

Calendar No. 107

112TH CONGRESS
1ST SESSION**S. 1228**

To prohibit trafficking in counterfeit military goods or services.

IN THE SENATE OF THE UNITED STATES

JUNE 16, 2011

Mr. WHITEHOUSE (for himself, Mr. GRAHAM, Mr. COONS, Mr. MCCAIN, Mr. BLUMENTHAL, Ms. KLOBUCHAR, Mr. KYL, Mr. LEAHY, and Mr. HATCH) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

JULY 21, 2011

Reported by Mr. LEAHY, with an amendment

[Strike out all after the enacting clause and insert the part printed in italic]

A BILL

To prohibit trafficking in counterfeit military goods or services.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Combating Military
5 Counterfeits Act of 2011”.

1 **SEC. 2. TRAFFICKING IN COUNTERFEIT MILITARY GOODS**
 2 **OR SERVICES.**

3 (a) **TRAFFICKING IN COUNTERFEIT MILITARY**
 4 **GOODS OR SERVICES.**—Section 2320 of title 18, United
 5 States Code, is amended—

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

8 “(3) **MILITARY GOODS OR SERVICES.**—

9 “(A) **IN GENERAL.**—A person who com-
 10 mits an offense under paragraph (1) shall be
 11 punished in accordance with subparagraph (B)
 12 if—

13 “(i) the offense involved a good or
 14 service described in paragraph (1) that if
 15 it malfunctioned, failed, or was com-
 16 promised, could reasonably be expected to
 17 cause—

18 “(I) serious bodily injury or
 19 death;

20 “(II) disclosure of classified in-
 21 formation;

22 “(III) impairment of combat op-
 23 erations; or

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

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

6 “(B) PENALTIES.—

7 “(i) INDIVIDUAL.—An individual who
8 commits an offense described in subpara-
9 graph (A) shall be fined not more than
10 \$5,000,000, imprisoned for not more than
11 20 years, or both.

12 “(ii) PERSON OTHER THAN AN INDI-
13 VIDUAL.—A person other than an indi-
14 vidual that commits an offense described in
15 subparagraph (A) shall be fined not more
16 than \$15,000,000.

17 “(C) SUBSEQUENT OFFENSES.—

18 “(i) INDIVIDUAL.—An individual who
19 commits an offense described in subpara-
20 graph (A) after the individual is convicted
21 of an offense under subparagraph (A) shall
22 be fined not more than \$15,000,000, im-
23 prisoned not more than 30 years, or both.

24 “(ii) PERSON OTHER THAN AN INDI-
25 VIDUAL.—A person other than an indi-

1 vidual that commits an offense described in
 2 subparagraph (A) after the person is con-
 3 victed of an offense under subparagraph
 4 (A) shall be fined not more than
 5 \$30,000,000.”; and

6 (2) in subsection (c)—

7 (A) in paragraph (1), by striking the pe-
 8 riod at the end and inserting a semicolon;

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

11 (C) in paragraph (4), by striking the pe-
 12 riod at the end and a semicolon; and

13 (D) by adding at the end the following:

14 “(5) the term ‘falsely identified as meeting mili-
 15 tary standards’ relating to a good or service—

16 “(A) means the good or service—

17 “(i)(I) bears a label, tag, stamp, prod-
 18 uct code, phrase, or emblem of any kind
 19 that indicates that the good or service
 20 meets a standard, requirement, or speci-
 21 fication issued by the Department of De-
 22 fense, an Armed Force, or a reserve com-
 23 ponent;

24 “(II) is packaged in a wrapper, con-
 25 tainer, box, case, or packaging of any type

1 or nature which bears a label, tag, stamp,
2 product code, phrase, or emblem of any
3 kind which indicates that the good or serv-
4 ices meets a standard, requirement, or
5 specification issued by the Department of
6 Defense, an Armed Force, or a reserve
7 component; or

8 “(III) is accompanied by or marketed
9 with a certificate or other oral or written
10 representation that the good or service
11 meets a standard, requirement, or speci-
12 fication issued by the Department of De-
13 fense, an Armed Force, or a reserve com-
14 ponent; and

15 “(ii) does not meet the standard, re-
16 quirement, or specification of the Depart-
17 ment of Defense, an Armed Force, or a re-
18 serve component that is indicated or rep-
19 resented in a manner described in clause
20 (i); and

21 “(B) shall not apply to—

22 “(i) the identification of a good or
23 service in a manner that is unlikely to
24 cause confusion, to cause mistake, or to
25 deceive; or

1 “(ii) a good or service if the standard,
2 requirement, or specification issued by the
3 Department of Defense, an Armed Force,
4 or a reserve component has only a de mini-
5 mis relationship to national security or the
6 safety of the members of the Armed
7 Forces; and

8 “(6) the term ‘use in a military or national se-
9 curity application’ means the use of a good or serv-
10 ice, independently, in conjunction with, or as a com-
11 ponent of another good or service—

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

16 “(B) by the United States to perform or
17 directly support—

18 “(i) combat operations; or

19 “(ii) critical national defense or na-
20 tional security functions.”.

