



July 2019

# DEFENSE ACQUISITIONS

## DOD Needs to Improve How It Communicates the Status of Regulation Changes

Accessible Version

## Why GAO Did This Study

Congress has pursued acquisition reforms to make DOD's acquisition process more efficient and timely. Some statutes have directed DOD to revise or consider revising its acquisition regulations.

The House Armed Services Committee's report accompanying the NDAA for Fiscal Year 2019 included a provision for GAO to review DOD's regulatory implementation of acquisition-related provisions in the NDAs from fiscal years 2010 through 2018. This report (1) determines how DOD implements acquisition-related NDAA provisions in the DFARS and communicates with stakeholders throughout that process, and (2) identifies the status of implementation of provisions enacted in the specified NDAs.

To conduct this work, GAO reviewed DOD documents and interviewed DOD officials regarding the process for implementing acquisition-related NDAA provisions. GAO also analyzed DOD's data and reports on the implementation status of provisions enacted in NDAs for fiscal years 2010 through 2018. GAO selected 12 of these provisions as case studies based on factors such as year enacted and time taken for implementation to obtain a mix of older and newer provisions, and shorter and longer implementation timeframes.

## What GAO Recommends

DOD should develop a mechanism to better communicate the implementation status of acquisition-related NDAA provisions, particularly those that direct a change or consideration of a change to the DFARS. DOD concurred with the recommendation.

View [GAO-19-489](#). For more information, contact William T. Woods at (202) 512-4841 or [woodsw@gao.gov](mailto:woodsw@gao.gov).

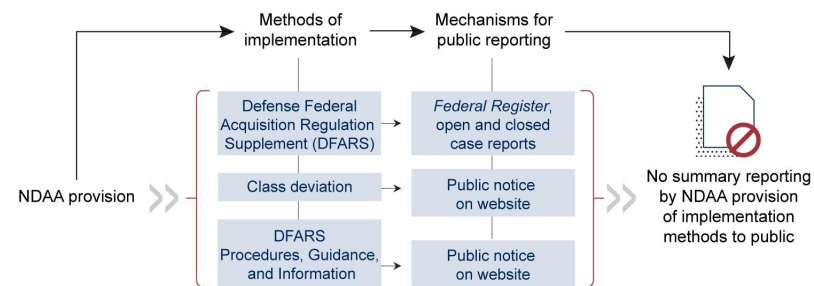
## DEFENSE ACQUISITIONS

### DOD Needs to Improve How It Communicates the Status of Regulation Changes

## What GAO Found

The staff of the Defense Acquisition Regulations System are responsible for making changes in the Defense Federal Acquisition Regulation Supplement (DFARS)—the Department of Defense's (DOD) regulation augmenting the Federal Acquisition Regulation, which guides government purchases of products and services. They begin their process by first tracking legislation that may affect acquisition regulations before Congress enacts the National Defense Authorization Act (NDAA). After enactment, they identify which provisions to implement through regulatory changes and which to implement through other means. In certain circumstances, rather than change the DFARS, DOD can issue a class deviation, which allows its buying organizations to temporarily diverge from the acquisition regulations. The figure below shows the primary means DOD uses to implement NDAA provisions, and the mechanisms DOD uses to make information on the status of any changes available to the public and others.

#### Department of Defense's (DOD) Methods to Implement and Report on Actions Taken on National Defense Authorization Act (NDAA) Provisions



Source: GAO analysis of DOD documents and interviews with DOD officials. | GAO-19-489

DOD does not have a mechanism to clearly communicate to Congress, industry, and other interested parties the status of regulatory or other changes based on NDAA provisions. Using only publicly-available reports and information, it is difficult for an interested party to find the implementation status of any given acquisition-related NDAA provision. This is because no single DOD source communicates the status of regulatory or other changes in a manner that links the changes to specific NDAA provisions. As a result, interested parties are not always aware of what provisions have been implemented and when. This information is important for congressional oversight and to industry for planning and compliance purposes. Federal internal control standards state that management should address the communication expectations of external users.

GAO found that DOD has taken action to address 180 acquisition-related provisions since 2010. On average, implementation was completed within 1 year from enactment. Some complicated provisions took more than 2 years to implement. For example, a fiscal year 2016 NDAA provision, directing a regulatory change for commercial item procurements, took more than 2 years to implement because DOD was reconciling a prior year's related but different NDAA commercial item provision into one DFARS change.

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**Abbreviations**

|       |   |
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| DARS  | Defense Acquisition Regulations System            |
| DFARS | Defense Federal Acquisition Regulation Supplement |
| DOD   | Department of Defense                             |
| LPTA  | Lowest Price Technically Acceptable               |
| NDAA  | National Defense Authorization Act                |
| PGI   | Procedures, Guidance, and Information             |

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July 11, 2019

Congressional Committees

Due to changes in national security priorities and the industrial base landscape, the Department of Defense (DOD) must have the ability to acquire and field the products and services needed in the most cost-efficient and timely manner possible. Congress has pursued acquisition reforms to help DOD achieve this objective through annual National Defense Authorization Acts (NDAA) and other statutes. In addition, some provisions in the NDAA specifically direct DOD to revise or consider revising the Defense Federal Acquisition Regulation Supplement (DFARS).

In a report related to the NDAA for Fiscal Year 2019, the House Committee on Armed Services raised questions about perceived delays between enactment of statutes and issuance of regulations in the DFARS. The committee's report contains a provision for us to review DOD's process for revising the DFARS.<sup>1</sup> This report (1) determines how DOD implements acquisition-related NDAA provisions and communicates implementation status, and (2) identifies the status of DOD's efforts to implement acquisition-related NDAA provisions from fiscal years 2010-2018.

To determine how DOD implements acquisition-related NDAA provisions, we reviewed the DFARS Operating Guide, DFARS open and closed cases reports, and decision matrices from the Defense Acquisition Regulations System (DARS), which document decisions on implementing NDAA provisions, from fiscal years 2010-2018. We also reviewed NDAA provisions from fiscal years 2010-2018 to identify provisions that directed DOD to make or consider regulation changes. We focused on Title VIII of the NDAA, which contains acquisition-related provisions. We also interviewed DARS staff, Defense Acquisition Regulations Council members, and officials from the DOD components—Air Force, Army, Navy, Defense Contract Management Agency, and Defense Logistics

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<sup>1</sup>H.R. Rep. No. 115-676, at 142-43 (2018).

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Agency. We compared the DARS rulemaking process with the *Standards for Internal Control in the Federal Government*.<sup>2</sup>

To identify the implementation status of acquisition-related NDAA provisions from fiscal years 2010-2018, we analyzed DARS reports that include information on the case files associated with the NDAA Title VIII provisions from fiscal years 2010-2018. We also analyzed data from the Defense Acquisition Regulations Management Information System as of October 31, 2018, to determine the number and types of cases by year, duration of cases, and relevant NDAA provisions. We asked DARS officials to verify the cases we identified. To better understand the Defense Acquisition Regulations Council's recommendations and the DARS implementation process, we selected as case studies 12 NDAA provisions that directed DOD to make or consider making regulation changes. The case study selection criteria included the year the provision originated in a NDAA (which allowed us to analyze a mix of older and newer provisions) and how long it took provisions to be implemented (which allowed us to analyze a mix of shorter and longer cases). For the 12 selected provisions, we reviewed the associated case files. We found the Defense Acquisition Regulations Management Information System data to be sufficiently reliable for purposes of reporting on how the DARS implemented NDAA provisions concerning acquisition issues. Additional details on our scope and methodology are provided in appendix I.

