

111TH CONGRESS
2D SESSION

S. 3386

To protect consumers from certain aggressive sales tactics on the Internet.

IN THE SENATE OF THE UNITED STATES

MAY 19, 2010

Mr. ROCKEFELLER (for himself, Mr. PRYOR, Mr. NELSON of Florida, Ms. KLOBUCHAR, Mrs. McCASKILL, and Mr. LEMIEUX) introduced the following bill; which was read twice and referred to the Committee on Commerce, Science, and Transportation

A BILL

To protect consumers from certain aggressive sales tactics
on the Internet.

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 “Restore Online Shop-
5 pers’ Confidence Act”.

6 **SEC. 2. FINDINGS; DECLARATION OF POLICY.**

7 The Congress finds the following:

8 (1) The Internet has become an important
9 channel of commerce in the United States, account-
10 ing for billions of dollars in retail sales every year.

1 Over half of all American adults have now either
2 made an online purchase or an online travel reserva-
3 tion.

4 (2) Consumer confidence is essential to the
5 growth of online commerce. To continue its develop-
6 ment as a marketplace, the Internet must provide
7 consumers with clear, accurate information and give
8 sellers an opportunity to fairly compete with one an-
9 other for consumers' business.

10 (3) An investigation by the Senate Committee
11 on Commerce, Science, and Transportation found
12 abundant evidence that the aggressive sales tactics
13 many companies use against their online customers
14 have undermined consumer confidence in the Inter-
15 net and thereby harmed the American economy.

16 (4) The Committee showed that, in exchange
17 for "bounties" and other payments, hundreds of rep-
18 utable online retailers and websites shared their cus-
19 tomers' billing information, including credit card and
20 debit card numbers, with third party sellers through
21 a process known as "data pass". These third party
22 sellers in turn used aggressive, misleading sales tac-
23 tics to charge millions of American consumers for
24 membership clubs the consumers did not want.

1 (5) Third party sellers offered membership
2 clubs to consumers as they were in the process of
3 completing their initial transactions on hundreds of
4 websites. These third party “post-transaction” offers
5 were designed to make consumers think the offers
6 were part of the initial purchase, rather than a new
7 transaction with a new seller.

8 (6) Third party sellers charged millions of con-
9 sumers for membership clubs without ever obtaining
10 consumers’ billing information, including their credit
11 or debit card information, directly from the con-
12 sumers. Because third party sellers acquired con-
13 sumers’ billing information from the initial merchant
14 through “data pass”, millions of consumers were un-
15 aware they had been enrolled in membership clubs.

16 (7) The use of a “data pass” process defied
17 consumers’ expectations that they could only be
18 charged for a good or a service if they submitted
19 their billing information, including their complete
20 credit or debit card numbers.

21 (8) Third party sellers used a free trial period
22 to enroll members, after which they periodically
23 charged consumers until consumers affirmatively
24 canceled the memberships. This use of “free-to-pay
25 conversion” and “negative option” sales took advan-

1 tage of consumers' expectations that they would
 2 have an opportunity to accept or reject the member-
 3 ship club offer at the end of the trial period.

4 **SEC. 3. PROHIBITIONS AGAINST CERTAIN UNFAIR AND DE-**
 5 **CEPTIVE INTERNET SALES PRACTICES.**

6 (a) REQUIREMENTS FOR CERTAIN INTERNET-BASED
 7 SALES.—It shall be unlawful for any post-transaction
 8 third party seller to charge or attempt to charge any con-
 9 sumer's credit card, debit card, bank account, or other fi-
 10 nancial account for any good or service sold in a trans-
 11 action effected on the Internet, unless—

12 (1) before obtaining the purchaser's billing in-
 13 formation, the post-transaction third party seller has
 14 clearly and conspicuously disclosed to the purchaser
 15 all material terms of the transaction, including—

16 (A) a description of the goods or services
 17 being offered;

18 (B) the fact that the post-transaction third
 19 party seller is not affiliated with the initial mer-
 20 chant, which may include disclosure of the
 21 name of the post-transaction third party in a
 22 manner that clearly differentiates the post-
 23 transaction third party seller from the initial
 24 merchant; and

25 (C) the cost of such goods or services; and

1 (2) the post-transaction third party seller has
 2 received the express informed consent for the charge
 3 from the consumer whose credit card, debit card,
 4 bank account, or other financial account will be
 5 charged by—

6 (A) obtaining from the consumer—

7 (i) the full account number of the ac-
 8 count to be charged; and

9 (ii) the consumer's name and address
 10 and a means to contact the consumer; and

11 (B) an additional affirmative action from
 12 the consumer, such as clicking on a confirma-
 13 tion button or checking a box that indicates the
 14 consumer's consent to be charged the amount
 15 disclosed.

