COUNCIL OF DEFENSE AND SPACE INDUSTRY ASSOCIATIONS
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September 10, 2014

Ms. Hada Flowers
Regulatory Secretariat Division (MVCB)
U.S. General Services Administration
1800 F Street NW
Washington, DC 20405

Via Regulations.gov

Re: Federal Acquisition Regulation; Expanded Reporting of Nonconforming Items; FAR Case 2013–002
CODSIA Case 07-14

Dear Ms. Flowers:

On behalf of the Council of Defense and Space Industry Associations [1](CODSIA), we appreciate the opportunity to submit comments on the proposed Federal Acquisition Regulation (FAR) rule entitled "Expanded Reporting of Nonconforming Items" published originally in the *Federal Register* on June 10, 2014. The Department of Defense (DoD), the General Services Administration (GSA), and the National Aeronautics and Space Administration (NASA) are proposing to revise the Federal Acquisition Regulation (FAR) to expand Government and contractor requirements for reporting of nonconforming goods in partial implementation of Section 818 of the National Defense Authorization Act (NDAA) for Fiscal Year 2012 (Pub. L. 112-81, enacted December 31, 2011). The rule is intended to reduce the risk of counterfeit items entering the supply chain, and we submit to you the following comments as you review the effectiveness of the text in helping to achieve that intention.

Introduction

As noted above, the subject proposed rulemaking is a partial implementation of Section 818 of the FY12 NDAA. Many of the concerns addressed herein have been noted in prior correspondence and at public meetings concerning other facets of the implementation, but are just as relevant in this context as when the underlying statute was enacted on December 31, 2011. CODSIA continues to request a more robust industry engagement with federal regulators on supply chain issues impacted by Section 818 and believes that a regular interactive dialogue with industry and government is still needed to support a balanced and effective implementation. Congress has endorsed such a process in both House and Senate report language from the FY 13 NDAA by requiring DoD to "… engage industry in a consistent and

[1]The Council of Defense and Space Industry Associations (CODSIA) was formed in 1964 by industry associations with common interests in federal procurement policy issues at the suggestion of the Department of Defense. CODSIA consists of seven associations – the Aerospace Industries Association (AIA), the American Council of Engineering Companies (ACEC), the Information Technology Alliance for Public Sector (ITAPS), the National Defense Industrial Association (NDIA), the Professional Services Council (PSC), TechAmerica, and the Chamber of Commerce of the United States. CODSIA's member associations represent thousands of government contractors nationwide. The Council acts as an institutional focal point for coordination of its members' positions regarding policies, regulations, directives, and procedures that affect them. A decision by any member association to abstain from participation in a particular case is not necessarily an indication of dissent.

meaningful dialogue as it continues to craft and implement policies…" and "…to solicit the views of… interested parties, including representatives of OEMs, DOD prime contractors, and lower tier contractors…as it works to address these and other implementation issues." Like Congress, Industry believes that meaningful dialogue must occur prior to the publication of regulatory proposals during the formative stages of development and would continue to urge the government to convene such meetings as an essential, part of this process.

We further note that since the enactment of Section 818 in the FY12 NDAA, multiple statutory provisions have been proposed, and/or enacted into law in various Defense Authorizations, modifying the initial requirements of Section 818. Those include establishing a conditional safe harbor from liability where Government Property is found to be counterfeit (Section 833, FY13 NDAA), direction to DoD to establish a framework for identifying and replacing obsolete Parts (Section 803, FY14 NDAA), approval to expand safe harbors for those complying with the system requirements (Section 811 and 812, FY 14 House passed version of the NDAA, not enacted), and an expansion of the meaning of trusted suppliers (Section 824, Senate proposed version of the FY15 NDAA, under consideration).

This legislative history suggests a level of rapid and continuing policy change that results from recognition by the Congress of the complexities of supply chain management and counterfeit electronic parts policy over the short period since initial enactment of Section 818. Such legislative changes have become part of the rolling implementation process for Section 818, which has not been well served by an incremental approach reliant on issuing separate rules to meet discrete requirements of Section 818, but which are dependent on both in-process and yet-to-be-created future implementation of other elements of the same policy (including already implemented contractor systems requirements for detection and avoidance, unimplemented rules on quality requirements, exclusion of sources, trusted suppliers, and now reporting requirements). Given the way the implementation has proceeded to date, we again urge the FAR and DAR Councils to collaborate as soon as possible with industry on developing an integrated policy model.

