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E-FENCING ENFORCEMENT ACT OF 2008, THE ORGANIZED RETAIL CRIME ACT OF 2008, AND THE COMBATING ORGANIZED RETAIL CRIME ACT OF 2008

HEARING

BEFORE THE

SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

SECOND SESSION

ON

H.R. 6713, H.R. 6491 and S. 3434

SEPTEMBER 22, 2008

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E-FENCING ENFORCEMENT ACT OF 2008, THE ORGANIZED RETAIL CRIME ACT OF 2008, AND THE COMBATING ORGANIZED RETAIL CRIME ACT OF 2008

MONDAY, SEPTEMBER 22, 2008

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CRIME, TERRORISM,
AND HOMELAND SECURITY
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 4:03 p.m., in room 2141, Rayburn House Office Building, the Honorable Robert C. "Bobby" Scott (Chairman of the Subcommittee) presiding.

Present: Representatives Scott, Gohmert, Coble, Chabot, and Lungren.

Also Present: Representative Putnam.

Staff Present: Bobby Vassar, Majority Chief Counsel; Ameer Gopalani, Majority Counsel; Mario Dispenza, Fellow, BATFE Detailee; Karen Wilkinson, Fellow, Federal Public Office Detailee; Veronica Eligan, Majority Professional Staff Member; Caroline Lynch, Minority Counsel; and Kelsey Whitlock, Minority Staff Assistant.

Mr. SCOTT. The Subcommittee will now come to order.

I am pleased to welcome you to today's hearing on legislative proposals in the 110th Congress for curbing organized retail theft, which by some estimates has become a $30 billion illicit industry that not only affects legitimate interstate commerce, but poses a significant public safety risk to consumers.

Theft of merchandise is nothing new and has traditionally been handled effectively through State criminal laws. In my home State of Virginia, for example, any theft in excess of $200 is grand larceny with a maximum penalty of 20 years. A third offense of petty larceny is, by law, treated the same as grand larceny.

With diligent enforcement activities, such measures are ordinarily adequate to keep the problem of merchandise theft sufficiently in check. However, organized theft rings, or OTRs, have become more sophisticated, learning to reduce their risks of penalty and capture. For example, to avoid the grand larceny threshold, they operate across the State lines, and using this tactic, they can shoplift with acceptable risk by remaining under the grand larceny threshold for each incident while stealing thousands of dollars worth of merchandise.

OTRs have reduced their risk of capture by exploiting the—being anonymous on the Internet. Traditionally, thieves who dispose of stolen goods locally through flea markets, pawnshops, swap meets or shady storefront operations where State and local police can investigate and make arrests, as the thieves have to physically stand behind the stolen goods. But without having to identify themselves or their contact information to consumers or others who seek information about them, OTRs that operate online evade identification much easier than traditional thieves, and they put themselves beyond the reach of local law enforcement.

In fact, OTRs now use the Internet to fence stolen goods to such a large extent that a new term has been coined for it. They call it "e-fencing."

But the volume of organized theft and its impact on commerce is not the only problem prompting congressional action. Purchasing stolen, consumable products online or in the physical world exposes consumers, often unwittingly, to serious safety and health risks. The products most frequently targeted by theft—by OTRs include FDA-regulated items like over-the-counter drug products or infant formula. Once stolen, these products are not kept under appropriate storage conditions, and we have reports that OTRs actually may be changing expiration dates on their labels.

These practices not only threaten the integrity of the products, but endanger the safety of consumers. They may believe that the vendor is selling products in conformance with consumer safety guidelines when, in fact, the products may actually be dangerous or even deadly.

Having risen to the point of affecting interstate commerce and safety, we have three legislative proposals addressing organized retail theft that will be discussed today.

H.R. 6713, the "E-fencing Enforcement Act of 2008," which I introduced, places requirements on online market providers. The providers would identify high-volume sellers, those who sell more than $12,000 of merchandise in 1 year or more than $5,000 in a single transaction. Information regarding the identity of such sellers and the transaction would be required to be retained by the online market and made available to aggrieved parties with specified standing to obtain the information. The bill would also require the provider to investigate an allegation of stolen property upon the request of a person with such standing and to deny access to the marketplace to the seller if the provider has good reason to believe that the seller is using the market to sell stolen goods.

H.R. 6491, introduced by the Representative Brad Ellsworth of Indiana, who is with us as a witness today, and Representative Jim Jordan of Ohio's Fourth District, defines organized retail crime and provides for Federal criminal penalties. The definition under the bill is illegally obtaining merchandise in quantities beyond what would be normal for personal consumption or recruiting persons to participate in such activity.

The bill also defines online marketplace as an Internet site where someone other than the site operator can enter into transactions to sell goods or services. There is a search engine on the site for the buyer to use to identify the seller's goods, and the site

operator has the right to supervise the seller's activities or has a financial interest in the goods sold.

That bill also criminalizes the failure of an online market to investigate when credible evidence exists that a seller is using the marketplace for selling stolen goods, to require a merchant to post certain information about his product or to keep identifying information about merchants who sell more than $12,000 of merchandise in any given year.

S. 3434 is wider in scope than H.R. 6713 and 6491 in that it addresses organized theft in physical as well as online markets. The bill has similar provisions to 6491 in its definitions and criminal penalties. However, the bill also requires operators of physical retail locations to notify the Attorney General if the operator reasonably determines that a vendor is using that operator's space in selling stolen goods.

This is the second hearing we have had on organized retail theft that the Subcommittee has held during this Congress. In October 2007, we heard testimony from representatives from the convenience retail industry, law enforcement and representatives from the online retail industry hoping to stimulate a discussion that would assist in developing mutually agreed solutions among the retail and online industries to the growing problem of organized retail theft. While there have been some efforts to do so by affected parties, they have not come to a final workable agreement, prompting the legislative proposals before us in today's hearing. The size and complexity of this problem clearly suggests the need for some congressional attention but exactly what form any assistance would take is what we are here to discuss.

It is now my pleasure to recognize the esteemed Ranking Member of the Subcommittee, the gentleman from Texas, Judge Gohmert.

Mr. GOHMERT. Thank you, Mr. Chairman. I do also thank you for holding this hearing. This is a very serious issue. I first became aware of it back as a judge when we started hearing about massive amounts of baby formula being stolen.

