

April 19, 2019

RESPONSE FROM THE SECTION 809 PANEL TO THE DEPARTMENT OF DEFENSE LETTER TO CONGRESS ON THE PANEL'S FINAL REPORT

On March 16, 2019, the Undersecretary of Defense for Acquisition and Sustainment responded to the Section 809 Panel's three-volume *Final Report* with letters and commentary delivered to the House and Senate Armed Services Committees and Appropriations Committees. This document responds to their commentary, clarifying inaccuracies where necessary.

Note that the recommendations are not in chronological order (i.e., from 1 to 98) but are in the same order as found in the undersecretary's response, which correlates to the thematic organization of recommendations in the panel's *Roadmap*, published on February 15, 2019. Full language for all recommendations can be found at the panel's website, <https://section809panel.org>.

**Recommendation 35 (Volume 3, Section 1, p. 7): Replace commercial buying and the existing simplified acquisition procedures and thresholds with simplified readily available procedures for procuring readily available products and services and readily available products and services with customization.**

**OSD Response:** More research required to evaluate the impacts of this radical change to commercial buying. Impacts include using commercial buying procedures for almost all DoD requirements (including Patriot missiles), prohibitions on obtaining certified cost or pricing data to establish fair and reasonable prices, eliminating up-front transparency and reducing competition, eliminating small business set-asides and DoD's ability to effectively use automated systems such as the System for Award Management (SAM), and the prohibition on flow-down of Federal Acquisition Regulation (FAR) and Defense Federal Acquisition Regulation Supplement (DFARS) clauses, including those pertaining to cyberterrorism, counterfeit parts, convict labor, child labor, prohibition of segregated facilities, equal opportunity, combatting trafficking in persons, employment eligibility verification, workplace safety, kickbacks, whistleblower protection, and procurement integrity.

**809 Panel Comments:** The Panel recommended both evolutionary and revolutionary changes to the defense acquisition system. Our *Interim Report* and Volumes 1 and 2 of the *Final Report* contain evolutionary changes, such as the changes to commercial buying processes. Volume 3 contains both evolutionary and revolutionary changes. Recommendation 35 is a revolutionary change that can put the defense acquisition system on a war footing and allow it to get inside the turn of the United States' near-peer competitors.

*The Patriot missile is clearly not a readily available product.* The Panel is unclear how OSD concluded the Patriot missile could be acquired using these readily available procedures. The Patriot missile is clearly a defense-unique item, which should be acquired using procedures largely similar to the ones used today under FAR Part 15. By contrast, readily available and readily available with customization procedures are for products and services that “can be ordered directly by customers” or “are sold in the private sector.”

Prohibitions on obtaining certified cost or pricing data would only apply to readily available and readily available with customization procedures, which are used to buy from the private sector marketplace where prices are driven by competition and not government regulations. This is essentially the way the system works today for procurement of commercial items.

The Panel recommended creating a new way for DoD to obtain competition, thus eliminating mandatory small business set-asides for readily available products and services acquired using readily available procedures. Under these procedures DoD would still have the option to set aside procurements for small business. The Panel did not address small business goals and left room for the Military Services to strategically use set-asides rather than just mandate them below an arbitrary threshold.

Readily available procedures would not eliminate DoD's ability to effectively use automated systems such as the System for Award Management (SAM). The Panel recommended that “contracting officers have the authority to waive SAM registration requirements for vendors offering readily available products and services when doing so is in DoD's best interests.” This addresses one of the barriers facing nontraditional contractors that was found in the Panel's research. Further, the Panel stated “Contracting officers should encourage companies to register in SAM if the companies are seeking to do business with the DoD on a regular basis.” In summary, waiving the SAM registration requirement is envisioned as an exception when the department wants to quickly buy from a company that does not normally do business with the DoD and is unwilling or unable to complete the tedious SAM registration process.

The Panel did not recommend a prohibition on flow-down of Federal Acquisition Regulation (FAR) and Defense Federal Acquisition Regulation Supplement (DFARS) clauses. The Panel's Volume 3 Report stated “Although the number of FAR and DFARS clauses applicable to DoD contracts is excessive and should be reduced, these recommendations do not call for comprehensive elimination of clauses or the flow down requirements.” The Panel did, however, observe that “The additional burden of FAR and DFARS clauses on commercial products and services purchases is often unnecessary, ineffective, and may limit competition to only those contractors that have traditionally sold goods and services to the government.” In this regard, the Panel noted that “the number of government-unique clauses that may be applicable to commercial-item and COTS contracts has expanded rapidly—from 57 in 1995 to 165 today—threatening the simplicity and commercial-like terms and practices that were supposed to be a cornerstone of the federal government's commercial buying process.” If Congress and DoD are truly seeking to engage with the commercial marketplace and its most innovative suppliers, they must boldly address the incorporation of government-unique terms that are solely

intended to use the procurement process to implement public policy. The OSD response to this recommendation uses example clauses that are likely to grab attention (e.g., child labor, combatting trafficking in persons), but these laws are on the books and companies do not make decisions about whether to abide by such laws based on a clause included in a contract.

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**Recommendation 1 (Volume 1, Section 1, p. 15): Revise definitions related to commercial buying to simplify their application and eliminate inconsistency.**

**OSD Response:** Enacted in part in Section 836 and 837 of the FY 2019 NDAA.

**809 Panel Comments:** Sections 836 and 837 enacts much, but not all of Recommendation 1.

- The Panel's recommendation to use the standard definitions of *commercial products* in 41 U.S.C. 103 in place of the unique definitions in 10 U.S.C. 2321, *Validation of Proprietary Data Rights*, and 10 U.S.C. 2464, *Core Logistics*, was not adopted. This remains a source of confusion and inconsistency in application and the panel's recommendation should be adopted to eliminate the confusion.
- The Panel's recommendation to create a single definition for the term *subcontract* in place of the 27 existing unique definitions was not adopted. The recommended definition would leverage the existing language in 10 U.S.C. 2375(c)(3) to make it simpler for companies in the commercial marketplace or companies with both DOD and commercial customers to do business with DOD.

**Recommendation 2 (Volume 1, Section 1, p. 32): Minimize government-unique terms applicable to commercial buying.**

**OSD Response:** Enacted in part in Section 837 and 839 of the FY 2019 NDAA, Section 849 of the FY2018 NDAA, and Section 874 of the FY2017 NDAA.