We conducted this performance audit from August 2018 to July 2019 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

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## Background

The Defense Acquisition Regulations Council is responsible for developing fully coordinated recommendations for revisions to the DFARS, which supplements the Federal Acquisition Regulation. The Federal Acquisition Regulation provides executive agencies with uniform

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<sup>2</sup>GAO, *Standards for Internal Control in the Federal Government*, [GAO-14-704G](#) (Washington, D.C.: Sept. 10, 2014).

acquisition policies and procedures for acquiring products and services, and is prepared and issued through the coordination of the Defense Acquisition Regulations Council and Civilian Agency Acquisition Council. The DFARS contains additional requirements of law, DOD-wide policies, delegations of Federal Acquisition Regulation authorities, deviations from Federal Acquisition Regulation requirements, and policies or procedures that have a significant effect beyond the internal operating procedures of DOD, or a significant cost or administrative impact on contractors or offerors. The DFARS is designed to be read in conjunction with the primary set of rules in the Federal Acquisition Regulation. Stakeholders in the acquisition process include executive agencies' program and contracting officials, members of Congress and congressional staff, industry and contractors, and members of the public.

Specifically, the Defense Acquisition Regulations Council generally makes implementation recommendations to DOD, such as when publication of rules to amend the DFARS is appropriate.<sup>3</sup> DARS staff then implements the Council's recommendations. The Defense Acquisition Regulations Council is composed of the Chair who is also the DARS Director, Deputy Chair who is also the DARS Deputy Director, and one policy and one legal representative from each of the following DOD components:

- Air Force,
- Army,
- Navy,
- Defense Contract Management Agency, and
- Defense Logistics Agency.<sup>4</sup>

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<sup>3</sup>The Under Secretary of Defense for Acquisition and Sustainment delegates authority to the Principal Director of Defense Pricing and Contracting to develop, coordinate, issue, and maintain the Federal Acquisition Regulation, DFARS, and supplementing DOD regulations. The Director of DARS, who reports to the Principal Director, supervises the activities of the Defense Acquisition Regulations Directorate and is the Chair of the Defense Acquisition Regulations Council.

<sup>4</sup>The Defense Acquisition Regulations Council is supported by DARS Case Managers who are responsible for managing DFARS case files. DARS also includes DFARS Committees or Drafting Teams (comprised of representatives from the DOD components) that research and draft rule language for potential DFARS changes and for the Defense Acquisition Regulations Council's review. The Drafting Teams obtain expert and functional advice as needed.



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DFARS changes can originate from different sources, including legislation, recommendations from DOD's Office of the Inspector General, our recommendations, court decisions, executive orders, or policy changes within DOD. DFARS changes that originate from legislation, including NDAA, are given the highest priority, according to DARS officials.

DARS staff has other related responsibilities, including working with civilian agencies in activities connected with promulgating the Federal Acquisition Regulation.

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## **DOD Has a Process for Implementing Acquisition-Related NDAA Provisions, but Does Not Clearly Communicate Implementation Status to Stakeholders**

DOD has a rulemaking process to change the DFARS that includes implementing acquisition-related NDAA provisions through regulatory changes or other methods. The DARS staff is responsible for facilitating the process of making these changes in the DFARS. The staff first reviews draft legislation that may affect acquisition regulations before Congress enacts the NDAA. After the NDAA is enacted, DARS staff then identifies which provisions require action. The DARS staff coordinates across the department and provides for public notice of implementation actions when required. However, there is no publicly-available summary reporting of the status of the regulatory changes or other implementation methods linked to specific NDAA provisions. Congress and industry representatives therefore cannot clearly see the status of pending regulatory changes pertaining to acquisition issues addressed in the NDAA.

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## **DOD Implements Acquisition-Related NDAA Provisions in DFARS and by Other Methods**

DOD's acquisition rulemaking procedures are governed by statute, which generally requires agencies to issue a proposed rule for each rulemaking and provide not less than a 30-day public comment period following

publication of the proposed rule in the *Federal Register*.<sup>5</sup> These requirements only apply to those DFARS rules that are related to the expenditure of appropriated funds and have either a significant effect beyond the agency's internal operating procedures or a significant cost or administrative impact on contractors or offerors. However, the requirements may be waived if "urgent and compelling" circumstances make compliance with the requirements impracticable. In those instances, DOD issues an interim rule rather than a proposed rule. The interim rule is effective on a temporary basis if DOD provides at least a 30-day public comment period after publishing the interim rule in the *Federal Register*. DOD then may issue a final rule after considering any comments received. As a part of the rulemaking process, the Office of Information and Regulatory Affairs reviews proposed and final regulations.<sup>6</sup> The time period for its review is generally limited to 90 days.<sup>7</sup> See figure 1 for an overview of the DARS's process to change DFARS rules.

