

Calendar No. 500

111TH CONGRESS
2^D SESSION

S. 3386

[Report No. 111-240]

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

AUGUST 2, 2010

Reported by Mr. ROCKEFELLER, with an amendment

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

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”.

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

2 The Congress finds the following:

3 (1) The Internet has become an important
4 channel of commerce in the United States, account-
5 ing for billions of dollars in retail sales every year.
6 Over half of all American adults have now either
7 made an online purchase or an online travel reserva-
8 tion.

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

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

21 (4) The Committee showed that, in exchange
22 for "bounties" and other payments, hundreds of rep-
23 utable online retailers and websites shared their cus-
24 tomers' billing information, including credit card and
25 debit card numbers, with third party sellers through
26 a process known as "data pass". These third party

1 sellers in turn used aggressive, misleading sales tac-
2 ties to charge millions of American consumers for
3 membership clubs the consumers did not want.

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

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

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

24 (8) Third party sellers used a free trial period
25 to enroll members, after which they periodically

1 charged consumers until consumers affirmatively
 2 canceled the memberships. This use of “free-to-pay
 3 conversion” and “negative option” sales took advan-
 4 tage of consumers’ expectations that they would
 5 have an opportunity to accept or reject the member-
 6 ship club offer at the end of the trial period.

7 **SEC. 3. PROHIBITIONS AGAINST CERTAIN UNFAIR AND DE-**
 8 **CEPTIVE INTERNET SALES PRACTICES.**

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

15 (1) before obtaining the purchaser’s billing in-
 16 formation, the post-transaction third party seller has
 17 clearly and conspicuously disclosed to the purchaser
 18 all material terms of the transaction, including—

19 (A) a description of the goods or services
 20 being offered;

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

1 transaction third party seller from the initial
2 merchant; and

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

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

9 ~~(A) obtaining from the consumer—~~

10 ~~(i) the full account number of the ac-~~
11 ~~count to be charged; and~~

12 ~~(ii) the consumer's name and address~~
13 ~~and a means to contact the consumer; and~~

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

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

1 use in an Internet-based sale of any goods or services from
2 that post-transaction third party seller.

3 (c) ~~LIMITATIONS ON USE OF NEGATIVE OPTION~~
4 ~~FEATURE IN INTERNET-BASED SALES TRANSACTIONS.—~~

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

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

13 (A) the name of the entity offering the
14 goods or services;

15 (B) a description of the goods or services
16 being offered;

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

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

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

1 (2) the seller has obtained the express informed
2 consent described in subsection (a)(2) from the pur-
3 chaser before charging or attempting to charge the
4 purchaser's credit card, debit card, bank account, or
5 other financial account on a recurring basis;

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

11 (A) the Internet; and

12 (B) telephone; and

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

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

22 (B) the amount of the charge and a de-
23 scription of the goods and services for which the
24 consumer will be charged; and

1 (C) instructions for stopping recurring
2 charges in accordance with the requirements of
3 paragraph (3).

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

9 (e) DEFINITIONS.—In this section:

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

15 (2) NEGATIVE OPTION FEATURE.—The term
16 “negative option feature” has the meaning given
17 that term in section 310.2(t) of the Federal Trade
18 Commission’s Telemarketing Sales Rule regulations
19 (16 C.F.R. 310.2(t)).

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

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

1 (B) solicits the purchase of such goods or
 2 services on the Internet through an initial mer-
 3 chant after the consumer has initiated a trans-
 4 action with the initial merchant; and

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

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

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

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

22 (c) **POWERS OF COMMISSION.**—

23 (1) **IN GENERAL.**—The Commission shall pre-
 24 vent any person from violating this Act and any reg-
 25 ulation prescribed under this Act, in the same man-

1 ner, by the same means, and with the same jurisdic-
2 tion, powers and duties as though all applicable
3 terms and provisions of the Federal Trade Commis-
4 sion Act (15 U.S.C. 41 et seq.) were incorporated
5 into and made a part of this Act.