The problem of organized retail theft is not only growing, but it involves the theft of large quantities of retail merchandise. Organized retail theft is not a high-profile crime—and that is one of the problems—but it certainly is costly. Unlike shoplifters or small-time thieves who steal for their own personal use, organized retail thieves steal merchandise in order to sell it back into the marketplace. These criminals typically target merchandise that can be easily concealed and easily resold. The stolen items range from low-cost products such as razor blades—baby formula is not so low cost for those that have bought any lately—but also things like batteries, as well as expensive items like electronics or appliances.

Organized retail thieves, commonly referred to as "boosters," will sell the stolen merchandise at flea markets, pawnshops, swap meets and increasingly on the Internet. According to the FBI, organized retail theft accounts for between $30 and $37 billion in losses annually. The Coalition Against Organized Retail Crime estimates that States with sales tax annually suffer over $1.5 billion in lost tax revenue due to organized retail theft.

In 2005, Congress directed the Attorney General and the FBI in consultation with the retail community to establish a task force to combat organized retail theft and create a national database or clearinghouse to track and identify organized retail thefts across the country. The result of that legislation is the Law Enforcement Retail Partnership Network, which was launched in 2006. This national database allows retailers to share information about suspected theft with each other and with law enforcement officials.

In addition, the FBI has created the major Theft Task Forces to identify and target multijurisdictional organized retail theft rings. There are currently nine FBI-led major Theft Task Forces staffed by FBI agents and State and local law enforcement officers, located in FBI field offices across the country.

Although Federal agencies work to investigate the criminals that engage in this conduct, retail organizations argue that there is still too little prosecution of this crime. They would seem to be right in their assertions. They argue that State felony thresholds that stolen goods must amount to $500 or, in some cases, $1,000 or $2,500 in order to be a felony are too high to provide for prosecution of organized retail theft. The Federal threshold for prosecution of a crime of transportation of stolen goods and interstate commerce is also high, as the amount of stolen goods must be in excess of $5,000 to trigger Federal criminal liability.

Several bills have been introduced in this Congress to prohibit organized retail theft and, in particular, e-fencing. Auction sites such as eBay and other online marketplaces, such as Amazon.com, have expressed concerns about the bills.

I have met with representatives from both industries and on all sides. And I, like the Chairman, was hoping the groups could come together to find a solution without congressional action.

Several merchants have used the comparison of pawnshops when discussing e-fencing with me. And I do think that there are certain parallels that are worth noting. Pawnshops are generally required to keep records of the merchandise available for sale because it is known that they are frequently used by criminals who have stolen merchandise. It seems reasonable to ask online marketplaces to do the same. Pawnshop records, on the other hand, are kept for law enforcement officials and not made available to private third parties.

I would like to hear from witnesses during the course of this hearing on their thoughts about imposing a duty to maintain records on merchandise on the Web sites that are not required of pawnshops, and whether this should be made available just for law enforcement and not anyone else.

One bill before the Subcommittee would create a new Federal crime of facilitation of organized retail theft. This provision exposes online marketplaces to incarceration based on a lower mental state than is traditionally required for criminal penalties.

I very much appreciate a desire to craft legislation that addresses innovative criminal conduct, but I am also wary of legislation that deviates from the mens rea, or mental states, of knowing or intentional that are commonly used in criminal offenses. That is important because criminal offenses, which lock people up in prison and take away so many of their constitutional rights just to walk

around, are intended to impose penalties on those normally who consciously act to commit a crime and consciously act in furtherance of a crime.

In fact, we have a group currently meeting to rein in some of the overzealous laws that have been crafted and passed in the past that have caused the incarceration of people for very unreasonable reasons when they had no idea that they were committing a crime as the law was later interpreted.

I also think it is helpful to note that civil penalties are also a possibility when it comes to crafting legislation. It doesn't require anybody to be locked up, and therefore, the mental state can sometimes be much lower and the penalties be career-ending for a business, so they do have a strong effect.

But I am very interested in hearing the testimony of our witnesses on this legislation. I am still trying to come to grips with what would be the best solution. And I am glad to see my office neighbor, Congressman Ellsworth, here and look forward to hearing him.

And I yield back the balance of my time.

Mr. SCOTT. Thank you.

We have been joined by the gentleman from North Carolina, Mr. Coble.

Good to see you.

Our first panelist will be the Honorable Brad Ellsworth who represents Indiana's Eighth District. He is serving his first term in the United States Congress after serving 24 years as the Vanderburgh County sheriff in the county sheriff's office, serving two terms as the Vanderburgh sheriff.

He was twice decorated for heroism in the line of duty and graduated from the FBI Academy. He also has a bachelor's degree in sociology and a master's degree in criminology from Indiana State University.

Mr. Brad Ellsworth, you are familiar with the lights. We have your entire statement for the record. So if you would like to summarize your testimony in 5 minutes or less, we would be happy to hear from you.

Mr. ELLSWORTH. Thank you.

TESTIMONY OF THE HONORABLE BRAD ELLSWORTH, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF INDIANA

Mr. ELLSWORTH. Thank you.

Thank you, Mr. Chairman, Ranking Member Gohmert and the rest of the Committee. I appreciate you letting me come and testify in front of the Committee today about this bill that—again, as Mr. Gohmert said, our purpose here is not to penalize entrepreneurs and online sites or—it is to take criminals off the streets and stop crime. That is my sole purpose here.

I appreciate this opportunity to testify before your Committee in support of my bill, knowing that as we work together, we can craft good legislation that gets to the bottom of this problem, the Organized Retail Crime Act of 2008.

I also want to thank you for your leadership in the area of e-fencing and organized retail crime. To both of you and this entire Com-

mittee, I look forward to working with you to craft legislation that gets to the problem.

As the Chairman said, before I came to Congress, I spent nearly 25 years in law enforcement with the Vanderburgh County sheriff's office. I can remember, when I was talking about this legislation, a particular incident. We made what we thought was a routine shoplifting run until we opened this gentleman's trunk, and in the trunk was a copy machine that had been rewired to 12 volt and was full of electric drills, the same particular electric drill out of this store.

What we found out through our investigation was that these gentlemen would go in and buy one drill, go out, take the legitimate receipt, go out to the trunk, turn on the car, run copies of that, go in and steal more drills. And they would actually have receipts for those drills, for as many as they wanted, on that particular day and have legitimate receipts.

That was one of my first real brushes with what I thought was organized retail crime, when someone puts a copy machine in their trunk and rewires that. Using fraudulent copied receipts, the thieves would then return that, like I said.

