

**Senate Bill 1867**  
**National Defense Authorization Act for**  
**Fiscal Year 2012**

**SECTION 848. DETECTION AND AVOIDANCE OF COUNTERFEIT  
ELECTRONIC PARTS.**

SA 1092. Mr. LEVIN (for himself, Mr. MCCAIN, Mr. AKAKA, Mr. CHAMBLISS, Mr. BLUMENTHAL, Mr. INHOFE, Mrs. GILLIBRAND, Mr. NELSON of Nebraska, Ms. STABENOW, Mr. UDALL of Colorado, Mr. WEBB, Mr. MANCHIN, and Mr. WHITEHOUSE) proposed an amendment to the bill S. 1867, to authorize appropriations for fiscal year 2012 for military activities of the Department of Defense, for military construction, and for defense activities of the Department of Energy, to prescribe military personnel strengths for such fiscal year, and for other purposes; as follows:

At the end of subtitle C of title VIII, add the following:

SEC. 848. DETECTION AND AVOIDANCE OF COUNTERFEIT ELECTRONIC PARTS.

(a) Revised Regulations Required.--

(1) IN GENERAL.--Not later than 180 days after the date of the enactment of this Act, the Secretary of Defense shall revise the Department of Defense Supplement to the Federal Acquisition Regulation to address the detection and avoidance of counterfeit electronic parts.

(2) CONTRACTOR RESPONSIBILITIES.--The revised regulations issued pursuant to paragraph (1) shall provide that--

(A) contractors on Department of Defense contracts for products that include electronic parts are responsible for detecting and avoiding the use or inclusion of counterfeit electronic parts or suspect counterfeit electronic parts in such products and for any rework or corrective action that may be required to remedy the use or inclusion of such parts; and

(B) the cost 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 are not allowable costs under such contracts.

(3) TRUSTED SUPPLIERS.--The revised regulations issued pursuant to paragraph (1) shall--

(A) require that, whenever possible, the Department of Defense and Department of Defense contractors and subcontractors--

(i) obtain electronic parts that are in production or currently available in stock from the original manufacturers of the parts or their authorized dealers, or from trusted suppliers who obtain such parts exclusively from the original manufacturers of the parts or their authorized dealers; and

(ii) obtain electronic parts that are not in production or currently available in stock from trusted suppliers;

(B) establish requirements for notification of the Department of Defense, inspection, test, and authentication of electronic parts that the Department of Defense or a Department of Defense contractor or subcontractor obtains from any source other than a source described in subparagraph (A);

(C) establish qualification requirements, consistent with the requirements of section 2319 of title 10, United States Code, pursuant to which the Department of Defense may identify trusted suppliers that have appropriate policies and procedures in place to detect and avoid counterfeit electronic parts and suspect counterfeit electronic parts; and

(D) authorize Department of Defense contractors and subcontractors to identify and use additional trusted suppliers, provided that--

(i) the standards and processes for identifying such trusted suppliers complies with established industry standards;

(ii) the contractor or subcontractor assumes responsibility for the authenticity of parts provided by such supplier as provided in paragraph (2); and

(iii) the selection of such trusted suppliers is subject to review and audit by appropriate Department of Defense officials.

(4) REPORTING REQUIREMENT.--The revised regulations issued pursuant to paragraph (1) shall require that any Department of Defense contractor or subcontractor who becomes aware, or has reason to suspect, that any end item, component, part, or material contained in supplies purchased by the Department of Defense, or purchased by a contractor or subcontractor for delivery to, or on behalf of, the Department of Defense, contains counterfeit electronic parts or suspect counterfeit electronic parts, shall provide a written report on the matter within 30 calendar days to the Inspector General of the Department of Defense, the contracting officer for the contract pursuant to which the supplies are purchased, and the Government-Industry Data Exchange Program or a similar program designated by the Secretary of Defense.

(b) Inspection of Imported Electronic Parts.--

(1) INSPECTION PROGRAM.--Not later than 270 days after the date of the enactment of this Act, the Secretary of Homeland Security shall establish a program of enhanced inspection by U.S. Customs and Border Patrol of electronic parts imported from any country that has been determined by the Secretary of Defense to have been a significant source of counterfeit electronic parts or suspect counterfeit electronic parts in the supply chain for products purchased by the Department of Defense over the previous five years.

(2) INFORMATION SHARING.--In carrying out the program required under paragraph (1) and in accordance with regulations issued by the Secretary of Homeland Security, the Secretary is authorized to provide the owner of a copyright or registered mark (as defined in section 1127 of title 15, United States Code) any information appearing on the imported merchandise or its retail packaging, and a sample of such merchandise and its retail packaging in their condition as presented for customs examination, as well as any packing material that bears an accused mark or work, when necessary in the view of the Secretary to assist the Secretary with determining whether the copyright has been pirated or the registered mark has been counterfeited.