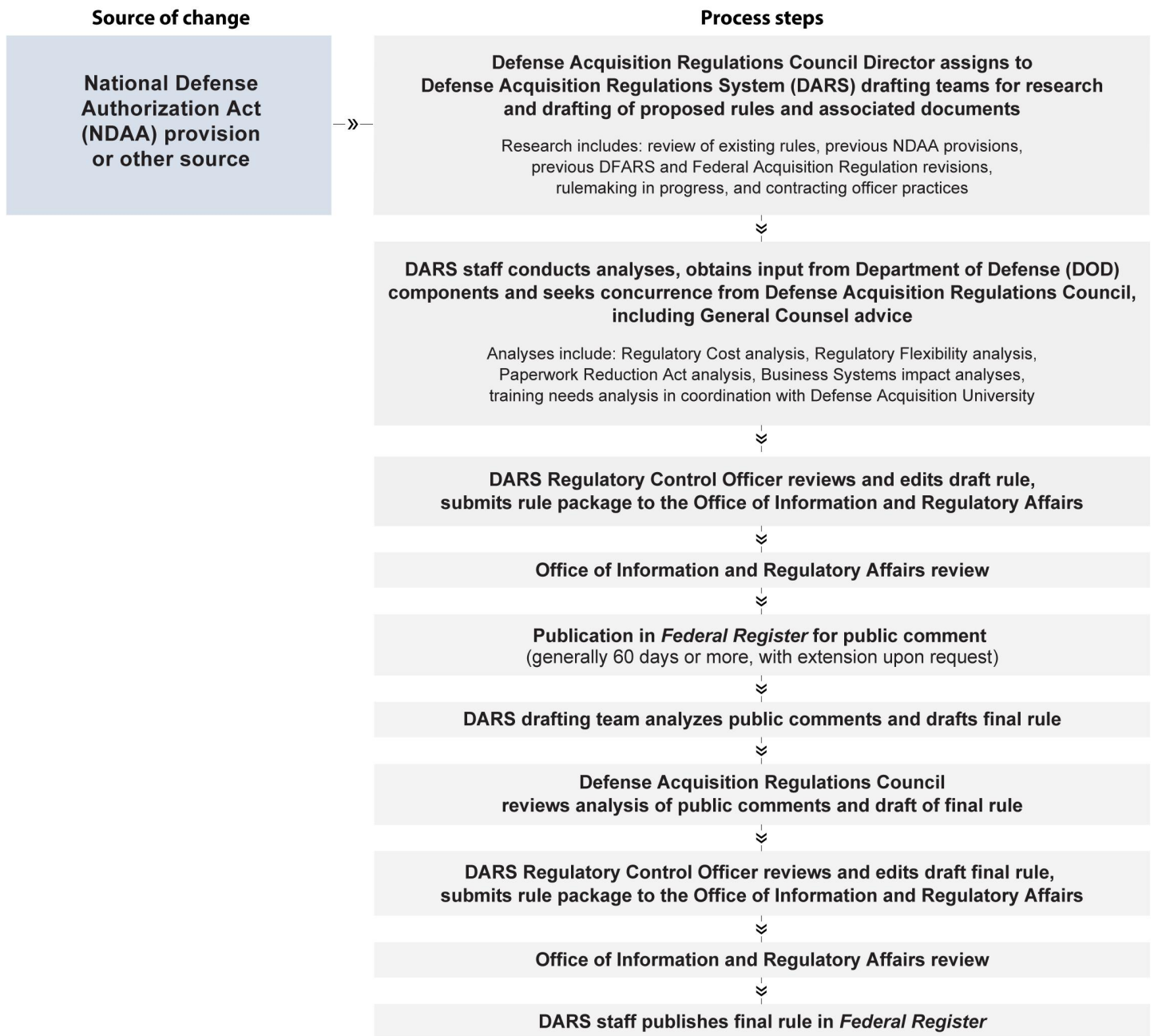
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<sup>5</sup>41 U.S.C. § 1707; see also Federal Acquisition Regulation subpart 1.5. The *Federal Register* is the official daily publication for rules, proposed rules, and notices of federal agencies and organizations. The Rules and Regulations section contains final rules and regulations—those regulatory documents having general applicability and legal effect.

<sup>6</sup>The Office of Information and Regulatory Affairs is part of the Office of Management and Budget, which is an agency within the Executive Office of the President.

<sup>7</sup>GAO, *Department of Defense: Acquisition Rulemaking Practices*, [GAO-15-423R](#) (Washington, D.C.: Apr. 17, 2015).

**Figure 1: General Process for Changing the Defense Federal Acquisition Regulation Supplement (DFARS)**



Source: GAO analysis of DOD documents and interviews with DOD officials. | GAO-19-489

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DARS staff can implement the provisions by one or more methods, including the rulemaking process described above and other actions, such as:

- issuing DFARS class deviations, and<sup>8</sup>
- changing DFARS Procedures, Guidance, and Information (PGI), a non-regulatory document that supplements the DFARS.<sup>9</sup>

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## DOD Reviews NDAA to Identify Provisions That Might Require DFARS Revisions or Other Actions

Before annual NDAA are enacted, DARS staff told us that they review proposed legislation and committee report language to stay abreast of provisions they may have to implement after NDAA are enacted. DARS staff solicits input on which provisions may require implementation from DOD components and offices, such as the Defense Contract Management Agency, that have a stakeholder interest in many acquisition-related provisions.

DARS staff tracks each of these potential changes in case files, which are referred to in this report as cases. DARS staff also can work with other federal agency offices to implement an acquisition-related NDAA provision through a Federal Acquisition Regulation rule change, interim rule change, or class deviation. In some instances, a provision may specify that DOD take other actions, such as holding a public meeting to obtain interested parties' opinions on an acquisition topic.

Upon review of the enacted NDAA, the Defense Acquisition Regulations Council or DARS staff sometimes decides that a provision should be

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<sup>8</sup>A class deviation is a deviation from the Federal Acquisition Regulation (or agency acquisition regulation, such as the DFARS) that revises how the regulations are applied to specified categories of contract actions. See Federal Acquisition Regulation § 1.404. The Principal Director of Defense Pricing and Contracting is the approval authority within DOD for class deviations, except certain deviations that may be approved by designated senior procurement executives. See DFARS § 201.404(b)(i). The Federal Acquisition Regulation provides that when an agency knows it will require a class deviation on a permanent basis, it should propose an acquisition regulation revision. Federal Acquisition Regulation § 1.404.

<sup>9</sup>The PGI is a companion resource to the DFARS that contains both mandatory internal DOD procedures and non-mandatory internal DOD procedures, guidance, and supplemental information. DFARS § 202.101.

implemented by another DOD office or in other defense acquisition guidance. For example, the DARS staff could determine that a provision only applies to one DOD component and does not require a DFARS change. In another example, DARS staff could determine that the initially identified provision should be implemented in acquisition guidance, such as DOD Instruction 5000.02.<sup>10</sup> Further, sometimes DARS staff will change implementation methods after having selected one. For example, DARS staff may initially decide to implement a provision with a DFARS change, but upon conducting research to draft the rule change, it may find that the provision would be better implemented with a Federal Acquisition Regulation change.

Based on our review of NDAs from fiscal years 2010-2018, we identified 37 explicitly directive provisions—36 that directed DOD to either make or consider making an acquisition-related regulatory change, and one that directed DOD to issue acquisition-related guidance.<sup>11</sup> DARS officials told us that when a provision directs a change or consideration of an acquisition-related regulatory change, the Defense Acquisition Regulations Council and DARS staff give it the highest priority. We confirmed that, in the Defense Acquisition Regulations Management Information System, this priority is reflected by identifying the NDA as the source of the change in the synopsis field. We confirmed that the 36 provisions we identified had NDA as the source of the change.

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## The Way the DARS Publicly Communicates Actions Makes It Difficult to Link to NDA Provisions

DARS staff has different ways of communicating changes to the regulations and other implementation methods to the public.

- “Significant revisions” to the DFARS must be published in the *Federal Register*.<sup>12</sup> DARS staff also publishes the progress of DFARS

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<sup>10</sup>DOD Instruction 5000.02 establishes policy that programs follow as they proceed through the defense acquisition cycle.

<sup>11</sup>The scope of our review was provisions included in Title VIII of the Fiscal Year 2010-2018 NDAs. DARS staff identified acquisition-related provisions outside of Title VIII during this timeframe.

<sup>12</sup>41 U.S.C. § 1707; FAR § 1.501-1 (definition of “significant revisions”); FAR § 1.501-2(b). Significant revisions to the Federal Acquisition Regulation must also be published in the *Federal Register*.

changes in case reports that are available on its website. Case reports provide a synopsis of each case, which can include the NDAA provision or other source of the case; describe cases combined to address more than one provision; or show multiple cases for a single provision.