**809 Panel Comments:**

- Sections 837 and 874 adopt, in part, the Panel's recommendation by creating statutory restrictions in the DFARS for the applicability of statutes to commercial buying that parallel the existing restrictions applicable to the FAR at 41 U.S.C. 3307.
- Sections 839 and 849 adopt, in spirit, the Panel's recommendation to conduct a thorough review of the rationale for all 165 statutes, executive orders and regulations currently applicable to the procurement of commercial products and services. However, the Panel is concerned that Sections 839 and 849 offer no additional criteria to the agencies for conducting this review and have again given the Administration the authority to determine that statutes not

explicitly specified as applicable to commercial buying may nonetheless be made applicable. This same approach was used unsuccessfully in a very similar review directed by Section 821 of the FY2008 NDAA. The Panel is concerned that asking the same entities to review the same statutes using the same criteria is likely to yield the same results, which will not change the way DoD does business.

- None of the sections of NDAs mentioned in the DOD response address the too frequent use by the FAR Council and OSD of the statutory authority to make determinations that statutes not specifically applicable to commercial buying may nonetheless be made applicable. The Panel believes that to truly streamline commercial buying, Congress must take a firmer hand in limiting the applicability of government-unique requirements to commercial buying. For this reason, the Panel recommended Congress rescind the authority of the FAR Council and OSD to make such determinations.

**Recommendation 3 (Volume 3, Section 1, p. 43): Align and clarify FAR commercial termination language.**

**OSD Response:** More research required.

**809 Panel Comments:** Implementation of this recommendation is clearly within the scope and expertise of the CAAC/DAR Council and should not require much additional research. The recommendation corrects a simple inconsistency that has existed in the commercial termination provision since 1995 and inserts two sentences addressing two long-standing FAR principles of contract termination – cure notices and fair compensation.

**Recommendation 4 (Volume 1, Section 1, p. 46): Revise DFARS sections related to rights in technical data policy for commercial products.**

**OSD Response:** Enacted in part in Section 865 of the FY2019 NDAA.

**809 Panel Comments:** Section 865 of the FY2019 NDAA only addresses the Panel's recommendation regarding the presumption of development exclusively at private expense for commercial items and its implementation in 252.227-7037. The Panel's Recommendation 4 which was not addressed by Congress pertains to the policies contained in DFARS 227.7102, *Commercial items, components, or processes*, and the requirement to use the clause at 252.227-7015, *Technical Data-Commercial items*, both of which are inconsistent with commercial practice by requiring rights that are customarily addressed in negotiated commercial licenses.

**Recommendation 28 (Volume 2, Section 3, p.102): Simplify the selection of sources for commercial products and services.**

**OSD Response:** More research required. DoD's implementation of all recommendations related to commercial products and services must also be tempered by national security (operational

security, supply chain integrity, cybersecurity, etc.) considerations, depending on the planned use of the commercial product.

**809 Panel Comments:** It is unclear what additional research would be required. The primary thrust of the Panel's recommendation is to move the existing FAR Part 13.5 policy for the use of simplified acquisition procedures (SAP) for commercial products and services to a more appropriate location in Part 12.6, and clearly identify the existing SAPs that are to be used when using the SAPs to acquire commercial products and services. The Panel's recommended revision to 15 U.S.C 637 and 41 U.S.C. 1708 would apply the existing exemption for publication of procurement notices for procurement of commercial products and services to the existing \$7M threshold for using SAPs for commercial products and services. Simplifying the existing authority to use SAPs for procuring commercial products and services should have no detrimental impact on national security.

**Recommendation 62 (Volume 3, Section 6, p. 322): Update the FAR and DFARS to reduce burdens on DoD's commercial supply chain to decrease cost, prevent delays, remove barriers, and encourage innovation available to the Military Services.**

**OSD Response:** More research required. DoD's implementation of all recommendations related to commercial products and services must also be tempered by national security (operational security, supply chain integrity, cybersecurity, etc.) considerations, depending on the planned use of the commercial product.

**809 Panel Comments:** None.

**Recommendation 63 (Volume 3, Section 6, p. 326): Create a policy of mitigating supply chain and performance risk through requirements documents.**

**OSD Response:** More research required to review implementation details and to assess the Panel's idea to establish a new Supply Chain Assurance Council.

**809 Panel Comments:** None.

**Recommendation 80 (Volume 3, Section 7, p. 434): Preserve the preference for procuring commercial products and services when considering small business set-asides.**

**OSD Response:** More research required.

**809 Panel Comments:** None.

**Recommendation 92 (Volume 3, Section 12, p. 512) Minimize the flow-down of government-unique terms in commercial buying by implementing Recommendation 2.**

**OSD Response:** Enacted in part in Section 837 and 839 of the FY 2019 NDAA, Section 849 of the FY2018 NDAA, and Section 874 of the FY2017 NDAA. More research required. DoD's

implementation of all recommendations related to commercial products and services must also be tempered by national security (operational security, supply chain integrity, cybersecurity, etc.) considerations, depending on the planned use of the commercial product.

**809 Panel Comments:** This recommendation expresses the Panel's concern that the reviews called for in Section 839 of the FY2019 NDAA and Section 849 of the FY 2018 NDAA are insufficient and likely to result in no significant simplification of the statutes deemed applicable to commercial buying. See the Panel's response to recommendation 2.

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**Recommendation 21 (Volume 1, Section 6, p. 167): Refocus DoD's small business policies and programs to prioritize mission and advance warfighting capabilities and capacities.**

**OSD Response:** Enacted in section 851 of the FY 2019 NDAA. DoD supports the authorization of the DoD Mentor Protégé Program, however more research required to determine the full impact of the recommendation.

**809 Panel Comments:** None.

**Recommendation 21a (Volume 1, Section 6, p. 192): Establish the infrastructure necessary to create and execute a DoD small business strategy, ensuring alignment of DoD's small business programs with the agency's critical needs.**

**OSD Response:** Enacted in part in sections 851,858, and 859 of the FY 2019 NDAA; DoD SB Strategy under 10 U.S.C. § 2283 (added by section 851) is in coordination process.