16 (b) PROHIBITION ON DATA-PASS USED TO FACILI-
 17 TATE CERTAIN DECEPTIVE INTERNET SALES TRANS-
 18 ACTIONS.—It shall be unlawful for an initial merchant to
 19 disclose a credit card, debit card, bank account, or other
 20 financial account number, or to disclose other billing infor-
 21 mation that is used to charge a customer of the initial
 22 merchant, to any post-transaction third party seller for
 23 use in an Internet-based sale of any goods or services from
 24 that post-transaction third party seller.

1 (c) LIMITATIONS ON USE OF NEGATIVE OPTION
 2 FEATURE IN INTERNET-BASED SALES TRANSACTIONS.—

3 It shall be unlawful for any person to charge or attempt
 4 to charge any consumer for any goods or services sold in
 5 a transaction effected on the Internet through a negative
 6 option feature, unless—

7 (1) before obtaining the purchaser's initial
 8 agreement to participate in the negative option plan,
 9 the seller has clearly and conspicuously disclosed all
 10 material terms of the transaction, including—

11 (A) the name of the entity offering the
 12 goods or services;

13 (B) a description of the goods or services
 14 being offered;

15 (C) the cost of such goods or services;

16 (D) notice of when billing will begin and at
 17 what intervals the charges will occur; and

18 (E) the length of any trial period, includ-
 19 ing a statement that the consumer's account
 20 will be charged unless the consumer takes af-
 21 firmative action and the steps the consumer
 22 must take to the avoid the charge;

23 (2) the seller has obtained the express informed
 24 consent described in subsection (a)(2) from the pur-
 25 chaser before charging or attempting to charge the

1 purchaser's credit card, debit card, bank account, or
2 other financial account on a recurring basis;

3 (3) the seller enables the purchaser to stop re-
4 curring charges from being made to the purchaser's
5 credit card, debit card, bank account, or other finan-
6 cial account through a simple process that is avail-
7 able via—

8 (A) the Internet; and

9 (B) telephone; and

10 (4) not less than 10 days prior to the initiation
11 of each charge to a purchaser's credit card, debit
12 card, bank account, or other financial account, the
13 seller has sent the purchaser an e-mail (at an e-mail
14 account provided by the consumer) that clearly and
15 conspicuously discloses—

16 (A) that a charge will be made to the con-
17 sumer's credit card, debit card, bank account,
18 or other financial account;

19 (B) the amount of the charge and a de-
20 scription of the goods and services for which the
21 consumer will be charged; and

22 (C) instructions for stopping recurring
23 charges in accordance with the requirements of
24 paragraph (3).

1 (d) APPLICATION WITH OTHER LAW.—Nothing in
 2 this Act shall be construed to supersede, modify, or other-
 3 wise affect the requirements of the Electronic Funds
 4 Transfer Act (15 U.S.C. 1693 et seq.) or any regulation
 5 promulgated thereunder.

6 (e) DEFINITIONS.—In this section:

7 (1) INITIAL MERCHANT.—The term “initial
 8 merchant” means a person that has obtained a con-
 9 sumer’s billing information directly from the con-
 10 sumer through an Internet transaction initiated by
 11 the consumer.

12 (2) NEGATIVE OPTION FEATURE.—The term
 13 “negative option feature” has the meaning given
 14 that term in section 310.2(t) of the Federal Trade
 15 Commission’s Telemarketing Sales Rule regulations
 16 (16 C.F.R. 310.2(t)).

17 (3) POST-TRANSACTION THIRD PARTY SELL-
 18 ER.—The term “post-transaction third party seller”
 19 means a person that—

20 (A) sells, or offers for sale, any good or
 21 service on the Internet;

22 (B) solicits the purchase of such goods or
 23 services on the Internet through an initial mer-
 24 chant after the consumer has initiated a trans-
 25 action with the initial merchant; and

1 (C) is not a subsidiary or corporate affil-
2 iate of the initial merchant.