- DARS staff also posts notices of DFARS class deviations and revisions to DFARS PGI on its website.
- DARS staff provides input for regulatory priorities through DOD's publicly-available Unified Agenda. This includes all expected rule changes DOD-wide and a Regulatory Plan that identifies the most significant regulatory actions DOD expects to issue within the next 12 months.<sup>13</sup>

It is difficult, however, for interested parties, such as Congress and industry groups, to determine if a provision has been implemented using only this publicly-available information. This is due, in part, to the fact that provisions can be implemented through one or multiple methods, and DARS actions can be reflected in more than one case. For example, if an interested party, such as a federal contractor, expects to see a change to the DFARS based on how an NDAA provision is worded, but the DARS staff implements the provision with a class deviation, the interested party may not realize that the provision has been implemented by another method. In addition, DARS staff may consider a provision as implemented with an action such as a class deviation even if a subsequent case to change the DFARS is opened later.

We, too, found it difficult to determine the implementation status of acquisition-related NDAA provisions using only publicly-available reports and information. DARS staff was able to create a report for us that showed implementation status by provision. But we were able to determine and verify the implementation status of these provisions only after using a combination of the DARS internal reports, publicly-available reports and information, and data we had requested from the Defense Acquisition Regulations Management Information System database.

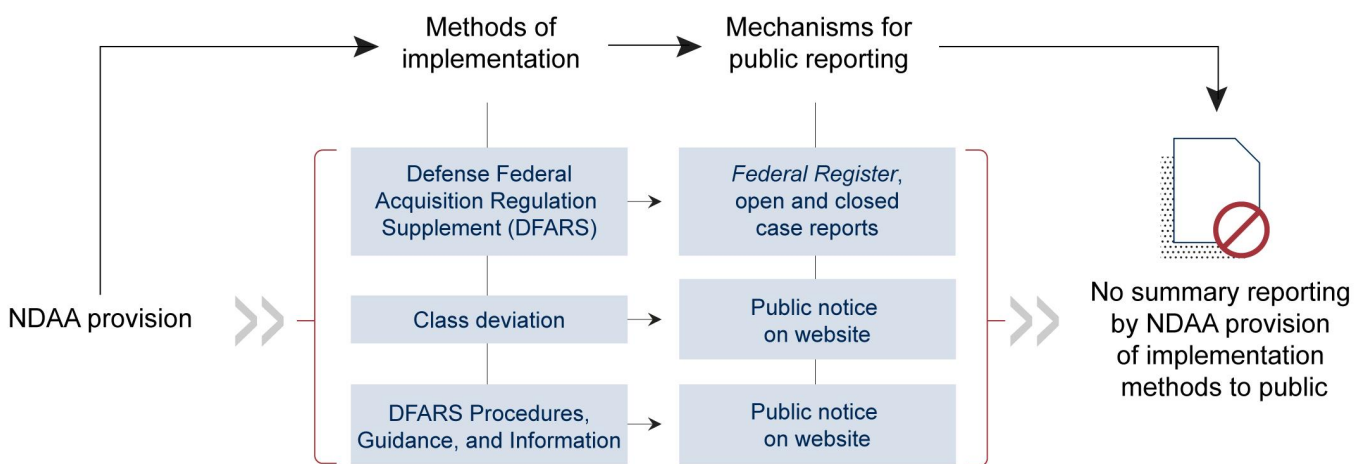
DFARS and Federal Acquisition Regulation open and closed case reports provide general information on a case, such as the topic and case number. The reports also provide the status of the case. For example, a

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<sup>13</sup>The regulatory plan is a requirement of Executive Order 12866, "Regulatory Planning and Review," Sept. 30, 1993. The information is published on [www.RegInfo.gov](http://www.RegInfo.gov).

report may say: “Defense Acquisition Regulations Council director tasked team to draft proposed DFARS rule.”<sup>14</sup> However, the case reports do not provide information on when a regulatory change may be expected. This information can help companies plan for future business opportunities and devise the means to ensure compliance with regulations. See figure 2 for an overview of NDAA provision implementation methods and the mechanisms DOD uses to report status information.

**Figure 2: Implementing and Reporting on Actions Taken on National Defense Authorization Act (NDAA) Provisions**



Source: GAO analysis of Department of Defense (DOD) documents and interviews with DOD officials. | GAO-19-489

*Standards for Internal Control in the Federal Government* states that management should externally communicate quality information to achieve the entity’s objectives. Specifically, available information should address the expectations of both internal and external users.<sup>15</sup> DARS staff regularly publishes public status updates on cases, rule changes, and PGI changes. However, there is no readily available mechanism for external stakeholders, such as Congress and industry representatives, to determine the implementation status of any particular legislative provision. This is because the status updates published by the DARS staff do not provide the complete implementation status listed by specific legislative provisions. Without communicating the implementation status

<sup>14</sup>DFARS cases are closed when the final DFARS rule is published in the *Federal Register*. DFARS cases may be closed without publication of a rule only with the approval of the Defense Acquisition Regulations Council Director after appropriate consultation with the Defense Acquisition Regulations Council.

<sup>15</sup>GAO-14-704G.

of legislative provisions, Congress lacks information for oversight of acquisition reforms, and federal contractors lack visibility into how and when changes will occur. For example, the House Armed Services Committee expressed its oversight interest in a provision passed in 2013 that was not implemented in the DFARS until 2018.<sup>16</sup> Additional information on the status of the DFARS change may have been helpful to the committee's oversight activities. In another example, industry expressed concern about the status of a regulation implementing a fiscal year 2017 NDAA provision related to the lowest price technically acceptable (LPTA) source selection process in order to plan for responding to solicitations following implementation of the rule.<sup>17</sup>

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## DOD Has Taken Action to Address Acquisition-Related Provisions in NDAs from Fiscal Years 2010-2018, and Time Taken to Implement Averaged Less Than 1 Year

DARS staff identified 180 NDAA provisions from fiscal years 2010-2018 that potentially required an acquisition-related regulatory change or another action. DARS staff and other DOD entities have taken some type of action to address all these provisions. Our analysis showed that 112 of the provisions had been implemented. The timeframe for implementation was, on average, just under 1 year. Some implementation efforts took longer than a year for a variety of reasons, such as reconciling multiple years of NDAA requirements or dealing with highly complex topics. The remaining legislative provisions are either in the process of being implemented or DARS staff determined that a regulatory change was not needed. DARS staff prioritized those provisions that expressly directed DOD to change or consider an acquisition-related regulatory change. DARS documentation showed that some of the implementation deadlines in statute were shorter than the time periods that DARS generally allows for the rulemaking process, including public comment and outside agency review.

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<sup>16</sup>H.R. Rep. No. 115-676, at 142 (2018).

