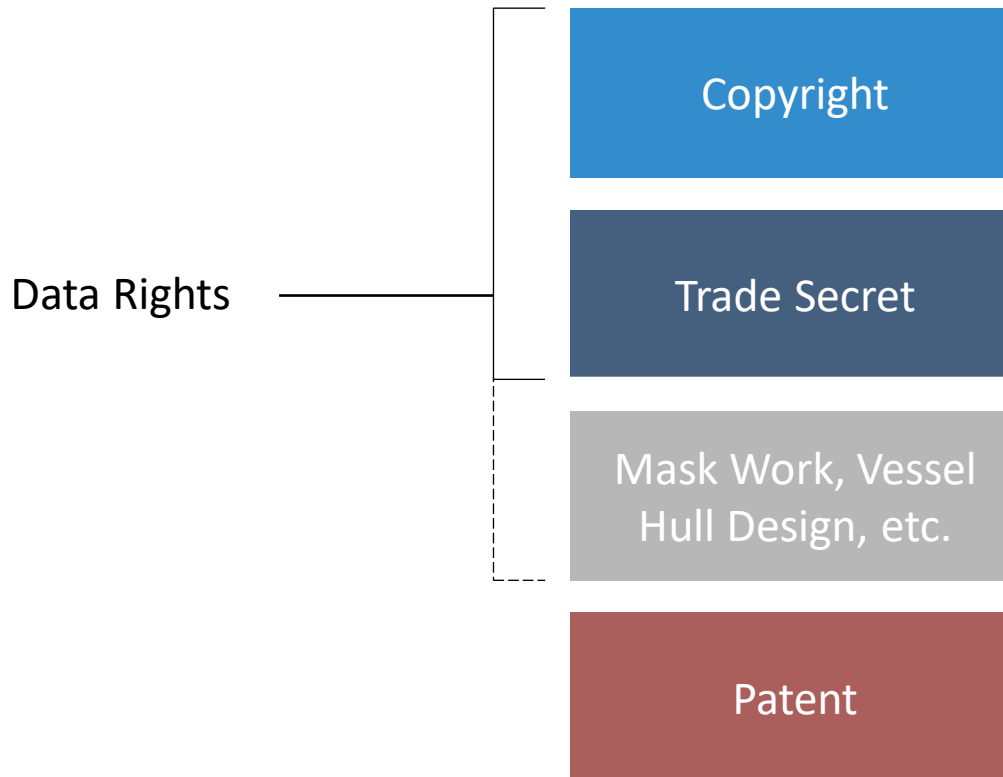
- DoD Data Rights Framework
- Senate FY24 NDAA Proposal
- New Protections for OMIT Data
- Opening of Detailed Manufacturing or Process Data
- Impact of Proposal
- Outstanding Issues
- Status of FY24 NDAA

Article:

<https://www.stepto.com/a/web/93WmbG52wRgVjQfvtaWmhM/law360-the-pros-and-cons-of-the-senates-dod-data-rights-plan.pdf>

Nature of Data Rights

- Data rights are not a form of intellectual property
- Instead, data rights are a license/permission granted by a contractor under a Government contract



Types of Data

| Type | Covered Items |
|---------------------|---|
| Technical Data | <ul style="list-style-type: none">• Scientific or technical information (e.g., reports and schematics)• Computer databases (e.g., AI training sets)• Computer software documentation (e.g., manuals and instructions) |
| Computer Software | <ul style="list-style-type: none">• Computer programs• Source code• Object code |
| Administrative Data | <ul style="list-style-type: none">• Financial, cost, or pricing data• Contract management and administration data |

Types of Rights

| Data Rights | Impact |
|--|---|
| Unlimited Rights | <ul style="list-style-type: none"> Any use and purpose, including public disclosure and commercial development Right to modify and make derivative works (i.e., new software) |
| Government Purpose Rights (DoD only) ~5 years | <ul style="list-style-type: none"> Within Government and under Government contracts No commercial use Protections for third-party use or disclosure |
| Limited / Restricted Rights | <ul style="list-style-type: none"> Within Government and limited disclosures to third parties (machine-by-machine for restricted computer software) No commercial use or manufacture Protections for third-party use or disclosure |
| Specifically Negotiated Rights | <ul style="list-style-type: none"> Generally free to negotiate down to limited rights Often available in non-standard agreements (e.g., OTAs and CRADAs) |

Government Data Rights

- Unlimited Rights:
 - Pertaining to item, component, or process developed exclusively with Government funds / data created with same (software and R&D)
 - *Tests and analyses when specified for performance (non-commercial)**
 - *Form, fit, and function data**
 - *Operation, maintenance, installation, or training (OMIT)**
(unrelated to detailed manufacturing or processes)
 - *Computer software documentation to be delivered (non-commercial)**
 - *Publicly available or disclosed without restriction**
- Government Purpose Rights: Pertaining to item, component, or process developed with mixed funds (and marked if delivered) / data created with same
- Limited/Restricted Rights: Confidential and developed exclusively with private funds (and marked if delivered)

