

106TH CONGRESS  
2D SESSION

# S. 2105

To amend chapter 65 of title 18, United States Code, to prohibit the unauthorized destruction, modification, or alteration of product identification codes used in consumer product recalls, for law enforcement, and for other purposes.

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## IN THE SENATE OF THE UNITED STATES

FEBRUARY 24, 2000

Mr. HATCH (for himself and Mr. LEAHY) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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## A BILL

To amend chapter 65 of title 18, United States Code, to prohibit the unauthorized destruction, modification, or alteration of product identification codes used in consumer product recalls, for law enforcement, and for other purposes.

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 “Antitampering Act of  
5 2000”.

1 **SEC. 2. PROHIBITION OF UNAUTHORIZED ALTERATION OF**  
 2 **PRODUCT IDENTIFICATION CODES.**

3 (a) IN GENERAL.—Chapter 65 of title 18, United  
 4 States Code, is amended by inserting after section 1365  
 5 the following:

6 **“§ 1365A. Tampering with product identification**  
 7 **codes**

8 “(a) DEFINITIONS.—In this section—

9 “(1) the term ‘consumer’—

10 “(A) means—

11 “(i) the ultimate user or purchaser of  
 12 a good; or

13 “(ii) any hotel, restaurant, or other  
 14 provider of services that must remove or  
 15 alter the container, label, or packaging of  
 16 a good in order to make the good available  
 17 to the ultimate user or purchaser; and

18 “(B) does not include any retailer or other  
 19 distributor who acquires a good for resale;

20 “(2) the term ‘flea market’ means any location,  
 21 other than a permanent retail store, at which space  
 22 is rented or otherwise made available for the conduct  
 23 of business of a transient or limited vendor;

24 “(3) the term ‘good’ means any article, product,  
 25 or commodity that is customarily produced or dis-  
 26 tributed for sale, rental, or licensing in interstate or

1 foreign commerce, and any container, packaging,  
2 label, or component thereof;

3 “(4) the term ‘manufacturer’ means—

4 “(A) the original manufacturer of a good;  
5 and

6 “(B) any duly appointed agent or rep-  
7 resentative of that manufacturer acting within  
8 the scope of its agency or representation;

9 “(5) the term ‘product identification code’—

10 “(A) means any visible number, letter,  
11 symbol, marking, date (including an expiration  
12 date), or code that is affixed to or embedded in  
13 any good, by which the manufacturer of the  
14 good may trace the good back to a particular  
15 lot, batch, date of production, or date of re-  
16 moval;

17 “(B) does not include—

18 “(i) copyright management informa-  
19 tion (as defined in section 1202(c) of title  
20 17) conveyed in connection with copies or  
21 phonorecords of a copyrighted work or any  
22 performance or display of a copyrighted  
23 work;

24 “(ii) other codes or markings on the  
25 good; or

1 “(iii) a Universal Product Code; and

2 “(C) does not include any trademark or  
3 copyright notice by itself or any item listed in  
4 subparagraph (A) that is affixed to, super-  
5 imposed on, or embedded in a trademark or  
6 copyright notice;

7 “(6) the term ‘transient or limited vendor’ does  
8 not include a person who sells by sample, catalog, or  
9 brochure for future delivery to the purchaser;

10 “(7) the term ‘Universal Product Code’ means  
11 a 12-digit, all numeric code that identifies the con-  
12 sumer package consisting of—

13 “(A) a 1-digit number system character;

14 “(B) a 5-digit manufacturer identification  
15 number;

16 “(C) a 5-digit item code;

17 “(D) a 1-digit check number; and

18 “(E) the bar code symbol that encodes the  
19 12-digit Universal Product Code; and

20 “(8) the term ‘value’ means the face, par, or  
21 market value, whichever is the greatest.

22 “(b) PROHIBITED ACTS.—Except as provided in sub-  
23 section (d) or as otherwise expressly authorized under any  
24 other provision of Federal law, it shall be unlawful for any  
25 person, other than the consumer or the manufacturer of

1 a good, knowingly and without the authorization of the  
2 manufacturer—

3 “(1) to directly or indirectly alter, conceal, re-  
4 move, obliterate, deface, strip, or peel any product  
5 identification code affixed to or embedded in a good  
6 and visible to the consumer;

7 “(2) to directly or indirectly affix to or embed  
8 in a good a product identification code that is visible  
9 to the consumer and that is intended by the manu-  
10 facturer for a different good, such that the code no  
11 longer accurately identifies the lot, batch, date of  
12 production, or date of removal of the good;

