chloro-8-quinolinyl)oxy]-, 1-methylhexyl ester; CAS Reg. No. 99607–70–2) and its acid metabolite (5-chloro-8-quinolinoxyacetic acid), expressed as cloquintocet-mexyl, in or on the following commodities:

* * * * *

[FR Doc. 2016–17534 Filed 8–1–16; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 202, 212, 242, 246, and 252

[Docket DARS–2015–0038]

RIN 0750–AI58

Defense Federal Acquisition Regulation Supplement: Detection and Avoidance of Counterfeit Electronic Parts—Further Implementation (DFARS Case 2014–D005)

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

ACTION: Final rule.

SUMMARY: DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a requirement of the National Defense Authorization Act for Fiscal Year 2012, as modified by a section of the National Defense Authorization Act for Fiscal Year 2015, that addresses required sources of electronic parts for defense contractors and subcontractors.

DATES: Effective August 2, 2016.

FOR FURTHER INFORMATION CONTACT: Ms. Amy G. Williams, telephone 571–372–6106.

SUPPLEMENTARY INFORMATION:

I. Background

DoD published a proposed rule in the **Federal Register** at 80 FR 56939 on September 21, 2015, to further implement section 818 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2012 (Pub. L. 112–81), as modified by section 817 of the NDAA for FY 2015 (Pub. L. 113–291).

In accordance with section 818, this rule requires DoD contractors and subcontractors, except in limited circumstances, acquire electronic parts from trusted suppliers in order to further address the avoidance of counterfeit electronic parts. DoD contractors and subcontractors that are not the original component manufacturer are required by this rule to notify the contracting officer if it is not possible to obtain an electronic part from a trusted supplier. For those instances where the contractor obtains electronic parts from sources other than a trusted supplier, the contractor is responsible for inspection, test, and authentication in accordance with existing applicable industry standards.

This rule enhances DoD's ability to strengthen the integrity of the process for acquisition of electronic parts and benefits both the Government and contractors. The careful selection of suppliers and the inspection, testing, and authentication of electronic parts that are not traceable to the original manufacturer are consistent with industry risk-based processes and are steps that a prudent contractor should take notwithstanding this rule. The avoidance of the proliferation of counterfeit electronic parts in the DoD supply chain reduces the risk of critical failure of fielded systems such as aircraft, ships, and other weapon systems, thus protecting troops' lives and safety.

This rule is part of DoD's retrospective plan, completed in August 2011, under Executive Order 13563, Improving Regulation and Regulatory Review. DoD's full plan and updates can be accessed at: *http://www.regulations.gov/#!docketDetail;D=DOD-2011-OS-0036.* Eighteen respondents submitted public comments in response to the proposed rule.

II. Discussion and Analysis

DoD reviewed the public comments in the development of the final rule. A discussion of the comments and the changes made to the rule as a result of those comments is provided, as follows:

A. Summary of Significant Changes From the Proposed Rule

1. Definitions

- Replaces the definition of ''authorized dealer'' with a definition of ''authorized supplier.''
- Replaces the definition of ''contract electronics manufacturer'' with a definition of ''contract manufacturer'' and a definition of ''authorized aftermarket manufacturer.'' This also results in a conforming change to the definition of ''original manufacturer.''
- Deletes the definition of ''trusted supplier'' and adds a definition of ''contractor-approved supplier.''
- Amends the definition of ''obsolete electronic part'' to utilize the newly defined term ''authorized aftermarket manufacturer.''
- Makes conforming changes throughout the rule in accordance with the added, revised, or deleted definitions.

2. Amends the following paragraphs of DFARS clause 252.246–7008, Sources of Electronic Parts, with conforming changes to DFARS subpart 246.8, as follows:

- (b)(1)—Clarifies ''in production'' and ''currently available in stock''.
- (b)(2) Introductory text—Clarifies ''not in production'' and ''not currently available in stock'' and changes ''or'' to ''and'' in the condition for use of contractor-approved suppliers, *i.e.*, ''Obtain electronic parts that are not in production by the original manufacturer or an authorized aftermarket manufacturer and not currently available in stock from a source listed in paragraph (b)(1) of this clause, from suppliers identified by the Contractor as contractor-approved suppliers . . . .''
- (b)(2)(i)—For electronic parts not in production and not currently available in stock, adds to the requirement for use of established counterfeit prevention industry standards and processes, the reference to the DoD-adopted standards at *https://assist.dla.mil*, but allows use of other appropriate standards. Use of DoD-adopted counterfeit prevention industry standards was previously required in the definition of ''trusted supplier.''
- (b)(2)(iii)—Specifies that the contracting officer is the appropriate DoD official to review and audit. This function is also added at DFARS 242.302 as a contract administration function that is delegable to the administrative contracting officer.
- (b)(3)—Moves former paragraph (d) to paragraph (b)(3), requiring prompt notification in writing, and adds the requirement that the contractor shall make documentation of the inspection, testing, and authentication of such electronic parts available to the contracting officer upon request if the contractor—
  - ○ Obtains an electronic part from a source other than any of the sources identified in paragraph (b)(1) or (b)(2) of the clause due to nonavailability from such sources, or a subcontractor (other than the original manufacturer) that refuses to accept flowdown of the clause; or
  - ○ Cannot confirm that an electronic part is new or that it has not been comingled in supplier new production or stock with used, refurbished, reclaimed, or returned parts.
- (c)(2)—Deletes contractor consideration of alternative parts if the contractor cannot establish traceability from the original manufacturer for a

specific electronic part, and makes the contractor responsible for inspection, testing, and authentication.

• (c)(3)—Requires the contractor to maintain documentation of traceability or the inspection, testing, and authentication, and adds the requirement to make such documentation available to the Government upon request.

• (d)—Adds a new paragraph (d) to address Government sources of electronic parts, to include purchases from the Federal Supply Schedule, purchases from suppliers accredited by the Defense Microelectronics Activity, or requisitioning from Government inventory/stock. Contractors and subcontractors are still required to comply with the requirements of paragraphs (b) and (c) of the clause 252.246–7008, if purchasing electronic parts from the Federal Supply Schedule or from suppliers accredited by the Defense Microelectronics Activity. However, if the contractor or subcontractor requisitions electronic parts from Government inventory/stock, then the Government is responsible for the authenticity of the parts.

• (e) Does not require clause flowdown to the original manufacturer.

B. Analysis of Public Comments

1. General Support for the Rule

Comment: Several respondents expressed support for many of the changes in the proposed rule, indicating that these are a significant step forward, are consistent with industry risk-based processes, and will help align DoD and defense contractor approaches to reduce the proliferation of counterfeit parts in the supply chain.

Response: Noted.

2. Applicability of DFARS 252.246–70XX (now 252.246–7008) and Associated Policy at Subpart 246.8

a. Contractors Not Covered by Cost Accounting Standards

Comment: Several respondents objected to the application of this rule to contractors not subject to the cost accounting standards (CAS), noting that it will apply to small businesses and acquisitions of commercial items. One respondent stated that section 818(c)(3) of the NDAA for FY 2012 does not add contractor responsibilities for avoiding counterfeit electronic parts to other than CAS-covered contractors and that DoD is overstepping Congressional intent when it applies this rule to small businesses and contracts for commercial items. The respondent states that section 818(c)(2) is only directed to contracts subject to CAS.

Response: Section 818 defines ''covered contractors'' to mean the same as the definition of the term in section 893(f)(2) of the NDAA for FY 2011, *i.e.*, a contractor that is subject to CAS under section 26 of the Office of Federal Procurement Policy Act (41 U.S.C. 422). Some portions of section 818 address covered contractors (*e.g.*, paragraph (c)(2)), and therefore only apply to contractors subject to CAS. However, paragraph (c)(3) of section 818 does not use the term ''covered contractor.'' It applies to all DoD contractors and subcontractors when obtaining electronic parts to be provided to DoD under a DoD contract. Section 818 is clear that DoD contractors and subcontractors at all tiers are responsible for detecting and avoiding counterfeit electronic parts. Thus, 252.246–7008 is consistent with the statute.

Comment: Another respondent stated the opinion that small entities not subject to CAS comprise a large portion of the counterfeit parts that directly threaten the DoD supply chain. The respondent provided several examples of non-CAS covered entities that were found by the Government to have allowed counterfeit parts to enter the DoD supply chain.

Response: Noted.

b. Small Entities

Various respondents addressed application of the rule to small entities. For analysis of applicability to small entities see the regulatory flexibility analysis at section V of this preamble.

c. Commercial Items (Including Commercially Available Off-the-Shelf Items (COTS Items)

Comment: Various respondents expressed concerns about the applicability of DFARS 252.246–7008 and associated policy to commercial item procurements, especially COTS items. One respondent expressed specific concern that the proposed expansion of coverage to commercial item contractors could result in reduced sources and increased costs for contractors. Another respondent stated that manufacturers of COTS items are independently motivated by the commercial market to assure that their products function as advertised.

Response: The Director of Defense Procurement and Acquisition Policy has determined that it is not in the best interest of the Government to exempt commercial items from the applicability of this rule. See section III of this preamble.

Comment: Several respondents expressed concerns that the proposed rule does not address the dilemma industry continually faces concerning the general lack of acceptance of counterfeit part prevention requirements flowdown by COTS electronic assembly producers and their authorized dealers. One respondent suggested providing relief from the obligation to flow down to COTS electronic assembly manufacturers.

Response: DoD has modified paragraph (b)(3) of the clause 252.246–7008 in the final rule to specify the required contractor actions if a subcontractor refuses to accept flowdown of the clause, to include notification to the contracting officer; contractor inspection, testing, and authentication of the part; and the requirement to make documentation of such inspection, testing, and authentication available to the Government upon request.

Comment: Several respondents expressed concerns that mandatory subcontract flowdown in 252.246–7008(e) for commercial items is inconsistent with Federal Acquisition Streamlining Act and that commercial item subcontracts or supplier agreements should be exempted. Another respondent stated that application of unique defense rules to commercial items where not expressly directed in the statute are prohibited without a best interests determination per 10 U.S.C. 2377. According to the respondent, in lieu of such a determination, at several points in the supplementary information, it states that ''DoD intends to determine that it is in the best interests to apply the rule to . . . .'' The respondent finds it unclear what the Department means by using the word ''intends'' rather than making the required determination or putting the cost-benefit analysis right in the rulemaking for review by the public.

Response: The provisions of the Federal Acquisition Streamlining Act (Pub. L. 103–355) with regard to applicability of laws to commercial items are now codified at 41 U.S.C. 1906 (commercial items other than COTS items) and 1907 (COTS items).