** Cannot be overridden by Government purpose or limited/restricted rights assertion*

Relevant Subtypes of Data

- Form, Fit, or Function

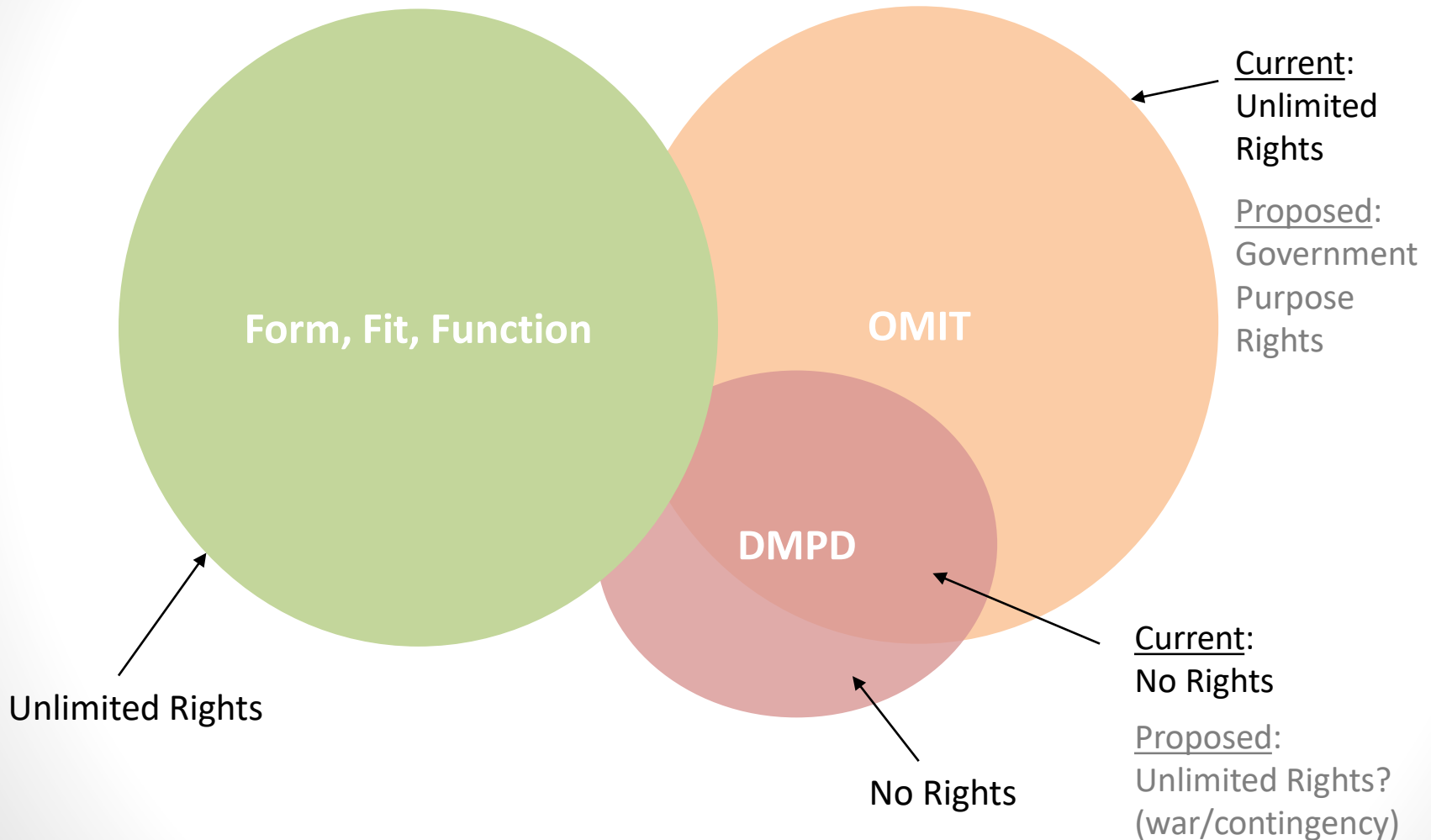
Overall characteristics for identification of physically and functionally interchangeable items

- Operation, Maintenance, Installation, or Training (OMIT)
(no definition)

- Detailed Manufacturing and Process Data (DMPD)

Steps, sequences, and conditions of manufacturing, processing, or assembly for item or process

Relevant Subtypes of Data



Senate FY24 NDAA Proposal: Baseline

Current Framework

Basic Protection

Limited Rights

(b)(2) Except as provided in [(b)(4)] . . . , in the case of an item or process that is developed by a contractor or subcontractor exclusively at private expense, the contractor or subcontractor may restrict the right of the United States to release or disclose technical data pertaining to the item or process to persons outside the government or permit the use of the technical data by such persons.

...

Exceptions

(b)(3) Paragraph [(b)(2)] does not apply to technical data that—

...

