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111TH CONGRESS *2d Session*	SENATE	REPORT 111–

RESTORE ONLINE SHOPPERS' CONFIDENCE ACT

REPORT

OF THE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

ON

S. 3386

AUGUST ——, 2010.—Ordered to be printed

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SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

ONE HUNDRED ELEVENTH CONGRESS

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Mr. ROCKEFELLER, from the Committee on Commerce, Science, and Transportation, submitted the following

REPORT

[To accompany S. 3386]

The Committee on Commerce, Science, and Transportation, to which was referred the bill (S. 3386) to protect consumers from certain aggressive sales tactics on the Internet, having considered the same, reports favorably thereon with an amendment (in the nature of a substitute) and recommends that the bill (as amended) do pass.

PURPOSE OF THE BILL

S. 3386, as amended, would protect online consumers from unfair and deceptive sales tactics on the Internet by (1) requiring e-commerce companies that advertise on other companies' websites to meet certain requirements before charging consumers' financial accounts, (2) prohibiting e-commerce companies from transferring their customers' billing information to the e-commerce companies that are advertising on their websites, and (3) requiring e-commerce companies that use "negative options" to meet certain minimum requirements.

BACKGROUND AND NEEDS

In the past 15 years, the Internet has rapidly grown from an entertaining diversion to an integral part of the daily life of millions of Americans. According to research done by the Pew Internet and American Life Project, over half of all American adults had either made an online purchase or an online travel reservation by 2008. Yet large percentages of online consumers continue to report that they feel frustrated, overwhelmed, or confused by online shopping.

A key factor contributing to consumers' lingering unease about online shopping is the aggressive sales tactics that many companies have used against their customers. In response, in May 2009, the Committee opened an investigation into a set of online sales tactics that many consumers, law enforcement officials, and consumer advocates described as misleading and deceptive. The year-long investigation found that hundreds of legitimate, respected websites had shared their customers' billing information through a "data pass" process with other companies (defined as "post-transaction third party sellers" in S. 3386). These post-transaction third party sellers then enrolled online consumers in their membership programs more than 35 million times, charging them over $1.4 billion in fees for benefits and services they were often unaware they had purchased.

The post-transaction third party sellers and the websites they partnered with used a combination of three aggressive sales tactics to enroll consumers in their membership clubs and discount programs: post-transaction marketing, data pass, and negative options.

Post-Transaction Marketing: Offers for membership clubs were presented to online consumers as they were completing their purchases on familiar retailers' websites. After consumers entered their billing information into a "check out" purchase page on familiar e-retailers' sites, but before they completed confirmation of the transaction, the unfamiliar post-transaction third party sellers interrupted the process and attempted to enroll consumers in membership clubs.

Data Pass: Consumers were not required to enter their billing information to be enrolled in the membership clubs offered by the post-transaction third party sellers. The websites on which the consumers had already made purchases were willing to share their customers' billing information with the post-transaction third party sellers. Collectively, hundreds of well-known, reputable websites earned hundreds of millions of dollars by passing their customers' billing information, including credit and debit card numbers, to third party sellers.

Negative Options: Consumers enrolled in the membership clubs were automatically charged a recurring, monthly fee until they contacted the post-transaction third party seller to cancel the membership. Post-transaction third party sellers' use of negative options cost American consumers hundreds of millions of dollars because they were enrolled in and charged for the membership clubs indefinitely, until they realized there was an unfamiliar charge on their credit card or debit card statements.

Attached to this report are two Committee staff investigative reports which document how extensive the injuries to consumers were and how pervasive the tactics were on the Internet. The evidence obtained by the Committee demonstrated overwhelmingly that most consumers were unaware they were enrolled in the membership programs.

During interviews with Committee staff and in Committee testimony, many affected consumers stated repeatedly that they were not aware they were consenting to allow a website to transfer their billing information to a post-transaction third party seller by simply clicking a button and providing their e-mail address. Many online consumers informed Committee staff that they had mistakenly believed it was illegal for e-commerce companies to transfer their billing information to another company.

Evidence obtained through the Committee's investigation showed that the companies engaged in the practice were well aware that consumers did not understand this process. The companies exploited consumer confusion by using practices that caused consumers to unwittingly enroll in the companies' services and programs. Annually, the post-transaction third party sellers received millions of calls from angry, frustrated consumers cancelling their memberships or asking questions about the charges to their credit or debit cards. When the companies tracked the reasons for these angry calls, the evidence overwhelmingly showed that consumers were being enrolled in the membership programs without their express informed consent. An employee of one company commented candidly in an internal e-mail that "at least 90% of our members don't know anything about the membership."

Summary of Provisions

To ensure online consumers are no longer taken advantage of by these questionable sales tactics, S. 3386 would create new rules for companies using post-transaction marketing and negative options. It would also prohibit e-commerce companies from using the so-called data pass process to pass their customers' billing information to e-commerce companies engaging in post-transaction marketing on their websites.

Post-transaction third party sellers would be required to meet certain requirements before charging a consumer for a good or service. The bill would require post-transaction third party sellers to disclose the material terms of the transaction and obtain the consumer's express informed consent. The disclosure requirements include:

- a description of the goods or services being offered;
- the fact that the post-transaction third party is not affiliated with the initial merchant; and
- the cost of such goods or services.