CODSIA appreciates this opportunity to respond to the proposed rule and will address the following in our response below:

- Challenges with the expansion of policy
- Indemnification from civil liability
- Ramifications from increased reporting to GIDEP
- Clarification for new reporting responsibilities
- Broader economic impacts
- Flowdown requirement challenges
- Exemptions from certain mandatory disclosure requirements

<u>Expansion of policy</u>

We believe that while well intended, the proposed rule is overly broad and does not reflect the stated intent of Congress expressed in Section 818. Instead, the FAR Council (the Council) expanded the scope of Section 818's mandate by applying the clause in a blanket and indiscriminate fashion. In the notice, the FAR Council acknowledged that "*While section 818 applied only to DoD, only to electronic products,*

and only to contractors covered by the Cost Accounting Standards (CAS), the FAR Council concluded that the principles expressed in section 818 should be applied beyond DoD, should not be limited to electronic products, and should not be limited to CAS-covered contractors." The preamble further acknowledges that while OFPP Policy Letter 91-3, Reporting of Non-Conforming Parts, required only agency reporting to the Government-Industry Data Exchange Program (GIDEP) system, the FAR Council "determined" in this instance that reporting would be more effective and timely if contractors were required to make the reports. We believe that this conclusion exceeds the authority of the Section and has been inappropriately applied.

Neither of these statements provides reasoning or justification why the FAR Council concluded that expansion of the reporting policy in Section 818 was needed or appropriate for all agencies to require contractor reporting of non-conforming items. There have been civilian agency reports from NASA and the Department of Commerce in the early 2000's about protecting against specific types of fraud by specific contractors in the counterfeit electronic parts trade, mostly involving printed circuit boards and done to advance policies on enhanced enforcement of trademark law. Industry is not aware of any publicly available reports from civilian agencies that provide adequate justification for the expansion of reporting beyond DoD and to include reporting of non-conforming items of any kind. The FAR Council's policy choices appear unrelated to the requirements of Section 818, which specifically limited the policy's applicability to the DFARS, to electronic parts, and only to CAS-covered contractors.

Additionally, even though the proposed rule expands upon the original policy, it is not likely to give a more complete picture of risk in the global supply chain. As international corporations cannot participate in GIDEP, this proposed rule will have limited value at identifying and removing nonconforming items from the system, in particular for electronic counterfeits where many electronic components like chips and even software code are produced all over the world. Global companies will have a difficult time participating. Instead, we encourage the rule-makers to identify means to include in the rule an accurate reflection of today's global supply chain. Such lack of attention to the global marketplace generating many of the goods and services acquired by the Department has the potential to interfere with international, bilateral trade agreements.

We believe that any final rule should more accurately reflect the statute from which it is derived. If the FAR Council believes that more can be done to prevent nonconforming parts entering the federal supply chain, we encourage them to work with Congress and the stakeholder community to justify the expansion of the application of this rule and identify alternative solutions.

<u>Safe Harbor: Indemnification from Civil Liability</u>

Section 818(c)(5) of the underlying statute, Detection and Avoidance of Counterfeit Electronic Parts, required that DoD craft regulations for contractors to report the discovery of counterfeit and suspect counterfeit electronic parts, ostensibly in supplies to be delivered to DoD or in the contractor's material inventory or supply chain. This rulemaking expands that reporting requirement beyond counterfeit and suspect counterfeit electronic parts to all non-conforming end items delivered to the government or included as components in an end item delivered to the government.

At the time of enactment, rules had not even begun promulgation and the means of reporting uncertain, but the statute created a "Safe Harbor" relief from civil liability for a prime or subcontractor that made a reasonable "good faith" effort (a term that remains undefined) to determine whether the material was counterfeit or a suspect counterfeit electronic part prior to reporting the items/materials into a government selected repository. The safe harbor was created to address industry's apprehension to report into GIDEP as a result of concerns and fears of civil litigation or harming the reputation of a company or for business interruption where that report might be erroneous. The safe harbor was also crafted to incentivize more industry participation in whatever reporting process was chosen by the Department.