Pursuant to 41 U.S.C. 1906, acquisitions of commercial items (other than acquisitions of COTS items, which are addressed in 41 U.S.C. 1907) are exempt from a provision of law unless the law (i) contains criminal or civil penalties; (ii) specifically refers to 41 U.S.C. 1906 and states that the law applies to acquisitions of commercial items; or (iii) the Federal Acquisition Regulatory Council (FAR Council) makes a written determination and finding that it would not be in the best interest of the Federal Government to

exempt contracts (or subcontracts under a contract) for the acquisition of commercial items from the provision of law.

Pursuant to 41 U.S.C. 1907, acquisitions of COTS items are exempt from a provision of law unless the law (i) contains criminal or civil penalties; (ii) specifically refers to 41 U.S.C. 1907 and states that the law applies to acquisition of COTS items; (iii) concerns authorities or responsibilities under the Small Business Act (15 U.S.C. 644) or bid protest procedures developed under the authority of 31 U.S.C. 3551 *et seq.*; 10 U.S.C. 2305(e) and (f); or 41 U.S.C. 3706 and 3707; or (iv) if the Administrator of the Office of Federal Procurement Policy makes a written determination that it would not be in the best interest of the Federal Government to exempt acquisitions of COTS items from the provision of law.

The Director, Defense Procurement and Acquisition Policy, is the appropriate authority to make comparable determinations for regulations to be published in the DFARS, which is part of the Federal Acquisition Regulation (FAR) system of regulations. Therefore, it is not inconsistent with the Federal Acquisition Streamlining Act to apply this rule to the acquisition of commercial items (including COTS items) if the Director of Defense Procurement and Acquisition Policy has determined that it would not be in the best interest of the Government to exempt acquisitions of commercial items, including COTS items, from the provision of law relating to detection and avoidance of counterfeit parts. The Director of Defense Procurement and Acquisition Policy does not make this determination until the final rule stage, in order to allow for review and analysis of public comments received. The Director of Defense Procurement and Acquisition Policy has now made this determination (see section III of this preamble).

Comment: One respondent expressed concerns that this proposed rule is in conflict with DFARS 252.244–7000, Subcontracts for Commercial Items.

Response: The flowdown to subcontracts for commercial items is not in conflict with DFARS clause 252.244–7000, Subcontracts for Commercial Items. DFARS 252.244–7000 states that the contractor is not required to flow down the terms of any DFARS clause in a subcontract for commercial items unless so specified in the particular clause. The fact that the new clause in this rule (252.246–7008), as well as the preexisting clause 252.246–7007, specify such flowdown to subcontracts for commercial items that are for electronic parts or assemblies containing electronic parts is, therefore, in conformance with DFARS 252.244–7000.

d. Original Manufacturers

Comment: Several respondents recommended revising the clause to make it clear that the flowdown does not apply to the original manufacturers. Several respondents asserted that the flowdown to original manufacturers would be costly to both the manufacturer and the end customer and unnecessary. One respondent stated that as an authorized dealer they would not be able to flow down the requirements to the original equipment manufacturers they represent; they have distribution agreements with them that dictate by contract what each parties' responsibilities are. Another respondent suggested it would also limit the genuine products available to the Government to purchase.

Response: DoD has revised the flowdown requirement of the clause at 252.246–7008 to exclude the requirement to flow the clause down to the original manufacturer of the electronic part.

e. Electronic Parts

Comment: One respondent commented that electronic parts are not the only products, parts, or commodities within the DoD supply system that have counterfeit issues. The respondent also stated that certain parts and commodities require higher standards, such as medical products, food, munitions, and now certain electronic parts.

Response: This case addresses only the electronic parts as defined by the NDAA for FY 2012. DoD is aware of the threat of counterfeit parts, other than electronic parts, and is taking action to mitigate the threat through policy and quality assurance requirements.

f. Medical Devices

Comment: One respondent commented that the proposed rule would impose a substantial burden on manufacturers of COTS medical devices and is unnecessary to resolve concerns that may present a significant mission, security, or safety hazard. This is especially true for medical devices, which are heavily regulated by the Food and Drug Administration (FDA) and often contain one or more electronic parts. According to the respondent, DoD's application of the rule to all contractors would apply new requirements to a sizeable group of products that already have a highly effective means of addressing the concern of counterfeit electronic parts.

Furthermore, the respondent commented that the FDA is the Federal agency tasked with protecting the public health by assuring the safety, effectiveness, quality and security of drugs, vaccines, and other biological product and medical devices. The respondent considered that this will not only unduly increase the burden on manufacturers; it has the capacity to cause confusion in the marketplace and result in potential adverse implications for public health. The FDA is in the best position to strike the proper balance of interests in the health care system when establishing requirements for assuring the quality of the products it regulates, assessing the burdens these requirements place on manufacturers, and considering their impact on healthcare costs and healthcare innovation. FDA already regulates purchasing controls for medical device manufacturing, requiring each manufacturer to ensure that all purchases or otherwise received product and services conform to the specified requirements. Medical device manufacturers are required to have robust processes in place to review, investigate, and evaluate external manufacturers and suppliers. The respondent recommended that any additional requirements for FDA-regulated products should be made through the current governing agency, the FDA.

Response: This rule implements section 818 of the NDAA for FY 2012, as amended by section 817 of the NDAA for FY 2015, and prescribes the policy and procedures for preventing counterfeit electronic parts from entering the supply chain. This rule addresses concerns that DoD has encountered regarding the electronic parts, including those that are COTS items, and including medical devices. DoD recognizes the FDA's authority over drugs and medical devices. DoD recognizes that manufacturers are required to have processes in place to review, investigate, and evaluate external manufacturers and suppliers. However, DoD has a responsibility to protect the warfighter by ensuring that we are utilizing electronic products that are not counterfeit or contain counterfeit parts.

g. Raw Materials and Minerals

Comment: Several respondents are concerned that the flowdown requirement is unclear as to whether the flowdown extends to suppliers of raw materials and minerals.

Response: The clause only flows down to subcontracts that are for electronic parts or assemblies containing electronic parts. Raw materials and minerals are not electronic parts.

3. Definitions

a. ''Electronic Part''

Comment: Various respondents commented favorably on the removal of references to ''embedded software'' and ''firmware'' from the definition of ''electronic part.'' One respondent stated that this revision aligns the term's definition with the underlying substance of the material covered by the regulations. The respondent also stated that it is difficult, if not impossible, to address such elements when an express standard or protocol has not yet been adopted. Another respondent recommended that the introduction of tainted software and firmware into integrated circuits is more appropriately addressed in a separate rulemaking process. Similarly, another respondent stated that the change to the definition will rightly focus contractor attention on identifying counterfeit electronic parts as the statute requires, rather than attempting to perform quality assurance on software and firmware without any DoD guidance on how to reliably perform that function.

Response: Noted.

b. ''Trusted Supplier''/''Non-trusted Supplier''

Many respondents commented on the definition of ''trusted supplier.''

Comment: Various respondents stated that the term ''trusted supplier'' is already in use in DoD, and that duplication would lead to confusion within organizations that deal with both trusted supplier types. For reference, the other usage of trusted supplier is with the Trusted Access Program Office (TAPO), which accredits trusted foundries and suppliers through the Defense Microelectronics Activity. One respondent stated that the clause should not mention trusted suppliers at all, instead completely listing items (1) through (3) in the definition, whenever applicable.

Response: The phrase ''trusted supplier'' has been mentioned as a source of confusion since it is was first used in the NDAA for FY 2012 (section 818). The final rule published under DFARS Case 2012–D055, Detection and Avoidance of Counterfeit Parts, avoided use of the term ''trusted supplier.'' The proposed rule under this case introduced the term because it is the term consistently used in section 818 of the NDAA for FY 2012, and subsequent amendments to that statute.

However, in response to the public comments, DoD has reverted to an identification of the sources from which a contractor or subcontractor may acquire electronic parts, or items containing electronic parts, without introducing the term ''trusted supplier.'' In order to facilitate this identification of acceptable sources, DoD has introduced the definition of the term ''contractor-approved supplier'' to cover the fourth category of sources at DFARS 246.870–2(a)(1)(ii) and 252.246–7008(b)(2), which may be used only if the electronic parts are not in production and are not currently available in stock. This term reflects that this is a supplier that is not authorized to sell the manufacturer's product, but the contractor has assessed and approved this supplier.

Comment: Several respondents commented on the meaning of the term ''trusted supplier.'' One respondent agreed with the trusted supplier definition including contractor-vetted suppliers in addition to original manufacturers and authorized dealers. Several respondents disagreed with item (4) in the definition, which allows contractor-approved unauthorized distributors to be a trusted supplier. One respondent went further by claiming that item (3), unauthorized distributors who bought exclusively from the original component manufacturer or an authorized distributor, also should not be included in the definition. One respondent stated that the definition should contain an ''or'' statement that requires purchase from (1) manufacturer or (2) authorized distributor supplier types before (3) and (4) unauthorized distributors of any sort could be used. Another respondent echoed this sentiment without specifically requesting the change in definition. One respondent stated that the definition should be clarified to be consistent throughout the clause.

Response: As stated in the prior response, the term ''trusted supplier'' is no longer used or defined. However, the sources from which a contractor or subcontractor may obtain electronic parts under given circumstances are explicitly provided in section 818(c), as amended, and the statutory provisions are accurately implemented in this rule.

Comment: One respondent stated that there should also be a ''non-trusted supplier'' definition, while another respondent stated that a new definition should be developed for small and disadvantaged businesses that should not contain the word ''trust.''

Response: The term ''non-trusted supplier'' is no longer used in the final rule.

c. ''Authorized Dealer''

Comments: There were various respondents that were opposed to the use of the term ''authorized dealer'' and recommended using the term ''authorized supplier'' instead. According to the respondents, the term ''authorized supplier'' is used in all of the industry counterfeit electrical, electronic, and electromechanical parts standards, and is commonly used in the electronics industry and by DoD.

One respondent pointed out that the term ''authorized dealer'' has different meanings in DFARS 246.870–1 and 252.246–7008, and recommended that they be coordinated with each other.

Response: The term ''authorized dealer'' is not used in the electronics industry, nor is it used by DoD activities when referring to electronics sellers. In the final rule, DoD has replaced the term ''authorized dealer'' with the electronics industry's term ''authorized supplier.'' All of the commercial standards allow the use of ''authorized suppliers'' and define how they should be used.

d. Contract Electronics Manufacturer

Comment: One respondent recommended amending the definition of ''contract electronics manufacturer'' to be in line with industry use of the term. According to the respondent, industry understands a contract electronics manufacturer to be a company who builds boards or units for another company, whereas the fabrication of an electronic part ''under a contract with, or with express written authority of, the original manufacturer'' is the work of an authorized aftermarket manufacturer. According to the respondent, this definition aligns with the industry standards AS5553, AS6171, and AS6081.

The respondent therefore recommended the following definition: ''Contract electronics manufacturer'' means an organization that produces goods, using electronic parts, for other companies on a contract basis under the label or brand name of the other organization.