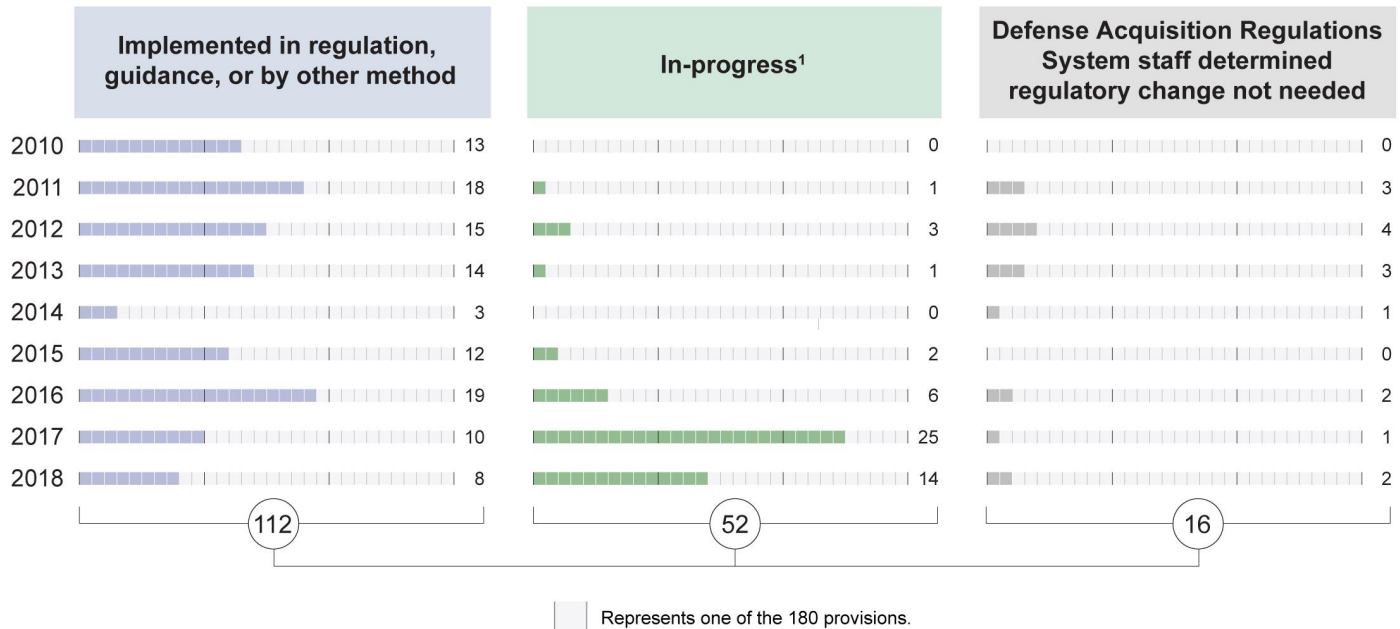
<sup>17</sup>When awarding a contract competitively, DOD may use the LPTA process, under which the lowest price is the determining factor when selecting among technically acceptable offers. GAO, *Defense Contracting: DOD Should Clarify Criteria for Using Lowest Price Technically Acceptable Process*, [GAO-19-54](#) (Washington, D.C.: Nov. 13, 2018).



## DARS Staff Identified and Addressed 180 Acquisition-Related NDAA Provisions

Following its process, DARS staff identified 180 NDAA provisions from fiscal years 2010-2018 that potentially required an acquisition-related regulatory change or another implementation action.<sup>18</sup> We found that DARS staff and, in a few instances, other DOD entities have taken action to address all of those provisions. See figure 3 for the implementation status of all 180 provisions distributed by NDAA fiscal year.

**Figure 3: Implementation Status of 180 National Defense Authorization Act Provisions from Fiscal Years 2010-2018 (as of October 31, 2018)**



Source: GAO analysis of Defense Acquisition Regulations System reports and Defense Acquisition Regulations Management Information System data. | GAO-19-489

<sup>1</sup>Two provisions counted as “In-progress” were partially implemented by DFARS rule changes that addressed specific paragraphs only, rather than the full provision.

<sup>18</sup>DARS staff took a total of 244 actions, such as class deviations and DFARS changes, in response to the 180 provisions. In response to all sources of DFARS changes during this same time, DARS staff opened a total of 412 cases.

## DARS Staff Implemented 112 Provisions within 1 Year of NDAA Enactment, on Average

We found that DARS officials opened cases within 30 days of NDAA enactment, on average, for the acquisition-related NDAA provisions from fiscal years 2010-2018.<sup>19</sup> For the 112 of 180 provisions that have been implemented, DOD completed the first implementation actions on average within 1 year. DARS staff frequently used a combination of methods to implement provisions, such as using an interim DFARS rule followed by a final rule. When two or more implementation actions are taken, DARS officials generally consider the first action as the action that implements the provision. If a class deviation, interim DFARS rule, or PGI is issued to address an NDAA provision, the DARS staff considers it implemented even if additional actions—such as issuing a final DFARS rule—are still being pursued. We used the same approach for our analyses for determining the implementation status of provisions and time taken to complete implementation. See table 1 below for the average time to complete the first action to implement the 112 NDAA provisions.

**Table 1: Average Time for First Methods for Implementing National Defense Authorization Act Provisions from Fiscal Years 2010–2018**

| Implementation method  | Number of provisions implemented by method | Number of days taken on average <sup>a</sup> |
|--|--|--|
| Defense Federal Acquisition Regulation Supplement (DFARS) final rule | 28   | 506  |
| DFARS Interim Rule   | 24   | 322  |
| DFARS Procedures, Guidance, and Information change                   | 3  | 362  |
| Class deviation <sup>b</sup>   | 37   | 187  |
| Public Meeting, Policy Memorandum, or Report                         | 3  | 361  |
| Federal Acquisition Regulation final rule                            | 10   | 526  |
| Federal Acquisition Regulation Interim Rule                          | 7  | 377  |
| <b>Total</b>   | <b>112</b>                                 | <b>347</b>                                   |

Source: GAO analysis of Defense Acquisition Regulation Management Information System data. | GAO-19-489.

<sup>19</sup>Average based on analysis of case files for 179 of the 180 provisions. One provision of the 180 did not have a case file even though the DARS staff took action to address the provision.

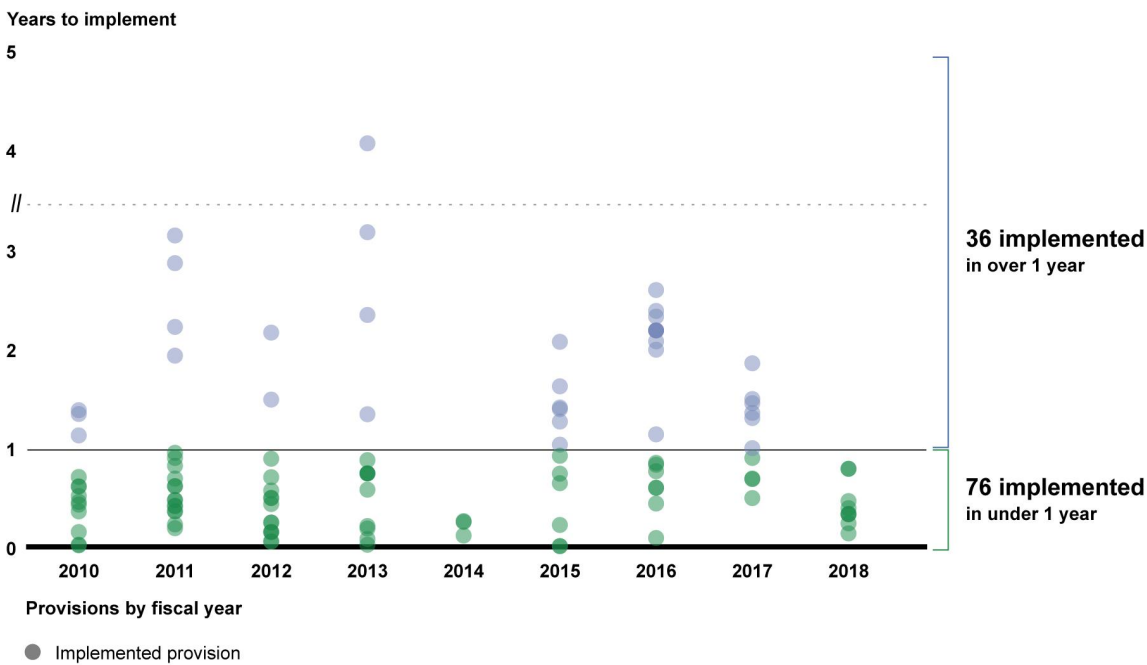
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<sup>a</sup>Calculation of averages was based on the number times the implementation method was used as the first action out of 112 implemented provisions.