The proposed rule acknowledges that statutory safe harbor as part of the contractual reporting requirement for counterfeit and suspect counterfeit electronic parts in subsection (d) of the draft clause. Unfortunately, the expansion of the reporting requirement beyond counterfeit and suspect counterfeit electronic part to all non-conforming items on all federal contracts goes well beyond the statute and creates a gap in the implementation that could dis-incentivize contractors from reporting because the clause does not specifically grant a safe harbor for erroneous good faith reporting in non-DoD contracts. The FAR Council should provide legal indemnification for all good faith reporting for all purposes set forth in the rule. CODSIA recommends that the Council adopt the broader indemnification approach and align the safe harbor in subsection (d) for DoD contracts and for counterfeit and suspect counterfeit electronic parts to all contracts and to all non-conforming items to be covered by the final rule.

Increased Reporting in GIDEP

The Government and Industry Data Exchange Program (GIDEP) is a useful tool that currently provides a repository for limited communication between a defined audience of government vendors and customers. Under this proposed rule, GIDEP would become the reporting platform for all contractors, subcontractors and suppliers to report the discovery of non-conforming or suspected non-conforming parts from across the entire Federal public sector market. Because of this significant change in scope, CODSIA is concerned that GIDEP is not currently resourced to effectively scale to facilitate this new role and that vendors, particularly those not currently part of GIDEP, would struggle with using the new reporting portal. Additionally, industry is concerned that the expense of collecting non-conforming part information, in particular for commercial item and COTS suppliers and small businesses, may prove to be prohibitive and companies at the lower tiers of the supply chain, where counterfeit and non-conforming items can best be avoided, would choose to exit the market.

GIDEP has reported that they are currently revising the program and the reporting portal, but a number of sensitive issues regarding access to the program and visibility into the reported data are still being resolved. CODSIA would recommend that the government be able to demonstrate the allocation of adequate resources for GIDEP, the effective scaling of the reporting portal and the resolution of outstanding issues regarding protections of the information reported into the portal prior to the enforcement of any reporting requirements under Section 818 and this rule. Among other suggested process improvements that may be offered, GIDEP should be configured to automatically issue bulletins to industry when reports are input into the system in order to provide the maximum opportunity for contractors to reduce the real-time risk of counterfeit, suspect counterfeit or non-conforming items entering the supply chain.

GIDEP may also present a substantial non-tariff barrier to trade because it limits participation to only a "U.S. or Canadian industrial organization who supplies items or services (directly or indirectly) to the U.S. Government or to the Canadian Department of National Defense."[2] If the proposed rule requires all contractors to participate in order to do business with the U.S. Government, but limits participation to only "U.S. or Canadian industrial organizations," this may present a significant barrier to foreign owned companies or their U.S. subsidiaries from selling to the U.S. government. In addition, many technology companies are truly multinational in scope, with global development, procurement, production and distribution operations, all which play a key role in discovering and mitigating counterfeit or non-conforming parts and would be covered by this rule. To comply with the proposed rule, any company with such global operations will require direct access to GIDEP by their foreign employees involved in such operations, which is not currently permitted by GIDEP rules,[3] or be permitted to use alternate methods of reporting, which the proposed rule does not address.

With new individuals reporting into GIDEP, there will be added cost to train and maintain the additional workforce. For example, companies will have to create standards for the determination of how "criticality" is assessed. Because this determination is based on users' design and application, what is not critical to one user might be critical to other users. Companies will have to create complex training, monitoring, and assurance mechanisms to make sure that their workforce knows how to submit reports to GIDEP and when to do so. Many companies simply may not be willing to implement such mechanisms and will voluntarily remove themselves as a source of supply to the federal government.

Reporting Duties, Requirements, and Timing

Contractors have several reporting responsibilities under the clause. Proposed FAR 46.105(f)(1) states that contractors must report within 30 days to the Contracting Officer (CO) when the Contractor "becomes aware" that any material/component "contained in supplies purchased by the contractor for delivery to or for the government is counterfeit or suspect counterfeit." Subsection (f)(2) states another contractor responsibility to report "to the GIDEP within 60 days from when it becomes aware that an item purchased by or for the contractor for delivery to or for the government- is counterfeit or suspect counterfeit; or contains a major or critical nonconformance…" This constitutes a significantly broader reporting requirement than envisioned in the statute and subsection (f)(2) goes on to describe the conditions under which such a report on a non-conforming part is required while the terms of art are mostly defined elsewhere in the rulemaking and in the proposed clause. We further note that these are two separate duties dependent on whether the item is counterfeit or suspect counterfeit (notice to the contracting officer) or whether it is counterfeit, suspect counterfeit or a non-conforming part (notice to GIDEP). The boundaries of these potentially overlapping duties should be clarified by the FAR Council.