I share this story as an example of the length that these thieves will go to. And like Ranking Member Gohmert said, they are hijacking trucks of baby formula out of the Bristol-Myers, MeadJohnson Enfamil—it happens quite often—to take advantage and to make a quick profit.

Today, criminals with the same motives are using the Internet with increasing frequency to sell stolen merchandise. It is taking a heavy toll on our communities throughout the country. According to the Food Marketing Institute, a study in 2006 alone, retailers in my State of Indiana lost $662 million in stolen merchandise. Indiana has a 6 percent sales tax, so these stolen goods account for close to $40 million in lost sales tax to the revenue of my State. This is a major problem, as you know.

Not only does organized retail crime result in substantial losses for retailers, it also has significant negative consequences for consumers. As you said, they steal baby formula, diabetic test strips, over-the-counter drugs from retailers. Needless to say, criminals are not interested in the proper storage of these sensitive health products, and as a result, the health and safety of consumers who unknowingly purchase these stolen products is often jeopardized.

ORC rings also negatively impact the bottom line for consumers because leading American retailers are forced to spend millions of dollars each year conducting loss prevention efforts. Organized retail crime currently accounts for tens of billions of dollars in retail loss annually.

The criminals who operate these organized crime rings are becoming more sophisticated in the ways they sell their goods to an often-unsuspecting public. ORC rings have expanded their base of operation from the streets—like you said, flea markets, pawnshops—to the online marketplace where they can break the law with anonymity.

For these reasons, I felt compelled to introduce H.R. 6491, the Organized Retail Crime Act of 2008. This legislation cracks down on ORC by amending the Federal Criminal Code to include activi-

ties such as stealing, embezzlement, obtaining by fraud or false pretenses retail merchandise in quantities that are not purchased for personal use or consumption for the purpose of reselling such retail merchandise in commerce.

By criminalizing facilitation, organized retail crime, Federal, State and local law enforcement will be better equipped to crack down on illegal activity as this takes place offline at pawnshops, flea markets. And, Judge, like you said, the definition of facilitation will be defined as we move down the road with this.

In addition to amending the Federal Criminal Code, H.R. 6491 requires specific and narrow obligations for the online marketplace used by high-volume dollars, $12,000 or more. Specifically, H.R. 6491 requires online auction sites to expeditiously assist with an investigation of the sale of stolen goods on its site where incredible evidence comes to its attention and remove or disable access to the material when there is reasonable cause to believe the goods or services were acquired through organized retail crime. These sites are also to maintain a record of all investigations for a minimum of 3 years.

The legislation also requires the online auction site to maintain the name, telephone number, e-mail address and a legitimate physical address of any user identification company name and transactions conducted by these high-volume sellers. And as I said, high-volume is someone selling more than $12,000 in merchandise annually.

Opponents to this legislation might say it unfairly targets online auction sites. I would like to reiterate the fact that the legislation criminalizes facilitation of organized retail crime. Facilitation includes criminal activity that takes place offline as well as online. The proposed record-keeping obligation for online marketplaces is far less burdensome than regulations in place for pawnshop brokers, for example. In the pawnbroker industry, many States require that these records are kept and provided to law enforcement. Some require fingerprinting and the presentation of valid government-issued IDs before any transaction is approved.

I want to acknowledge the efforts by some in the online marketplaces to police their own sites for criminal activity. These efforts are certainly beneficial toward deterring the resale of stolen merchandise. But I firmly believe these efforts do not go far enough.

ORC is a growing problem that must be addressed through a robust effort of cooperation between retailers, the online marketplace and law enforcement. I believe we can put in place a legal framework to make this happen. My goal is very simple: The online marketplace should be fair and protect consumers, producers and a free market when goods are traded.

I want online auction sites to prosper in a marketplace that has rules that are enforceable. It is important that the State and local law enforcement retailers have the tools necessary to pursue and stop crime where it exists. This legislation is important, and it defines organized retail crime in the Federal Criminal Code and requires online auction sites to perform the necessary record keeping of high-volume sellers so that criminals are prevented from exploiting the online marketplace.

I would also like to note that this legislation will not place an undue burden on users who play by the rules. The obligation is on the online marketplace to keep transparent records and assist with law enforcement when criminal activity is suspected.

Mr. Chairman, H.R. 6491, the Organized Retail Crime Act of 2008, is not intrusive. It is a commonsense bill that aims to dry up avenues for the organized retail crime criminals to sell their stolen merchandise at the expense of retailers and consumers.

I look forward to hearing the expert testimony today, and I urge colleagues to join Congressman Jim Jordan and myself in supporting this important legislation as a first step toward cracking down on ORC.

And just in closing, Mr. Chairman, I agree with Ranking Member Gohmert in that with—how much Federal law enforcement FBI has committed to this; but obviously, in just my State alone, with the tens of billions that are being lost in my State alone, the millions that are being lost, obviously the job is not getting done with law enforcement alone.

So I appreciate any questions. I would be willing to answer any questions, and I will offer this for the record. Thank you.

[The prepared statement of Mr. Ellsworth follows:]

PREPARED STATEMENT OF THE HONORABLE BRAD ELLSWORTH, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF INDIANA

Mr. Chairman, I appreciate the opportunity to testify before your committee in support of my bill—the Organized Retail Crime Act of 2008. I also want to thank you for your leadership in the area of e-fencing and organized retail crime. I look forward to working with you and our colleagues on this committee in the coming days and weeks on legislation that will address the emerging issue of e-fencing. Together, we can craft legislation that cracks down on organized retail crime and protects consumers.

Before I came to Congress, I spent a career fighting crime in the Vanderburgh County Sheriff's Department. I remember a particular instance where we arrested two thieves who were running a sophisticated criminal enterprise from the trunk of their car. At a hardware retailer that had several Evansville locations, these two thieves would pay cash for one drill, make copies of the receipt using a copier that they had in the trunk of their car, and then shoplift the same drills in bulk. Using the fraudulent copied receipts, the thieves would then return the stolen merchandise and receive cash back multiple times over. I share this story as an example of the lengths criminals will go to fraudulently take advantage of businesses to make a quick profit.

Today, criminals with the same motives are using the internet with increasing frequency to sell stolen merchandise, and it's taking a heavy toll on retailers throughout the country. According to a Food Marketing Institute study, in 2006 alone, retailers in my state, Indiana, lost $662 million in stolen merchandise. Indiana has a six percentage sales tax so these stolen goods account for close to $40 million in lost sales tax revenue to the state. This is a major problem.