<sup>b</sup>DFARS and Federal Acquisition Regulation class deviations.

Figure 4 shows the distribution of time taken to implement all 112 NDAA provisions.

**Figure 4: Time Taken to Implement 112 National Defense Authorization Act Provisions from Fiscal Years 2010-2018**



Source: GAO analysis of Defense Acquisition Regulations Management Information System data. | GAO-19-489

Some implementation efforts took longer than a year for a variety of reasons. Publishing an interim DFARS rule generally took less than a year, while publishing a final DFARS rule change took closer to 2 years on average. In the selected DFARS cases studied, we found examples where DOD had to reconcile multiple years of NDAA requirements or manage complex topics, which we have similarly reported on as reasons that influence the time needed to issue regulations in past work.<sup>20</sup>

- Reconciling Multiple Years of NDAA Requirements:**  
 Congress directed DOD to revise the DFARS to reflect updated requirements related to procuring commercial items in section 851 of the fiscal year 2016 NDAA. Congress included a deadline of 180 days from the NDAA enactment, but the DFARS update was not completed

<sup>20</sup>GAO, *Federal Rulemaking: Improvements Needed to Monitoring and Evaluation of Rules Development as Well as to the Transparency of OMB Regulatory Reviews*, GAO-09-205 (Washington, D.C.: Apr. 20, 2009).

until nearly 800 days after enactment. Our review of DARS case files showed that the DARS staff prioritized implementing the provision, but decided to address a related NDAA provision from 2013 through a single DFARS rule change. In this instance, multiple NDAA provisions the DARS staff viewed as closely related. As a result, developing language that reconciled the requirements for all of these provisions took additional time and effort. DARS officials told us that they came close to publishing a commercial items rule earlier, but started over because subsequent NDAA provisions included requirements related to commercial items.

- **Managing Complex Topics:**

Congress directed DOD to revise the DFARS regarding the use of the LPTA source selection process in section 813 of the NDAA for fiscal year 2017. Congress included a deadline of 120 days from enactment in the provision, which DARS staff was unable to meet due to the complexity of the issue and additional requirements added by a subsequent NDAA. Following enactment of the 2017 NDAA, DARS staff developed a proposed rule that would have implemented relevant NDAA sections in under a year. However, prior to publishing that rule, the NDAA for fiscal year 2018 was enacted and contained added LPTA requirements. After the 2018 NDAA was enacted, DARS staff combined all of its related LPTA cases into a new DFARS case and made adjustments to the proposed rule it had been developing. The DARS staff responsible for updating the previous proposed rule requested five extensions from DARS leadership between January and March 2018 to update documentation to address the fiscal year 2018 provisions and prepare additional analyses. After months of coordination and reviews, DARS staff published a proposed rule in December 2018 with a 60-day comment period. Sixteen formal submissions were received by the February 2019 deadline. The DARS staff is currently reviewing those comments and drafting a final rule, which must still go through multiple reviews before it can be published in the *Federal Register*.

- **Other:**

Congress directed DOD to consider revising the DFARS regarding an extension of contractor conflict of interest limitations in section 829 of the NDAA for fiscal year 2013. This provision has been in the process of implementation due to a determination that this rule should be informed by a pending Federal Acquisition Regulation change. In this instance, Federal Acquisition Regulation principals opened a case to implement the provision in the Federal Acquisition Regulation 7 months after NDAA enactment, and DARS officials agreed to draft the rule change that would implement the provision. DARS staff published

a proposed rule in the *Federal Register* for public comment approximately 8 months later. However, DARS staff informed us that a few weeks after the public comment period, Federal Acquisition Regulation officials directed them to suspend its activities until a separate, related Federal Acquisition Regulation rule on “closely associated with inherently governmental functions” was finalized. However in August of 2018, section 829 of the NDAA for fiscal year 2013 was repealed by section 812(b)(4) of the NDAA for fiscal year 2019.

We identified 36 provisions, a subset of the 180, that expressly directed DOD to make or consider making an acquisition-related regulatory change, as well as one provision that directed DOD to issue guidance. DARS staff implemented 22 of the 37 provisions in about 13 months on average.<sup>21</sup> Of the 37 provisions, 32 had statutory deadlines, ranging from 30 to 365 days after enactment. The DARS documentation showed that the DARS staff prioritized these NDAA provisions by noting the deadlines, but generally did not implement them by the deadline. We found that:

- DARS staff met the deadlines in eight of 32 instances. In those eight instances, the actions completed were relatively simple, and DARS staff determined that a public comment period was not required. For example, DARS staff changed the DFARS to implement section 801 of the fiscal year 2018 NDAA—which required DOD to revise the DFARS to include three specific statements about DOD acquisitions—in 143 days, ahead of Congress’s 180-day deadline.
- Four provisions had deadlines for implementation of 60 days or less. For example, sections 841 and 842 in the fiscal year 2012 NDAA called for changes to be made to the DFARS within 30 days. The short deadlines allowed for fewer days than DARS staff allocate for public comment (minimum of 30 days, by law) and outside agency review (no more than 90 days, by executive order). Deadlines that did not allow for these activities as well as time to draft language were typically not met.

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<sup>21</sup>One of the 37 provisions, section 883 of the fiscal year 2017 NDAA, required DFARS changes if the Secretary of Defense exercises authority under that section to carry out a pilot program for distribution support and services for weapon systems contractors. DARS staff determined that because the Secretary of Defense has not exercised this authority, the provision does not require action at this time. DARS staff is in the process of implementing the remaining 14 provisions.

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## Conclusions

DARS is responsible for developing and maintaining DOD acquisition regulations, which may include implementing acquisition-related NDAA provisions. The DARS staff has internal tools to track, manage, and communicate the status of DFARS changes, including implementation of NDAA provisions. However, DOD's DFARS change process does not have a reporting mechanism to clearly communicate to Congress, industry, and other interested parties the status of regulatory or other changes linked to specific NDAA provisions. Without a mechanism to better communicate DOD's actions to implement NDAA provisions, stakeholders potentially affected by reforms may be unaware of what and when changes may be implemented. Given the actions and length of time that it may take to implement provisions and see a change reflected in the DFARS or elsewhere, stakeholders would benefit from knowing the status of DOD's actions before implementation has been completed in order to, for example, prepare for compliance.