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[2] See: GIDEP Membership Requirements located at: http://www.gidep.org/join/requirements.htm (visited August 19, 2014).

[3] The GIDEP Operational Manual, Appendix E, paragraph 1.1.3, notes that: "Data and documents downloaded from GIDEP are controlled distribution and shall not be shared with companies outside the continental United States and Canada. Distribution of GIDEP data is controlled under the Foreign Technology Transfer Act… Access by other nationals and foreign contractors operating outside Canada and the United States requires approval of the US Department of State and the DoD Office of Technology Transfer."
See: http://www.gidep.org/about/opmanual/appen-e.pdf.

As a threshold matter, the FAR Council should review the elements and characteristics of the terms used to identify a non-conforming part for the purposes of reporting. The qualifying definitions for common item, and for major and critical nonconformance are all susceptible to many interpretations by a supplier at any tier or at any point in the supply chain and could lead to either multiple reporting and/or no reporting. It is also difficult to understand from those definitions where in the supply chain a part may be found to be non-conforming for a specific application.

The final rule promulgated for the detection and avoidance requirements on May 6, 2014 defines a counterfeit electronic part as a knowingly misrepresented part and defines a suspect counterfeit as an item that a (presumably) higher tiered supplier had credible evidence to believe was knowingly misrepresented by a lower tiered supplier or the counterfeit maker. In the case of non-conforming parts, where there is no evidence of knowing misrepresentation for why something is non-conforming, suppliers at all tiers will be held more or less to an undefined standard for meeting the reporting requirements. The qualifiers to the definitions add no substantive information to allow a supplier to adopt a useful model to identify when a part is non-conforming under the rules. Moreover, because the definitions use potential for product failure as the defining element for non-conformances, if a part is delivered in damaged condition, for whatever reason, but by no fault of the lower tier supplier or manufacturer and there is no intent to deceive, this rule could conceivably require that the damaged part received be reported to GIDEP. CODSIA recommends that the FAR Council add into the underlying duty to report a non-conforming part that there was some intent to deceive by entering a non-conforming part into the stream of commerce or the supply chain.

We also believe it is important for the FAR Council to remember that the DoD rules for counterfeit and suspect counterfeit electronic parts now include “embedded software or firmware” within their ambit, which only serves to magnify the enormous scope of the reporting duty for “counterfeit and suspect counterfeit items” where higher tiered contractors may not be able to physically do definitive engineering analysis on such products without destructive testing of the product in which the software or firmware is embedded. Further clarification is requested to address the applicability of reporting on binary code or downloaded apps that are stored in a contractor’s data system. The ability to discover flaws in embedded “products” was not part of Section 818 and its inclusion in the detection and avoidance systems rules will undoubtedly cause gaps in the reporting process.

Additionally, the government-only reporting mechanism in GIDEP seems unfair to companies who, by the authorities in this rule, take on additional levels of liability. Companies do not have an opportunity to counterbalance what the government has reported, which not only represents just one party’s position but also does not achieve the objective of mitigating counterfeit part/product risk. The government-only report shows only one part of the larger story and we believe the GIDEP tool could be more useful if companies were allowed to file a response to the government report. This will also add additional protection for the government, as today’s process risks the customer being held accountable. The current system runs the risk of driving companies, and small businesses in particular, out of the market if they cannot afford to bring a case and obtain relief.