Not only does organized retail crime result in substantial losses for retailers, it also has significant, negative consequences for consumers. These criminals often steal products like baby formula, diabetic test strips, and over-the-counter drugs from retailers. Needless to say, criminals are not interested in properly storing these sensitive health products, and as a result, the health and safety of consumers, who unknowingly purchase these stolen products, is often jeopardized. ORC rings also negatively impact the bottom line for consumers because leading American retailers are forced to spend millions of dollars each year conducting loss prevention efforts.

The Federal Bureau of Investigation estimates that organized retail crime currently accounts for $30 billion in retail losses annually. The criminals who form and operate these organized crime rings are becoming more sophisticated in the ways they sell their stolen goods to an often unsuspecting public. ORC rings have expanded their base of operation from the streets, flea markets, and pawn shops to the online marketplace where they can break the law with anonymity.

For these reasons I felt compelled to introduced H.R. 6491, the Organized Retail Crime Act of 2008. This legislation cracks down on ORC by amending the federal criminal code to include activities such as the stealing, embezzlement, obtaining by fraud or false pretenses retail merchandise in quantities that are not purchased for personal use or consumption for the purpose of reselling such retail merchandise in commerce. By criminalizing the facilitation of organized retail crime, federal, state, and local law enforcement will be better equipped to crack down on illegal activity that takes place offline—at pawnshops and flea markets—as well as online.

In addition to amending the federal criminal code, H.R. 6491 requires specific and narrow obligations for the online marketplace used by high-volume sellers. Specifically, H.R. 6491 requires online auction sites to expeditiously assist with an investigation of the sale of stolen goods on its site when credible evidence comes to its attention, and remove or disable access to the material when there is reasonable cause to believe the goods or services were acquired through organized retail crime. These sites are to maintain a record of all investigations for a minimum of three years.

The legislation also requires the online auction site to maintain the name, telephone number, email address, legitimate physical address, any user identification, company name, and transactions conducted of each high-volume seller. A high-volume seller is defined as someone selling more than $12,000 in merchandise annually.

Opponents of this legislation say it unfairly targets online auction sites. I would like to reiterate the fact that this legislation criminalizes the facilitation of organized retail crime. Facilitation includes criminal activity that takes place offline as well as online.

The proposed recordkeeping obligation for online marketplaces is far less burdensome than regulations in place for pawnshop owners, for example. In the pawnbroker industry, many states require fingerprinting and the presentation of valid government issued IDs before a transaction.

I want to acknowledge efforts by some online marketplaces to police their own sites for criminal activity. These efforts are certainly beneficial towards deterring the resale of stolen merchandise but I firmly believe these efforts do not go far enough. ORC is a growing problem that must be addressed through a robust effort of cooperation between retailers, the online marketplace, and law enforcement. I believe we can put in place a legal framework to make this happen.

My goal is simple. The online marketplace should be fair and protect consumers, producers, and the free market where goods are traded. I want online auction sites to prosper in a marketplace that has rules that are enforceable. It is important that state and local law enforcement have the tools necessary to pursue and stop crime where it exists. This legislation is important in that it defines organized retail crime in the federal criminal code and requires online auction sites to perform the necessary recordkeeping of high-volume sellers so that criminals are prevented from exploiting the online marketplace. I'd also like to note that this legislation will not place an undue burden on users who play by the rules. The obligation is on the online marketplace to keep transparent records and assist with law enforcement when criminal activity is suspected.

Mr. Chairman, H.R. 6491, the Organized Retail Crime Act of 2008, is a non-intrusive, common sense bill that aims to dry up avenues for organized retail criminals to sell their stolen merchandise at the expense of retailers and consumers. I look forward to hearing the expert testimony today and I urge my colleagues to join Congressman Jim Jordan and me in supporting this important legislation as a first step toward cracking down on organized retail crime.

Mr. SCOTT. Thank you very much. I have no questions.

The gentleman from Texas, the gentleman from North Carolina, and the gentleman from Ohio; we have been joined by Mr. Chabot.

Thank you.

Mr. ELLSWORTH. Thank you very much.

Mr. SCOTT. If the next panel will come forward.

As you are being seated, I will begin to introduce the witnesses.

Our first witness will be Frank Muscato, Organized Retail Crime Field Investigator for Walgreens pharmacies. In addition to investigating retail crime, his duties include assisting in legislative issues that pertain to loss prevention; and he has helped draft more than 17 loss prevention proposals for State legislatures.

Before joining Walgreens, he spent 25 years at the Dallas Police Department's Intelligence Division as a Case Supervisor. Upon his retirement in 1994, he was recruited by Walgreens to assist in creating the first Organized Retail Crime Investigative Division and supervise its loss prevention team.

Our second witness will be introduced by the distinguished gentleman from Florida, Mr. Putnam.

Mr. PUTNAM. Thank you, Mr. Chairman. And I want to thank the Ranking Member, Mr. Gohmert, for the privilege of temporarily joining the Judiciary Committee's Subcommittee on Crime long enough to introduce a terrific witness.

As a Representative of Florida's 12th District, I am honored to introduce my sheriff, Sheriff Grady Judd, to your Subcommittee. Sheriff Judd is a leading force in the Nation when it comes to combating organized retail crime. In the past year, he added to his long record of accomplishment one of the largest organized retail crime busts to date.

In January this year, after months of working across a number of jurisdictions, partnering with the private sector and tracking the perpetrators, the Polk County sheriff's office arrested 18 people with ties to a crime ring that was responsible for an estimated loss of $100 million to retailers. That is just in Polk County, Florida. He was joined in that effort by Detective Ostojic, who was just recognized as Law Enforcement Officer of the Year by the Florida Retail Federation.

Organized retail crime threatens the very soundness of commerce in our communities. The criminals and the tactics they use to steal consumer products generally fly under the radar of law enforcement at a significant cost to retailers and, therefore, to consumers. The FBI has reported that such organized crime costs retailers $30 billion every year. You don't have to be in law enforcement to know that the funds generated from these crimes are used to proliferate additional criminal activity, possibly gang related.

Law enforcement and retailers need the support of Congress to pursue organized retail criminals with the proper tools to close down their operations. I am pleased to join Mr. Ellsworth as a cosponsor of his Organized Retail Crime Act, and I support my sheriff's efforts to go after these illusive criminals and to make the public more aware about the pervasive effects of organized retail crime.