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## Recommendation for Executive Action

We are making the following recommendation to the Secretary of Defense to ensure that the Director of the Defense Acquisition Regulations System:

Develop a mechanism to better communicate to all stakeholders the implementation status of acquisition-related NDAA provisions, particularly those provisions that direct a change or consideration of a change to the DFARS. (Recommendation 1)

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## Agency Comments and Our Evaluation

We provided a draft of this report to DOD for comment. DOD concurred with our recommendation to develop a mechanism to better communicate to all stakeholders the implementation status of acquisition-related NDAA provisions. The department said it will develop a matrix reflecting the implementation status of acquisition-related NDAA provisions and post the matrix on the Defense Pricing and Contracting public website. DOD's written comments on the report are reprinted in appendix II. DOD also provided technical comments, which we incorporated as appropriate.





We are sending copies of this report to the Acting Secretary of Defense; the Under Secretary of Defense for Acquisition and Sustainment; the Secretaries of the Air Force, Army, and Navy; the Director, Defense Acquisition Regulations System; appropriate congressional committees; and other interested parties. This report will also be available at no charge on the GAO website at <http://www.gao.gov>.

If you or your staff have any questions concerning this report, please contact me at (202) 512-4841 or by e-mail at [woodsw@gao.gov](mailto:woodsw@gao.gov). Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this report. GAO staff that made key contributions to this report are listed in appendix III.



William T. Woods  
Director,  
Contracting and National Security Acquisitions

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*List of Committees*

The Honorable James M. Inhofe  
Chairman  
The Honorable Jack Reed  
Ranking Member  
Committee on Armed Services  
United States Senate

The Honorable Richard Shelby  
Chairman  
The Honorable Richard Durbin  
Ranking Member  
Subcommittee on Defense  
Committee on Appropriations  
United States Senate

The Honorable Adam Smith  
Chairman  
The Honorable Mac Thornberry  
Ranking Member  
Committee on Armed Services  
House of Representatives

The Honorable Peter Visclosky  
Chairman  
The Honorable Ken Calvert  
Ranking Member  
Subcommittee on Defense  
Committee on Appropriations  
House of Representatives

# Appendix I: Objectives, Scope, and Methodology

A House Armed Services Committee report related to the National Defense Authorization Act (NDAA) for Fiscal Year 2019 included a provision for us to review the Department of Defense's (DOD) process for revising the Defense Federal Acquisition Regulation Supplement (DFARS), among other things.<sup>1</sup> This report (1) determines how DOD implements acquisition-related NDAA provisions and communicates implementation status, and (2) identifies the status of DOD's efforts to implement acquisition-related NDAA provisions from fiscal years 2010-2018.

To determine how DOD implements acquisition-related NDAA provisions, we reviewed DOD documents and supplemented our work with interviews with relevant DOD officials. Specifically, we reviewed the DFARS Operating Guide, January 2015; presentation on the Defense Acquisition Regulations System Rulemaking Process, DFARS open and closed cases reports, Federal Acquisition Regulation open and closed cases reports; decision matrices from the Defense Acquisition Regulations System (DARS), which document decisions on implementing NDAA provisions from fiscal years 2010-2018; and other applicable reports and information on provisions and cases from the DARS staff and the Defense Acquisition Regulations Council. We also referenced our past reports on DFARS rulemaking; U.S. Code on Publication of proposed regulations; the Federal Acquisition Regulation Operating Guide, July 2015; *Federal Register* notices related to DOD rulemaking; and the news listing on the DARS website.<sup>2</sup> We adopted the DARS use of the term "implementation," which includes both regulatory action as well as other actions, such as public meetings or a report.

We interviewed DOD officials that are involved in the DFARS rulemaking process. Specifically, we interviewed members of the Defense Acquisition

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<sup>1</sup>H.R. Rep. No. 115-676, at 142-43 (2018).

<sup>2</sup>GAO, *Department of Defense: Acquisition Rulemaking Practices*, [GAO-15-423R](#) (Washington, D.C.: Apr. 17, 2015). 41 U.S.C. § 1707. <https://www.acq.osd.mil/dpap/dars/>, accessed on May 20, 2019.

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Regulations Council and DARS staff, including the Chair and Deputy Chair, the Regulatory Control Officer that prepares rules for submission to the Office of Information and Regulatory Affairs within the Office of Management and Budget, and DFARS case managers. We also interviewed officials from the DOD components—Air Force, Army, Navy, Defense Contract Management Agency, and Defense Logistics Agency. We interviewed industry representatives from the Aerospace Industries Association, National Defense Industrial Association, and the Professional Services Council.

We compared the DARS process with the *Standards for Internal Control in the Federal Government*.<sup>3</sup> Specifically, we reviewed DOD’s public reports of its implementation actions with internal control principle 15: “management should externally communicate the necessary quality information to achieve the entity’s objectives.” Stakeholders in the acquisition process include executive agencies’ program and contracting officials, members of Congress, congressional staff, industry, contractors, and members of the public.

The DARS staff provided a complete data extract of Defense Acquisition Regulations Management Information System as of October 31, 2018, to document the acquisition-related NDAA provisions that DARS staff identified as potentially requiring implementation. The Defense Acquisition Regulations Management Information System is the DARS database to track the status of individual cases that are associated with DARS rulemaking actions. We analyzed the data extract to identify which Title VIII provisions that the DARS identified for implementation from NDAs from fiscal years 2010-2018, and to identify the cases related to those provisions. We focused on Title VIII—Acquisition Policy, Acquisition Management, and Related Matters—of the NDAs, which contain acquisition-related provisions. We queried the data extract to identify cases with notes indicating NDAA provisions from fiscal years 2010-2018 as the source of change in the database synopsis field. We found 180 acquisition-related provisions from Title VIII of the NDAs from fiscal years 2010-2018 that the DARS staff had identified for implementation. For these 180 provisions, we determined the number and types of cases by year, duration of cases, and duration of select steps for cases. We verified the validity of provisions and cases that were not in both the

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<sup>3</sup>GAO, *Standards for Internal Control in the Federal Government*, [GAO-14-704G](#) (Washington, D.C.: Sept. 10, 2014).

DARS reports that DARS staff manually produced and the Defense Acquisition Regulations Management Information System data with DARS officials as of April 19, 2019.

To identify the implementation status of acquisition-related NDAA provisions from fiscal years 2010-2018, we further analyzed data from the Defense Acquisition Regulations Management Information System and DARS reports. For the actions associated with the 180 provisions, we analyzed the status history of each case, associated status dates for cases, and closed status indicators. We also reviewed DARS reports, such as the internal stats charts with case duration and closure metrics that DARS officials told us they manually verify. We reviewed a report that the DARS staff manually produced for us that showed actions and cases by provision for the NDAs from fiscal years 2010-2018.