In addition, the respondent recommended that the concept of ''contract electronics manufacturer'' should be removed from the definition of ''original manufacturer.'' According to the respondent, the original manufacturer is regularly understood to be the original component manufacturer or the original equipment manufacturer.

Response: DoD has revised the definition of ''contract electronics

manufacturer'' consistent with the recommendation of the respondent and removed paragraph (2) from the proposed definition. The removed paragraph has been utilized as the basis for an added definition of ''authorized aftermarket manufacturer.'' This also resulted in a conforming change to the definition of ''obsolete electronic part.''

DoD also removed the term ''electronics'' from the defined term, because the other related terms of ''original manufacturer,'' original component manufacturer,'' and ''original equipment manufacturer'' are not limited to just electronic parts, even though this rule then applies those terms to the acquisition of electronic parts. Having removed the word ''electronics'' and the portion of the definition that applied to an authorized aftermarket manufacturer, DoD has retained the term ''contract manufacturer'' as part of the definition of ''original manufacturer.''

4. Supply Base Terminology

Comment: One respondent recommended that DoD define the supply base in the same way as the commercial defense industry and regulate sources of supply accordingly. According to the respondent, DoD defines the supply base in terms of (1) original equipment manufacturer primes; (2) manufacturers; and (3) dealers, distributors, or others; while the commercial defense industry uses the terms (1) original equipment manufacturer primes; (2) approved manufacturers; (3) authorized dealers/distributors; (4) dealers/brokers/others; and (5) surplus dealers. The respondent asserts that without using the commercial defense industry terms, DoD could procure certain products from potentially unauthorized sources.

Response: Since the scope of the case is limited to electronic parts, DoD has elected to define the supply base in terms commonly used by the electronics industry, rather than across the entire commercial defense industry, and has utilized the categories identified in the statute, although changing the term ''authorized dealer'' to ''authorized supplier'' to be consistent with the electronic industry usage.

5. Sources of Electronic Parts

a. Tiered Approach

The statute and this regulation provide for a tiered approach for sources of electronic parts.

- Category 1: Electronic parts that are in production or currently available in stock. The contractor shall obtain such parts from the original manufacturer, their authorized suppliers, or from suppliers that obtain such parts exclusively from the original manufacturers of the parts or their authorized dealers.
- Category 2: Electronic parts that are not in production and not currently available in stock. The contractor shall obtain such parts from suppliers identified by the contractor as contractor-approved suppliers, subject to certain conditions.
- Category 3: Electronic parts that are not in production and not available from any of the above sources; electronic parts from a subcontractor (other than the original manufacturer) that refuses to accept flowdown of DFARS 252.246–7008; or electronic parts that the contractor or subcontractor cannot confirm are new or that the electronic parts have not been comingled in supplier new production or stock with used, refurbished, reclaimed, or returned parts. The contractor may buy such electronic parts subject to certain conditions.

Comment: One respondent supported the requirement to obtain parts that are in production or currently available in stock from original manufacturers, authorized dealers, or suppliers that obtain such parts exclusively from the original manufacturers or authorized dealers.

Response: Noted.

Comment: One respondent recommended that contractors and subcontractors only be allowed to purchase from suppliers that obtain such parts exclusively from the original manufacturers of the parts or their authorized dealers only if not available from the original manufacturers or their authorized dealers. Another respondent stated that the most effective method for avoiding counterfeit electronic parts is to purchase these parts from the original manufacturer and their authorized distributors, and authorized aftermarket distributors and manufacturers (*i.e.,* ''legally authorized sources''). According to the respondent, purchasing from any other source significantly increases the likelihood of acquiring counterfeit parts.

Response: The statute unconditionally allows a contractor or subcontractor to purchase electronic parts from suppliers that obtain such parts exclusively from the original manufacturers of the parts or their authorized dealers.

Comment: One respondent suggested adding ''authorized aftermarket manufacturer'' to ''authorized dealer.''

Response: The concept of authorized aftermarket manufacturer was already included in the definition of ''authorized dealer'' (now ''authorized supplier'' in the final rule).

b. Not in Production and Not Currently Available in Stock

Comment: Several respondents requested that DoD clarify terms ''in stock'' and ''available in stock.'' One respondent noted that a part could be in production but not in stock, or not in production but available in stock. This respondent expressed concerns about the costly steps necessary to ensure compliance when a part is not acquired from a trusted supplier, so the initial analysis of the supply chain sources could be relevant to how a contractor acquires a specific part and have many assorted cost impacts. Another respondent had concerns with use of the phrase ''currently available in stock'' as it raises questions about parts that are in production but have lead times. ''Unless there is a demonstrated, immediate need for a part in production with a lead time, contractors should not have the option to seek the part from a source with a higher level of counterfeit risk.'' That respondent also had concerns with the use of the phrase ''parts that are not in production'' raising issues about obsolete parts that are not in production by the original manufacturer but may be produced on demand in a timely manner by authorized aftermarket manufacturers.

One respondent recommended that DoD must require contractors to do a more exhaustive search of the authorized supply channel before utilizing other sources. This respondent also recommended that the rule should clarify that ''not currently available in stock'' means ''not currently available in stock from original manufacturer, authorized aftermarket manufacturers, or authorized dealers.''

One respondent thought of numerous possibilities of the meaning of ''unavailable'':

- Parts might be unavailable when they exceed a certain multiple of standard pricing.
- Parts might be unavailable if they cannot be received within an acceptable lead time.
- Parts might be unavailable and out of production if the original manufacturer and no other foundry make the part.
- Parts might be unavailable and out of production because the original component manufacturer is no longer producing an electronic part yet has the ability to restart production given appropriate lead time.
- Parts that seem unavailable because they are not in production could

conceivably be available from a trusted foundry.

This respondent was concerned that parts also might change in availability and asked whether a contractor would be required to switch between sources of supply if a product later becomes available from the original manufacturer or an authorized dealer. This respondent recommended removing the triggering mechanism that use of an ''other'' trusted source requires that the parts be not in production or not currently available.

Response: The statute requires that if parts are in production or currently available in stock, the contractor or subcontractor must use a Category 1 supplier. The electronic parts may be in production and currently available in stock, in production and not currently available in stock, or not in production but currently available in stock. Therefore, even if there is a demonstrated, immediate need for a part in production with a lead time, contractors do not have the option to seek the part from other than a Category 1 source. Some of the listed technicalities with regard to potential meanings of ''unavailable'' are irrelevant, because if the part is in production, it must be bought from a Category 1 supplier, whether or not it is currently available or unavailable in stock.

DoD has modified the final rule to clarify that ''in production'' includes by the original manufacturer or by an authorized aftermarket manufacturer, and that ''currently available in stock'' means from one of the Category 1 sources.

In addition, DoD changed ''or'' to ''and'' in DFARS 246.870–2(a)(1)(ii) and at 252.246–7008(b)(2) because ''or'' includes circumstances that overlap with paragraphs (a)(1)(i) and (b)(1), respectively, and does not accurately reflect the statutory requirement to specify the sources in circumstances not covered in those paragraphs. The only remaining circumstance to be covered in paragraph (a)(1)(ii) and (b)(2) is ''not in production'' and ''not currently available in stock.''

A contractor must make a good faith effort to determine whether an electronic part is available from Category 1 sources (DFARS 246.870–2(a)(1)(i)). Any changes to a contractor's use of approved sources would require additional review by DoD. Due to the added costs that may be involved in obtaining a part from a contractor-approved supplier, a contractor is incentivized to locate a Category 1 source.

This DFARS rule does not address obsolescence management and diminishing manufacturing sources as these areas are outside the scope of this case. DFARS Case 2016–D022 will implement section 803 of the NDAA for FY 2014 to address these issues. This rule takes a risk-based approach to counterfeit prevention. The rule allows contractors to make risk-based decisions (such as testing and inspection) based on supply chain assurance measures (such as the source of the electronic part), which is all subject to review and audit by the contracting officer. DoD uses the Department of Defense Risk, Issue, and Opportunity Management Guide for Defense Acquisition Programs.

6. Contractor Identification of Contractor-Approved Suppliers

a. Selection and Use of Standards

Several respondents expressed concerns specific to the selection and use of DoD-adopted industry standards and requested that the agency identify application of standards by industry.

Comment: One respondent commented that by acknowledging that contractors can identify other suppliers as ''trusted'' if they first qualify the supplier using industry standards and processes for counterfeit prevention, the proposed rule allows for electronic parts, particularly parts for mature platforms near the end of their lifecycles, to be procured after the original manufacturers and immediate authorized dealers and distributors have ceased to manufacture and supply the parts.

Response: Noted.

Comment: One respondent questioned the meaning of ''DoD-adopted'' standards, and recommended that industry standards be the default test for the conformance of contractor-vetted trusted suppliers vice DoD-adopted standards. This respondent also mentioned an inconsistency between the requirements with regard to standards in the definition of ''trusted supplier'' and the DFARS clause at 252.246–7008(b)(2). Another respondent requested clarification as to where DoD-adopted standards are to be used versus other industry standards.

Response: A Web site was provided in the proposed rule in the definition of ''trusted supplier'' that specified DoD-adopted counterfeit prevention industry standards and processes. The following industry standards are currently DoD-adopted and could be used to satisfy contractual requirements: ISO 9001, AS9100, AS5553A, AS6462, AS6081, AS6174A, etc. The definition of ''trusted supplier'' has been deleted from the final rule. DFARS 246.870–2(a)(1)(ii)(A) and 252.246–7008(b)(2)(i) have been amended to add ''such as the DoD-adopted standards at *https://assist.dla.mil,''* but does not specifically require the use of DoD-adopted standards.

Comment: One respondent suggested changing FAR 46.203, Criteria for Use of Contract Quality Requirements, to require certification to industry standards vice compliance with industry standards.

Response: Changing the FAR is outside the scope of this case.

b. Redundant Validation

Comment: Several respondents recommended that the proposed rule be revised to eliminate redundant validation of suppliers. The respondents assert that the rule as written would require contractors to validate U.S. Government sources such as the Defense Logistics Agency and the Federal Supply Schedule as trusted suppliers. Several respondents recommend specifying that these sources be considered trusted suppliers. Another respondent recommended presuming suppliers to be ''trusted'' if the prime and subcontractors have approved processes in place to identify suppliers and provide proof that those processes have been followed. Alternately, this respondent suggested that the Government could work with industry to develop a third party accreditation program to verify that suppliers at all tiers are in compliance with established counterfeit detection and avoidance requirements and identify a pool of accredited suppliers.