Form, Fit, Function

(B) relates to form, fit, or function;

OMIT (Except DMPD)

(C) is necessary for operation, maintenance, installation, or training (other than detailed manufacturing or process data, including such data pertaining to a major system component)

Senate FY24 NDAA Proposal: OMIT Data

Proposed Framework

Basic Protection

Limited Rights

(b)(2) Except as provided in [(b)(3)] . . . , in the case of an item or process that is developed by a contractor or subcontractor exclusively at private expense, the contractor or subcontractor may restrict the right of the United States to release or disclose technical data pertaining to the item or process to persons outside the government or permit the use of the technical data by such persons.

...

Exceptions

(b)(3) Paragraph [(b)(2)] does not apply to technical data that—

...

Form, Fit, Function

(B) relates to form, fit, or function;

OMIT (Except DMPD)

(C) is necessary for operation, maintenance, installation, or training (other than detailed manufacturing or process data, including such data pertaining to a major system component) for which the United States shall have government purpose rights, unless the Government and the contractor negotiate different license rights

Senate FY24 NDAA Proposal: DMPD

Proposed Framework

Basic Protection

Limited Rights

(b)(2) Except as provided in [(b)(4)] . . . , in the case of an item or process that is developed by a contractor or subcontractor exclusively at private expense, the contractor or subcontractor may restrict the right of the United States to release or disclose technical data pertaining to the item or process to persons outside the government or permit the use of the technical data by such persons.

...

Exceptions

(b)(4) Notwithstanding paragraph [(b)(2)], the United States may release or disclose technical data to persons outside the Government, or permit the use of technical data by such persons, if—

(A) Such release, disclosure, or use—

DMPD

(iii) is a release, disclosure, or use of **detailed manufacturing or process data**— (I) that is necessary for operation, maintenance, installation, or training and shall be used only for operation, maintenance, installation, or training purposes supporting wartime operations or contingency operations; and (II) for which the head of an agency determines that the original supplier of such data will be unable to satisfy military readiness or operational requirements for such operations.

Impact: OMIT Data

1. Preserves trade secret protections
2. Limits competitor use in commercial operations
3. Should provide right to pursue claims directly for another contractor's misuse of data

Impact: DMPD

1. Potential loss of trade secret protections
2. Permits competitors to use DMPD in competing government contracts
 - Disproportionately impacts small businesses without resources to transition technology
 - Limits potential for vendor-lock when constrained by supply or contract terms

DMPD Limitations

| Limitation | Considerations |
|--|--|
| <p><u>Type of Data</u> “necessary for operation, maintenance, installation, or training”</p> | <ul style="list-style-type: none"> • Will likely limit to DMPD that is OMIT data • DMPD-OMIT can still be very broad, with DoD arguing that it extends to manufacturing |
| <p><u>Use</u> “used only for operation, maintenance, installation, or training purposes supporting wartime operations or contingency operations”</p> | <ul style="list-style-type: none"> • OMIT field of use limits other activities like commercial sales (similar to government purpose rights) • Wartime or contingency support limitation limits uses outside of national security, but can be broad (e.g., terrorism/cyber) |
| <p><u>Circumstances</u> “the head of an agency determines that the original supplier of such data will be unable to satisfy military readiness or operational requirements for such operations”</p> | <ul style="list-style-type: none"> • No limit on delegation • No statutory appeals/review process • Disproportionate impact on small businesses |

Outstanding Issues

- Applicability to Computer Software
 - DoD has historically extended statutory framework to software
 - No statutory limitation on doing so
- Applicability to Commercial Items and SBIR Contracts
 - OMIT data rights already supersede commercial item and SBIR protections
 - No statutory limitation on doing same with new DMPD rights
- Compensation
 - Likely no intent to provide compensation for using DMPD or destroying trade secret
 - Analogous frameworks contemplate compensation (e.g., march-in rights, classified/nuclear inventions, and the Defense Production Act)
 - May have taking or unconstitutional condition claims

Status of FY24 NDAA

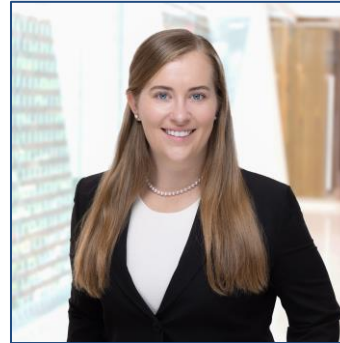
- July 14, 2023 - House Passed H.R.2670
- July 27, 2023 - Senate Passed S.2226 (engrossed House bill)
- September 2023 – Conference Committee Conferees announced to resolve bicameral differences
- Although Congress is addressing a variety of other priorities, including federal appropriations, enactment of the FY24 NDAA is expected by year end (~Dec. 15)

Questions?



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Tyler Evans focuses his practice on assisting clients in resolving complex US government contracting issues. He has significant experience in contract negotiations, and regularly represents government contractors in the defense and life sciences industries. Clients turn to Tyler for assistance with research and development contracting, non-traditional agreements, intellectual property, negotiations, flow-down requirements, small business issues, sourcing restrictions, costs, and compliance.



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Anna Menzel represents clients in matters arising from contracting with the government, including protesters and intervenors in bid protests at the Government Accountability Office and the Court of Federal Claims, contract disputes and claims, and compliance with US federal and state procurement regulations.