For a post-transaction third party seller to obtain consumers' express informed consent, consumers would need to provide their full sixteen digit credit card or debit card number, their name and address, and a means to contact them. The purpose of this provision is to require post-transaction third party sellers to go through the same process to charge consumers as initial merchants do. Evidence obtained through the Committee's investigation shows that online consumers understand that they are making a purchase when they go through this process. The bill would also prohibit initial merchants from transferring their customers' billing information to post-transaction third party sellers because initial merchants, like post-transaction third party sellers, should be held liable if they participate in a data pass process prohibited by the bill.

The bill's "negative option" provision would establish clear standards of disclosure and consent for sales that involve recurring charges. The practices outlined in this provision are already used by most legitimate e-commerce companies selling goods and services through negative option sales. All companies would be required to make certain disclosures, obtain consumers' express informed consent and provide the consumers with simple, convenient ways to cancel the "negative options" via the Internet or through e-mail. The disclosure requirements include:

- the name and entity offering the goods or services;
- a description of the goods or services;
- the cost of such goods or services;
- notice of when billing will begin and at what intervals the charges will occur;
- the length of any trial period; and
- instructions for stopping the recurring charges.

The bill would provide the Federal Trade Commission with enforcement authority and the State Attorneys General with the power to seek injunctive relief in Federal court.

Legislative History

Senator Rockefeller introduced S. 3386 on May 19, 2010, and it was referred to the Committee on Commerce, Science, and Transportation. The bill was co-sponsored by Senators Pryor, Nelson, Klobuchar, McCaskill, and LeMieux. The bill was introduced following a November 17, 2009, investigative hearing entitled "Aggressive Sales Tactics on the Internet and Their Impact on American Consumers" and the release of two Committee staff reports on the subject. Each staff report is attached. On June 9, 2010, the Committee considered the bill during an open executive session and adopted it by voice vote.

Estimated Costs

In accordance with paragraph 11(a) of rule XXVI of the Standing Rules of the Senate and section 403 of the Congressional Budget Act of 1974, the Committee provides the following cost estimate, prepared by the Congressional Budget Office:

[Insert CBO letter, attached as pages 4A through 4C]

Regulatory Impact Statement

In accordance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee provides the following evaluation of the regulatory impact of the legislation, as reported:

NUMBER OF PERSONS COVERED

S. 3386 would cover all e-commerce companies whose practices meet the definition of a post-transaction third party seller, all Internet merchants that would otherwise share consumers' billing information with post-transaction third party sellers, and all marketers of negative option programs offered through the Internet.

ECONOMIC IMPACT

S. 3386 would not have an adverse impact on the nation's economy. The legislation is expected to reduce the number of consumers who are subject to fraudulent online sales practices, and would therefore save consumers millions of dollars every year in unauthorized charges.

PRIVACY

S. 3386 would increase the personal privacy of consumers making purchases on the Internet by prohibiting online retailers from passing consumers' billing information to post-transaction third party sellers.

PAPERWORK

S. 3386 would not increase paperwork requirements for individuals and businesses.

CONGRESSIONALLY DIRECTED SPENDING

In compliance with paragraph 4(b) of rule XLIV of the Standing Rules of the Senate, the Committee provides that no provisions contained in the bill, as reported, meet the definition of congressionally directed spending items under the rule.

SECTION-BY-SECTION ANALYSIS

Section 1. Short Title.

This section would provide that the Act may be cited as the Restore Online Shoppers' Confidence Act.

Section 2. Findings; Declaration of Policy.

Section 2 sets out the bill's findings, which are based in large part on the Committee's year-long investigation into aggressive online sales tactics.

Section 3. Prohibitions Against Certain Unfair and Deceptive Internet Sales Practices.

Section 3(a) would prohibit an online post-transaction third party seller from charging a consumer unless the post-transaction third party seller has clearly disclosed the terms of an Internet purchase to the consumer and has obtained the consumer's express informed consent to the purchase. The consumer signifies express informed consent by submitting his or her billing information, including the full credit or debit card number, to the post-transaction third party seller and by performing an additional affirmative action.

Section 3(b) would prohibit Internet retailers and other commercial websites ("initial merchants") from transferring a consumer's billing information to post-transaction third party sellers.

Section 3(c) would establish rules under which Internet retailers may periodically charge consumers for goods or services until the consumer cancels the arrangement ("negative option feature"). It would prohibit a seller from charging a consumer through a negative option feature unless: 1) the seller has clearly disclosed the terms of the plan to the consumer; 2) the seller has obtained the consumer's express informed consent to the plan; and 3) the seller provides the consumer simple, convenient ways to cancel the negative option plan.

Section 3(d) would define the terms initial merchant, negative option, and post-transaction third party seller.

Section 4. Enforcement by Federal Trade Commission.

Section 4 would give the Federal Trade Commission the authority to enforce the prohibitions in section 3 and to write regulations furthering enforcement of the prohibitions in section 3.

Section 5. Enforcement by State Attorneys General.

Section 5 would give State Attorneys General the authority to use injunctive relief in Federal court to stop entities from violating the prohibitions in section 3.

Changes in Existing Law

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, the Committee states that the bill as reported would make no change to existing law.

[Insert report "Aggressive Sales Tactics on the Internet and their Impact on American Consumers," attached as Appendix A]

[Insert report "Supplemental Report on Aggressive Sales Tactics on the Internet," attached as Appendix B]

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