(c) Contractor Systems for Detection and Avoidance of Counterfeit and Suspect Counterfeit Electronic Parts.--

(1) IN GENERAL.--Not later than 270 days after the date of the enactment of this Act, the Secretary of Defense shall implement a program for the improvement of contractor systems for the detection and avoidance of counterfeit electronic parts and suspect counterfeit electronic parts.

(2) ELEMENTS.--The program developed pursuant to paragraph (1) shall--

(A) require covered contractors to adopt and implement policies and procedures, consistent with applicable industry standards, for the detection and avoidance of counterfeit electronic parts and suspect counterfeit electronic parts, including policies and procedures for training personnel, designing and maintaining systems to mitigate risks associated with parts obsolescence, making sourcing decisions, prioritizing mission critical and sensitive components, ensuring traceability of parts, developing lists of trusted and untrusted suppliers, flowing down requirements to subcontractors, inspecting and testing parts, reporting and quarantining suspect counterfeit electronic parts and counterfeit electronic parts, and taking corrective action;

(B) establish processes for the review and approval or disapproval of contractor systems for the detection and avoidance of counterfeit electronic parts and suspect counterfeit electronic parts, comparable to the processes established for contractor business systems under section 893 of the Ike Skelton National Defense Authorization Act for Fiscal Year 2011 (Public Law 111-383; 124 Stat. 4311; 10 U.S.C. 2302 note); and

(C) effective beginning one year after the date of the enactment of this Act, authorize the withholding of payments as provided in subsection (c) of such section, in the event that a contractor system for detection and avoidance of counterfeit electronic parts is disapproved pursuant to subparagraph (B) and has not subsequently received approval.

(3) COVERED CONTRACTOR AND COVERED CONTRACT DEFINED.--In this subsection, the terms ``covered contractor" and ``covered contract" have the meanings given such terms in section 893(f) of the Ike Skelton National Defense Authorization Act for Fiscal Year 2011 (Public Law 111-383; 124 Stat. 4312; 10 U.S.C. 2302 note).

(d) Department of Defense Responsibilities.--Not later than 270 days after the date of the enactment of this Act, the Secretary

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of Defense shall take steps to address shortcomings in Department of Defense systems for the detection and avoidance of counterfeit electronic parts and suspect counterfeit electronic parts. Such steps shall include, at a minimum, the following:

(1) Policies and procedures applicable to Department of Defense components engaged in the purchase of electronic parts, including requirements for training personnel, making sourcing decisions, ensuring traceability of parts, inspecting and testing parts, reporting and quarantining suspect counterfeit electronic parts and counterfeit electronic parts, and taking corrective action.

The policies and procedures developed by the Secretary under this paragraph shall prioritize mission critical and sensitive components.

(2) The establishment of a system for ensuring that government employees who become aware of, or have reason to suspect, that any end item, component, part, or material contained in supplies purchased by or for the Department of Defense contains counterfeit electronic parts or suspect counterfeit electronic parts are required to provide a written report on the matter within 30 calendar days to the Inspector General of the Department of Defense, the contracting officer for the contract pursuant to which the supplies are purchased, and the Government-Industry Data Exchange Program or a similar program designated by the Secretary of Defense.

(3) A process for analyzing, assessing, and acting on reports of counterfeit electronic parts and suspect counterfeit electronic parts that are submitted to the Inspector General of the Department of Defense, contracting officers, and the Government-Industry Data Exchange Program or a similar program designated by the Secretary of Defense.

(4) Guidance on appropriate remedial actions in the case of a supplier who has repeatedly failed to detect and avoid counterfeit electronic parts and suspect counterfeit electronic parts or otherwise failed to exercise due diligence in the detection and avoidance of such parts, including consideration of whether to suspend or debar a supplier until such time as the supplier has effectively addressed the issues that led to such failures.

(e) Trafficking in Counterfeit Military Goods or Services.--Section 2320 of title 18, United States Code, is amended--

(1) in subsection (a), by adding at the end the following:

“(3) MILITARY GOODS OR SERVICES.--

“(A) IN GENERAL.--A person who commits an offense under paragraph (1) shall be punished in accordance with subparagraph (B) if--

“(i) the offense involved a good or service described in paragraph (1) that if it malfunctioned, failed, or was compromised, could reasonably be foreseen to cause--

“(I) serious bodily injury or death;

“(II) disclosure of classified information;

“(III) impairment of combat operations; or

“(IV) other significant harm to a member of the Armed Forces or to national security; and

“(ii) the person had knowledge that the good or service is falsely identified as meeting military standards or is intended for use in a military or national security application.