3 **SEC. 4. ENFORCEMENT BY FEDERAL TRADE COMMISSION.**

4 (a) IN GENERAL.—Violation of this Act or any regu-
5 lation prescribed under this Act shall be treated as a viola-
6 tion of a rule under section 18 of the Federal Trade Com-
7 mission Act (15 U.S.C. 57a) regarding unfair or deceptive
8 acts or practices. The Federal Trade Commission shall en-
9 force this Act in the same manner, by the same means,
10 and with the same jurisdiction, powers, and duties as
11 though all applicable terms and provisions of the Federal
12 Trade Commission Act (15 U.S.C. 41 et seq.) were incor-
13 porated into and made a part of this Act.

14 (b) REGULATIONS.—Notwithstanding any other pro-
15 vision of law, the Commission may promulgate such regu-
16 lations as it finds necessary or appropriate under this Act
17 under section 553 of title 5, United States Code.

18 (c) POWERS OF COMMISSION.—

19 (1) IN GENERAL.—The Commission shall pre-
20 vent any person from violating this Act and any regu-
21 lation prescribed under this Act, in the same man-
22 ner, by the same means, and with the same jurisdic-
23 tion, powers and duties as though all applicable
24 terms and provisions of the Federal Trade Commis-

1 sion Act (15 U.S.C. 41 et seq.) were incorporated
2 into and made a part of this Act.

3 (2) PENALTIES.—Any person who violates this
4 Act or any regulation prescribed under this Act,
5 shall be subject to the penalties and entitled to the
6 privileges and immunities provided in the Federal
7 Trade Commission Act as though all applicable
8 terms and provisions of the Federal Trade Commis-
9 sion Act were incorporated in and made part of this
10 Act.

11 (d) AUTHORITY PRESERVED.—Nothing in this sec-
12 tion shall be construed to limit the authority of the Com-
13 mission under any other provision of law.

14 **SEC. 5. ENFORCEMENT BY STATE ATTORNEYS GENERAL.**

15 (a) RIGHT OF ACTION.—Except as provided in sub-
16 section (e), the attorney general of a State, or other au-
17 thorized State officer, alleging a violation of this Act or
18 any regulation issued under this Act that affects or may
19 affect such State or its residents may bring an action on
20 behalf of the residents of the State in any United States
21 district court for the district in which the defendant is
22 found, resides, or transacts business, or wherever venue
23 is proper under section 1391 of title 28, United States
24 Code, to obtain appropriate injunctive relief.

25 (b) INITIATION OF CIVIL ACTION.—

1 (1) NOTICE TO COMMISSION REQUIRED IN ALL
2 CASES.—A State shall provide prior written notice to
3 the Federal Trade Commission of any civil action
4 under subsection (a) together with a copy of its com-
5 plaint, except that if it is not feasible for the State
6 to provide such prior notice, the State shall provide
7 such notice immediately upon instituting such ac-
8 tion.

9 (2) FILING OF COMPLAINT.—A State may ini-
10 tiate the civil action by filing a complaint—

11 (A) at any time after the date on which
12 the 30-day period ends; or

13 (B) earlier than such date if the Commis-
14 sion consents to an earlier initiation of the civil
15 action by the State.

16 (C) FORM OF NOTICE.—The written notice
17 required by this paragraph may be provided by
18 electronic mail, facsimile machine, or any other
19 means of communication accepted by the Com-
20 mission.

21 (c) INTERVENTION BY THE COMMISSION.—The Com-
22 mission may intervene in such civil action and upon inter-
23 vening—

24 (1) be heard on all matters arising in such civil
25 action; and

1 (2) file petitions for appeal of a decision in such
2 civil action.

3 (d) CONSTRUCTION.—Nothing in this section shall be
4 construed—

5 (1) to prevent the attorney general of a State,
6 or other authorized State officer, from exercising the
7 powers conferred on the attorney general, or other
8 authorized State officer, by the laws of such State;
9 or

10 (2) to prohibit the attorney general of a State,
11 or other authorized State officer, from proceeding in
12 State or Federal court on the basis of an alleged vio-
13 lation of any civil or criminal statute of that State.

14 (e) LIMITATION.—No separate suit shall be brought
15 under this section if, at the time the suit is brought, the
16 same alleged violation is the subject of a pending action
17 by the Federal Trade Commission or the United States
18 under this Act.

○