Several process concerns also manifest themselves wherever multiple reporting obligations enveloping the entirety of a contractor’s supply chain arise under this rule. First there is no definition of the term

"becomes aware," so a standard needs to be established that recognizes that there are many touch points in a supply chain where a counterfeit or suspect counterfeit part could potentially be discovered and thus potentially many points where the reporting requirement might legitimately surface. Second, the proposed rule and clause use the term "contractor" at some points and "Contractor" at other points, while it also requires mandatory flow-down of the clause to all subcontracts for supplies, thus confusing the situation greatly as to the identity of the contractor obligated to report under the rule's conditions: is it a prime contractor where the final end item resides, but where the non-conforming item may have traveled great distances and over a vast time period to get to that point and been touched by many hands and/or been in multiple contractor inventories; is it a lower tiered subcontractor who likewise received the non-conforming or counterfeit part through several contractual layers of suppliers/subcontractors below them; or is it the distributor or supplier who first takes possession of the non-conforming or counterfeit part?

A prime contractor may thus only become aware of a non-conforming or counterfeit or suspect counterfeit part at time of delivery and acceptance of a lower tiered assembly or product, while awareness could conceivably take place many years and at many layers below that prime or first tier subcontractor. The FAR Council needs to implement a definitive time and place where awareness triggers the contractual obligation for a "contractor/Contractor" to report to the GIDEP. Some observers have suggested, however, that the original supplier or the title holder of the product in question be the default reporting entity, but that could create a different set of identification issues. We suggest that further collaboration with industry on the proper reporting entity may be required before pronouncing exactly where the duty to report lies.

Conversely, while it is unclear where exactly in the supply chain the reporting obligation might fall under these proposed rules, it is almost certain that the government does not desire multiple reports from multiple points in the supply chain flooding the GIDEP system on the same non-conforming or counterfeit or suspect counterfeit part, if only because of the investigative burden and compliance costs that might accrue where agencies and/or contractors are attempting strict compliance with the reporting rules and over-reporting the same instances of non-conforming parts. CODSIA recommends that "actual knowledge" be required of a contractor as the regulatory trigger for the reporting obligation and that the first point in time in the supply chain where "actual knowledge" can be established may be the proper point for disclosure and reporting to GIDEP.

As stated above, there is an obligation to report to the Contracting Officer (CO) in cases where counterfeit or suspect counterfeit parts are discovered, but not where non-conforming parts are identified. The FAR Council should clarify the rationale for different reporting duties to different functions based on whether something is deemed counterfeit or simply non-conforming. If anything, since a counterfeit item requires fraudulent intent, and CO's are not trained in the legal process for understanding or prosecuting fraud, it is difficult to know why counterfeit items are reported to the CO, but not non-conforming items, which a CO is trained to deal with. We note finally that the GIDEP manual already contains a reporting process and timing that many involved with federal contracting already use. Further, those users support the application and use of that existing process to this instance, but caution that the process would need further substantial adjustment to scale it properly to align with this rulemaking prior to becoming the standard for defining contractor reporting obligations.

Economic Impact on Contractors and Small Businesses

While the Council recognizes that there is a potential for a substantial economic impact, we remain concerned that the estimate may be significantly underestimated. The true costs and economic impact this rule will have on the information and communications technology (ICT) industry and defense industrial base (DIB) are not reflected in the cost estimates provided. For instance, we believe the information collection requirement estimates that each response takes an average of three hours is substantially underestimated. Some contractors have reported that a single report can take up to one hundred hours to complete, including the significant legal review required when preparing reports. Also, the government's estimation on the time to prepare a GIDEP document is too low, and does not take into consideration the amount of time that programs would spend to evaluate the impact of the GIDEP document. If the government's estimation that this FAR would result in the generation of 474,000 additional GIDEP documents is true, the evaluation of those documents would be extremely costly.

The Council has also concluded that this rule is not a "major rule" under 5 U.S.C. 804, which by definition, means that the rule will not have an economic impact of $100 million or more on the country. Based solely on the value of current industry investments to secure supply chains and ensure product integrity, CODSIA finds it difficult to concur with this estimation. Additionally, the interim rule has numerous other economic impacts, including increased costs to the government customer for compliance and the additional liability costs of the provision imposed on the government industrial base and information and communication technology (ICT) sectors. Thus, we respectfully disagree with and do not support the Council's conclusion that this proposed rule is not a "major rule."