Response: Contractors or subcontractors who purchase directly from another vendor (such as the Federal Supply Schedule or from suppliers accredited by the Defense Microelectronics Activity), or requisition electronic parts from the Government inventory/stock under the authority of DFARS 252.251–7000, Ordering from Government Supply Sources, are still required to comply with the requirements of DFARS 252.246–7008(b) and (c). However, the final rule has been revised at DFARS 246.870–2(a)(3)(iii)(B) and 252.246–7008(d)(3)(ii) to state that if the contractor or contractor requisitions electronic parts from the Government, the Government will be responsible for the authenticity of the parts. If any such part is subsequently found to be counterfeit or suspect counterfeit, the Government will promptly replace such part at no charge and will consider an adjustment in the contract schedule to

the extent that replacement of the counterfeit or suspect counterfeit electronic parts caused a delay in performance.

A third party accreditation program is outside the scope of this rule, which is implementing the statutory requirement to allow contractors and subcontractors to identify trusted suppliers (now termed ''contractor-approved suppliers.''

c. Review and Audit by Government

Comment: Several respondents addressed the requirement that the contractor's identification of trusted suppliers for parts not in production or not currently in stock is subject to review and audit by DoD.

One respondent commented that section 818 of the NDAA for FY 2012 only required that selection of ''trusted suppliers'' (as opposed to non-trusted suppliers) be subject to Government review and audit. One respondent questioned why contractor identified suppliers that also conform to industry standards (DoD-adopted or otherwise) are subject to review and audit by DoD officials. The respondent recommends that no additional review or audit be implemented where system oversight is compliant with DFARS part 246.

One respondent was concerned that, absent a clear standard, the due diligence required to establish a trusted supplier will vary depending on the judgment of the DoD official conducting the review and audit. This respondent recommended that the Government should establish a presumption that suppliers are trusted if the prime contractor and subcontractors have approved processes in place to identify suppliers and provide proof that those processes have been followed.

Response: Section 818 of the NDAA for FY 2012 (Pub. L. 112–81) requires, in paragraph (c)(3)(D)(iii), that the selection of additional trusted suppliers by DoD contractors is subject to review and audit by DoD officials.

Furthermore, section 885 of the NDAA for FY 2016 amends paragraph (c)(3)(D)(iii) of section 818 to require review, audit, and approval by DoD officials. This amendment will be addressed under DFARS Case 2016–D013, Amendments Related to Sources of Electronic Parts.

d. DoD Establishment of Qualification Requirements

A number of respondents commented on the need for DoD to establish qualification requirements and expressed concern about the status of DFARS Case 2015–D020, DoD Use of Trusted Suppliers for Electronic Parts.

Comment: One respondent said that the proposed rule appeared to shift the determination and risk of which suppliers to trust entirely to the contractor community, which the respondent believed is contrary to Congressional intent. The respondent asserted that the intent was for DoD and contractors to share the risk. The respondent further stated that the proposed rule does not provide detailed guidance to contractors on the factors to consider in identifying trusted suppliers.

One respondent expressed concern that there is a potential loophole for a contractor to procure electronic parts from a high-risk supplier without Government notification. A contractor might locate an obsolete, high-risk part from a poor supplier, and quickly qualify that supplier as trusted, thereby avoiding the notification requirement.

Another respondent mentioned that there is no current means to qualify a non-authorized electronic part as an original component manufacturer authorized part and purchases of electronic parts from nonauthorized sources threaten the safety and integrity of the DoD supply chain. The respondent recommended that DoD propose regulations that include DoD's use and qualification requirements for trusted suppliers, to ensure consistency with the proposed rule and the final rule in DFARS Case 2012–D055. The respondent stated that DoD should issue the rule to establish qualifications for DFARS Case 2015–D020 simultaneously with this proposed rule to avoid confusion and ensure consistency of implementation. According to the respondent, DoD has not exercised its statutory authority to identify additional trusted suppliers for contracts and subcontracts to use. The respondent encouraged DoD to clarify that the qualification requirements to be established in DFARS Case 2015–D020 may be used by contractors when implementing their trusted-supplier program as required by the proposed clause DFARS 252.246–7008, Sources of Electronic Parts.

According to one respondent DoD continues to delay regulations for use and qualification requirements of trusted suppliers. One respondent recommended that DoD accelerate resolution of DFARS Case 2015–D020 because the proposed rule requires contractors to guarantee authenticity of electronic parts acquired from the Federal Supply Schedule. Another respondent recommended that DFARS Case 2015–D020 should be aggressively developed.

Another respondent recommended delaying the proposed rule until DFARS 2015–D020 has been released so they can understand how DoD will define criteria for Trusted and Non-Trusted Suppliers.

Response: This rule implements section 818 of the NDAA for FY 2012, as amended, which provides in paragraph (c)(3)(D) that regulations to be issued by DoD shall authorize DoD contractors to identify and use ''additional trusted suppliers'' subject to certain conditions (DFARS 246.870–2(a)(1)(ii) and 252.246–7008(b)(2)). The contractor must use established counterfeit prevention industry standards, including testing, and must assume responsibility for the authenticity of the parts provided by such contractor-approved suppliers. Furthermore, DoD has the right to ''review and audit'' the contractor selection of ''contractor-approved suppliers.'' In this final rule, DoD has added this review and audit of contractor identification of contractor-approved suppliers at DFARS 242.302(S–76) as a contract administration function that is delegable to the administrative contracting officer.

This authority to identify contractor-approved suppliers is independent of section 818(c)(3)(D), which is the subject of DFARS Case 2015–D020. It would not be in the best interest of industry to delay this rule until publication of a final rule under DFARS Case 2015–D020, which has not yet been published as a proposed rule, because the ''safe harbor'' provisions of section 885(a) of the NDAA for FY 2016 are dependent upon publication of this final rule (see section II.B.9. of this preamble).

7. Traceability

Many respondents commented on the requirements for traceability from the original manufacturer to product acceptance by the Government.

Comment: Several respondents were concerned that traceability will be difficult to establish for parts used in defense systems. According to the respondents, it is likely that very large numbers of electronic parts cannot be traced back to the original manufacturer or authorized dealer.

Response: The rule expects that traceability is not always possible and provides that the contractor is responsible for inspection, testing, and authentication, in accordance with existing industry standards, if the contractor cannot establish traceability from the original manufacturer for a specific part.

Comment: Several respondents question the benefit of maintaining end-to-end traceability compared to the cost. One respondent opposes serialized end-to-end traceability throughout the supply chain because the costs of such traceability are prohibitively high as compared to the incremental benefit in increased quality assurance. According to one respondent, there will be increased costs associated with implementation and recordkeeping, which could be significant for smaller businesses. One respondent noted that traceability does not necessarily prove that an electronic component is genuine or that the component has been properly packaged, stored or handled in accordance with the original component manufacturer's specifications and that traceability documents and technologies are subject to counterfeiting.

Response: DoD has accounted for the recordkeeping requirements related to traceability in the regulatory flexibility analysis and the Office of Management and Budget clearance of the information collection requirement. While DoD acknowledges the burden associated with this requirement and that establishing such traceability does not guarantee the authenticity of all parts, nevertheless DoD considers the costs associated with this burden to be justified in comparison to the harm that can result from introduction of counterfeit parts into the DoD supply chain.

Comment: One respondent stated that the requirements of the proposed rule do not appear to be based upon risk. One respondent, however, agreed with the proposed rule allowing for risk-based processes including testing and inspections when buying parts from other than an original equipment manufacturer or original component manufacturer, their authorized dealers, or suppliers that purchase parts exclusively from the original equipment manufacturers, original component manufacturer, or their authorized dealers.

Another respondent stated that the proposed rule adopts an approach recommended by industry subject matter experts. Where traceability to the original manufacturer cannot be established, the contractor or subcontractor must complete an evaluation that includes use of alternative parts, and apply its risk-based systems, including tests and inspections commensurate with risk.

Response: First, the requirement in DFARS 252.246–7007, Contractor Counterfeit Electronic Part Detection and Avoidance System, states in paragraph (c)(4) that the system shall address risk-based processes that enable tracking of electronic parts from the original manufacturer to product acceptance by the Government. Then in paragraph (c) of DFARS 252.246–7008, it again states that the contractor shall have risk-based processes (taking into consideration the consequences of failure of an electronic part) that enable tracking from the original manufacturer. The level of inspection, testing, and authentication that the contractor would perform if unable to track an electronic part from the original manufacturer would also be commensurate with the criticality of the part. The final rule removes the requirement for contractor consideration of alternative parts. That should be a Government decision.

Comment: Several other respondents stated that industry does not ordinarily maintain this kind of serialized end-to-end traceability for electronic parts and recommended that the rule should conform to industry standards (such as SAE AS5533) for maintaining traceability of electronic parts.

One respondent stated that many legacy systems now require electronic parts not available from trusted suppliers as defined here, and pursuant to the requirement of section 803 of the NDAA for FY 2014 to issue guidance on sourcing for obsolete parts, the Department should provide instructions on how to make such determinations of risk and what criteria should reasonably support the contractor's determination. Another respondent requests more explanation as to the required ''determination of risk'' assessments that contractors, and their supply chains, will need to undertake.

Another respondent was appreciative that this rule allows the industry to enable the traceability without proscribing the method, so that the industry is able to use processes that maintain the traceability without the added expense and bureaucracy of specific documents and systems.

Response: DoD is willing to bear the expense associated with maintaining traceability to the extent feasible in order to improve detection and avoidance of counterfeit parts in the DoD supply chain. The final rule provides a course of action for the contractor if traceability cannot be established, *i.e.,* the contractor is responsible for inspection, testing, and authentication in accordance with existing applicable industry standards.

Regulations to implement section 803 of the NDAA for FY 2014 are still pending (DFARS Case 2016–D022).

Comment: One respondent asked whether traceability will be a contract deliverable to the Government.

Response: In the final rule, the clause requires that the contractor and subcontractors maintain documentation regarding traceability and make such documentation available to the Government upon request.

8. Purchases From Other Suppliers

a. Notification

Several respondents provided comments on the notification requirement of the proposed rule, which required the contractor to notify the contracting officer when buying from a Category 3 source (see DFARS 252.246–7008(b)(3)).

Comment: Several respondents questioned what is meant by ''not possible to obtain an electronic part from a trusted supplier.'' According to one respondent, it was unclear on whether the term ''not possible'' intends to preclude contractors and subcontractors from taking price and schedule impact into account in evaluating the relative risks of purchasing a particular part from a trusted supplier versus an other than trusted supplier.

Response: DoD has clarified the wording of DFARS 252.246–7008(b)(3)(i)(A), replacing ''not possible to obtain'' with ''due to nonavailability,'' for increased consistency with the statute and DFARS 246.870–2(a)(2)(i).

Comment: One respondent questioned how, when, or to whom subcontractors are supposed to provide the required notification.

Response: Since the clause flows down to all tiers, subcontractors will provide the required notification up the chain to the prime contractor.

Comment: One respondent commented that the notification requirements would present a significant challenge in cases where a subcontractor would not accept counterfeit avoidance and detection requirements included in DFARS clause 252.246–7007, Contractor Counterfeit Electronic Part Detection and Avoidance System, particularly when dealing with COTS electronic assembly providers.