We independently analyzed the NDAs from fiscal years 2010-2018 and determined 36 provisions in Title VIII that expressly directed DOD to make or consider making an acquisition-related regulatory change, as well as one provision that directed DOD to issue guidance. We identified these provisions using a keyword search of individual and combined terms and criteria, such as “regulation, defense, and acquisition regulation.” To better understand the Defense Acquisition Regulations Council’s recommendations and DARS implementation process, we selected 12 provisions that directed DOD to make or consider an acquisition-related regulatory change for case studies. The case study selection criteria included the year of the NDAA from which the provision originated for a mix of older and newer provisions and time duration for a mix of shorter and longer cases related to implement the provisions.

We used DARS reports and our analysis of the Defense Acquisition Regulations Management Information System data to determine the year and time duration. Since the DFARS Case Standard Timeline is 52 weeks, we selected provisions with cases that were both more and less than 52 weeks. We also selected provisions with cases that were open and closed. We created a data collection instrument for the case studies that captured information, such as which provisions were associated with the case, to standardize our data collection process. For the 12 provisions, we reviewed the associated case files that are generally a record of the implementation process and the Defense Acquisition Regulations Council’s recommendations, and the decisions made by the DARS staff. We also reviewed available publication folders associated with the cases that generally document input and decisions from other agencies, such as the Office of Management Budget’s Office of

Information and Regulatory Affairs. Finally, we used the information in the files to verify the information in Defense Acquisition Regulations Management Information System for those specific cases.

We found the Defense Acquisition Regulations Management Information System data and information in the files that we reviewed to be sufficiently reliable for purposes of reporting on how the DARS staff implemented NDAA provisions and the time duration to do so.

We conducted this performance audit from August 2018 to July 2019 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

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# Appendix II: Comments from the Department of Defense

**Appendix II: Comments from the Department  
of Defense**



ACQUISITION  
AND SUSTAINMENT

**OFFICE OF THE UNDER SECRETARY OF DEFENSE**

3000 DEFENSE PENTAGON  
WASHINGTON, DC 20301-3000

*JUN 18 2019*

Mr. William T. Woods  
Director, Contracting and National Security Acquisitions  
U.S. Government Accountability Office  
441 G Street, NW  
Washington, DC 20548

Dear Mr. Woods,

This is the Department of Defense (DoD) response to the Government Accountability Office (GAO) Draft Report, GAO-19-489, "Defense Acquisitions: DoD Needs to Improve How It Communicates the Status of Regulation Changes," dated May 22, 2019 (GAO Code 102978). Detailed comments on the report recommendation are enclosed.

Sincerely,

A handwritten signature in blue ink, appearing to read "K. Herrington", is written over the typed name.

Kim Herrington  
Acting Principal Director,  
Defense Pricing and Contracting

Enclosure:  
As stated



GAO DRAFT REPORT DATED MAY 22, 2019  
GAO-19-488 (GAO CODE 102978)

“DEFENSE ACQUISITIONS: DOD Needs to Improve How It Communicates the Status of  
Regulation Changes”

DEPARTMENT OF DEFENSE COMMENTS  
TO THE GAO RECOMMENDATION

**RECOMMENDATION 1:** The GAO recommends that The Secretary of Defense to ensure that the Director of the Defense Acquisition Regulations System: develop a mechanism to better communicate to all stakeholders the implementation status of acquisition-related NDAA provisions, particularly those provisions that direct a change or consideration of a change to the DFARS. (Recommendation 1)

**DoD RESPONSE:** Concur. DoD will develop a matrix to communicate to all stakeholders the implementation status of acquisition-related NDAA provisions, particularly those provisions that direct a change or consideration of a change to the DFARS. The matrix will be posted and updated regularly on the Defense Pricing and Contracting public website located at <https://www.acq.osd.mil/dpap/dars/index.html>

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# Appendix III: GAO Contacts and Staff Acknowledgments

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## GAO Contact

William T. Woods at (202) 512-4841 or [woodsw@gao.gov](mailto:woodsw@gao.gov)

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## Staff Acknowledgments

In addition to the contact named above, Penny Berrier, Assistant Director; James Kim; Holly Williams; Beth Reed Fritts; Gail-Lynn Michel; Emily Bond; Lori Fields; Matthew T. Crosby; Lorraine Ettaro; and Tim Bober made key contributions to this report.

# Appendix IV: Accessible Data

## Data Table

Accessible Data for Figure 3: Implementation Status of 180 National Defense Authorization Act Provisions from Fiscal Years 2010-2018 (as of October 31, 2018)

|  | Count of provisions (fiscal year 2010) | Count of provisions (fiscal year 2011) | Count of provisions (fiscal year 2012) | Count of provisions (fiscal year 2013) | Count of provisions (fiscal year 2014) | Count of provisions (fiscal year 2015) | Count of provisions (fiscal year 2016) | Count of provisions (fiscal year 2017) | Count of provisions (fiscal year 2018) | Count of provisions (Total) |
|--|--|--|--|--|--|--|--|--|--|-----------------------------|
| Implemented in regulation, guidance or by other method                               | 13                                     | 18                                     | 15                                     | 14                                     | 3                                      | 12                                     | 19                                     | 10                                     | 8                                      | 112                         |
| In-Progress <sup>1</sup>   | .                                      | 1                                      | 3                                      | 1                                      | .                                      | 2                                      | 6                                      | 25                                     | 14                                     | 52                          |
| Defense Acquisition Regulations System staff determined regulatory change not needed | .                                      | 3                                      | 4                                      | 3                                      | 1                                      | .                                      | 2                                      | 1                                      | 2                                      | 16                          |
| Total provisions   | 13                                     | 22                                     | 22                                     | 18                                     | 4                                      | 14                                     | 27                                     | 36                                     | 24                                     | 180                         |

## Agency Comment Letter

Accessible Text for Appendix II Comments from the Department of Defense

Page 1

JUN 18 2019

Mr. William T. Woods

Director, Contracting and National Security Acquisition s

U.S. Government Accountability Office

441 G Street, NW

Washington, DC 20548

Dear Mr. Woods,

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Sincerely,

Kim Herrington

Acting Principal Director,

Defense Pricing and Contracting

Enclosure:

As stated

Page 2

GAO DRAFT REPORT DATED MAY 22, 2019 GAO-19-488 (GAO CODE 102978)

"DEFENSE ACQUISITIONS: DOD Needs to Improve How It Communicates the Status of Regulation Changes"

DEPARTMENT OF DEFENSE COMMENTS TO THE GAO RECOMMENDATION

RECOMMENDATION 1: The GAO recommends that The Secretary of Defense to ensure that the Director of the Defense Acquisition Regulations System: develop a mechanism to better communicate to all stakeholders the implementation status of acquisition-related NOAA

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provisions, particularly those provisions that direct a change or consideration of a change to the OFARS. (Recommendation 1)

DoD RESPONSE: Concur. DoD will develop a matrix to communicate to all stakeholders the implementation status of acquisition-related NOAA provisions, particularly those provisions that direct a change or consideration of a change to the DFARS. The matrix will be posted and updated regularly on the Defense Pricing and Contracting public website located at

<https://www.acq.osd.mil/dpap/dars/index.html>

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