13 “(3) to directly or indirectly affix to or embed  
14 in a good any number, letter, symbol, marking, date,  
15 or code intended to simulate a product identification  
16 code that is otherwise visible to the consumer;

17 “(4) to import, reimport, export, sell, offer for  
18 sale, hold for sale, distribute, or broker a good—

19 “(A) in a case in which the person knows  
20 that the product identification code, which oth-  
21 erwise would be visible to the consumer, has  
22 been altered, concealed, removed, obliterated,  
23 defaced, stripped, peeled, affixed, or embedded  
24 in violation of paragraph (1) or (2); or

1           “(B) in a case in which the person knows  
2           that the good bears a number, letter, symbol,  
3           marking, date, or code in violation of paragraph  
4           (3); or

5           “(5) to sell, offer for sale, or knowingly permit  
6           the sale at a flea market of—

7           “(A) baby food, infant formula, or any  
8           other similar product manufactured and pack-  
9           aged for sale for consumption by a child who is  
10          less than 3 years of age; or

11          “(B) any food, drug, device, or cosmetic  
12          (as those terms are defined in section 201 of  
13          the Federal Food, Drug, and Cosmetic Act (21  
14          U.S.C. 321));

15          unless that person keeps for public inspection writ-  
16          ten documentation identifying such person as an au-  
17          thorized representative of the manufacturer or dis-  
18          tributor of the food, drug, device, or cosmetic.

19          “(c) APPLICABILITY.—The prohibitions set forth in  
20          paragraphs (1) through (4) of subsection (b) shall apply  
21          to visible product identification codes (or simulated prod-  
22          uct identification codes in a case to which subsection  
23          (b)(3) applies) affixed to, or embedded in, any good held  
24          for sale or distribution in interstate or foreign commerce  
25          or after shipment therein, including any good held in a

1 United States Customs Service bonded warehouse or for-  
2 eign trade zone.

3 “(d) EXCEPTIONS.—

4 “(1) UNIVERSAL PRODUCT CODE CODES.—

5 Nothing in this section prohibits a person from  
6 affixing a Universal Product Code, security tag, or  
7 other legitimate pricing or inventory code or other  
8 information required by Federal or State law, if  
9 such code or information does not (or can be re-  
10 moved so as not to) permanently alter, conceal, re-  
11 move, obliterate, deface, strip, or peel any product  
12 identification code.

13 “(2) REPACKAGING FOR RESALE.—Nothing in  
14 this section prohibits a person from removing a good  
15 from a primary package or container and repack-  
16 aging the good in another package or container, or  
17 from placing a good and its original packaging with-  
18 in new packaging, if—

19 “(A) the good retains its original product  
20 identification code, which has not been perma-  
21 nently altered, concealed, or removed;

22 “(B) the repackaging is in full compliance  
23 with all applicable Federal laws and regula-  
24 tions, including section 301 of the Federal

1 Food, Drug, and Cosmetic Act (21 U.S.C.  
2 331); and

3 “(C) a new package includes a label that  
4 clearly states—

5 “(i) that the good has been repack-  
6 aged; and

7 “(ii) the name of the repacker.

8 “(e) CRIMINAL PENALTIES.—Any person who will-  
9 fully violates this section—

10 “(1) shall be fined under this title, imprisoned  
11 not more than 1 year, or both;

12 “(2) shall be fined under this title, imprisoned  
13 not more than 5 years, or both, if the total value of  
14 the good or goods involved in the violation is greater  
15 than \$10,000;

16 “(3) shall be fined under this title, imprisoned  
17 not more than 10 years, or both, if—

18 “(A) the person acts with reckless dis-  
19 regard for the health or safety of the public and  
20 under circumstances manifesting extreme indif-  
21 ference to such risk; and

22 “(B) the violation threatens the health or  
23 safety of the public;

24 “(4) shall be fined under this title, imprisoned  
25 not more than 20 years, or both, if—

1           “(A) the person acts with reckless dis-  
2 regard for the risk that another person will be  
3 placed in danger of death or bodily injury and  
4 under circumstances manifesting extreme indif-  
5 ference to such risk; and

6           “(B) serious bodily injury to any individual  
7 results;

8           “(5) shall be fined under this title, imprisoned  
9 for any term of years or for life, or both, if—

10           “(A) the person acts with reckless dis-  
11 regard for the risk that another person will be  
12 placed in danger of death or bodily injury and  
13 under circumstances manifesting extreme indif-  
14 ference to such risk; and

15           “(B) the death of an individual results;  
16 and

17           “(6) with respect to any second or subsequent  
18 violation of this section, be convicted of a felony, and  
19 be subject to twice the maximum term of imprison-  
20 ment that would otherwise be imposed under this  
21 subsection, fined under this title, or both.

