

COMMITTEE AMENDMENT

[STAFF WORKING DRAFT]

June 6, 2010

Purpose: To modify the bill as introduced.

**IN THE COMMITTEE ON COMMERCE, SCIENCE, AND
TRANSPORTATION —111TH Cong., 2D Sess.**

S. 3386, 111TH Congress, 2D Session

JUNE 9, 2010

INTENDED to be proposed by Mr. ROCKEFELLER

Viz: Strike out all after the enacting clause and insert the following:

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
7 channel of commerce in the United States, account-
8 ing for billions of dollars in retail sales every year.
9 Over half of all American adults have now either
10 made an online purchase or an online travel reserva-
11 tion.

12 (2) Consumer confidence is essential to the
13 growth of online commerce. To continue its develop-

1 ment as a marketplace, the Internet must provide
2 consumers with clear, accurate information and give
3 sellers an opportunity to fairly compete with one an-
4 other for consumers' business.

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

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

20 (5) Third party sellers offered membership
21 clubs to consumers as they were in the process of
22 completing their initial transactions on hundreds of
23 websites. These third party "post-transaction" offers
24 were designed to make consumers think the offers

1 were part of the initial purchase, rather than a new
2 transaction with a new seller.

3 (6) Third party sellers charged millions of con-
4 sumers for membership clubs without ever obtaining
5 consumers' billing information, including their credit
6 or debit card information, directly from the con-
7 sumers. Because third party sellers acquired con-
8 sumers' billing information from the initial merchant
9 through "data pass", millions of consumers were un-
10 aware they had been enrolled in membership clubs.

11 (7) The use of a "data pass" process defied
12 consumers' expectations that they could only be
13 charged for a good or a service if they submitted
14 their billing information, including their complete
15 credit or debit card numbers.

16 (8) Third party sellers used a free trial period
17 to enroll members, after which they periodically
18 charged consumers until consumers affirmatively
19 canceled the memberships. This use of "free-to-pay
20 conversion" and "negative option" sales took advan-
21 tage of consumers' expectations that they would
22 have an opportunity to accept or reject the member-
23 ship club offer at the end of the trial period.

1 **SEC. 3. PROHIBITIONS AGAINST CERTAIN UNFAIR AND DE-**
2 **CEPTIVE INTERNET SALES PRACTICES.**

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

9 (1) before obtaining the purchaser’s billing in-
10 formation, the post-transaction third party seller has
11 clearly and conspicuously disclosed to the purchaser
12 all material terms of the transaction, including—

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

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

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

23 (2) the post-transaction third party seller has
24 received the express informed consent for the charge
25 from the consumer whose credit card, debit card,

1 bank account, or other financial account will be
2 charged by—

3 (A) obtaining from the consumer—

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

6 (ii) the consumer's name and address
7 and a means to contact the consumer; and

8 (B) requiring the consumer to perform an
9 additional affirmative action, such as clicking
10 on a confirmation button or checking a box that
11 indicates the consumer's consent to be charged
12 the amount disclosed.

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

22 (c) LIMITATIONS ON USE OF NEGATIVE OPTION
23 FEATURE IN INTERNET-BASED SALES TRANSACTIONS.—
24 It shall be unlawful for any person to charge or attempt
25 to charge any consumer for any goods or services sold in

1 a transaction effected on the Internet through a negative
2 option feature, unless—

3 (1) before obtaining the purchaser's initial
4 agreement to participate in the negative option plan,
5 the seller has clearly and conspicuously disclosed all
6 material terms of the transaction, including—

7 (A) the name of the entity offering the
8 goods or services;

9 (B) a description of the goods or services
10 being offered;

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

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

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

19 (F) instructions for stopping the recurring
20 charges in accordance with the requirements of
21 paragraph (3);

22 (2) the seller has obtained the express informed
23 consent described in subsection (a)(2) from the pur-
24 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; and

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; or

9 (B) e-mail.

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

15 (e) DEFINITIONS.—In this section:

16 (1) INITIAL MERCHANT.—The term “initial
17 merchant” means a person that has obtained a con-
18 sumer's billing information directly from the con-
19 sumer through an Internet transaction initiated by
20 the consumer.

21 (2) NEGATIVE OPTION FEATURE.—The term
22 “negative option feature” has the meaning given
23 that term in section 310.2(t) of the Federal Trade
24 Commission's Telemarketing Sales Rule regulations
25 (16 C.F.R. 310.2(t)).

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

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

6 (B) solicits the purchase of such goods or
7 services on the Internet through an initial mer-
8 chant after the consumer has initiated a trans-
9 action with the initial merchant; and

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

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

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

23 (b) REGULATIONS.—Notwithstanding any other pro-
24 vision of law, the Commission may promulgate such regu-

1 lations as it finds necessary or appropriate under this Act
2 under section 553 of title 5, United States Code.—

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

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

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

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

24 (b) INITIATION OF CIVIL ACTION.—A State shall pro-
25 vide prior written notice to the Federal Trade Commission

1 of any civil action under subsection (a) together with a
2 copy of its complaint, except that if it is not feasible for
3 the State to provide such prior notice, the State shall pro-
4 vide such notice immediately upon instituting such action.

5 (c) INTERVENTION BY THE COMMISSION.—The Com-
6 mission may intervene in such civil action and upon inter-
7 vening—

8 (1) be heard on all matters arising in such civil
9 action; and

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

12 (d) CONSTRUCTION.—Nothing in this section shall be
13 construed—

14 (1) to prevent the attorney general of a State,
15 or other authorized State officer, from exercising the
16 powers conferred on the attorney general, or other
17 authorized State officer, by the laws of such State;
18 or

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

23 (e) LIMITATION.—No separate suit shall be brought
24 under this section if, at the time the suit is brought, the
25 same alleged violation is the subject of a pending action

1 by the Federal Trade Commission or the United States
2 under this Act.

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