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

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

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

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

1 is proper under section 1391 of title 28, United States
2 Code, to obtain appropriate injunctive relief.

3 (b) INITIATION OF CIVIL ACTION.—

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

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

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

16 (B) earlier than such date if the Commis-
17 sion consents to an earlier initiation of the civil
18 action by the State.

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

1 (c) INTERVENTION BY THE COMMISSION.—The Com-
2 mission may intervene in such civil action and upon inter-
3 vening—

4 (1) be heard on all matters arising in such civil
5 action; and

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

8 (d) CONSTRUCTION.—Nothing in this section shall be
9 construed—

10 (1) to prevent the attorney general of a State,
11 or other authorized State officer, from exercising the
12 powers conferred on the attorney general, or other
13 authorized State officer, by the laws of such State;
14 or

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

19 (e) LIMITATION.—No separate suit shall be brought
20 under this section if, at the time the suit is brought, the
21 same alleged violation is the subject of a pending action
22 by the Federal Trade Commission or the United States
23 under this Act.

1 **SECTION 1. SHORT TITLE.**

2 *This Act may be cited as the “Restore Online Shop-*
3 *pers’ Confidence Act”.*

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

5 *The Congress finds the following:*

6 (1) *The Internet has become an important chan-*
7 *nel of commerce in the United States, accounting for*
8 *billions of dollars in retail sales every year. Over half*
9 *of all American adults have now either made an on-*
10 *line purchase or an online travel reservation.*

11 (2) *Consumer confidence is essential to the*
12 *growth of online commerce. To continue its develop-*
13 *ment as a marketplace, the Internet must provide*
14 *consumers with clear, accurate information and give*
15 *sellers an opportunity to fairly compete with one an-*
16 *other for consumers’ business.*

17 (3) *An investigation by the Senate Committee on*
18 *Commerce, Science, and Transportation found abun-*
19 *dant evidence that the aggressive sales tactics many*
20 *companies use against their online customers have*
21 *undermined consumer confidence in the Internet and*
22 *thereby harmed the American economy.*

23 (4) *The Committee showed that, in exchange for*
24 *“bounties” and other payments, hundreds of reputable*
25 *online retailers and websites shared their customers’*
26 *billing information, including credit card and debit*

1 *card numbers, with third party sellers through a*
2 *process known as “data pass”. These third party sell-*
3 *ers in turn used aggressive, misleading sales tactics to*
4 *charge millions of American consumers for member-*
5 *ship clubs the consumers did not want.*

6 *(5) Third party sellers offered membership clubs*
7 *to consumers as they were in the process of com-*
8 *pleting their initial transactions on hundreds of*
9 *websites. These third party “post-transaction” offers*
10 *were designed to make consumers think the offers were*
11 *part of the initial purchase, rather than a new trans-*
12 *action with a new seller.*

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

21 *(7) The use of a “data pass” process defied con-*
22 *sumers’ expectations that they could only be charged*
23 *for a good or a service if they submitted their billing*
24 *information, including their complete credit or debit*
25 *card numbers.*

1 (8) *Third party sellers used a free trial period*
 2 *to enroll members, after which they periodically*
 3 *charged consumers until consumers affirmatively can-*
 4 *celed the memberships. This use of “free-to-pay con-*
 5 *version” and “negative option” sales took advantage*
 6 *of consumers’ expectations that they would have an*
 7 *opportunity to accept or reject the membership club*
 8 *offer at the end of the trial period.*

9 **SEC. 3. PROHIBITIONS AGAINST CERTAIN UNFAIR AND DE-**
 10 **CEPTIVE INTERNET SALES PRACTICES.**

11 (a) *REQUIREMENTS FOR CERTAIN INTERNET-BASED*
 12 *SALES.—It shall be unlawful for any post-transaction third*
 13 *party seller to charge or attempt to charge any consumer’s*
 14 *credit card, debit card, bank account, or other financial ac-*
 15 *count for any good or service sold in a transaction effected*
 16 *on the Internet, unless—*