Our sheriff is a dynamic leader in central Florida, and his efforts and his accomplishments are a testament to his commitment to the safety and security of our community. I know that his testimony would be enlightening to your Subcommittee as you attempt to prepare the best possible legislative remedy to this problem.

I applaud you, Mr. Chairman, for bringing in our local experts who are on the front lines of this battle. And I thank you for the privilege of introducing him.

Mr. SCOTT. Well, thank you.

And welcome, Sheriff.

Our next witness will be Steve DelBianco, the Executive Director for NetChoice, a coalition of trade associations and e-commerce leaders. He is a well-known expert on Internet governance, online consumer protection and Internet taxation. He has testified several times before the United States Congress and is a frequent witness

in State legislatures and represents NetChoice in Internet governance meetings around the world.

Before joining NetChoice, he founded and was President of Financial Dynamics, an information technology consulting firm delivering financial and marketing solutions. He has degrees in engineering and economics from the University of Pennsylvania, and an MBA from the Wharton School of Business.

Our next witness will be Ed Torpoco, a Senior Regulatory Counsel for eBay. He provides legal counsel to eBay's policymakers regarding the company's efforts to keep the eBay marketplace a safe place for consumers.

Prior to joining eBay in 2006, he was a State and Federal prosecutor for 7 years, having worked in the Los Angeles District Attorney's Office, U.S. Department of Justice and U.S. Attorney's Office in northern California. He has a bachelor's degree from Georgetown University and Juris Doctorate from Harvard Law School.

Our final witness will be Joseph LaRocca, Vice President of the National Retail Federation. He has over 20 years of retail loss prevention security and operations experience. In January 2005, he joined the National Retail Federation as Vice President for Loss Prevention, working with retailers, small developers and government agencies to develop programs and content.

He serves on several U.S. Department of Homeland Security committees, is a member of the International Association of Chiefs of Police and works closely with Federal, State and local law enforcement agencies.

Mr. SCOTT. Each of our witnesses' written statements will be made a part of the record in its entirety.

I would ask each of our witnesses to summarize your testimony in 5 minutes or less. And to help you stay within that time, there is a timing device that is right behind your display on that side. It is back there. The timing light will start off green, will go to yellow when 1 minute is remaining, and to red when 5 minutes are up.

We begin with Mr. Muscato.

TESTIMONY OF FRANK MUSCATO, ORGANIZED RETAIL CRIME FIELD INVESTIGATOR, WALGREENS, DEERFIELD, IL

Mr. MUSCATO. Good afternoon, Chairman Scott and Ranking Member Gohmert and Members of the Subcommittee. My name is Frank Muscato. I am an Organized Retail Crime Investigations Supervisor with Walgreens, and I thank you for the opportunity to appear here at the Subcommittee as it examines the significant problem of organized retail crime, we refer to as ORC.

Walgreens operates over 6,300 drugstores in 49 States, the District of Columbia and Puerto Rico and serves 1.8 billion customers nationwide annually. I am here today to testify on behalf of Walgreens and the Coalition Against Organized Retail Crime. I thank you for your interest in this issue and for introducing H.R. 6713. I would also like to thank Congressmen Ellsworth and Jordan for their work on H.R. 6491.

I realize my time is limited so I will refer you to my written testimony for a more detailed discussion.

ORC is a significant problem that victimizes diverse segments of the retail community from supermarkets to drugstores to department stores and specialty shops. Unlike shoplifters, ORC gangs are sophisticated criminal enterprises that steal large quantities of merchandise with the intent of reselling those goods for profit.

ORC is not what is commonly known as shoplifting. It is not an opportunistic theft where merchandise like food and clothing are stolen for personal use. Rather, ORC is an extremely sophisticated and coordinated crime. It involves highly structured organizations and gangs that hire and control teams of thieves to steal merchandise in large quantities. These teams move from store to store, city to city and State to State, employing sophisticated tactics and methods to allude store security, fraud prevention tools and law enforcement. This is a Federal problem with all the multijurisdictional law enforcement challenges that come with it.

Walgreens has been a leader in advocating ORC legislation in States and supports making ORC a Federal criminal offense. We understand the first line of defense against ORC is in our stores and within our distribution channels. For this reason, Walgreens in 2003 created an Organized Retail Crime Division that is devoted to working both State and Federal ORC cases in collaboration with law enforcement. Our 6,300 stores operate under a comprehensive loss prevention program.

I would like to briefly outline one example where the Federal law would have helped in the prosecution of a case. It involves a grocery store up in Chicago. In collaboration with the Cook County Sheriff's Department, we observed more than 52 boosters in a 2-hour period enter the grocery store, carrying what appeared to be stolen property and many leaving, counting money as they walked out. We discovered the store owner was selling these stolen goods to other businesses there in Chicago and out of State.

Because of the limited resources and jurisdictional issues, the out-of-State case were not pursued. If ORC was identified as a specific crime in Title 18 of the Criminal Code, a Federal agency may have been more inclined to pursue that case. H.R. 6491 focuses the theft and sale of stolen goods obtained through ORC.

There are several provisions Walgreens believes would be particularly impactful on combating this crime. The bill would explicitly criminalize the transportation, sale and receipt of stolen goods through ORC for the first time under Title 18. The bill would also criminalize its facilitation of ORC, including the facilitation through the operation of an online marketplace.

Additionally, as I understand it, the bill will impose stronger criminal penalties and sentences for ORC. It is organized crime and should be treated as such with stronger penalties and enforcement.

H.R. 6713 focuses on the serious problem of e-fencing. This bill requires certain information about high-volume sellers to be available for criminal investigations. Similarly, the online marketplace would be required to take down items where there is good—that they know were obtained unlawfully.

In summary, ORC poses harm to consumers, retailers of every kind and deprives local and State governments of valuable and needed tax revenue. Walgreens supports legislation that makes

ORC a Federal crime and targets the facilitator and the tools used to conduct these unlawful activities. Walgreens supports efforts to reduce ORC and all the various channels used to dispose of this illegally acquired merchandise.

I thank you for the time, the opportunity to speak before your Subcommittee; and I look forward to your questions and working with the Subcommittee on this legislation. Thank you.

Mr. SCOTT. Thank you.