22           “(f) INJUNCTIONS AND IMPOUNDING, FORFEITURE,  
23 AND DISPOSITION OF GOODS.—

1           “(1) INJUNCTIONS AND IMPOUNDING.—In any  
2 prosecution under this section, upon motion of the  
3 United States, the court may—

4           “(A) grant 1 or more temporary, prelimi-  
5 nary, or permanent injunctions on such terms  
6 as the court determines to be reasonable to pre-  
7 vent or restrain the alleged violation; and

8           “(B) at any time during the proceedings,  
9 order the impounding, on such terms as the  
10 court determines to be reasonable, of any good  
11 that the court has reasonable cause to believe  
12 was involved in the violation.

13           “(2) FORFEITURE AND DISPOSITION OF  
14 GOODS.—Upon conviction of any person of a viola-  
15 tion of this section, the court shall—

16           “(A) order the forfeiture of any good in-  
17 volved in the violation or that has been im-  
18 pounded under paragraph (1)(B); and

19           “(B) either—

20           “(i) order the destruction of each  
21 good forfeited under subparagraph (A);

22           “(ii) order the disposal of the good by  
23 delivery to such Federal, State, or local  
24 government agencies as, in the opinion of  
25 the court, have a need for such good, or by

1 gift to such charitable or nonprofit institu-  
2 tions as, in the opinion of the court, have  
3 a need for such good; or

4 “(iii) order the return of the goods in-  
5 volved upon the request of any interested  
6 party.

7 “(g) CIVIL REMEDIES.—

8 “(1) IN GENERAL.—Any person who is injured  
9 by a violation of this section, or demonstrates the  
10 likelihood of such injury, may bring a civil action in  
11 an appropriate district court of the United States  
12 against the alleged violator.

13 “(2) INJUNCTIONS AND IMPOUNDING AND DIS-  
14 POSITION OF GOODS.—In any action under para-  
15 graph (1), the court may—

16 “(A) grant 1 or more temporary, prelimi-  
17 nary, or permanent injunctions upon the post-  
18 ing of a bond at least equal to the value of the  
19 goods affected on such terms as the court de-  
20 termines to be reasonable to prevent or restrain  
21 the violation;

22 “(B) at any time while the action is pend-  
23 ing, order the impounding of the goods  
24 affected—

1           “(i) if the court has reasonable cause  
2 to believe the goods were involved in the  
3 violation;

4           “(ii) upon the posting of a bond at  
5 least equal to the value of the goods af-  
6 fected; and

7           “(iii) on other terms such as the court  
8 determines to be reasonable; and

9           “(C) as part of a final judgment or decree,  
10 in the court’s discretion—

11           “(i) order the destruction of any good  
12 involved in the violation or that has been  
13 impounded under subparagraph (B);

14           “(ii) order the disposal of the good—

15           “(I) by delivery to such Federal,  
16 State, or local government agencies  
17 as, in the opinion of the court, have a  
18 need for such good; or

19           “(II) by gift to such charitable or  
20 nonprofit institutions as, in the opin-  
21 ion of the court, have a need for such  
22 good, if such disposition would not  
23 otherwise be in violation of law, and if  
24 the manufacturer consents to such  
25 disposition; or

1                   “(iii) order the return of the goods in-  
2                   volved in the violation to the manufacturer  
3                   upon the request of any interested party.

4                   “(3) DAMAGES.—

5                   “(A) IN GENERAL.—Subject to subpara-  
6                   graph (B), in any action under paragraph (1),  
7                   the plaintiff shall be entitled to recover—

8                   “(i) the actual damages suffered by  
9                   the plaintiff as a result of the violation,  
10                  and;

11                  “(ii) any profits of the violator that  
12                  are attributable to the violation and are  
13                  not taken into account in computing the  
14                  actual damages.

15                  “(B) STATUTORY DAMAGES.—In any ac-  
16                  tion under paragraph (1), the plaintiff may  
17                  elect, at any time before final judgment is ren-  
18                  dered, to recover, instead of actual damages  
19                  and profits described in subparagraph (A), an  
20                  award of statutory damages for any violation  
21                  under this section in an amount equal to—

22                  “(i) not less than \$500 and not more  
23                  than \$100,000, with respect to each type  
24                  of goods involved in the violation; and

1           “(ii) if the court finds that the viola-  
2           tion threatens the health and safety of the  
3           public, not less than \$5,000 and not more  
4           than \$1,000,000, with respect to each type  
5           of good involved in the violation.