17 (1) *before obtaining the purchaser’s billing infor-*
 18 *mation, the post-transaction third party seller has*
 19 *clearly and conspicuously disclosed to the purchaser*
 20 *all material terms of the transaction, including—*

21 (A) *a description of the goods or services*
 22 *being offered;*

23 (B) *the fact that the post-transaction third*
 24 *party seller is not affiliated with the initial mer-*
 25 *chant, which may include disclosure of the name*

1 *of the post-transaction third party in a manner*
 2 *that clearly differentiates the post-transaction*
 3 *third party seller from the initial merchant; and*

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

5 *(2) the post-transaction third party seller has re-*
 6 *ceived the express informed consent for the charge*
 7 *from the consumer whose credit card, debit card, bank*
 8 *account, or other financial account will be charged*
 9 *by—*

10 *(A) obtaining from the consumer—*

11 *(i) the full account number of the ac-*
 12 *count to be charged; and*

13 *(ii) the consumer's name and address*
 14 *and a means to contact the consumer; and*

15 *(B) requiring the consumer to perform an*
 16 *additional affirmative action, such as clicking*
 17 *on a confirmation button or checking a box that*
 18 *indicates the consumer's consent to be charged*
 19 *the amount disclosed.*

20 *(b) PROHIBITION ON DATA-PASS USED TO FACILI-*
 21 *TATE CERTAIN DECEPTIVE INTERNET SALES TRANS-*
 22 *ACTIONS.—It shall be unlawful for an initial merchant to*
 23 *disclose a credit card, debit card, bank account, or other*
 24 *financial account number, or to disclose other billing infor-*
 25 *mation that is used to charge a customer of the initial mer-*

1 *chant, to any post-transaction third party seller for use in*
2 *an Internet-based sale of any goods or services from that*
3 *post-transaction third party seller.*

4 *(c) LIMITATIONS ON USE OF NEGATIVE OPTION FEA-*
5 *TURE IN INTERNET-BASED SALES TRANSACTIONS.—It shall*
6 *be unlawful for any person to charge or attempt to charge*
7 *any consumer for any goods or services sold in a trans-*
8 *action effected on the Internet through a negative option*
9 *feature, unless—*

10 *(1) before obtaining the purchaser's initial agree-*
11 *ment to participate in the negative option plan, the*
12 *seller has clearly and conspicuously disclosed all ma-*
13 *terial terms of the transaction, including—*

14 *(A) the name of the entity offering the goods*
15 *or services;*

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

18 *(C) the cost of such goods or services;*

19 *(D) notice of when billing will begin and at*
20 *what intervals the charges will occur;*

21 *(E) the length of any trial period, including*
22 *a statement that the consumer's account will be*
23 *charged unless the consumer takes affirmative*
24 *action and the steps the consumer must take to*
25 *the avoid the charge; and*

1 (F) instructions for stopping the recurring
2 charges in accordance with the requirements of
3 paragraph (3);

4 (2) the seller has obtained the express informed
5 consent described in subsection (a)(2) from the pur-
6 chaser before charging or attempting to charge the
7 purchaser's credit card, debit card, bank account, or
8 other financial account on a recurring basis; and

9 (3) the seller enables the purchaser to stop recur-
10 ring charges from being made to the purchaser's cred-
11 it card, debit card, bank account, or other financial
12 account through a simple process that is available
13 via—

14 (A) the Internet; or

15 (B) e-mail.

16 (d) APPLICATION WITH OTHER LAW.—Nothing in this
17 Act shall be construed to supersede, modify, or otherwise
18 affect the requirements of the Electronic Funds Transfer Act
19 (15 U.S.C. 1693 et seq.) or any regulation promulgated
20 thereunder.

21 (e) DEFINITIONS.—In this section:

22 (1) INITIAL MERCHANT.—The term “initial mer-
23 chant” means a person that has obtained a con-
24 sumer's billing information directly from the con-

1 sumer through an Internet transaction initiated by
2 the consumer.