21 (b) SENTENCING GUIDELINES.—

22 (1) DIRECTIVE.—The United States Sentencing
23 Commission shall review and, if appropriate, amend
24 the Federal sentencing guidelines and policy state-
25 ments applicable to persons convicted of an offense

1 under section 2320(a) of title 18, United States
2 Code, to reflect the intent of Congress that penalties
3 for such offenses be increased in comparison to
4 those provided on the day before the date of enact-
5 ment of this Act under the guidelines and policy
6 statements.

7 (2) REQUIREMENTS.—In amending the Federal
8 Sentencing Guidelines and policy statements under
9 paragraph (1), the United States Sentencing Com-
10 mission shall—

11 (A) ensure that the guidelines and policy
12 statements, including section 2B5.3 of the Fed-
13 eral Sentencing Guidelines (and any successor
14 thereto), reflect—

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

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

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

1 (B) consider the extent to which the guide-
2 lines appropriately account for the risk, even if
3 attenuated or unknown to the offender, to
4 members of the Armed Forces of the United
5 States, military readiness, and national security
6 resulting from an offense committed under sec-
7 tion 2320(a) of title 18, United States Code, in-
8 cluding in instances involving a limited value or
9 quantity of goods or services;

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

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

15 (E) ensure that the guidelines relating to
16 offenses under section 2320(a) of title 18,
17 United States Code, adequately meet the pur-
18 poses of sentencing, as described in section
19 3553(a)(2) of title 18, United States Code.

20 (3) EMERGENCY AUTHORITY.—The United
21 States Sentencing Commission shall—

22 (A) promulgate the guidelines, policy state-
23 ments, or amendments provided for in this Act
24 as soon as practicable, and in any event not
25 later than 180 days after the date of enactment

1 of this Act, in accordance with the procedure
 2 set forth in section 21(a) of the Sentencing Act
 3 of 1987 (28 U.S.C. 994 note), as though the
 4 authority under that Act had not expired; and

5 (B) pursuant to the emergency authority
 6 provided under subparagraph (A), make such
 7 conforming amendments to the Federal sen-
 8 tencing guidelines as the Commission deter-
 9 mines necessary to achieve consistency with
 10 other guideline provisions and applicable law.

11 **SECTION 1. SHORT TITLE.**

12 *This Act may be cited as the “Combating Military*
 13 *Counterfeits Act of 2011”.*

14 **SEC. 2. TRAFFICKING IN COUNTERFEIT MILITARY GOODS**
 15 **OR SERVICES.**

16 *(a) TRAFFICKING IN COUNTERFEIT MILITARY GOODS*
 17 *OR SERVICES.—Section 2320 of title 18, United States*
 18 *Code, is amended—*

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

21 *“(3) MILITARY GOODS OR SERVICES.—*

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

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

5 “(I) serious bodily injury or
6 death;

7 “(II) disclosure of classified infor-
8 mation;

9 “(III) impairment of combat op-
10 erations; or

11 “(IV) other significant harm to a
12 member of the Armed Forces or to na-
13 tional security; and

14 “(ii) the person had knowledge that the
15 good or service is falsely identified as meet-
16 ing military standards or is intended for
17 use in a military or national security ap-
18 plication.

19 “(B) PENALTIES.—

20 “(i) INDIVIDUAL.—An individual who
21 commits an offense described in subpara-
22 graph (A) shall be fined not more than
23 \$5,000,000, imprisoned for not more than
24 20 years, or both.