Response: DoD has revised the rule to address the issues raised regarding flowdown clause acceptance of DFARS 252.246–7008, Sources of Electronic Parts, by the subcontractors (see section II.B.2.c. of this preamble), which should sufficiently resolve the concerns of the respondent.

Comment: Several respondents requested clarification on what is required to be provided in the notice to the contracting officer, when such notice is to be issued, and where in the

chain of custody the notice is to originate.

Response: The final rule has been amended at DFARS 252.246–7008(b)(3)(ii)(A) to require prompt notification to the contracting officer in writing. There is no requirement for content of the notice beyond the common sense facts necessary to convey the circumstances to the contracting officer—what part is being bought, from whom, and why. The notice originates with whatever entity (prime contractor or subcontractor) is making the purchase, and is passed up to the contracting officer through the intervening subcontract tiers and the prime contractor. Documentation of inspection, testing, and authentication of such electronic parts is only required to be furnished to the Government upon request.

Comment: One respondent referenced the outstanding ''Expanded Reporting'' FAR case that proposed addressing counterfeit electronic part reporting through the GIDEP mechanism but that case has been held in abeyance for reasons unknown to industry. The respondent requested that DOD ensure that any notice requirements in the new clause are distinguished from other requirements to report counterfeits to the GIDEP portal after discovery.

Response: DoD has noted the comments regarding the FAR Case 2013–002, Expanded Reporting Requirements. The notice in this case will not conflict with GIDEP reporting, because this notice is not a notice of a nonconforming part, but notice of contracting with a potentially higher-risk supplier.

b. Is DoD approval required?

Comments: One respondent commented that the proposed notification requirement does not address whether the contractor or subcontractor is free to purchase the part from an other-than-trusted supplier once the required notification has been given to the contracting officer or whether they cannot proceed with the purchase until it has received some form of approval from the contracting officer. Confirmation of the intent was requested to be included in the rule.

Response: The rule does not require approval for use of Category 3 sources.

9. Safe Harbor

Comment: Several respondents requested a safe harbor under various circumstances:

One respondent recommended that the DFARS be amended to reflect the ''safe harbor'' of buying from ''legally authorized sources'' (*i.e.,* original manufacturer and their authorized distributors, and authorized aftermarket distributors and manufacturers) and that the processes/procedures for detecting and avoiding counterfeit electronic parts only be used for acquisitions from unauthorized sources (*i.e.,* sources other than ''legally authorized sources'').

One respondent requested that the Defense Acquisition Regulation Council should address whether, and the extent to which, an agency's approval following a required notification would act as a safe harbor for any counterfeit problems that were subsequently encountered with the parts that had been approved.

One respondent recommended that, because traceability is considered an element of the contractor process of acquiring parts where the prime is not a trusted supplier and also part of the detection and avoidance system requirements, DoD provide a safe harbor from liability or contract breach if the contractor acquires an electronic part to support a legacy system and has performed a good faith risk determination in lieu of end-to-end traceability, but the part is determined to be counterfeit at some point in the future after delivery to DoD.

This respondent also noted that section 885(a) of the NDAA for FY 2016 provides a ''conditional safe harbor from strict liability from damage caused by counterfeit electronic parts provided the contractor has a detection and avoidance system, provides timely notice of a counterfeit in the supply chain to DoD, and acquires the parts from a trusted supplier.'' This respondent also requested that DoD ensure that any rules be conformed with all legislative changes made to the law since enactment of the NDAA for FY 2012 and that allow for an understandable and cost efficient implementation.

Response: The language of section 818 of the NDAA for FY 2012, as revised by section 885(a) of the NDAA for FY 2016, exclusively addresses allowable costs for counterfeit parts or suspect counterfeit parts and the cost of rework or corrective action that may be required to remedy the use or inclusion of such parts, and does not provide a safe harbor from liability or harm or damage that may result from the undetected use or inclusion of counterfeit parts. Section 885(a) is being implemented under DFARS Case 2016–D009.

Contractor developed risk-based processes utilizing industry standards or their internal processes/controls, are the responsibility of the contractors' discretion. Any failure of the contractor counterfeit electronic part detection and avoidance system will require remedial action.

DoD does not currently approve the acquisition of parts from any particular source.

10. Cost Allowability

Comment: One respondent asked for clarification that the costs associated with any new supply chain security measures are allowable. According to the respondent, the rule is silent as to who will bear the added costs of implementing serialized traceability or of the non-recurring engineering associated with utilizing alternate parts or of the testing necessary to establish authenticity. Any new costs associated with the final rule should be clearly stated as allowable.

Response: The implementation costs associated with compliance with DFARS 252.246–7008 are not unlike any other costs anticipated to be incurred by the contractor or subcontractor to perform the requirements of a contract. Whether a cost is allowable and allocable is generally governed by FAR part 31. Unless a cost is explicitly unallowable, whether a cost is allowable depends on factors such as reasonableness, allocability, CAS standards (and approved disclosure statements), if applicable, otherwise, generally accepted accounting principles and practices appropriate to the particular circumstances, and the terms of the contract. It is unnecessary to address the allowability of costs incurred under every contract requirement. In accordance with FAR 31.201–4, a cost is allocable if it is assignable or chargeable to one or more cost objectives on the basis of relative benefits received or other equitable relationship. Subject to these conditions a cost is allocable to a Government contract if it is (a) incurred specifically for the contract; (b) benefits both the contract and other work, and can be distributed to them in reasonable proportion to the benefits received; or (c) is necessary to the overall operation of the business, although a direct relationship to any particular cost objective cannot be shown.

11. Regulatory Flexibility Analysis

See the comments and responses relating to impact on small business in the summary of the Final Regulatory Flexibility Analysis in section V of this preamble.

12. Information Collection Requirement

Several respondents commented on the information collection requirement.

Comment: One respondent expressed detailed concerns about the necessity

and practical utility of the proposed rule. The respondent was concerned about significantly expanding contractors' tracking, collection, and reporting obligations. Subcontractors may not have such information readily available and may be reluctant to share this information up the supply chain. The respondent also had serious concerns about security and protection of the information. The respondent encouraged DoD to consider whether it is necessary to collect all this data at all tiers and to pass the data up through the supply chain to the Government, before any reportable instance of counterfeit or suspect counterfeit electronic parts.

The respondent also believed that DoD may already have access to a lot of this data, because DoD has access to databases of thousands of suppliers that provide parts to its acquisition system. The respondent considered that the handful of additional suppliers that may be identified will not provide much return on investment.

Response: The only definite reporting requirement in the rule is to provide notification to the Government if using a Category 3 supplier. This notification is a statutory requirement. Documentation on traceability or inspection, testing, and validation need only be provided to the Government upon request. This approach is considered necessary by subject matter experts within DoD to implement the statutory requirement and to detect and avoid counterfeit parts within the supply chain.

Comment: One respondent did not believe that the Government estimated collection time and costs capture all that contractors must do to comply.

- Hours per response (1 hour per response): Appears to assume that all information is already in a database or otherwise easily accessible and that a single person at a single facility will be able to generate such a report.
- Frequency of report (1 per year): The proposed rule requires that contractors must notify the contracting officer when they cannot obtain covered parts from a trusted supplier in each instance, or at least on a lot basis. This requirement is event-driven, potentially arising on multiple occasions during any given year.
- Number of respondents (1,000): In view of the statement in the **Federal Register** that the rule will cover 33,000 small entities in addition to the large CAS-covered businesses, the respondent considers the estimate of 1,000 respondents too low.

Another respondent suggested that the information collection portion of the proposed rule be re-estimated to reflect the suggested flowdown requirements to create a more accurate assessment of the true costs of the rule.

Response: The estimated information collection burden in the proposed rule related only to the required notification when using other than a ''trusted supplier.'' This should be quite rare, since it only occurs when an item is out of production, not currently available in stock, and not available from a contractor-approved supplier. However, the estimates have been adjusted to acknowledge that in many cases information for such notification may have to be provided by a lower tier subcontractor to the prime contractor.

In addition, the final rule makes explicit the requirement to maintain documentation with regard to traceability or inspection, testing and authentication and make the documentation available upon request. This is not an added burden for contractors and subcontractors, but an acknowledgement of a burden that was implicit in the proposed rule. These requirements have been calculated for subcontractors, as well as prime contractors. The final information collection requirement estimates are summarized as follows:

Requirement	Respondents	Responses	Total reporting hours	Annual reporting burden ($)
252.246–7008 (c)(3)(ii)	5,049	50,490	41,310	1,900,260
252.246–7008 (b)(3)(ii)	1,575	2,550	2,550	117,300
Total Reporting Burden	6,624	53,040	43,860	$2,017,560

Recordkeeping	Recordkeepers	Recordkeeping hours	Annual record-keeping burden
252.246–7008	78,773	2,363,190	$75,622,080

Comment: The respondent urged reconsideration not only of the estimate of the burdens, but consideration of how the rule might be revised so as to reduce the burdens on industry and the Government.

Response: DoD has not been able to identify a viable alternative that would meet the objectives of the rule and comply with the statutory requirements. The notification requirement is statutory. The data on traceability or inspection, testing, and validation need only be provided to the Government upon request.

Comment: One respondent asked for the elimination of the requirement for information collection concerning detection and avoidance of counterfeit electronic parts for products regulated by the FDA.

Response: See response in section II.B.2.f. of this preamble.

C. Other Changes

1. Revised the definition of ''original component manufacturer'' to replace ''is pursuing, or has obtained the intellectual property rights'' with ''is entitled to any intellectual property rights.'' There may not be any intellectual property rights associated with an item or the manufacturer may have the rights on the basis of a trade secret without having filed for a patent.

2. Moved DFARS 246.870–2(a)(1)(iii) to paragraph (a)(3), so that it is also applicable to (a)(2) of that section.

3. Corrected the reference at DFARS 246.870–2(a)(2) from ''paragraph (c)'' to ''paragraph (b)(3)(ii) through (b)(3)(iv)'' of the clause at 252.246–7008.

4. Amended DFARS 246.870–2(b)(2)(v) to reference 246.870–2(a), rather than replicate the suppliers to be used under certain conditions. This is consistent with DFARS 252.246–7007(c)(5), as amended in this final rule.

5. Amended DFARS 252.246–7007(b) to add notification to the contractor that an additional consequence of an unacceptable counterfeit electronic part detection and avoidance system may be a negative impact on the allowability of costs of counterfeit electronic parts or suspect counterfeit electronic parts and the cost of rework or corrective action

that may be required to remedy the use or inclusion of such parts, with a cross-reference to the cost principle at DFARS 231.205–71, while deleting the cross-reference to the cost principle at 252.246–7008(b)(2)(ii). The cost principle addresses CAS-covered contractors, which makes a cross-reference to that principle more appropriate in 252.246–7007, which applies only to CAS-covered contractors.