[The prepared statement of Mr. Muscato follows:]

PREPARED STATEMENT OF FRANK MUSCATO

I. INTRODUCTION

Good afternoon Chairman Scott and members of the Subcommittee. I am Frank Muscato, Organized Retail Crime Field Investigator with Walgreens, and I thank you for the opportunity to appear before the Subcommittee as it examines the significant problem of organized retail crime ("ORC"). Walgreens operates over 6,300 drugstores in 49 states, the District of Columbia and Puerto Rico and serves 1.8 billion customers nationwide annually. I have spent the last 15 years working ORC cases after retiring from a major metropolitan police department following 25 years of service. I am here today testifying on behalf of Walgreens, and the Coalition Against Organized Retail Crime. Mr. Chairman, I thank you for your interest in this issue, for convening this hearing to explore legislative means of addressing this growing problem, and for introducing your bill, H.R. 6713, the "E-fencing Enforcement Act." I would also like to take this opportunity to commend Congressmen Ellsworth and Jordan for their work on H.R. 6491, the "Organized Retail Crime Act."

My testimony today will cover three issues:

- First, I will describe the nature and scope of the problem of ORC;
- Second, I will describe more specifically ORC's impact on Walgreens and our customers, as well as set forth the broad fraud prevention efforts we undertake; and
- Finally, I will provide specific comments on the proposed legislation.

II. NATURE OF ORGANIZED RETAIL CRIME

ORC is a significant problem that is victimizing diverse segments of the retail community from supermarkets and drug stores to department stores and specialty shops. Unlike shoplifters, ORC gangs are sophisticated criminal enterprises that steal large quantities of merchandise from retail stores with the intent to resell the goods for a profit. Products most often stolen by professional rings include: infant formula, over-the-counter medications, razor blades, batteries, DVDs, and CDs. These criminals also target other retailers for higher-end items such as designer clothes and accessories, household appliances, and consumer electronics. The more sophisticated rings often engage in identity theft, credit card fraud, gift card fraud, and returns fraud that amount to millions in lost revenue. Equally alarming are the possible health and safety consequences for consumers who unknowingly purchase merchandise acquired through illegal means—particularly over-the-counter medications and other consumables.

ORC rings frequently travel to a designated area and methodically steal merchandise from a number of stores over a short period of time. The stolen merchandise is then moved and sold through fencing operations, flea markets, pawnshops, Internet auction sites and swap meets. Merchandise also may be fed back through the supply chain by re-packagers and illegitimate wholesalers who move the products into the distribution system, rerouting the items to unsuspecting retailers and consumers.

As you can see, ORC is not what is commonly known as shoplifting. It is not opportunistic theft where merchandise like food, clothing, sundries or music are stolen for personal use. Rather, ORC is an extremely sophisticated and coordinated crime. It involves highly structured organizations and gangs that hire and control teams of thieves to steal merchandise in large quantities. These teams move from store-to-store, city-to-city, and state-to-state employing sophisticated tactics and methods to elude store security, fraud prevention tools, and law enforcement. Make no mistake about it, ORC rings have networks throughout the United States, and they distribute their stolen goods through interstate commerce. This is a Federal problem with all the multijurisdictional law enforcement challenges that come with it.

The FBI estimates that ORC costs retailers $30 billion annually. This type of crime also deprives state and local governments of hundreds of millions in lost sales tax revenues. Losses resulting from ORC also increase costs to consumers—every time a truckload worth of over-the-counter medication or baby formula is stolen, our customers ultimately incur the cost of products that must be replaced. Proceeds from ORC are often used to finance other criminal enterprises such as drug trafficking, terrorism, and gang activity. In fact, the low risk—high return nature of this crime is attractive to street gangs. Many gangs even finance the travel and expenses for illegal immigrants and put them to work stealing from retailers. Some crime rings, in an attempt to protect their interests, have resorted to murdering witnesses and plotting to murder law enforcement agents and federal prosecutors. ORC has evolved into serious, organized criminal activity that impacts consumer welfare and our national economy as a whole.

Retailers have identified the hierarchy consisting of "boosters" and "fences" within the ORC rings. "Boosters" are those individuals who actually steal the merchandise. There are three levels of boosters: "level 1" is a person who steals close to home, is typically dependent on drugs or alcohol, and sells the goods the day they are stolen to support a habit; "level 2" boosters are persons that work with accomplices who travel to nearby states to steal and there is usually a leader of the group who sells the goods to a "fence"; "level 3" boosters travel in organized groups, cover large geographical areas and can be on the road for weeks at a time—these groups are often organized by a "fence". A "fence" buys stolen goods from the boosters and is also identified in three distinct levels. A "level 1" fence often controls the three levels of boosters, they purchase goods for 20–30 percent of retail value and often have small retail businesses where boosters brings the merchandise; a "level 2" fence typically controls 10–20 different "level 1" fences and many "level 2 and 3" boosters—they often work out of small warehouses where product is cleaned, stored and sold to "level 3" fences for 50–60 percent of the retail value; "level 3" fences redistribute stolen retail goods, they have several "level 2" fences working for them and buy millions of dollars worth of stolen property every month—they operate large warehouses where stolen goods are mixed with legitimate product and sold back to some retailers through the supply chain.

I would like to share a few examples of recent large-scale ORC cases reported in the press to illustrate the nature of this crime. As you heard from Sherriff Grady Judd, in early 2008 authorities broke up an enormous ORC ring in Polk County, Florida. What started as a single shoplifting investigation led to an 18-member organized enterprise that stole up to $100 million in over-the-counter medications and health and beauty aids. This criminal enterprise operated for at least five years under the control of ringleaders, which directed a sophisticated theft ring that stole from convenience and grocery stores statewide. Unfortunately, such incidents are all too common and not isolated. In June of this year, state and federal law enforcement broke up two ORC rings in the San Jose / San Francisco Bay area, arresting 17 members and on the day of the bust, recovered over $5.5 million dollars worth of stolen property. These rings employed hundreds of shoplifters to steal razor blades, baby formula, tooth whitening strips, and over-the-counter medications for sale through storefronts, flea markets, and the Internet.

In Texas, Walgreens and other retailers collaborated with law enforcement on a case that involved a fence who was buying $50,000 to $100,000 worth of stolen baby formula, diabetic test strips and other over-the-counter medications every single day. The stolen product was being stored in a mini warehouse with no temperature controls in an area where temperatures routinely exceed 100 degrees during the summer months. The merchandise was being sold back to unsuspecting retailers and fenced over the internet. This type of activity puts the public's health and safety at risk as merchandise like baby formula and OTC medications can easily degrade. The fence was selling this product to an out of state fence that operated a distribution warehouse.