6           “(C) PROOF OF DAMAGES.—In estab-  
7           lishing the violator’s profits, the plaintiff shall  
8           be required to present proof only of the viola-  
9           tor’s sales, and the violator shall be required to  
10          prove all elements of cost or deduction claimed.

11          “(4) COSTS AND ATTORNEY’S FEES.—In any  
12          action under paragraph (1), in addition to any dam-  
13          ages recovered under paragraph (3), the court in its  
14          discretion may award the prevailing party its costs  
15          of the action and its reasonable attorney’s fees.

16          “(5) REPEAT VIOLATIONS.—

17                 “(A) TREBLE DAMAGES.—In any case in  
18                 which a person violates this section within 3  
19                 years after the date on which a final judgment  
20                 was entered against that person for a previous  
21                 violation of this section, the court, in an action  
22                 brought under this subsection, may increase the  
23                 award of damages for the later violation to not  
24                 more than 3 times the amount that would oth-

1           erwise be awarded under paragraph (3), as the  
2           court considers appropriate.

3           “(B) BURDEN OF PROOF.—A plaintiff that  
4           seeks damages as described in subparagraph  
5           (A) shall bear the burden of proving the exist-  
6           ence of the earlier violation.

7           “(6) LIMITATIONS ON ACTIONS.—No civil ac-  
8           tion may be commenced under this section later than  
9           3 years after the date on which the claimant dis-  
10          covers or has reason to know of the violation.

11          “(7) INNOCENT VIOLATIONS.—In any action  
12          under paragraph (1), the court in its discretion may  
13          reduce or remit the total award of damages or award  
14          no damages in any case in which the violator sus-  
15          tains the burden of proving, and the court finds,  
16          that the violator was not aware and had no reason  
17          to believe that the acts of the violator constituted a  
18          violation.

19          “(h) ENFORCEMENT ACTIONS.—

20          “(1) IN GENERAL.—Subject to paragraphs (2)  
21          and (3), the Attorney General and the Secretary of  
22          the Treasury shall enforce the requirements of this  
23          section.

24          “(2) AGENCY DISCRETION.—The head of a de-  
25          partment or agency of the Federal Government (in-

1 including the Commissioner of Food and Drugs and  
2 the Secretary of Agriculture) may investigate any  
3 violation of this section involving a good that is reg-  
4 ulated by a provision of law administered by that de-  
5 partment or agency.

6 “(3) CUSTOMS SERVICE.—

7 “(A) IN GENERAL.—The United States  
8 Customs Service shall—

9 “(i) seize any good imported, re-  
10 imported, or offered for import into the  
11 United States in violation of subsection  
12 (b)(4);

13 “(ii) promptly notify the manufac-  
14 turer or duly appointed agent or represent-  
15 ative of the seizure; and

16 “(iii) destroy or dispose of the goods  
17 in accordance with the procedures set forth  
18 in section 526(e) of Tariff Act of 1930 (19  
19 U.S.C. 1526(e)).

20 “(B) VOLUNTARY DISCLOSURES.—In order  
21 to assist the United States Customs Service in  
22 carrying out its obligations under this para-  
23 graph, any domestic or foreign manufacturer  
24 may voluntarily record with the United States  
25 Customs Service—

1                   “(i) its name and address;  
2                   “(ii) a description of its goods and  
3                   product identification codes; and  
4                   “(iii) such other information as may  
5                   facilitate the enforcement of this section.”.

6           (b) CONFORMING AMENDMENT.—The table of sec-  
7 tions for chapter 65 of title 18, United States Code, is  
8 amended by inserting after the item relating to section  
9 1365 the following:

“1365A. Tampering with product identification codes.”.

10           (c) REGULATORY AUTHORITY.—Not later than 6  
11 months after the date of enactment of this Act, the Attor-  
12 ney General, after consultation with the Secretary of the  
13 Treasury, the Commissioner of Food and Drugs, and the  
14 head of any other department or agency of the Federal  
15 Government that the Attorney General determines to be  
16 appropriate, shall issue such rules and regulations as may  
17 be necessary to implement section 1365A of title 18,  
18 United States Code, as added by this section.

19 **SEC. 3. ATTORNEY GENERAL REPORTING REQUIREMENTS.**

20           Section 2320(f) of title 18, United States Code, is  
21 amended—

22                   (1) by striking “of title 18” each place that  
23                   term appears;

1           (2) by inserting “tampering with product iden-  
2           tification codes (as defined in section 1365A),” after  
3           “involve”; and

4           (3) in paragraph (4), by inserting “1365A,”  
5           after “sections”.

6 **SEC. 4. EFFECTIVE DATE.**

7           This Act and the amendments made by this Act shall  
8           take effect 6 months after the date of enactment of this  
9           Act.

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