The proposed rule poses significant burdens for existing companies in the market, and will only further dissuade new and innovative companies from entering the public sector market. This is especially true for commercial companies with contract clauses in their non-U.S. federal contracts indicating that if they are ineligible for work with the U.S. government then they are ineligible for work with that other entity. Those commercial companies will not want to risk relationships with their commercial or international government client bases to serve the U.S. federal government. The final version of this rule must include a more accurate assessment conducted with industry to determine how these new regulations will affect competition in the marketplace.

The Initial Regulatory Flexibility Analysis has made the determination that this proposed rule, as written, would have a "substantial economic impact on a substantial number of small entities." We agree that the proposed rule is likely to increase costs for smaller businesses by requiring them to significantly increase quality assurance and compliance investments in order to remain at some tier in government supply chain, increasing liability costs associated with compliance failures, and increasing costs associated with the heightened risk of application of the exclusionary authority and the business and economic effects noted above. These added compliance burdens are not just limited to small businesses, however, and will likely make future contracting opportunities cost-prohibitive for many small, medium, and large business enterprises – a fact which would amount to nothing less than a significant economic impact.

Moreover, it is reasonable to conclude that the majority of small businesses do not currently have the manpower or infrastructure to support the GIDEP reporting process without incurring dramatic increases in product cost to account for the increased levels of liability and legal risk. So far in the

Section 818 regulatory process, the rule-makings have had the net effect of higher tiered federal contractors trimming their supply chains to eliminate companies unable or unwilling to implement flow-down policies or that cannot immediately demonstrate well in advance of entering supplier agreements that they have the capabilities demanded by the various Section 818 rules. Ultimately, the by-product of this and other Section 818 rule-makings is that they have, and will continue to, disproportionately and negatively impact small businesses through reduced participation in the federal market and reduced federal funding.

Finally, the rule does not appear to consider the economic impact that this rule will have on the federal supply chain. The rule's scope creep to "major non-conformances" will cause an immediate spike in the costs associated with companies having to review and assess all of the additional reports into GIDEP, and the costs for training at lower tiers of the supply chain. These goals can all be achieved, but not without significant additional cost on the supplier and contractor side and the rule's rapid approach only further increases those costs, instead of allowing companies to take an incremental approach. Anything other than an incremental approach will not permit companies to control costs as they implement these new compliance requirements. We believe that companies should be allowed to get used to a subset of information and then work with the government and the lines of supply to drive efficiency into the process. The initial operating cost investment will be very high, but by providing an incremental approach, companies can adjust and their incremental costs may not be as significant. CODSIA reiterates our belief that a phased approach focused on counterfeit reporting instead of nonconformance reporting would be a better way to proceed.

Reporting Flowdown Requirements

CODSIA also opposes the mandatory flow-down of the reporting requirement clause to all subcontractors and suppliers to all tiers within the supply chain, including suppliers of commercial or COTS items. The administrative cost to the government to manage subcontractor and supplier compliance has been underestimated as set forth above, and any attempt to enforce strict compliance of the reporting requirement in the global market place is illusory and will be non-value added to those doing business with the federal government and an additional overhead cost that will reduce competition.

FAR Mandatory Disclosure Requirements

The FAR Council should expressly state that any reporting required under this rule does not implicate or trigger any of the requirements to notify agency Inspectors General (IGs) under the FAR Mandatory Disclosure rules in FAR Part 3.10. As the DoD stated in the preamble to the final Detection and Avoidance rulemaking, notice to the IG for reporting counterfeit and suspect counterfeit parts in the DoD supply chain may not be appropriate because it (the mandatory disclosure process) suggests that a contractor has committed an ethical or code of conduct violation, while GIDEP reporting is not meant to imply a violation of this nature.

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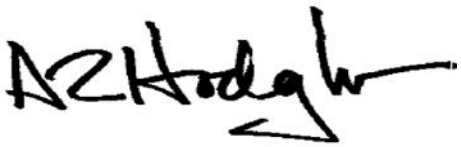
CODSIA looks forward to continuing to work with you to better understand how expanded reporting of nonconforming items may be improved to effectively accommodate the federal supply chain. Thank you

for your consideration of these comments and should you have any questions, please contact Erica R. McCann, the CODSIA case manager for this comment, at 202-524-4394 oremccann@itic.org, or Bettie McCarthy, CODSIA's Administrative Officer, at 703-875-2051 or at codsia@pscouncil.org.

Respectfully submitted,



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