Also amended paragraph (c)(4) to change ''Processes'' to ''Risk-based processes,'' for consistency with DFARS 252.246–7008(c)(1) and referenced the clause at 252.246–7008(c) for details on the notification requirement (comparable to the cross-reference in the 252.246–7007(5)).

6. Moved paragraph (d) of DFARS 252.246–7008 to paragraph (b)(3) of the clause, restructured, and clarified the wording for increased consistency with the statute and DFARS 246.870–2(a)(2).

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT) and for Commercial Items, Including COTS Items

This rule applies the requirements of section 818(c)(3) of the NDAA for FY 2012, as amended, to contracts at or below the SAT, and to contracts for the acquisition of commercial items, including COTS items.

A. Applicability to Contracts at or Below the Simplified Acquisition Threshold

41 U.S.C. 1905 governs the applicability of laws to contracts or subcontracts in amounts not greater than the simplified acquisition threshold. It is intended to limit the applicability of laws to such contracts or subcontracts. 41 U.S.C. 1905 provides that if a provision of law contains criminal or civil penalties, or if the FAR Council makes a written determination that it is not in the best interest of the Federal Government to exempt contracts or subcontracts at or below the SAT, the law will apply to them. The Director, Defense Procurement and Acquisition Policy (DPAP), is the appropriate authority to make comparable determinations for regulations to be published in the DFARS, which is part of the FAR system of regulations.

B. Applicability to Contracts for the Acquisition of Commercial Items, Including COTS Items

41 U.S.C. 1906 governs the applicability of laws to contracts for the acquisition of commercial items, and is intended to limit the applicability of laws to contracts for the acquisition of commercial items. 41 U.S.C. 1906 provides that if a provision of law contains criminal or civil penalties, or if the FAR Council makes a written determination that it is not in the best interest of the Federal Government to exempt commercial item contracts, the provision of law will apply to contracts for the acquisition of commercial items. Likewise, 41 U.S.C. 1907 governs the applicability of laws to COTS items, with the Administrator for the Office of Federal Procurement Policy the decision authority to determine that it is in the best interest of the Government to apply a provision of law to acquisitions of COTS items in the FAR. The Director, DPAP, is the appropriate authority to make comparable determinations for regulations to be published in the DFARS, which is part of the FAR system of regulations.

C. Determination

The Director, DPAP, has determined that it is in the best interest of the Government to apply the requirements of section 818(c)(3) of the NDAA for FY 2012, as amended, to contracts at or below the SAT and to contracts for the acquisition of commercial items, including COTS items. Counterfeit electronic parts, regardless of dollar value, can seriously disrupt the DoD supply chain, harm weapon system integrity, and endanger troops' lives. Even low dollar value electronic parts can cause critical failure of fielded systems, such as aircraft, ships, and other weapon systems. Furthermore, studies have shown that a large proportion of proven counterfeit electronic parts were initially purchased as commercial items, including COTS items. Therefore, exempting contracts and subcontracts below the SAT or for acquisition of commercial (including COTS) items from application of the statute would severely decrease the intended effect of the statute and increase the risk of receiving counterfeit parts, which may present a significant mission, security, or safety hazard.

IV. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action and, therefore, was subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

V. Regulatory Flexibility Act

A final regulatory flexibility analysis (FRFA) has been prepared consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq*. The FRFA is summarized as follows:

This final rule further implements section 817 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2014 (Pub. L. 112–81), which amended section 818 of the NDAA for FY 2012. The objective of this rule is to avoid acquisition of counterfeit electronic parts by requiring DoD contractors and subcontractors, except in limited circumstances, to buy electronic parts from the original manufacturers, their authorized supplier, or suppliers that obtain such parts exclusively from the original manufacturer of the parts or their authorized suppliers, in accordance with section 818(c)(3) of the National Defense Authorization Act for FY 2012.

A. Applicability to Small Business Entities

Comment: Several respondents recommended that DoD should not apply this rule to small entities, citing the burdens imposed. However, other respondents were very supportive of DoD for establishing requirements on contracts at all tiers and applying to small entities, because counterfeit parts purchased within the supply chain from small entities comprise a large portion of the counterfeit parts that directly threaten the DoD supply chain.

Response: The law does not exempt small businesses from the statutory requirements. (See response to in section II.B.2.a. of this preamble.)

B. Burden Imposed

Comment: Several respondents, including the Office of Advocacy of the Small Business Administration, noted that the increased costs associated with implementation and recordkeeping could be significant for small businesses. Another respondent suggested that DoD weigh the cost and benefits of information collected from contractors when implementing these rules. Most small and some mid-sized companies would not have the resources, experience, and infrastructure necessary to keep up a database of information related to this rule.

Response: The Government recognizes that the cost of compliance to

the DFARS requirement for obtaining electronic parts from trusted sources may deter some small businesses and even suppliers of commercial items and COTS (where the Government is not a major portion of sales). However, the receipt of counterfeit parts represents an unacceptable risk to the Government. The clause requires small businesses and commercial item suppliers to put in place risk-based processes that take into consideration the consequences of failure.

Comment: The Office of Advocacy stated that the cost of compliance will serve to deter small businesses from participating as prime and subcontractors in the Federal Acquisition process. More specifically, the Office of Advocacy, found it unclear, for parts that are in production, who will absorb the higher costs of restrictions on sources of electronic parts. The Office of Advocacy stated that this was of concern to small businesses. For parts that are not in production, the Office of Advocacy found it unclear how the small business owner is to provide documentation to the prime contractor or the contracting officer whether the part is in production or not. The Office of Advocacy also cites lack of guidance on cost or process or acceptable procedures for the small business to follow.

Response: The Government recognizes that the cost of compliance to the DFARS requirement for obtaining electronic parts from trusted sources may deter some small businesses and even suppliers of commercial items and COTS (where the Government is not a major portion of sales). However, the receipt of counterfeit parts represents an unacceptable risk to the Government. With regard to cost allowability, the implementation costs associated with compliance with DFARS 252.246–7008 are not unlike any other costs anticipated to be incurred by the contractor or subcontractor to perform the requirements of a contract (see section II.B.10. of this preamble). With regard to the costs of counterfeit electronic parts and suspect counterfeit electronic parts, and the cost of rework or corrective action that may be required to remedy the use or inclusion of such parts, section 818(c)(2)(B), as amended by the section 885 of the NDAA for FY 2016, will make such costs allowable if the contractor obtains such parts in accordance with the regulations to be published under this case; discovers the counterfeit parts or suspect counterfeit parts; and provides timely notice to the Government (see DFARS Case 2016–D010).

With regard to parts that are not in production, the final rule has added clarification about necessary recordkeeping and documentation that shall be provided upon request (by the next high tier for a subcontractor or by the Government for the prime contractor). There is no requirement to provide documentation of whether the part is in productions. If the part can be obtained from a contractor-approved supplier and the contractor can establish traceability to the original manufacturer, then there is only need to provide documentation of the traceability upon request. If traceability cannot be established, then the contractor is required to maintain documentation of the required inspection, testing, and authentication, and make such documentation available upon request (see DFARS 252.246–7008(b)(3)(ii) and (c)(3)).

The responsibility of the contractor in paragraph (c)(2), if the contractor cannot establish traceability, has been simplified to be comparable to the requirement in paragraph (b)(3)(ii) (if the contractor buys for a source other than what the statute terms a ''trusted supplier''), *i.e.,* the contractor is responsible for inspection, testing, and authentication in accordance with existing applicable industry standards.

C. Estimates of Burden

Comment: The Office of Advocacy recommended that DoD should provide more clarity in the Initial Regulatory Flexibility Analysis (IRFA) as to the actual numbers of small businesses affected by the rule and the cost of compliance for small entities as prime and as subcontractors. The Office of Advocacy questioned whether COTS small businesses were included in the estimates.

The Office of Advocacy further stated that DoD should have more accurate data on subcontractors, citing the DoD Comprehensive Subcontracting Test Program.

Response: DoD has revised the estimated number of small business entities affected by the rule from 33,000 to 52,168. The supporting statement for the information collection requirement in the proposed rule only addressed the burden associated with the notification if the contractor is using a source other than a ''trusted supplier.'' The final rule makes explicit the requirement to maintain documentation with regard to traceability or inspection, testing, and authentication and make it available upon request (see section II.B.12. of this preamble). This is not an added burden for contractors and subcontractors but an acknowledgement of a burden that was implicit in the proposed rule.

DoD does not have access to subcontract the subcontract data necessary to provide an accurate assessment of the impact of this rule. There are only about ten entities enrolled in the DoD Comprehensive Subcontracting Data Test Program. DoD also considered the data in the Electronic Subcontracting Reporting System. This system accumulates data by prime contractor to assess whether the prime contractor is meeting its subcontracting goals—it does not provide data on whether the subcontracts being reported contain electronic parts.

D. Alternatives

Comment: According to the Office of Advocacy, DoD has not explored workable alternatives that will allow the Government to achieve its objectives. The Office of Advocacy suggested several alternatives for consideration:

- Support an Insurance Pool for small businesses, due to lack of clarity as to what constitutes a counterfeit part and who has ultimate liability.
- Use DoD testing resources to assist small firms in validating the authenticity of electronic parts or provide through the Mentor-Protege program a structure that would validate and test electronic parts for small subcontractors.
- Phase in compliance for COTS companies and small business subcontractors at certain dollar thresholds.

Response: Supporting an insurance pool for small businesses is outside the scope of this rule.

DoD does not have sufficient resources to take on the responsibility for validating the authenticity of electronic parts for small businesses. Furthermore, this would shift responsibility for compliance away from the prime contractor. 10 U.S.C. 2302 Note, which governs the DoD Mentor-Protege Pilot Program, addresses forms of assistance in paragraph (f) that a mentor firm may provide. This includes ''assistance, by using mentor firm personnel in engineering and technical matters such as production, inventory control, and quality assurance.'' It appears that this could cover a request by a small protégé firm for assistance by the mentor in compliance with this clause.

The detection and avoidance of counterfeit parts is too important to delay implementation. A low dollar value undetected counterfeit part from a small business or a COTS item can have equally disastrous consequences as

higher dollar value part that is not a COTS item or provided by a small business. Not only is this a requirement of the law, but the criticality of levying this requirements on all vendors is to meet operational mission requirements and prevent loss of life. However, the final rule has been revised to provide a procedure for notification, inspection, testing, and authentication of an electronic part if a subcontractor refuses to accept flowdown of the clause at DFARS 252.246–7008.

Based on Federal Procurement Data System data for FY 2015, DoD estimates that this rule will apply to approximately 52,168 small entities that have DoD prime contracts or subcontracts for electronic parts, including end items, components, parts, or assemblies containing electronic parts; or services, if the contractor will supply electronic parts or components, parts, or assemblies containing electronic parts as part of the service.