In 2002, Walgreens and other retailers were instrumental in investigating one of the first groups identified by law enforcement as an ORC ring, in this case members of the same family. They were operating a large network of ORC repack and redistribution warehouses. Members of this crime ring fenced more than $78 million dollars worth of stolen property to and from Kentucky through Ohio, Texas, Utah, California, Florida, New York, New Jersey and North Carolina. This investigation led to a conviction. In 2004, the FBI investigated and charged other members of the same family who continued to conduct the same type of business.

Law enforcement was ultimately successful in these cases, but this is the exception not the rule. Too often, cases are abandoned due to lack of resources and jurisdictional challenges. The legislation currently being considered would make ORC a

federal criminal offense which would be extremely helpful in prosecuting more of these large, mulitjurisdictional cases.

III. IMPACT OF ORGANIZED RETAIL CRIME

As previously mentioned, Walgreens operates over 6,300 community pharmacies in 49 states, the District of Columbia and Puerto Rico. ORC impacts us throughout the country and costs Walgreens in excess of $300 million dollars a year. Walgreens has been a leader in advocating for ORC legislation in the states and supports making ORC a federal criminal offense, including criminalizing those activities that clearly facilitate the furtherance of ORC.

We understand the first line of defense against ORC is in our stores and within our distribution channels. For this reason, in 2003 Walgreens created an Organized Retail Crime Division that currently consists of six experienced investigators solely devoted to working both state and federal ORC cases in collaboration with law enforcement. We have a robust fraud prevention program that includes upgrading the cameras in our stores to "state of the art" digital systems, in-store security, anti-theft tagging, retail secure devices and employee training. We developed a sophisticated "computer dashboard" which helps our loss prevention personnel track stolen property using the "top 25 stolen items list." This list is continually updated using our perpetual inventory system. Although our fraud prevention program has proven successful and effective, legislation is necessary to supplement our efforts and target facets of the criminal activity beyond our reach. Without this legislation, cases involving multiple jurisdictions and facilitators will continue to be a challenge to prosecute.

I would like to briefly outline two examples where this federal law would have helped in the prosecution of the cases. The first involves a small grocery store in Chicago. In collaboration with the Cook County Sheriff's Department we observed more than 52 boosters enter the grocery store with what appeared to be stolen property and leave counting money as they walked out. An informant admitted on tape that he would travel to Wisconsin, Indiana, Michigan, and Iowa to steal property and sell thousands of dollars worth of goods to this grocery store every day. We discovered the store owner was selling stolen goods to other business in Chicago and out of state. Because of limited resources and jurisdictional issues the out of state cases were not pursued. If ORC was identified as a specific crime in Title 18 of the criminal code, we could have taken the case to a federal agency to pursue further investigation and/or prosecution.

The second case occurred this year in New York City. Three small "mom & pop" stores were identified by an informant as buying stolen retail property. NYPD worked this case and was able to infiltrate the businesses. After several months of investigation and surveillance the stores were busted and proprietors arrested. At one of the stores, police recovered more than $600,000 in stolen property that was boxed up and ready for shipment to out of state locations. The Queens County Attorney working this case said the department could not pursue the case further because of budget and jurisdictional issues. Again, if ORC was identified as a specific crime in the criminal code we could have pursued the case federally.

IV. SPECIFIC COMMENTS ON PROPOSED LEGISLATION

Mr. Chairman, as you know, there is no federal statute on the books to specifically address ORC. We are hopeful that legislation in this area will result in greater awareness of this crime by both law enforcement and prosecutors alike. Today, ORC, like many property crimes, goes unrecognized and unpunished. Those who are caught often get away with only a "slap on the wrist" due to lagging investigative resources and federal prosecutors who may be unwilling to take complicated cases if high-dollar thresholds are not met. We are hopeful provisions in the law will serve to reduce the transfer and sale of stolen goods obtained through ORC by applying more scrutiny to those who may facilitate this crime.

As you know, two bills, H.R. 6491 and H.R. 6713, are now pending before this Subcommittee. H.R. 6491, the "Organized Retail Crime Act," focuses on ORC itself and the sale of stolen goods obtained through ORC. There are several provisions Walgreens believes will be particularly impactful on combating this crime. First, the bill would explicitly criminalize the transportation, sale, and receipt of goods and services through ORC for the fist time under Title 18. The bill would also criminalize the facilitation of ORC, including facilitation through the operation of an online marketplace. It is our strong belief the facilitation provisions will help ensure both individuals and entities are held accountable for perpetuating this criminal activity. In the case of online marketplaces, this provision will require them to take

reasonable steps to gather information about sellers, assist retailers in investigations, and affirmatively limit the sale of stolen goods.

We also strongly support the provision in H.R. 6491 that amends the existing "access device" fraud statute to include devices commonly used to commit retail fraud such as gift cards, universal product codes and radio frequency identification transponders. By specifically enumerating these devices in the code, law enforcement will be able to more efficiently prosecute crimes involving the unlawful production and use of these devices. Additionally, as I understand it, the bill will impose stronger criminal penalties and sentences for ORC. As indicated earlier in my testimony, ORC is not garden variety shoplifting. It is organized crime and should be treated as such with stronger penalties and enforcement.

The second of the two bills, H.R. 6713, the "E-fencing Enforcement Act," focuses on the serious problem of "e-fencing." We thank the Chairman for his recognition that the problem of "e-fencing" is getting worse, not better. We believe status quo will not solve the problem and this bill takes the appropriate approach to limiting "e-fencing." Like H.R. 6491, this bill would require certain information about high volume sellers be available to retailers for criminal investigations. Similarly, an online marketplace would be required to take down items where there is good reason to know they were not acquired lawfully.

V. CONCLUSION

In summary, ORC poses harm to consumers, retailers of every kind, and deprives local and state governments of valuable and needed tax revenue. Walgreens supports legislation that makes ORC a federal crime and targets the facilitator and tools used to perpetrate these unlawful activities. Walgreens supports efforts to reduce ORC in all of the various channels used to dispose of the illegally acquired merchandise. A significant portion of ORC continues to be furthered through physical markets, such as flea markets, pawnshops, swap meets, and other large-scale distribution networks. For this reason, we hope legislation ultimately enacted by Congress includes provisions that go after all the channels used to dispose of stolen merchandise, and addresses the unique challenges of conducting investigations related to "e-fencing."