“(B) PENALTIES.--

“(i) INDIVIDUAL.--An individual who commits an offense described in subparagraph (A) shall be fined not more than \$5,000,000, imprisoned for not more than 20 years, or both.

“(ii) PERSON OTHER THAN AN INDIVIDUAL.--A person other than an individual that commits an offense described in subparagraph (A) shall be fined not more than \$15,000,000.

“(C) SUBSEQUENT OFFENSES.--

“(i) INDIVIDUAL.--An individual who commits an offense described in subparagraph (A) after the individual is convicted of an offense under subparagraph (A) shall be fined not more than \$15,000,000, imprisoned not more than 30 years, or both.

“(ii) PERSON OTHER THAN AN INDIVIDUAL.--A person other than an individual that commits an offense described in subparagraph (A) after the person is convicted of an offense under subparagraph (A) shall be fined not more than \$30,000,000.”; and

(2) in subsection (e)--

(A) in paragraph (1), by striking the period at the end and inserting a semicolon;

(B) in paragraph (3), by striking “and” at the end;

(C) in paragraph (4), by striking the period at the end and inserting a semicolon; and

(D) by adding at the end the following:

“(5) the term ‘falsely identified as meeting military standards’ relating to a good or service means there is a material misrepresentation that the good or service meets a standard, requirement, or specification issued by the Department of Defense, an Armed Force, or a reserve component; and

“(6) the term ‘use in a military or national security application’ means the use of a good or service, independently, in conjunction with, or as a component of another good or service--

“(A) during the performance of the official duties of the Armed Forces of the United States or the reserve components of the Armed Forces; or

“(B) by the United States to perform or directly support--

“(i) combat operations; or

“(ii) critical national defense or national security functions.”.

(f) Sentencing Guidelines.--

(1) DEFINITION.--In this subsection, the term ``critical infrastructure'' has the meaning given that term in application note 13(A) of section 2B1.1 of the Federal Sentencing Guidelines.

(2) DIRECTIVE.--The United States Sentencing Commission shall review and, if appropriate, amend the Federal Sentencing Guidelines and policy statements applicable to persons convicted of an offense under section 2320(a) of title 18, United States Code, to reflect the intent of Congress that penalties for such offenses be increased for defendants that sell infringing products to, or for the use by or for, the Armed Forces or a Federal, State, or local law enforcement agency or for use in critical infrastructure or in national security applications.

(3) REQUIREMENTS.--In amending the Federal Sentencing Guidelines and policy statements under paragraph (2), the United States Sentencing Commission shall--

(A) ensure that the guidelines and policy statements, including section 2B5.3 of the Federal Sentencing Guidelines (and any successor thereto), reflect--

(i) the serious nature of the offenses described in section 2320(a) of title 18, United States Code;

(ii) the need for an effective deterrent and appropriate punishment to prevent offenses under section 2320(a) of title 18, United States Code; and

(iii) the effectiveness of incarceration in furthering the objectives described in clauses (i) and (ii);

(B) consider an appropriate offense level enhancement and minimum offense level for offenses that involve a product used to maintain or operate critical infrastructure, or used by or for an entity of the Federal Government or a State or local government in furtherance of the administration of justice, national defense, or national security;

(C) ensure reasonable consistency with other relevant directives and guidelines and Federal statutes;

(D) make any necessary conforming changes to the guidelines; and

(E) ensure that the guidelines relating to offenses under section 2320(a) of title 18, United States Code, adequately meet the purposes of sentencing, as described in section 3553(a)(2) of title 18, United States Code.

(4) EMERGENCY AUTHORITY.--The United States Sentencing Commission shall--

(A) promulgate the guidelines, policy statements, or amendments provided for in this Act as soon as practicable, and in any event not later than 180 days after the date of the enactment of this Act, in accordance with the procedure set forth in section 21(a) of the Sentencing Act of 1987 (28 U.S.C. 994 note), as though the authority under that Act had not expired; and

(B) pursuant to the emergency authority provided under subparagraph (A), make such conforming amendments to the Federal Sentencing Guidelines as the Commission determines necessary to achieve consistency with other guideline provisions and applicable law.

(g) Definitions.--

(1) COUNTERFEIT ELECTRONIC PART.--The Secretary of Defense shall define the term ``counterfeit electronic part'' for the purposes of this section. Such definition shall include used electronic parts that are represented as new.

(2) SUSPECT COUNTERFEIT ELECTRONIC PART AND ELECTRONIC PART.--For the purposes of this section:

(A) A part is a ``suspect counterfeit electronic part'' if visual inspection, testing, or other information provide reason to believe that the part may be a counterfeit part.

(B) An ``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.