In addition to the requirements to acquire electronic components from trusted suppliers (in the rule: Original manufacturers, authorized suppliers, suppliers that obtain parts exclusively from original manufacturers or authorized suppliers, and contractor-approved suppliers), contractors and subcontractors that are not the original manufacturer or authorized supplier are required have a risk-based process to trace electronic parts from the original manufacturer to product acceptance by the Government. If that is not feasible, the Contractor shall have a process to complete an evaluation that includes consideration of alternative parts or utilization of tests and inspections commensurate with the risk. If it is not possible to obtain an electronic part from a trusted supplier, the contractor is required to notify the contracting officer. The contractor is responsible for inspection, testing, and authentication, in accordance with existing applicable industry standards, of electronic parts obtained from sources other than a trusted supplier. Notifying the contracting officer if it is not possible to obtain an electronic part from a trusted supplier, or responding to requests for documentation on traceability or inspection, testing, and validation of electronic parts would probably involve a mid-level of executive involvement. Recordkeeping is estimated to be function performed by personnel approximately equivalent to a Government GS–9 step 5 level.

DoD was unable to identify any significant alternatives that would reduce the economic impact on small entities and still fulfill the requirements of the statute and the objectives of the rule to detect and avoid counterfeit parts in the DoD supply chain. It is not possible to exempt small entities or acquisition of commercial items (including COTS items) from application of this rule or phase in the applicability to such entities, without an unacceptable increase in the risk to of counterfeit parts in the supply chain. (See response to the Office of Advocacy of the Small Business Administration comments on alternatives in this FRFA.) DoD also considered (with the addition of this DFARS clause 252.246–7008, which is applicable to all subcontractors that provide electronic parts, including small businesses) whether the requirements of DFARS 252.247–7007 for a formal system to detect and avoid counterfeit parts could be made inapplicable to small businesses that are subcontractors to a CAS-covered prime contractor. This alternative was not acceptable to DoD policy experts.

VI. Paperwork Reduction Act

This rule contains information collection requirements under the Paperwork Reduction Act (44 U.S.C. chapter 35). The Office of Management and Budget (OMB) has assigned OMB Control Number 0704–0541, entitled ''Detection and Avoidance of Counterfeit Parts—Further Implementation.''

List of Subjects in 48 CFR Parts 202, 212, 242, 246, and 252

Government procurement.

Jennifer L. Hawes,

Editor, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 202, 212, 242, 246, and 252 are amended as follows:

■ 1. The authority citation for parts 202, 212, 242, 246, and 252 continues to read as follows:

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

PART 202—DEFINITIONS OF WORDS AND TERMS

■ 2. Amend section 202.101 by—

■ a. Adding, in alphabetical order, the definitions for ''authorized aftermarket manufacturer,'' ''contract manufacturer,'' ''contractor-approved supplier,'' ''original component manufacturer,'' ''original equipment manufacturer,'' and ''original manufacturer'';

■ b. Amending the definition of ''electronic part'' by removing the second sentence; and

■ c. Revising the definition of ''obsolete electronic part''.

The additions and revision read as follows:

202.101 Definitions.

Authorized aftermarket manufacturer means an organization that fabricates an electronic part under a contract with, or with the express written authority of, the original component manufacturer based on the original component manufacturer's designs, formulas, and/or specifications.

* * * * *

Contract manufacturer means a company that produces goods under contract for another company under the label or brand name of that company.

* * * * *

Contractor-approved supplier means a supplier that does not have a contractual agreement with the original component manufacturer for a transaction, but has been identified as trustworthy by a contractor or subcontractor.

* * * * *

Obsolete electronic part means an electronic part that is no longer available from the original manufacturer or an authorized aftermarket manufacturer.

Original component manufacturer means an organization that designs and/or engineers a part and is entitled to any intellectual property rights to that part.

Original equipment manufacturer means a company that manufactures products that it has designed from purchased components and sells those products under the company's brand name.

Original manufacturer means the original component manufacturer, the original equipment manufacturer, or the contract manufacturer.

* * * * *

PART 212—ACQUISITION OF COMMERCIAL ITEMS

■ 3. Amend section 212.301 by adding new paragraph (f)(xix)(C) to read as follows:

212.301 Solicitation provisions and contract clauses for the acquisition of commercial items.

* * * * *

(f) * * *

(xix) * * *

(C) Use the clause at 252.246–7008, Sources of Electronic Parts, as prescribed in 246.870–3(b), to comply with section 818(c)(3) of Public Law 112–81, as amended by section 817 of the National Defense Authorization Act for Fiscal Year 2015 (Pub. L. 113–291).

PART 242—CONTRACT ADMINISTRATION AND AUDIT SERVICES

■ 4. Amend section 242.302(a) by adding a new paragraph (S–76) to read as follows:

242.302 Contract administration functions.

(a) * * *

(S–76) Review and audit contractor identification of contractor-approved suppliers for the acquisition of electronic parts, as identified in the clause at 252.246–7008, Sources of Electronic Parts.

* * * * *

PART 246—QUALITY ASSURANCE

■ 5. Revise section 246.870 heading to read as follows:

246.870 Contractor counterfeit electronic part detection and avoidance.

246.870–1 [Redesignated as 246.870–0]

■ 6. Redesignate section 246.870–1 as 246.870–0.

■ 7. In newly redesignated section 246.870–0, revise paragraph (a) to read as follows:

246.870–0 Scope.

* * * * *

(a) Partially implements section 818(c) and (e) of the National Defense Authorization Act for Fiscal Year 2012 (Pub. L. 112–81), as amended by section 817 of the National Defense Authorization Act for Fiscal Year 2015 (Pub. L. 113–291); and

* * * * *

■ 8. Add section 246.870–1 to read as follows:

246.870–1 Definition.

Authorized supplier, as used in this subpart, means a supplier, distributor, or an aftermarket manufacturer with a contractual arrangement with, or the express written authority of, the original manufacturer or current design activity to buy, stock, repackage, sell, or distribute the part.

■ 9. Revise section 246.870–2 to read as follows:

246.870–2 Policy.

(a) *Sources of electronic parts.* (1) Except as provided in paragraph (a)(2) of this section, the Government requires contractors and subcontractors at all tiers, to—

(i) Obtain electronic parts that are in production by the original manufacturer or an authorized aftermarket manufacturer or currently available in stock from—

(A) The original manufacturers of the parts;

(B) Their authorized suppliers; or

(C) Suppliers that obtain such parts exclusively from the original manufacturers of the parts or their authorized suppliers; and

(ii) Obtain electronic parts that are not in production by the original manufacturer or an authorized aftermarket manufacturer, and that are not currently available in stock from a source listed in paragraph (a)(1)(i) of this section, from suppliers identified by the Contractor as contractor-approved suppliers, provided that—

(A) For identifying and approving such contractor-approved suppliers, the contractor uses established counterfeit prevention industry standards and processes (including inspection, testing, and authentication), such as the DoD-adopted standards at *https://assist.dla.mil;*

(B) The contractor assumes responsibility for the authenticity of parts provided by such contractor-approved suppliers (see 231.205–71); and

(C) The selection of such contractor-approved suppliers is subject to review and audit by the contracting officer.

(2) The Government requires contractors and subcontractors to comply with the notification, inspection, testing, and authentication requirements of paragraph (b)(3)(ii) through (b)(3)(iv) of the clause at 252.246–7008, Sources of Electronic Parts, if the contractor—

(i) Obtains an electronic part from—

(A) A source other than any of the sources identified in paragraph (a)(1) of this section, due to nonavailability from such sources; or

(B) A subcontractor (other than the original manufacturer) that refuses to accept flowdown of this clause; or

(ii) Cannot confirm that an electronic part is new or not previously used and that it has not been comingled in supplier new production or stock with used, refurbished, reclaimed, or returned parts.

(3) Contractors and subcontractors are still required to comply with the requirements of paragraphs (a)(1) or (2) of this section, as applicable, if—

(i) Authorized to purchase electronic parts from the Federal Supply Schedule;

(ii) Purchasing electronic parts from suppliers accredited by the Defense Microelectronics Activity; or

(iii) Requisitioning electronic parts from Government inventory/stock under the authority of the clause at 252.251–7000, Ordering from Government Supply Sources.

(A) The cost of any required inspection, testing, and authentication of such parts may be charged as a direct cost.

(B) The Government is responsible for the authenticity of the requisitioned electronic parts. If any such part is subsequently found to be counterfeit or suspect counterfeit, the Government will—

(*1*) Promptly replace such part at no charge; and

(*2*) Consider an adjustment in the contract schedule to the extent that replacement of the counterfeit or suspect counterfeit electronic parts caused a delay in performance.

(b) *Contractor counterfeit electronic part detection and avoidance system.* (1) Contractors that are subject to the cost accounting standards and that supply electronic parts or products that include electronic parts, and their subcontractors that supply electronic parts or products that include electronic parts, are required to establish and maintain an acceptable counterfeit electronic part detection and avoidance system. Failure to do so may result in disapproval of the purchasing system by the contracting officer and/or withholding of payments (see 252.244–7001, Contractor Purchasing System Administration).

(2) *System criteria.* A counterfeit electronic part detection and avoidance system shall include risk-based policies and procedures that address, at a minimum,the following areas (see the clause at 252.246–7007, Contractor Counterfeit Electronic Part Detection and Avoidance System):

(i) The training of personnel.

(ii) The inspection and testing of electronic parts, including criteria for acceptance and rejection.

(iii) Processes to abolish counterfeit parts proliferation.

(iv) Processes for maintaining electronic part traceability.

(v) Use of suppliers in accordance with paragraph (a) of this section.

(vi) The reporting and quarantining of counterfeit electronic parts and suspect counterfeit electronic parts.

(vii) Methodologies to identify suspect counterfeit electronic parts and to rapidly determine if a suspect counterfeit electronic part is, in fact, counterfeit.

(viii) Design, operation, and maintenance of systems to detect and avoid counterfeit electronic parts and suspect counterfeit electronic parts.

(ix) Flow down of counterfeit detection and avoidance requirements.

(x) Process for keeping continually informed of current counterfeiting information and trends.

(xi) Process for screening the Government-Industry Data Exchange

Program (GIDEP) reports and other credible sources of counterfeiting information.

(xii) Control of obsolete electronic parts.

■ 10. Amend section 246.870–3 by—
■ a. Revising the section heading;
■ b. Redesignating paragraphs (a)(1) through (3) as paragraph (a)(1)(i) through (iii), respectively;
■ c. Redesignating paragraph (a) as paragraph (a)(1);
■ d. In newly redesignated paragraph (a)(1), removing ''paragraph (b)'' and adding ''paragraph (a)(2)'' in its place;
■ e. In newly redesignated paragraph (a)(1)(iii), removing ''Services where'' and adding ''Services, if'' in its place;
■ f. Resdesignating paragraph (b) as paragraph (a)(2);
■ g. In newly redesignated paragraph (a)(2), removing ''set-aside'' and adding ''set aside'' in its place; and
■ h. Adding new paragraph (b).