3 (2) *NEGATIVE OPTION FEATURE.*—The term
4 “negative option feature” has the meaning given that
5 term in section 310.2(t) of the Federal Trade Com-
6 mission’s Telemarketing Sales Rule regulations (16
7 C.F.R. 310.2(t)).

8 (3) *POST-TRANSACTION THIRD PARTY SELLER.*—
9 The term “post-transaction third party seller” means
10 a person that—

11 (A) sells, or offers for sale, any good or serv-
12 ice on the Internet;

13 (B) solicits the purchase of such goods or
14 services on the Internet through an initial mer-
15 chant after the consumer has initiated a trans-
16 action with the initial merchant; and

17 (C) is not a subsidiary or corporate affiliate
18 of the initial merchant.

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

20 (a) *IN GENERAL.*—Violation of this Act or any regula-
21 tion prescribed under this Act shall be treated as a violation
22 of a rule under section 18 of the Federal Trade Commission
23 Act (15 U.S.C. 57a) regarding unfair or deceptive acts or
24 practices. The Federal Trade Commission shall enforce this
25 Act in the same manner, by the same means, and with the

1 *same jurisdiction, powers, and duties as though all applica-*
2 *ble terms and provisions of the Federal Trade Commission*
3 *Act (15 U.S.C. 41 et seq.) were incorporated into and made*
4 *a part of this Act.*

5 (b) *REGULATIONS.*—*Notwithstanding any other provi-*
6 *sion of law, the Commission may promulgate such regula-*
7 *tions as it finds necessary or appropriate under this Act*
8 *under section 553 of title 5, United States Code.*

9 (c) *PENALTIES.*—*Any person who violates this Act or*
10 *any regulation prescribed under this Act shall be subject*
11 *to the penalties and entitled to the privileges and immuni-*
12 *ties provided in the Federal Trade Commission Act as*
13 *though all applicable terms and provisions of the Federal*
14 *Trade Commission Act were incorporated in and made part*
15 *of this Act.*

16 (d) *AUTHORITY PRESERVED.*—*Nothing in this section*
17 *shall be construed to limit the authority of the Commission*
18 *under any other provision of law.*

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

20 (a) *RIGHT OF ACTION.*—*Except as provided in sub-*
21 *section (e), the attorney general of a State, or other author-*
22 *ized State officer, alleging a violation of this Act or any*
23 *regulation issued under this Act that affects or may affect*
24 *such State or its residents may bring an action on behalf*
25 *of the residents of the State in any United States district*

1 *court for the district in which the defendant is found, re-*
2 *sides, or transacts business, or wherever venue is proper*
3 *under section 1391 of title 28, United States Code, to obtain*
4 *appropriate injunctive relief.*

5 **(b) NOTICE TO COMMISSION REQUIRED.**—*A State*
6 *shall provide prior written notice to the Federal Trade*
7 *Commission of any civil action under subsection (a) to-*
8 *gether with a copy of its complaint, except that if it is not*
9 *feasible for the State to provide such prior notice, the State*
10 *shall provide such notice immediately upon instituting such*
11 *action.*

12 **(c) INTERVENTION BY THE COMMISSION.**—*The Com-*
13 *mission may intervene in such civil action and upon inter-*
14 *vening—*

15 **(1)** *be heard on all matters arising in such civil*
16 *action; and*

17 **(2)** *file petitions for appeal of a decision in such*
18 *civil action.*

19 **(d) CONSTRUCTION.**—*Nothing in this section shall be*
20 *construed—*

21 **(1)** *to prevent the attorney general of a State, or*
22 *other authorized State officer, from exercising the*
23 *powers conferred on the attorney general, or other au-*
24 *thorized State officer, by the laws of such State; or*

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

5 (e) *LIMITATION.—No separate suit shall be brought*
6 *under this section if, at the time the suit is brought, the*
7 *same alleged violation is the subject of a pending action*
8 *by the Federal Trade Commission or the United States*
9 *under this Act.*

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A BILL

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

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