**809 Panel Comments:** None.

**Recommendation 21 b (Volume 1, Section 6, p. 193): Build on the successes of the SBJR/STTR and RIF programs. Increase the funding for SBIR/STTR and RIF programs and in the process provide greater incentive for program managers to use small businesses to provide innovation to DoD.**

**OSD Response:** Enacted in part in Section 854 of the FY 2019 NDAA, however more research required to determine the full impact of the recommendation.

**809 Panel Comments:** None.

**Recommendation 21c (Volume 1, Section 6, p. 194): Enable innovation in the acquisition system and among industry partners. Create incentives to bring nontraditional suppliers of innovation into the DoD marketplace.**

**OSD Response:** Support, but more research required.

**809 Panel Comments:** None.

**Recommendation 64 (Volume 3, Section 6, p. 330): Update socioeconomic laws to encourage purchasing from nontraditional suppliers by (a) adopting exceptions for DoD to domestic purchasing preference requirements for commercial products, and (b) adopting a public interest exception and procedures for the Berry Amendment identical to the ones that exist for the Buy American Act.**

**OSD Response:** More research required. Government-wide and DoD requirements exist to preserve critical manufacturing sectors needed for defense and to contribute to a stronger national economy. There is a risk that protected industries may languish and innovative products may not come to market.

**809 Panel Comments:** The Panel concluded the DoD is no longer a significant driver of the national economy, and that the bigger risk to the defense of the nation is the inability of the current acquisition system to quickly and effectively buy from innovative, nontraditional suppliers.

**Recommendation 65 (Volume 3, Section 6, p. 334): Increase the acquisition thresholds of the Davis Bacon Act, the Walsh-Healey Public Contracts Act, and the Services Contract Act to \$2 million.**

**OSD Response:** More research required. Dual compensation systems may complicate use of subcontractors in the \$1 million plus stratum, pose a barrier to smaller businesses competing for requirements above \$2 million without compliant systems, and increase performance risk without a common labor cost across proposals.

**809 Panel Comments:** Raising these acquisition thresholds to \$2 million will strike a balance between achieving less burdensome contract actions and continuing to uphold the intent of these laws for most of DoD's related expenditures.

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**Recommendation 79 (Volume 3, Section 7, p. 431): Enable enhanced use of advanced payments, at time of contract award, to small businesses.**

**OSD Response:** DoD is already in the process of enhancing payments to prime contractors but more research required to fully address.

**809 Panel Comments:** None.

**Recommendation 84 (Volume 3, Section 8, p. 456): Direct DOD to communicate with the marketplace concerning acquisition from development of the need/requirement through contract closeout, final payment, and disposal.**

**OSD Response:** Support efforts to increase communications with the marketplace. New efforts should be built on existing engagements, such as bi-annual meeting with major primes, trade associations, and small businesses, and enhance the effectiveness of communication activities.

**809 Panel Comments:** The Panel's recommendation recognizes what has already been tried by DoD and Congress. It points out that more needs to be done and how to do it.

**Recommendation 85 (Volume 3, Section 8, p. 463) Establish market liaison at each acquisition activity to facilitate communications with industry.**

**OSD Response:** More research required.

**809 Panel Comments:** The Panel recommends that as part of DoD's additional research it should discuss the scope and effectiveness of existing market liaison activities such as those at AMCOM and DLA.

**Recommendation 86 (Volume 3, Section 8, p.467) Encourage greater interaction with industry during market research.**

**OSD Response:** Support. Existing efforts to promote interaction with industry, aligned to the Secretary's 2018 memo "Engagement with Industry," will be reviewed and assessed for impact.

**809 Panel Comments:** The Secretary's memo is important to set the tone at the top. However, the Panel believes that DoD must not only be clear about its policy on market research and communication with industry, it must memorialize that policy in the FAR or DFARS where it will provide contracting officers and program managers with the clear message that they have the authority to communicate with industry during the market research stage of any procurement. The text of the recommended FAR revisions draw heavily from the existing OFPP policy on communications with industry.

**Recommendation 87 (Volume 3, Section 8, p. 472): Establish a market intelligence capability throughout DoD to facilitate communication that enhances the government's industry knowledge through open, two-way communication.**

**OSD Response:** More research required to determine appropriate metrics, information requirements, and information sharing to ensure competition is preserved while communication is enhanced.

**809 Panel Comments:** The Panel's recommendation is focused on both gathering and sharing information about capabilities that exist in the marketplace that may enhance warfighting. This market intelligence will also improve understanding of market dynamics that require DoD action to establish second sources for needed products to support the warfighter. This kind of market intelligence will help prevent situations such as the Palantir case, in which commercial capabilities were not understood, as well as the market dynamics that allowed TransDigm to



dominate and set the price for particular market segments. Sufficient research has already been conducted; action is needed to ensure we can get inside the turn of our near peer competitors.

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**Recommendation 81 (Volume 3, Section 7, p. 440): Clarify and expand the authority to use Other Transaction agreements for production.**

**OSD Response:** Implemented on November 20, 2018 with USD(A&S) memorandums "Authority for Use of Other Transactions for Prototype Projects Under 10, United States Code, Section 2371 b" and "Definitions and Requirements for Other Transactions Under Title 10, United States Code, Section 2371 b." More research required to determine the full impact of the recommendation.

**809 Panel Comments:** The Panel's recommendation #81 could not be implemented by a USD(A&S) memorandum because it requires statutory changes to 10 U.S.C. that have not been enacted.

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**Recommendation 36 (Volume 3, Section 2, p. 53): Transition from a program-centric execution model to a portfolio execution model.**

**OSD Response:** Support. USD(A&S) is responsible for portfolio execution, and has been in the practice of doing portfolio management since before the AT&L re-organization. As part of the re-organization, the ASD for Acquisition [ASD(A)] established DASDs for Platform and Weapon and Information and Integration Portfolio Management positions, which will continue to perform portfolio management. ASD(A) will utilize mission engineering to analyze high-priority mission threads, beginning with nuclear command, control and communications. ASD(A) is working with USD(R&E), Joint Staff, CAPE and the services to implement Portfolio Management and Mission Engineering more broadly across the Department.

**809 Panel Comments:** Current portfolio initiatives referenced by DoD differ from the panel's recommendations. The Panel recommends a multi-tiered portfolio management framework at both the execution (Rec. 36) and enterprise (Rec. 37) levels. Recommendation 36 is for execution level portfolio management at the service and agency level, outside of OSD. The Panel also notes that to fully implement its suite of portfolio management recommendations, statutory changes are required. For example: "Authorize DoD to establish a pilot program, under which one acquisition portfolio for each Military Service would be managed under a single budget line item or PE, providing the portfolio manager with flexibility to move money in response to changes in technology and other program developments."