The addition reads as follows:

246.870–3 Contract clauses.

* * * * *

(b) Use the clause at 252.246–7008, Sources of Electronic Parts, in solicitations and contracts, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial items, when procuring—

(1) Electronic parts;

(2) End items, components, parts, or assemblies containing electronic parts; or

(3) Services, if the contractor will supply electronic parts or components, parts, or assemblies containing electronic parts as part of the service.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 11. Amend section 252.246–7007 by—
■ a. In the introductory text, removing ''246.870–3'' and adding ''246.870–3(a)'' in its place;
■ b. Removing the clause date ''(MAY 2014)'' and adding ''(AUG 2016)'' in its place;
■ c. In paragraph (a)—
■ i. Adding in alphabetical order the definitions of ''authorized aftermarket manufacturer,'' ''authorized supplier,'' ''contract manufacturer,'' ''contractor-approved supplier,'' ''original component manufacturer,'' ''original equipment manufacturer,'' and ''original manufacturer''; and
■ ii. Amending the definition of ''electronic part'' by removing the second sentence; and
■ iii. Revising the definition of ''obsolete electronic part'' and
■ d. Revising paragraph (b);
■ e. Revising paragraphs (c)(4) and (5); and
■ f. Revising paragraph (e).

The additions and revisions read as follows:

252.246–7007 Contractor Counterfeit Electronic Part Detection and Avoidance System.

* * * * *

(a) * * *

Authorized aftermarket manufacturer means an organization that fabricates a part under a contract with, or with the express written authority of, the original component manufacturer based on the original component manufacturer's designs, formulas, and/or specifications.

Authorized supplier means a supplier, distributor, or an aftermarket manufacturer with a contractual arrangement with, or the express written authority of, the original manufacturer or current design activity to buy, stock, repackage, sell, or distribute the part.

Contract manufacturer means a company that produces goods under contract for another company under the label or brand name of that company.

Contractor-approved supplier means a supplier that does not have a contractual agreement with the original component manufacturer for a transaction, but has been identified as trustworthy by a contractor or subcontractor.

* * * * *

Obsolete electronic part means an electronic part that is no longer available from the original manufacturer or an authorized aftermarket manufacturer.

Original component manufacturer means an organization that designs and/or engineers a part and is entitled to any intellectual property rights to that part.

Original equipment manufacturer means a company that manufactures products that it has designed from purchased components and sells those products under the company's brand name.

Original manufacturer means the original component manufacturer, the original equipment manufacturer, or the contract manufacturer.

* * * * *

(b) *Acceptable counterfeit electronic part detection and avoidance system.* The Contractor shall establish and maintain an acceptable counterfeit electronic part detection and avoidance system. Failure to maintain an acceptable counterfeit electronic part detection and avoidance system, as defined in this clause, may result in disapproval of the purchasing system by the Contracting Officer and/or withholding of payments and affect the allowability of costs of counterfeit electronic parts or suspect counterfeit electronic parts and the cost of rework or corrective action that may be required to remedy the use or inclusion of such parts (see DFARS 231.205–71).

(c) * * *

(4) Risk-based processes that enable tracking of electronic parts from the original manufacturer to product acceptance by the Government, whether the electronic parts are supplied as discrete electronic parts or are contained in assemblies, in accordance with paragraph (c) of the clause at 252.246–7008, Sources of Electronic Parts (also see paragraph (c)(2) of this clause).

(5) Use of suppliers in accordance with the clause at 252.246–7008.

* * * * *

(e) The Contractor shall include the substance of this clause, excluding the introductory text and including only paragraphs (a) through (e), in subcontracts, including subcontracts for commercial items, for electronic parts or assemblies containing electronic parts.

* * * * *

■ 12. Add section 252.246–7008 to read as follows:

252.246–7008 Sources of Electronic Parts.

As prescribed in 246.870–3(b), use the following clause:

SOURCES OF ELECTRONIC PARTS (AUG 2016)

(a) *Definitions.* As used in this clause—

Authorized aftermarket manufacturer means an organization that fabricates a part under a contract with, or with the express written authority of, the original component manufacturer based on the original component manufacturer's designs, formulas, and/or specifications.

Authorized supplier means a supplier, distributor, or an aftermarket manufacturer with a contractual arrangement with, or the express written authority of, the original manufacturer or current design activity to buy, stock, repackage, sell, or distribute the part.

Contract manufacturer means a company that produces goods under contract for another company under the label or brand name of that company.

Contractor-approved supplier means a supplier that does not have a contractual agreement with the original component manufacturer for a transaction, but has been identified as trustworthy by a contractor or subcontractor.

Electronic part means an integrated circuit, a discrete electronic component (including, but not limited to, a transistor, capacitor, resistor, or diode), or a circuit assembly (section 818(f)(2) of Pub. L. 112–81).

Original component manufacturer means an organization that designs and/or engineers a part and is entitled to any intellectual property rights to that part.

Original equipment manufacturer means a company that manufactures products that it has designed from purchased components and sells those products under the company's brand name.

Original manufacturer means the original component manufacturer, the original equipment manufacturer, or the contract manufacturer.

(b) *Selecting suppliers.* In accordance with section 818(c)(3) of the National Defense Authorization Act for Fiscal Year 2012 (Pub. L. 112–81), as amended by section 817 of the National Defense Authorization Act for Fiscal Year 2015 (Pub. L. 113–291), the Contractor shall—

(1) First obtain electronic parts that are in production by the original manufacturer or an authorized aftermarket manufacturer or currently available in stock from—

(i) The original manufacturers of the parts;

(ii) Their authorized suppliers; or

(iii) Suppliers that obtain such parts exclusively from the original manufacturers of the parts or their authorized suppliers;

(2) If electronic parts are not available as provided in paragraph (b)(1) of this clause, obtain electronic parts that are not in production by the original manufacturer or an authorized aftermarket manufacturer, and that are not currently available in stock from a source listed in paragraph (b)(1) of this clause, from suppliers identified by the Contractor as contractor-approved suppliers, provided that—

(i) For identifying and approving such contractor-approved suppliers, the Contractor uses established counterfeit prevention industry standards and processes (including inspection, testing, and authentication), such as the DoD-adopted standards at *https://assist.dla.mil*;

(ii) The Contractor assumes responsibility for the authenticity of parts provided by such contractor-approved suppliers; and

(iii) The Contractor's selection of such contractor-approved suppliers is subject to review and audit by the contracting officer; or

(3)(i) Take the actions in paragraphs (b)(3)(ii) through (b)(3)(iv) of this clause if the Contractor—

(A) Obtains an electronic part from—

(*1*) A source other than any of the sources identified in paragraph (b)(1) or (b)(2) of this clause, due to nonavailability from such sources; or

(*2*) A subcontractor (other than the original manufacturer) that refuses to accept flowdown of this clause; or

(B) Cannot confirm that an electronic part is new or previously unused and that it has not been comingled in supplier new production or stock with used, refurbished, reclaimed, or returned parts.

(ii) If the contractor obtains an electronic part or cannot confirm an electronic part pursuant to paragraph (b)(3)(i) of this clause—

(A) Promptly notify the Contracting Officer in writing. If such notification is required for an electronic part to be used in a designated lot of assemblies to be acquired under a single contract, the Contractor may submit one notification for the lot, providing identification of the assemblies containing the parts (*e.g.*, serial numbers);

(B) Be responsible for inspection, testing, and authentication, in accordance with existing applicable industry standards; and

(C) Make documentation of inspection, testing, and authentication of such electronic parts available to the Government upon request.

(c) *Traceability.* If the Contractor is not the original manufacturer of, or authorized supplier for, an electronic part, the Contractor shall—

(1) Have risk-based processes (taking into consideration the consequences of failure of an electronic part) that enable tracking of electronic parts from the original manufacturer to product acceptance by the Government, whether the electronic part is supplied as a discrete electronic part or is contained in an assembly;

(2) If the Contractor cannot establish this traceability from the original manufacturer for a specific electronic part, be responsible for inspection, testing, and authentication, in accordance with existing applicable industry standards; and

(3)(i) Maintain documentation of traceability (paragraph (c)(1) of this clause) or the inspection, testing, and authentication required when traceability cannot be established (paragraph (c)(2) of this clause) in accordance with FAR subpart 4.7; and

(ii) Make such documentation available to the Government upon request.

(d) *Government sources.* Contractors and subcontractors are still required to comply with the requirements of paragraphs (b) and (c) of this clause, as applicable, if—

(1) Authorized to purchase electronic parts from the Federal Supply Schedule;

(2) Purchasing electronic parts from suppliers accredited by the Defense Microelectronics Activity; or

(3) Requisitioning electronic parts from Government inventory/stock under the authority of 252.251–7000, Ordering from Government Supply Sources.

(i) The cost of any required inspection, testing, and authentication of such parts may be charged as a direct cost.

(ii) The Government is responsible for the authenticity of the requisitioned parts. If any such part is subsequently found to be counterfeit or suspect counterfeit, the Government will—

(A) Promptly replace such part at no charge; and

(B) Consider an adjustment in the contract schedule to the extent that replacement of the counterfeit or suspect counterfeit electronic parts caused a delay in performance.

(e) *Subcontracts.* The Contractor shall include the substance of this clause, including this paragraph (e), in subcontracts, including subcontracts for commercial items that are for electronic parts or assemblies containing electronic parts, unless the subcontractor is the original manufacturer.

(End of clause)

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DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 225 and 252

[Docket DARS–2016–0021]

RIN 0750–AI97

Defense Federal Acquisition Regulation Supplement: New Qualifying Countries—Japan and Slovenia (DFARS Case 2016–D023)

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

ACTION: Final rule.

SUMMARY: DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to add Japan and Slovenia as qualifying countries.

DATES: Effective August 2, 2016.

FOR FURTHER INFORMATION CONTACT: Ms. Jo Ann Reilly, telephone 571–372–6176.

SUPPLEMENTARY INFORMATION:

I. Background

DoD is amending the DFARS to add Japan and Slovenia as qualifying countries. The Secretary of Defense recently signed reciprocal defense procurement agreements with these countries. These agreements were placed into force on June 4, 2016, for Japan and June 21, 2016, for Slovenia. The agreements remove discriminatory barriers to procurements of supplies and services produced by industrial enterprises of the other country to the extent mutually beneficial and consistent with national laws, regulations, policies, and international obligations. These agreements do not cover construction or construction material. Japan and Slovenia are already designated countries under the World Trade Organization Government Procurement Agreement.

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

This rule only updates the list of qualifying countries in the DFARS by adding the newly qualifying countries of Japan and Slovenia. The definition of ''qualifying country'' is updated in each of the following clauses; however, this revision does not impact the clause prescriptions for use, or applicability at or below the simplified acquisition threshold, or applicability to commercial items. The clauses are: