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NATIONAL DEFENSE AUTHORIZATION ACT
FOR FISCAL YEAR 2012

CONFERENCE REPORT

TO ACCOMPANY

H.R. 1540



DECEMBER 12, 2011.—Ordered to be printed

“(1) *The Federal Acquisition Regulation and other laws and regulations that apply to procurements of property and services by Federal agencies.*

“(2) *Laws and regulations (including applicable Department of Defense financial management regulations) that apply to procurements of property and services made by the Department of Defense through other Federal agencies.*”.

SEC. 818. DETECTION AND AVOIDANCE OF COUNTERFEIT ELECTRONIC PARTS.

(a) **ASSESSMENT OF DEPARTMENT OF DEFENSE POLICIES AND SYSTEMS.**—*The Secretary of Defense shall conduct an assessment of Department of Defense acquisition policies and systems for the detection and avoidance of counterfeit electronic parts.*

(b) **ACTIONS FOLLOWING ASSESSMENT.**—*Not later than 180 days after the date of the enactment of the Act, the Secretary shall, based on the results of the assessment required by subsection (a)—*

(1) *establish Department-wide definitions of the terms “counterfeit electronic part” and “suspect counterfeit electronic part”, which definitions shall include previously used parts represented as new;*

(2) *issue or revise guidance applicable to Department components engaged in the purchase of electronic parts to implement a risk-based approach to minimize the impact of counterfeit electronic parts or suspect counterfeit electronic parts on the Department, which guidance shall address requirements for training personnel, making sourcing decisions, ensuring traceability of parts, inspecting and testing parts, reporting and quarantining counterfeit electronic parts and suspect counterfeit electronic parts, and taking corrective actions (including actions to recover costs as described in subsection (c)(2));*

(3) *issue or revise guidance applicable to the Department on remedial actions to be taken in the case of a supplier who has repeatedly failed to detect and avoid 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;*

(4) *establish processes for ensuring that Department personnel 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 contains counterfeit electronic parts or suspect counterfeit electronic parts provide a report in writing within 60 days to appropriate Government authorities and to the Government-Industry Data Exchange Program (or a similar program designated by the Secretary); and*

(5) *establish a process for analyzing, assessing, and acting on reports of counterfeit electronic parts and suspect counterfeit electronic parts that are submitted in accordance with the processes under paragraph (4).*

(c) **REGULATIONS.**—

(1) **IN GENERAL.**—*Not later than 270 days after the date of the enactment of this Act, the Secretary 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) covered contractors who supply electronic parts or 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 Department contracts.

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

(A) require that, whenever possible, the Department and Department contractors and subcontractors at all tiers—

(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, and inspection, testing, and authentication of electronic parts that the Department or a Department 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 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 contractors and subcontractors to identify and use additional trusted suppliers, provided that—

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

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

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

(4) *REPORTING REQUIREMENT.*—The revised regulations issued pursuant to paragraph (1) shall require that any Department contractor or subcontractor who becomes aware, or has reason to suspect, that any end item, component, part, or mate-

rial contained in supplies purchased by the Department, or purchased by a contractor or subcontractor for delivery to, or on behalf of, the Department, contains counterfeit electronic parts or suspect counterfeit electronic parts report in writing within 60 days to appropriate Government authorities and the Government-Industry Data Exchange Program (or a similar program designated by the Secretary).

(5) CONSTRUCTION OF COMPLIANCE WITH REPORTING REQUIREMENT.—A Department contractor or subcontractor that provides a written report required under this subsection shall not be subject to civil liability on the basis of such reporting, provided the contractor or subcontractor made a reasonable effort to determine that the end item, component, part, or material concerned contained counterfeit electronic parts or suspect counterfeit electronic parts.

(d) INSPECTION PROGRAM.—The Secretary of Homeland Security shall establish and implement a risk-based methodology for the enhanced targeting of electronic parts imported from any country, after consultation with the Secretary of Defense as to sources of counterfeit electronic parts and suspect counterfeit electronic parts in the supply chain for products purchased by the Department of Defense.

(e) IMPROVEMENT OF CONTRACTOR SYSTEMS FOR DETECTION AND AVOIDANCE OF 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 to enhance contractor detection and avoidance of counterfeit electronic parts.

(2) ELEMENTS.—The program implemented pursuant to paragraph (1) shall—

(A) require covered contractors that supply electronic parts or systems that contain electronic parts to establish policies and procedures to eliminate counterfeit electronic parts from the defense supply chain, which policies and procedures shall address—

- (i) the training of personnel;
- (ii) the inspection and testing of electronic parts;
- (iii) processes to abolish counterfeit parts proliferation;
- (iv) mechanisms to enable traceability of parts;
- (v) use of trusted suppliers;
- (vi) the reporting and quarantining of counterfeit electronic parts and suspect counterfeit electronic parts;
- (vii) methodologies to identify suspect counterfeit parts and to rapidly determine if a suspect counterfeit part is, in fact, counterfeit;
- (viii) the design, operation, and maintenance of systems to detect and avoid counterfeit electronic parts and suspect counterfeit electronic parts; and
- (ix) the flow down of counterfeit avoidance and detection requirements to subcontractors; and

(B) establish of contractor systems for the review and approval of contractor systems for the detection and avoidance of counterfeit electronic parts and suspect counterfeit electronic parts, which processes shall be 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).

(f) **DEFINITIONS.**—In subsections (a) through (e) of this section:

(1) The term “covered contractor” has the meaning given that term in section 893(f)(2) of the Ike Skelton National Defense Authorization Act for Fiscal Year 2011.

(2) The term “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.

(g) **INFORMATION SHARING.**—

(1) **IN GENERAL.**—If United States Customs and Border Protection suspects a product of being imported in violation of section 42 of the Lanham Act, and subject to any applicable bonding requirements, the Secretary of the Treasury may share information appearing on, and unredacted samples of, products and their packaging and labels, or photographs of such products, packaging, and labels, with the rightholders of the trademarks suspected of being copied or simulated for purposes of determining whether the products are prohibited from importation pursuant to such section.

(2) **SUNSET.**—This subsection shall expire on the date of the enactment of the Customs Facilitation and Trade Enforcement Reauthorization Act of 2012.

(3) **LANHAM ACT DEFINED.**—In this subsection, the term “Lanham Act” means the Act entitled “An Act to provide for the registration and protection of trademarks used in commerce, to carry out the provisions of certain international conventions, and for other purposes”, approved July 5, 1946 (commonly referred to as the “Trademark Act of 1946” or the “Lanham Act”).

(h) **TRAFFICKING IN INHERENTLY DANGEROUS GOODS OR SERVICES.**—Section 2320 of title 18, United States Code, is amended to read as follows:

“§ 2320. Trafficking in counterfeit goods or services

“(a) **OFFENSES.**—Whoever intentionally—

“(1) traffics in goods or services and knowingly uses a counterfeit mark on or in connection with such goods or services,

“(2) traffics in labels, patches, stickers, wrappers, badges, emblems, medallions, charms, boxes, containers, cans, cases, hangtags, documentation, or packaging of any type or nature, knowing that a counterfeit mark has been applied thereto, the use of which is likely to cause confusion, to cause mistake, or to deceive, or

“(3) traffics in goods or services knowing that such good or service is a counterfeit military good or service the use, malfunction, or failure of which is likely to cause serious bodily injury or death, the disclosure of classified information, impairment of combat operations, or other significant harm to a combat operation, a member of the Armed Forces, or to national security,

or attempts or conspires to violate any of paragraphs (1) through (3) shall be punished as provided in subsection (b).

“(b) **PENALTIES.**—

“(1) *IN GENERAL.*—Whoever commits an offense under subsection (a)—

“(A) if an individual, shall be fined not more than \$2,000,000 or imprisoned not more than 10 years, or both, and, if a person other than an individual, shall be fined not more than \$5,000,000; and

“(B) for a second or subsequent offense under subsection (a), if an individual, shall be fined not more than \$5,000,000 or imprisoned not more than 20 years, or both, and if other than an individual, shall be fined not more than \$15,000,000.

“(2) *SERIOUS BODILY INJURY OR DEATH.*—

“(A) *SERIOUS BODILY INJURY.*—Whoever knowingly or recklessly causes or attempts to cause serious bodily injury from conduct in violation of subsection (a), if an individual, shall be fined not more than \$5,000,000 or imprisoned for not more than 20 years, or both, and if other than an individual, shall be fined not more than \$15,000,000.

“(B) *DEATH.*—Whoever knowingly or recklessly causes or attempts to cause death from conduct in violation of subsection (a), if an individual, shall be fined not more than \$5,000,000 or imprisoned for any term of years or for life, or both, and if other than an individual, shall be fined not more than \$15,000,000.

“(3) *COUNTERFEIT MILITARY GOODS OR SERVICES.*—Whoever commits an offense under subsection (a) involving a counterfeit military good or service—

“(A) if an individual, shall be fined not more than \$5,000,000, imprisoned not more than 20 years, or both, and if other than an individual, be fined not more than \$15,000,000; and

“(B) for a second or subsequent offense, if an individual, shall be fined not more than \$15,000,000, imprisoned not more than 30 years, or both, and if other than an individual, shall be fined not more than \$30,000,000.

“(c) *FORFEITURE AND DESTRUCTION OF PROPERTY; RESTITUTION.*—Forfeiture, destruction, and restitution relating to this section shall be subject to section 2323, to the extent provided in that section, in addition to any other similar remedies provided by law.

“(d) *DEFENSES.*—All defenses, affirmative defenses, and limitations on remedies that would be applicable in an action under the Lanham Act shall be applicable in a prosecution under this section. In a prosecution under this section, the defendant shall have the burden of proof, by a preponderance of the evidence, of any such affirmative defense.

“(e) *PRESENTENCE REPORT.*—(1) During preparation of the presentence report pursuant to Rule 32(c) of the Federal Rules of Criminal Procedure, victims of the offense shall be permitted to submit, and the probation officer shall receive, a victim impact statement that identifies the victim of the offense and the extent and scope of the injury and loss suffered by the victim, including the estimated economic impact of the offense on that victim.

“(2) Persons permitted to submit victim impact statements shall include—

“(A) producers and sellers of legitimate goods or services affected by conduct involved in the offense;

“(B) holders of intellectual property rights in such goods or services; and

“(C) the legal representatives of such producers, sellers, and holders.

“(f) DEFINITIONS.—For the purposes of this section—

“(1) the term ‘counterfeit mark’ means—

“(A) a spurious mark—

“(i) that is used in connection with trafficking in any goods, services, labels, patches, stickers, wrappers, badges, emblems, medallions, charms, boxes, containers, cans, cases, hangtags, documentation, or packaging of any type or nature;

“(ii) that is identical with, or substantially indistinguishable from, a mark registered on the principal register in the United States Patent and Trademark Office and in use, whether or not the defendant knew such mark was so registered;

“(iii) that is applied to or used in connection with the goods or services for which the mark is registered with the United States Patent and Trademark Office, or is applied to or consists of a label, patch, sticker, wrapper, badge, emblem, medallion, charm, box, container, can, case, hangtag, documentation, or packaging of any type or nature that is designed, marketed, or otherwise intended to be used on or in connection with the goods or services for which the mark is registered in the United States Patent and Trademark Office; and

“(iv) the use of which is likely to cause confusion, to cause mistake, or to deceive; or

“(B) a spurious designation that is identical with, or substantially indistinguishable from, a designation as to which the remedies of the Lanham Act are made available by reason of section 220506 of title 36;

but such term does not include any mark or designation used in connection with goods or services, or a mark or designation applied to labels, patches, stickers, wrappers, badges, emblems, medallions, charms, boxes, containers, cans, cases, hangtags, documentation, or packaging of any type or nature used in connection with such goods or services, of which the manufacturer or producer was, at the time of the manufacture or production in question, authorized to use the mark or designation for the type of goods or services so manufactured or produced, by the holder of the right to use such mark or designation;

“(2) the term ‘financial gain’ includes the receipt, or expected receipt, of anything of value;

“(3) the term ‘Lanham Act’ means the Act entitled ‘An Act to provide for the registration and protection of trademarks used in commerce, to carry out the provisions of certain international conventions, and for other purposes’, approved July 5, 1946 (15 U.S.C. 1051 et seq.);

“(4) the term ‘counterfeit military good or service’ means a good or service that uses a counterfeit mark on or in connection with such good or service and that—

“(A) is falsely identified or labeled as meeting military specifications, or

“(B) is intended for use in a military or national security application; and

“(5) the term ‘traffic’ means to transport, transfer, or otherwise dispose of, to another, for purposes of commercial advantage or private financial gain, or to make, import, export, obtain control of, or possess, with intent to so transport, transfer, or otherwise dispose of.

“(g) *LIMITATION ON CAUSE OF ACTION.*—Nothing in this section shall entitle the United States to bring a criminal cause of action under this section for the repackaging of genuine goods or services not intended to deceive or confuse.