**The following comment applies to Recommendations 36 through 41:** This set of recommendations work together to create the panel's portfolio management framework and should be considered as a whole. This framework is also incorporated in the report's draft

revision to DoD Directive 5000.01. The framework and the directive move the objective of the defense acquisition system from “acquire quality products” to “timely and affordable delivery of capabilities,” which extends not just across the lifecycle but also across the decision support systems. The Panel’s recommendations address the need to stop making decisions in separate silos (requirements, acquisition, budget) and to adopt a multi-perspective, multi-tiered portfolio framework where empowered representatives make informed decisions about capabilities.

**Recommendation 37 (Volume 3, Section 2, p. 64): Implement a defensewide enterprise capability portfolio framework that provides an enterprise view of existing and planned capabilities, to ensure delivery of integrated and innovative solutions to meet strategic objectives.**

**OSD Response:** Support, but more research required.

**809 Panel Comments:** The enterprise nature of this recommendation means developing and implementing this comprehensive framework would require committed leadership beyond USD(A&S). The Panel recommends an enterprise approach with VJCS, USD(A&S), USD(R&E), OUSD (C), and Service leadership, serving akin to a “corporate board” chaired by DEPSECDEF. DEPSECDEF would approve their charter to create a working group of empowered representatives from those offices to develop a transition plan to the multitier portfolio management framework. Core to this effort would be a revised DoD Directive 5000.01 to align the governance structure, roles, and responsibilities to enable successful portfolio execution.

**Recommendation 38 (Volume 3, Section 2, p. 76): Implement best practices for portfolio management.**

**OSD Response:** Support, but more research required. Industry best practices should be studied, implemented and applied where it makes sense for the Department, taking consideration that the Department is a governmental organization focused on warfighting.

**809 Panel Comments:** Recommendation 38 is to implement best practices, not study them. Research on the fundamental principles and benefits of portfolio management is well documented.

**Recommendation 39 (Volume 3, Section 2, p. 87): Leverage a portfolio structure for requirements.**

**OSD Response:** Support, but more research required.

**809 Panel Comments:** The panel feels this recommendation provides sufficient research on how to leverage a portfolio structure at the enterprise level, leveraging the current JCIDS functional capabilities board structure.

**Recommendation 40 (Volume 3, Section 2, p. 98): Professionalize the requirements management workforce.**

**OSD Response:** Support. OUSD(A&S) currently serves as the functional lead for the requirements career path in partnership with the Joint Staff, focused on professionalizing this element of the acquisition workforce which includes comprehensive requirements management training through the Defense Acquisition University (DAU).

**809 Panel Comments:** The Panel's revised DoDD 5000.01, enclosure section E1.1.19, Professional Workforce, outlines a much broader view than the current approach. The revised directive calls for career development models that continuously deepen and broaden the workforce member's experience throughout their entire career. It also requires a competency model with technical and non-technical skills and associated proficiency standards for every career field.

**Recommendation 41 (Volume 3, Section 2, p. 102): Establish a sustainment program baseline, implement key enablers of sustainment, elevate sustainment to equal standing with development and procurement, and improve the defense materiel enterprise focus on weapon system readiness.**

**OSD Response:** More research required. DoD has made significant improvements to managing sustainment costs and continues to focus on sustainment metrics. DoD will determine most appropriate means to implement on a program basis.

**809 Panel Comments:** Recommendation 41 is focused on sustainment within the context of the overall portfolio management framework. DoD should consider implementation within portfolios with empowered Portfolio Acquisition Executives, which have total life-cycle systems management responsibilities, as outlined in the revised DoDD 5000.01.

**Recommendation 42 (Volume 3, Section 2, p. 121): Reduce budgetary uncertainty, increase funding flexibility, and enhance the ability to effectively execute sustainment plans and address emergent sustainment requirements.**

**OSD Response:** Support.

**809 Panel Comments:** None.

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**Recommendation 46 (Volume 3, Section 4, p. 177): Empower the acquisition community by delegating below threshold reprogramming decision authority to portfolio acquisition executives. This change would facilitate the broader transition to a portfolio-based model for defense acquisition programs laid out in Recs. 36-39.**

**OSD Response:** More research required. While this may be advantageous to portfolio managers, it could sub-optimize Department level decisions on how best to re-allocate funding to meet higher priority requirements in the year of execution.

**809 Panel Comments:** One of the overarching principles of current acquisition reform efforts is to power down authority and decision making. In this case, portfolio acquisition executives would be empowered with BTR authority to enable flexibility to best meet warfighter capability needs through the programs in their portfolio. If the department needs to re-allocate funding for higher priority requirements in another portfolio, there should be nothing to stop it from doing that.

**Recommendation 47 (Volume 3, Section 4, p. 186): Restore reprogramming dollar thresholds to match their previous levels relative to inflation and the DoD budget.**

**OSD Response:** Support.

**809 Panel Comments:** None.

**Recommendation 48 (Volume 3, Section 4, p. 192): Increase to 50 percent the lesser of 20 percent restriction that creates artificially low reprogramming thresholds for smaller programs.**

**OSD Response:** Support.

**809 Panel Comments:** None.

**Recommendation 49 (Volume 3, Section 4, p. 195): Provide increased flexibility to the time periods within which a small percentage of single-year contract obligations are permitted to occur.**

**OSD Response:** Support.

**809 Panel Comments:** None.

**Recommendation 50 (Volume 3, Section 4, p. 221 ): Enact regular appropriations bills on time.**

**OSD Response:** Support.

**809 Panel Comments:** None.

**Recommendation 51 (Volume 3, Section 4, p. 232): Mitigate the negative effect of continuing resolutions by allowing congressional regular appropriations to remain available for a standardized duration from date of enactment.**

**OSD Response:** Support.

**809 Panel Comments:** None.

**Recommendation 52 (Volume 3, Section 4, p. 236): Permit the initiation of all new starts, provided Congress has appropriated sufficient funding.**

**OSD Response:** Support.

**809 Panel Comments:** None.

**Recommendation 53 (Volume 3, Section 4, p. 239):** Permit the initiation of all production rate increases, provided Congress has appropriated sufficient funding.

**OSD Response:** Support.

**809 Panel Comments:** None.

**Recommendation 54 (Volume 3, Section 4, p. 241 )::** Permit the initiation of multiyear procurements under a CR.

**OSD Response:** Support.

**809 Panel Comments:** None.

**Recommendation 55 (Volume 3, Section 4, p. 242):** Raise the Prompt Payment Act interest rate payment threshold from \$1 to \$15.

**OSD Response:** Support.

**809 Panel Comments:** None.

**Recommendation 56 (Volume 3, Section 4, p. 250):** Use the authority in Section 1077 of the FY 2018 NDAA to establish a revolving fund for information technology modernization projects and explore the feasibility of using revolving funds for other money-saving investments.

**OSD Response:** More research required.

**809 Panel Comments:** None.

**Recommendation 57 (Volume 3, Section 4, p. 256):** Modify fiscal law to extend the duration of when funds cancel from five years to eight years.

**OSD Response:** Support. This would align program acquisitions with funding periods, prevent putting current funds at risk, and support the original congressional intent of the appropriations.

**809 Panel Comments:** None.

**Recommendation 58 (Volume 3, Section 4, p. 263):** Address the issue of over-age contracts by (a) establishing an end-to-end, integrated, streamlined process, (b) codifying the Defense Contract Management Agency (DCMA) Quick Close Out class deviation in the Defense

**Federal Acquisition Regulation Supplement, and (c) extending DCMA's Low Risk Quick Close Out initiative by 2 years.**

**OSD Response:** In 2018, DoD deployed an end-to-end streamlined capability to address over-age contracts in Wide Area Workflow. DoD anticipates that a DoD-wide approach will be taken to Quick Closeout, rather than restricting that capability to DCMA.

**809 Panel Comments:** None.

**Recommendation 25 (Volume 2, Section 2, p. 64): Streamline and adapt hiring authorities to support the acquisition workforce.**

**OSD Response:** Support streamlining of authorities. Efforts underway to fully use available authorities.

**809 Panel Comments:** The Panel recommends OSD not only fully use available authorities, but also advocate for legislative changes in Recommendation #25 that would create new and/or enhanced hiring authorities. For example, "Create a DoD-unique Scientific and Professional Positions (ST) hiring authority, based in Title 10, under the authority of the Secretary of Defense."

**Recommendation 26 (Volume 2, Section 2, p. 78): Convert the Civilian Acquisition Workforce Personnel Demonstration Project (AcqDemo) from an indefinite demonstration project to a permanent personnel system.**

**OSD Response:** Support. AcqDemo proved to be a successful personnel system and the Department fully supports making it a permanent authority.

**809 Panel Comments:** None.

**Recommendation 27 (Volume 2, Section 2, p. 87): Improve resourcing, allocation, and management of the Defense Acquisition Workforce Development Fund (DAWDF).**

**OSD Response:** Resourcing has finally stabilized with DoD aligning to latest Congressional direction to budget using only appropriated funding. DoD has a stable budget projected across the FYDP. Support continuous improvements to DAWDF management across the Department.

**809 Panel Comments:** The Panel recommends OSD not only support continuous improvements to DAWDF management across the Department, but also advocate for the legislative change in Recommendation #27 that would "Establish DAWDF as a permanent, multiyear fund and require it be resourced by expiring, unobligated funds at a level of no less than \$450 million."

**Recommendation 59 (Volume 3, Section 5, p. 273): Revise the Defense Acquisition Workforce Improvement Act (DAWIA) to focus more on building professional qualifications.**

**OSD Response:** Support less prescription, more flexibility, and streamlining of DAWIA to enable DoD to modernize talent management for a more qualified workforce.

**809 Panel Comments:** The Panel recommends OSD not only support less prescription, more flexibility, and streamlining of DAWIA, but also advocate for the legislative changes in Recommendation #59. For example, "...implement an AWF professional certification program based on third-party accredited, nationally or internationally recognized standards for each DoD acquisition career field."

**Recommendation 60 (Volume 3, Section 5, p. 285): Implement acquisition career paths that are integrated with an institutionalized competency model tailored to mission needs.**

**OSD Response:** Support approach that includes components having competency-based career path models for their workforce. The 60 day FARA review will assess and recommend improvements to the acquisition workforce requirements approach.

**809 Panel Comments:** The Panel recommends that as part of its 60 day FARA review, OSD consider the specific legislative changes in Recommendation #60. For example, "Amend the requirement in 10 U.S.C. § 1723, Career Path Requirements, to apply to all AWF career fields (as opposed to only critical acquisition-related duties and tasks)."

**Recommendation 61 (Volume 3, Section 5, p. 305): Create a comprehensive public-private exchange program (PPEP) for DoD's acquisition workforce.**

**OSD Response:** Support. A&S launched a pilot for the acquisition workforce in January 2019. We intend to build on this program, work to remove barriers to participation, and fully transition it out to the Services and Components for full implementation.

**809 Panel Comments:** The Panel recommends OSD also advocate for the legislative change in Recommendation #59 to "Create a new PPEP in Chapter 87 of Title 10, U.S. Code."

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**Recommendation 88 (Volume 3, Section 9, p. 477): Use existing defense business system open-data requirements to improve strategic decision making on acquisition and workforce issues.**

**OSD Response:** Support current efforts to improve acquisition outcomes through the use of open-data requirements and continue efforts with the components to align and ensure transparency of acquisition data. Focus and use of this data have identified the need to recruit and employ a more skilled workforce for use of that data.

**809 Panel Comments:** None.

**Recommendation 89 (Volume 3, Section 9, p. 483): Direct DoD to consolidate or eliminate competing data architectures within the defense acquisition and financial system.**

**OSD Response:** Support current efforts to establish a common acquisition data operating picture within the Acquisition and Sustainment Community. This alignment supports efforts already underway to eliminate redundant or outdated data architectures and align to the architecture efforts underway within the Financial Community.

**809 Panel Comments:** None.

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**Recommendation 91 (Volume 3, Section 11, p. 505): Require the Administrator of General Services and the Secretary of Defense to maintain the FAR and DFARS respectively, with electronic documents with references to the related statutes, Executive Orders, regulations, and policies, and with hyperlinks to Federal Register Notices.**

**OSD Response:** Support; implementation in process.

**809 Panel Comments:** None.

**Recommendation 93 (Volume 3, Section 13, p. 515): Create a Center for Acquisition Innovation located at the National Defense University, Eisenhower School.**

**OSD Response:** The Department will determine how best to address the report language in House Report 115-676 accompanying the House version of H.R. 5515, the FY 2019 NDAA, which suggested both the Section 809 Panel's records and its mission should be transferred to National Defense University.

**809 Panel Comments:** The Panel's objective with this recommendation is to comply with report language in the FY2018 NDAA, ensuring its records are properly archived and available to current and future acquisition reform efforts. In keeping with the report language, the panel also recommends that DOD have a focal point for continually pressing forward with research-based improvements to meet the acquisition challenges of the 21st century.

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**Recommendation IR-1 (Supplement to the Interim Report, p. 2): Affirm agency mission as the primary goal of DoD acquisition.**

**OSD Response:** Enacted in Section 801 of the FY 2018 NDAA.

**809 Panel Comments:** None.

**Recommendation IR-4 (Supplement to the Interim Report, p. 17): Eliminate FAR section on texting while driving (FAR Clause 52.223-18).**



**OSD Response:** Support, but need to better understand benefit gained for the effort required to remove the clause.

**809 Panel Comments:** While minor as a stand-alone issue, this clause is symbolic of many others that make up the *underbrush* of acquisition and cause clutter without adding value or contributing to the core mission of the department. The cumulative effect of clearing out the underbrush of defense acquisition will result in substantial efficiencies to the process.

**Recommendation IR-5 (Supplement to the Interim Report, p. 25): Eliminate the requirement to accept and dispense dollar coins at government business operations.**

**OSD Response:** Enacted in section 885 of the FY 2018 NDAA.

**809 Panel Comments:** None.

**Recommendation 70 (Volume 3, Section 7, p. 360): Authorize DoD to develop a replacement approach to the inventory of contracted services (ICS) requirement under 10 U.S.C. § 2330a.**

**OSD Response:** The Department currently requires the data for performance of services, including contracts for goods with defined requirements for services, be reported using an Enterprise-wide Contractor Manpower Reporting Application. The system utilized by civilian agencies is the System for Award Management (SAM). To assist contractors who work for both the DoD and civilian agencies and to offer one face to industry, it makes sense for the DoD to move to SAM so contractors do not have to be proficient in entering data into two different systems. We will be working to make this change in the very near future.

**809 Panel Comments:** The single face to industry will address some of the concerns with the current system. The Panel recommends that as part of this transition OSD ensures the new system is "...designed to support and integrate with DoD's total workforce management system and acquisition requirements development processes" and has the ability to "...provide Congress and other oversight bodies with more intelligible and useful information on services contracts."

**Recommendation 74 (Volume 3, Section 7, p. 395): Eliminate redundant documentation requirements or superfluous approvals when appropriate consideration is given and documented as part of acquisition planning.**

**OSD Response:** DoD supports the elimination of redundancy and reducing administrative burdens; more research is required to determine the impact of the specific recommended regulatory and legislative changes.

**809 Panel Comments:** None.

**Recommendation 75 (Volume 3, Section 7, p. 408): Revise regulations, instructions, or directives to eliminate nonvalue-added documentation or approvals.**

**OSD Response:** DoD supports the elimination of redundancy and reducing administrative burdens; more research is required to determine the impact of the specific recommended regulatory changes.

**809 Panel Comments:** None.

**Recommendation 22a-n (Volume 1, Section 7, p. 199):** Eliminate, or sunset within five years, the statutory requirement for certain acquisition-related offices and Secretary of Defense designated officials to increase flexibility and/or reduce redundancy.

**OSD Response:** Enacted in part in section 811 of the FY 2019 NDAA.

**809 Panel Comments:** None.

**Recommendation 23 (Volume 1, Section 8, p. 227):** Establish a permanent, automatic five-year sunset provision for DoD congressional reporting requirements.

**OSD Response:** Support.

**809 Panel Comments:** None.

**Recommendation 24a-ab (Volume 1, Section 8, p. 229):** Repeal, preserve, or maintain various DoD congressional reporting requirements.

**OSD Response:** Enacted in part in section 813 of the FY 2019 NDAA.

**809 Panel Comments:** None.

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**Recommendation 33 (Volume 2, Section 6, p.168):** Update the Assignment of Claims processes under FAR Part 32.805.

**OSD Response:** Support.

**809 Panel Comments:** None.

**Recommendation 66 (Volume 3, Section 6, p. 341):** Establish a purpose statement for bid protests in the procurement system to help guide adjudicative bodies in resolving protests consistent with said purpose and establish a standard by which the effectiveness of protests may be measured.

**OSD Response:** More research required.

**809 Panel Comments:** None.

**Recommendation 67 (Volume 3, Section 6, p. 345): Reduce potential bid protest processing time by eliminating the opportunity to file a protest with the Court of Federal Claims (COFC) after filing at the Government Accountability Office (GAO) and require the COFC to issue a decision within 100 days of ordering a procurement be delayed.**

**OSD Response:** Support.

**809 Panel Comments:** None.

**Recommendation 68 (Volume 3, Section 6, p. 355): Limit the jurisdiction of GAO and COFC to only those protests of procurements with a value that exceeds, or is expected to exceed, \$75,000.**

**OSD Response:** Support.

**809 Panel Comments:** None.

**Recommendation 69 (Volume 3, Section 6, p. 358): Provide as part of a debriefing, in all procurements where a debriefing is required, a redacted source selection decision document and the technical evaluation of the vendor receiving the debriefing.**

**OSD Response:** Support.

**809 Panel Comments:** None.

**Recommendation 82 (Volume 3, Section 7, p. 448): Provide Armed Services Board of Contract Appeals authority to require filing of contract appeals through an electronic case management system.**

**OSD Response:** Support.

**809 Panel Comments:** None.

**Recommendation 83 (Volume 3, Section 7, p. 450): Raise the monetary threshold to provide agency boards of contract appeals accelerated, small business, and small claims (expedited) procedures to \$250,000 and \$150,000 respectively.**

**OSD Response:** Support.

**809 Panel Comments:** None.

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**Recommendation 76 (Volume 3, Section 7, p. 416): Revise the fair opportunity procedures and require their use in task and delivery order competitions.**

**OSD Response:** Support use of FAR 16.5 fair opportunity procedures. More research is required to determine the impact of the specific recommended regulatory and legislative changes.

**809 Panel Comments:** None.

**Recommendation 77 (Volume 3, Section 7, p. 422): Require role-based planning to prevent unnecessary application of security clearance and investigation requirements to contracts.**

**OSD Response:** Support, but more research required.

**809 Panel Comments:** None.

**Recommendation IR-2 (Supplement to the Interim Report, p. 20): Increase contract time for fuel storage from 20 years to 30 years.**

**OSD Response:** Enacted in section 881 of the FY 2018 NDAA.

**809 Panel Comments:** None.

**Recommendation IR-3 (Supplement to the Interim Report, p. 10): Eliminate the requirement for contractors to use recycled paper.**

**OSD Response:** Support, but need to better understand benefit gained for the effort required to remove the requirement.

**809 Panel Comments:** While minor as a stand-alone issue, this requirement is symbolic of many others that make up the *underbrush* of acquisition and cause clutter without adding value or contributing to the core mission of the department. The cumulative effect of clearing out the underbrush of defense acquisition will result in substantial efficiencies to the process.

**Recommendation 32 (Volume 2, Section 6, p. 162): Exempt DoD from paying the Federal Retail Excise Tax.**

**OSD Response:** Support, but DoD cannot address loss of revenue to the Highway Fund.

**809 Panel Comments:** DoD would not be expected to address loss of revenue to the Highway Fund. The Panel recommends OSD advocate for this legislative change.

**Recommendation 78 (Volume 3, Section 7, p. 427): Include the supply of basic energy as an exemption under FAR 5.202.**

**OSD Response:** Support.

**809 Panel Comments:** None.

**Recommendation 43 (Volume 3, Section 3, p. 136): Revise acquisition regulations to enable more flexible and effective procurement of consumption-based solutions.**

**OSD Response:** Support. More research required to implement and ensure compliance with activities as outlined in Section 889 of the FY 2019 NDAA.

**809 Panel Comments:** Recommendation 43 would greatly improve the process of procuring consumption-based solutions such as cloud services. The requirements of Section 889 of the FY 2019 NDAA are applicable to current buys of these types of services, and this recommendation would not compromise or change DoD's ability to ensure compliance.

**Recommendation 44 (Volume 3, Section 3, p. 149): Exempt DoD from Clinger-Cohen Act Provisions in title 40, U.S. Code.**

**OSD Response:** More research required.

**809 Panel Comments:** None.

**Recommendation 45 (Volume 3, Section 3, p. 162): Create a pilot program for contracting directly with information technology consultants through an online talent marketplace.**

**OSD Response:** Support, but more research required.

**809 Panel Comments:** None.

**Recommendation 16: (Volume I, Section 3, p. 111): Combine authority for requirements, resources, and acquisition in a single, empowered entity to govern Defense Business Systems (DBS) portfolios separate from the existing acquisition chain of command.**

**OSD Response:** More research required.

**809 Panel Comments:** None.

**Recommendation 17 (Volume I, Section 3, p. 130): Eliminate the separate requirement for annual Investment Review Board certification of DBS investments.**

**OSD Response:** Support.

**809 Panel Comments:** None.

**Recommendation 18 (Volume I, Section 3, p. 137): Fund DBS in a way that allows for commonly accepted software development approaches.**

**OSD Response:** Support.

**809 Panel Comments:** None.

**Recommendation 19 (Volume I, Section 4, p. 151): Eliminate the Earned Value Management (EVM) mandate for software programs using Agile methods.**

**OSD Response:** EVM or other tailored program management tools must still be implemented to control cost, schedule, and technical performance risks. Collaboration with government and industry partners resulted in the update of the DoD Agile and EVM Program Manager's Desk Guide published in 2018. Efforts continue to evolve the Guide, including collecting best practices from the FY 2018 NDAA sections 873 and 874 on Agile pilot programs.

**809 Panel Comments:** The Panel agrees that program management tools must still be implemented to control cost, schedule, and technical performance risks. In fact, the Panel's recommendation #19 specified a minimum set of measures to be tracked regardless of the specific tool employed (EVM or otherwise). The larger point, made by the Section 809 Panel, Defense Science Board, and Defense Innovation Board is that the primary metric in modern software development is rapid delivery of working software. Section 873 of the FY 2018 NDAA does not address EVM, and Section 874 specifically prohibits EVM, so it is unclear what best practices could be collected for the EVM Program Manager's Desk Guide. Recommendation #19 applies only to defense business systems, not weapons systems.

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**Recommendation 20 (Volume I, Section 5, p. 159): Clarify the definitions of personal and nonpersonal services and incorporate in the Defense Federal Acquisition Regulation Supplement (DFARS) a description of supervisory responsibilities for service contracts.**

**OSD Response:** Enacted in part in section 820 of the FY 2019 NDAA.

**809 Panel Comments:** Section 820 of the FY 2019 NDAA required a report. The Panel recommends that following completion of the required report, OSD advocate for implementation of the changes to the definitions of personal and nonpersonal services and the recommended DFARS changes.

**Recommendation 31: (Volume 2, Section 5, p. 148): Eliminate the statutory and regulatory distinction between personal services contracts and non-personal services contracts.**

**OSD Response:** More research required.

**809 Panel Comments:** None.

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**Recommendation 5 (Volume I, Section 2, p. 64): Align Defense Contract Audit Agency's (DCAA) mission statement to focus on its primary customer, the contracting officer.**

**OSD Response:** Support.

**809 Panel Comments:** None.

**Recommendation 6 (Volume I, Section 2, p. 67):** Revise the elements of DCAA's annual report to Congress to incorporate multiple key metrics.

**OSD Response:** Enacted in part in Section 803 of the FY 2018 NDAA.

**809 Panel Comments:** Section 803 of the FY 2018 NDAA is "PERFORMANCE OF INCURRED COST AUDITS" and while it addresses numerous topics and reports, it does not contain a provision to revise the elements of DCAA's annual report to Congress as discussed in Recommendation 6.

**Recommendation 7 (Volume I, Section 2, p. 70):** Provide flexibility to contracting officers and auditors to use audit and advisory services when appropriate.

**OSD Response:** Enacted in part in Section 803 of the FY 2018 NDAA.

**809 Panel Comments:** Section 803 doesn't specifically address the use of advisory services instead of audit services in any context. Enacting Section 803 will not fulfill the intent of recommendation.

**Recommendation 7a (Volume 1, Section 2, p. 71):** Prior to requesting field pricing/audit assistance, contracting officers should consider other available internal resources and tailor their request for assistance to the maximum extent possible.

**OSD Response:** Support.

**809 Panel Comments:** None.

**Recommendation 7b (Volume I, Section 2, p. 72):** Define the term audit.

**OSD Response:** Support.

**809 Panel Comments:** None.

**Recommendation 7c (Volume 1, Section 2, p. 72):** DCAA should use the full range of audit and non-audit services available.

**OSD Response:** Support.

**809 Panel Comments:** None.

**Recommendation 7d (Volume 1, Section 2, p. 74):** Direct a review of the roles of DCAA and DCMA to ensure appropriate alignment and eliminate redundancies.

**Status:** Enacted in Section 925 of the FY 2019 NDAA.

**809 Panel Comments:** None.

**Recommendation 8 (Volume 1, Section 2, p. 76):** Establish statutory time limits for defense oversight activities.

**OSD Response:** Support.

**809 Panel Comments:** None.

**Recommendation 9 (Volume 1, Section 2, p. 80):** Permit DCAA to use Intergovernmental Personnel Act (IPA) to manage resources to meet time limits.

**Status:** Enacted in part in Section 803 of the FY 2018 NDAA.

**809 Panel Comments:** The OSD response incorrectly confuses IPA with “Intergovernmental Personnel Act” instead of “Independent Professional Auditors.” The Panel encourages the use of IPAs for any type of audit or service that helps DCAA better accomplish its mission and supports the department’s needs to reduce costly audit and contract backlogs. Section 803 authorizes use of IPAs for only incurred cost audits.

**Recommendation 10 (Volume 1, Section 2, p. 82):** Replace system criteria from DFARS 252.242-7006, Accounting System Administration, with an internal control audit to assess the adequacy of contractors' accounting systems.

**OSD Response:** Support.

**809 Panel Comments:** None.

**Recommendation 11 (Volume I, Section 2, p. 87):** Develop a Professional Practice Guide for DoD's oversight of contractor costs and business systems.

**OSD Response:** Support.

**809 Panel Comments:** None.

**Recommendation 12 (Volume I, Section 2, p. 91):** Require DCAA to obtain peer review from a qualified external organization.

**OSD Response:** Enacted in part in Section 803 of FY 2018 NDAA.

**809 Panel Comments:** None.

**Recommendation 13 (Volume I, Section 2, p. 93):** Increase coverage of the effectiveness of contractor internal control audits by leveraging IPAs.



**OSD Response:** Support.

**809 Panel Comments:** None.

**Recommendation 14 (Volume I, Section 2, p. 95): Incentivize contractor compliance and manage risk efficiently through robust risk assessment.**

**OSD Response:** Support.

**809 Panel Comments:** None.

**Recommendation 15 (Volume I, Section 2, p. 100): Clarify and streamline the definition of, and requirements for, an adequate incurred cost proposal to refocus the purpose of DoD's oversight.**

**OSD Response:** Support.

**809 Panel Comments:** None.

**Recommendation 29 (Volume 2, Section 4, p. 114): Revise 41 U.S.C. §§ 1501-1506 to designate the Cost Accounting Standards Board as an independent federal organization within the executive branch.**

**OSD Response:** Enacted in part in Section 820 of the FY 2017 NDAA.

**809 Panel Comments:** The Panel specifically recommended that Section 820 of the FY 2017 NDAA be repealed and that "CASB should be part of the Executive Branch, but completely independent of any department of any other agency." There are several other parts of Recommendation 29 that the Panel believes will improve the functioning of the CASB. The Panel encourages OSD to support these reforms.

**Recommendation 30 (Volume 2, Section 4, p. 122): Reshape Cost Accounting Standards (CAS) program requirements to function better in a changed acquisition environment.**

**OSD Response:** Enacted in part in Section 820 of the FY 2017 NDAA.

**809 Panel Comments:** Section 820 of the FY 2017 NDAA preceded the Panel's Recommendation 30 and does not address any of the specific suggestions to increase thresholds for full and modified CAS coverage, clarify applicability to hybrid contracts, or other parts of the recommendation to update CAS program requirements.

**Recommendation 71 (Volume 3, Section 6, p. 375): Adopt the professional practice guide to support the contract audit practice of DoD and the independent public accountants DoD may use to meet its contract audit needs, and direct DoD to establish a working group to maintain and update the guide.**

**OSD Response:** Support.

**809 Panel Comments:** None.

**Recommendation 72 (Volume 3, Section 6, p. 379):** Replace 18 system criteria from DFARS 252.242-7006, Accounting System Administration, with an internal control audit to assess the adequacy of contractors' accounting systems based on seven system criteria.

**OSD Response:** Support, but more research required.

**809 Panel Comments:** We note that OSD supports Recommendation 10, but for Recommendation 72, OSD indicates more research is required. Recommendations 10 and 72 propose the same basic outcome. Recommendation 72 (from Volume 3) modified Recommendation 10 (from Volume 1) by refining the internal control audit criteria.

**Recommendation 73 (Volume 3, Section 6, p. 381):** Revise the definition of business system deficiencies to more closely align with generally accepted auditing standards.

**OSD Response:** Support.

**809 Panel Comments:** None.

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**Recommendation 34 (Volume 2, Section 7, p. 171):** Repeal certain Title 10, U.S. Code sections and note sections, create a new Part V under Subtitle A of Title 10, and redesignate sections in Subtitles B-D to make room for Part V to support a more logical organization and greater ease of use.

**OSD Response:** Enacted in Sections 801, 806, 807, 808, 809, and 812 of the FY 2019 NDAA.

**809 Panel Comments:** None.

**Recommendation 90 (Volume 3, Section 10, p. 499):** Reorganize Title 10 of the U.S. Code to place all of the acquisition provisions in a single part, and update and move acquisition-related note sections into the reorganized acquisition part of Title 10.

**OSD Response:** Support; however we would recommend a phased approach to allow for learning and acclimation so the whole corpus of law is not restructured all at once.

**809 Panel Comments:** None.