1 “(i) *PERSON OTHER THAN AN INDI-*
 2 *VIDUAL.—A person other than an indi-*
 3 *vidual that commits an offense described in*
 4 *subparagraph (A) shall be fined not more*
 5 *than \$15,000,000.*

6 “(C) *SUBSEQUENT OFFENSES.—*

7 “(i) *INDIVIDUAL.—An individual who*
 8 *commits an offense described in subpara-*
 9 *graph (A) after the individual is convicted*
 10 *of an offense under subparagraph (A) shall*
 11 *be fined not more than \$15,000,000, impris-*
 12 *oned not more than 30 years, or both.*

13 “(ii) *PERSON OTHER THAN AN INDI-*
 14 *VIDUAL.—A person other than an indi-*
 15 *vidual that commits an offense described in*
 16 *subparagraph (A) after the person is con-*
 17 *victed of an offense under subparagraph (A)*
 18 *shall be fined not more than \$30,000,000.”;*
 19 *and*

20 (2) *in subsection (e)—*

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

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

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

3 (D) by adding at the end the following:

4 “(5) the term ‘falsely identified as meeting mili-
5 tary standards’ relating to a good or service means
6 there is a material misrepresentation that the good or
7 service meets a standard, requirement, or specifica-
8 tion issued by the Department of Defense, an Armed
9 Force, or a reserve component; and

10 “(6) the term ‘use in a military or national se-
11 curity application’ means the use of a good or service,
12 independently, in conjunction with, or as a compo-
13 nent of another good or service—

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

18 “(B) by the United States to perform or di-
19 rectly support—

20 “(i) combat operations; or

21 “(ii) critical national defense or na-
22 tional security functions.”.

23 (b) *SENTENCING GUIDELINES.*—

24 (1) *DEFINITION.*—In this subsection, the term
25 “critical infrastructure” has the meaning given that

1 *term in application note 13(A) of section 2B1.1 of the*
2 *Federal Sentencing Guidelines.*

3 (2) *DIRECTIVE.*—*The United States Sentencing*
4 *Commission shall review and, if appropriate, amend*
5 *the Federal Sentencing Guidelines and policy state-*
6 *ments applicable to persons convicted of an offense*
7 *under section 2320(a) of title 18, United States Code,*
8 *to reflect the intent of Congress that penalties for such*
9 *offenses be increased for defendants that sell infring-*
10 *ing products to, or for the use by or for, the Armed*
11 *Forces or a Federal, State, or local law enforcement*
12 *agency or for use in critical infrastructure or in na-*
13 *tional security applications.*

14 (3) *REQUIREMENTS.*—*In amending the Federal*
15 *Sentencing Guidelines and policy statements under*
16 *paragraph (2), the United States Sentencing Commis-*
17 *sion shall—*

18 (A) *ensure that the guidelines and policy*
19 *statements, including section 2B5.3 of the Fed-*
20 *eral Sentencing Guidelines (and any successor*
21 *thereto), reflect—*

22 (i) *the serious nature of the offenses de-*
23 *scribed in section 2320(a) of title 18,*
24 *United States Code;*

1 (ii) the need for an effective deterrent
2 and appropriate punishment to prevent of-
3 fenses under section 2320(a) of title 18,
4 United States Code; and

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

8 (B) consider an appropriate offense level en-
9 hancement and minimum offense level for of-
10 fenses that involve a product used to maintain or
11 operate critical infrastructure, or used by or for
12 an entity of the Federal Government or a State
13 or local government in furtherance of the admin-
14 istration of justice, national defense, or national
15 security;

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

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

21 (E) ensure that the guidelines relating to of-
22 fenses under section 2320(a) of title 18, United
23 States Code, adequately meet the purposes of sen-
24 tencing, as described in section 3553(a)(2) of
25 title 18, United States Code.

1 (4) *EMERGENCY AUTHORITY.*—*The United States*
2 *Sentencing Commission shall—*

3 (A) *promulgate the guidelines, policy state-*
4 *ments, or amendments provided for in this Act*
5 *as soon as practicable, and in any event not*
6 *later than 180 days after the date of enactment*
7 *of this Act, in accordance with the procedure set*
8 *forth in section 21(a) of the Sentencing Act of*
9 *1987 (28 U.S.C. 994 note), as though the author-*
10 *ity under that Act had not expired; and*

11 (B) *pursuant to the emergency authority*
12 *provided under subparagraph (A), make such*
13 *conforming amendments to the Federal Sen-*
14 *tencing Guidelines as the Commission determines*
15 *necessary to achieve consistency with other*
16 *guideline provisions and applicable law.*

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112TH CONGRESS
1ST Session

S. 1228

A BILL

To prohibit trafficking in counterfeit military goods
or services.

JULY 21, 2011

Reported with an amendment