“(h) *REPORT TO CONGRESS.*—(1) Beginning with the first year after the date of enactment of this subsection, the Attorney General shall include in the report of the Attorney General to Congress on the business of the Department of Justice prepared pursuant to section 522 of title 28, an accounting, on a district by district basis, of the following with respect to all actions taken by the Department of Justice that involve trafficking in counterfeit labels for phonorecords, copies of computer programs or computer program documentation or packaging, copies of motion pictures or other audiovisual works (as defined in section 2318 of this title), criminal infringement of copyrights (as defined in section 2319 of this title), unauthorized fixation of and trafficking in sound recordings and music videos of live musical performances (as defined in section 2319A of this title), or trafficking in goods or services bearing counterfeit marks (as defined in section 2320 of this title):

“(A) The number of open investigations.

“(B) The number of cases referred by the United States Customs Service.

“(C) The number of cases referred by other agencies or sources.

“(D) The number and outcome, including settlements, sentences, recoveries, and penalties, of all prosecutions brought under sections 2318, 2319, 2319A, and 2320 of title 18.

“(2)(A) The report under paragraph (1), with respect to criminal infringement of copyright, shall include the following:

“(i) The number of infringement cases in these categories: audiovisual (videos and films); audio (sound recordings); literary works (books and musical compositions); computer programs; video games; and, others.

“(ii) The number of online infringement cases.

“(iii) The number and dollar amounts of fines assessed in specific categories of dollar amounts. These categories shall be: no fines ordered; fines under \$500; fines from \$500 to \$1,000; fines from \$1,000 to \$5,000; fines from \$5,000 to \$10,000; and fines over \$10,000.

“(iv) The total amount of restitution ordered in all copyright infringement cases.

“(B) In this paragraph, the term ‘online infringement cases’ as used in paragraph (2) means those cases where the infringer—

“(i) advertised or publicized the infringing work on the Internet; or

“(ii) made the infringing work available on the Internet for download, reproduction, performance, or distribution by other persons.

“(C) The information required under subparagraph (A) shall be submitted in the report required in fiscal year 2005 and thereafter.

“(i) TRANSSHIPMENT AND EXPORTATION.—No goods or services, the trafficking in of which is prohibited by this section, shall be transshipped through or exported from the United States. Any such transshipment or exportation shall be deemed a violation of section 42 of an Act to provide for the registration of trademarks used in commerce, to carry out the provisions of certain international conventions, and for other purposes, approved July 5, 1946 (commonly referred to as the ‘Trademark Act of 1946’ or the ‘Lanham Act’).”.

SEC. 819. MODIFICATION OF CERTAIN REQUIREMENTS OF THE WEAPON SYSTEMS ACQUISITION REFORM ACT OF 2009.

(a) **REPEAL OF CERTIFICATION OF COMPLIANCE OF CERTAIN MAJOR DEFENSE ACQUISITION PROGRAMS WITH ACTIONS ON TREATMENT OF SYSTEMIC PROBLEMS BEFORE MILESTONE APPROVAL.**—Subsection (c) of section 204 of the Weapon Systems Acquisition Reform Act of 2009 (Public Law 111–23; 123 Stat. 1723; 10 U.S.C. 2366a note) is repealed.

(b) **WAIVER OF REQUIREMENT TO REVIEW PROGRAMS RECEIVING WAIVER OF CERTAIN CERTIFICATION REQUIREMENTS.**—Section 2366b(d) of title 10, United States Code, is amended by adding the following new paragraph:

“(3) The requirement in paragraph (2)(B) shall not apply to a program for which a certification was required pursuant to section 2433a(c) of this title if the milestone decision authority—

“(A) determines in writing that—

“(i) the program has reached a stage in the acquisition process at which it would not be practicable to meet the certification component that was waived; and

“(ii) the milestone decision authority has taken appropriate alternative actions to address the underlying purposes of such certification component; and

“(B) submits the written determination, and an explanation of the basis for the determination, to the congressional defense committees.”.

SEC. 820. INCLUSION OF CONTRACTOR SUPPORT REQUIREMENTS IN DEPARTMENT OF DEFENSE PLANNING DOCUMENTS.

(a) **ELEMENTS IN QDR REPORTS TO CONGRESS.**—Section 118(d) of title 10, United States Code, is amended—

(1) in paragraph (4)—

(A) in subparagraph (D), by striking “and” at the end;

(B) in subparagraph (E), by striking the period at the end and inserting “; and”; and

(C) by adding at the end the following new subparagraph:

“(F) the roles and responsibilities that would be discharged by contractors.”;

(2) in paragraph (6), by striking “manpower and sustainment” and inserting “manpower, sustainment, and contractor support”; and