I thank you for your time and the opportunity to speak before your Subcommittee. I look forward to your questions and working with the Subcommittee on this legislation.

Mr. SCOTT. Sheriff Judd.

TESTIMONY OF GRADY JUDD, SHERIFF, POLK COUNTY SHERIFF'S OFFICE, BARTOW, FL

Sheriff JUDD. Good afternoon, Mr. Chairman and Members of the Subcommittee. It is my pleasure to be with you today to talk about the very serious and far-reaching ramifications of organized retail crime.

I appreciate my Representative, Adam Putnam, introducing me today.

As Sheriff of Polk County, my agency learned of a so-called "simple shoplifting incident" that occurred on June 22, 2007. When the incident crossed Detective Jim Ostojic's desk, he didn't dismiss it as just another retail theft, but took the time to investigate.

Seven months, a task force involving over 100 local and statewide law enforcement officers and retail loss crime prevention specialists, multiple old-fashioned stakeouts, several undercover purchases, numerous tracking devices, two storage warehouses, four flea markets, two Internet sites, five search warrants and one consent to search later, detectives uncovered a 5-year-old organized crime ring which resulted in approximately $100 million worth of stolen property.

Operation Beauty Stop culminated in the arrest of 18 individuals. For these criminals, the profits were high and the risks were very low.

Retailers suffer hefty losses as a result of organized retail crime. However, this crime does not affect retailers alone. It has a major impact on consumers, our governments and our society's quality of life. The quality of life we, as Americans, enjoy is compromised by this alleged simple act of theft because, you see, these insignificant shoplifters are all too often connected to other crimes.

Fourteen of the 18 subjects charged in our recent operation had extensive criminal histories. Along with their shoplifting charges, their past charges included felony burglary, hit and run, drug possession, carrying a concealed weapon, domestic violence, aggravated battery with a deadly weapon, robbery, lewd and lascivious conduct, resisting arrest with violence, and battery on a law enforcement officer, just to name a few. These are people who constantly live outside of society's rules.

Progressive law enforcement agencies have experienced a paradigm shift from the traditional reactive focus on crime. Years ago the New York City Transit Police began to place the focus on toll jumpers. At the time, some postulated it was unconscionable that resources were going to be wasted on such insignificant violations. However, this new focus proved very beneficial and crime decreased considerably. You see, the murders, the robbers, the thieves, the other violent criminals haunting the subway systems were the very same ones committing the minor violation of jumping the toll booths.

My agency is progressive in following a similar process called ProCap, proactive community attacking problems, based on zero tolerance for crime, even insignificant crime. Our philosophy is to arrest all on arrestable offenses. We dig into cases in order to prevent further crime and not enable it. As a result to our paradigm shift, major crime has decreased 37 percent in unincorporated Polk County.

Operation Beauty Stop was so intensive it was a multiple jurisdictional effort that even needed the Federal agencies to become involved. As a matter of fact, the illicit criminal organization uncovered during this investigation had tentacles throughout other States to include North Carolina, South Carolina and New York.

These criminals operate secure in the knowledge that local and State law enforcement agencies have neither the resources nor the jurisdiction to expose the full extent of their operations. Criminals do not limit themselves to jurisdictional lines for the convenience of law enforcement. Crimes perpetrated in this operation crossed all city, county and State lines.

This proposed legislation would assist with the ease of prosecution for crimes that occur across jurisdictional lines and ensure the significance of these crimes is realized through standardized charges and sentencing across our great country. For these reasons, I am in full support of the Organized Retail Crime Act of 2008.

Those involved in organized retail crime use every means to support their low-risk, high-profit criminal activity. The Internet has helped facilitate this illegal activity. The Internet adds a new dynamic to law enforcement; I liken it to the Wild West with very lit-

tle regulation or enforcement and many prospects. Along with the vast benefits and endless opportunities derived from the Internet come the endless opportunities to perpetuate crimes and victimize our constituents in new ways.

The Internet has indeed become the new frontier for crime. As a result, we must be prepared with resources to combat the new criminal tactics. I am in full support of the E-fencing Enforcement Act of 2008, not for the sake of regulation, but to require responsible business practices that protects consumers and our governments.

I must tell you as I close today that organized retail crime is a sinister crime, negatively impacting our economy and directly tied to more violent and dangerous crimes. There is every indication that some of these criminal groups are even involved in funding terrorism. Please look beyond the tentacles to the monster to which they are attached.

Thank you.

Mr. SCOTT. Thank you.

[The prepared statement of Sheriff Judd follows:]

PREPARED STATEMENT OF GRADY JUDD

House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security

Hearing on H.R. 6713, the "E-fencing Enforcement Act of 2008," H.R. 6491, the "Organized Retail Crime Act of 2008," and S.3434, the "Combating Organized Retail Crime Act of 2008."

Monday, September 22, 2008

Grady Judd
Sheriff, Polk County, Florida

Statement in Support

Good afternoon, Mr. Chairman and members of the committee. My name is Grady Judd and I serve as the Sheriff of Polk County, Florida. I am pleased to have this opportunity to appear before you today to discuss the serious issue and far-reaching ramifications of Organized Retail Crime.

As Sheriff of Polk County, my agency learned of a simple shoplifting incident that occurred on June 22, 2007. When the incident report crossed Detective Jim Ostojic's desk, he didn't dismiss it as just another retail theft, but took the time to investigate. Seven months, a task force – (involving over 100 local and statewide law enforcement officers and retail loss prevention specialists), multiple old-fashioned stakeouts, several undercover purchases, numerous tracking devices, two storage warehouses, four flea markets, two Internet sites, five search warrants, and one consent to search later, detectives uncovered a five-year organized crime ring resulting in an estimated $60 - $100 Million loss to retailers and consumers. Operation Beauty Stop culminated in arrest warrants for 18 individuals. For these criminals, the profits were high and the risks low.

Retailers suffer hefty losses as a result of organized retail crime. However, this crime does not affect retailers alone; it has a major impact on consumers, our governments, and our society's quality of life. Our consumers are put at risk by uncontrolled redistribution and unsafe storage of stolen products and are forced to pay for these criminals' conduct at the cash register. Our governments are negatively impacted by the loss of sales and income tax revenues from these stolen products and the cost it takes law enforcement to investigate such crimes. The quality of life we, as Americans, enjoy is compromised by this "simple act of theft;" because, you see, these insignificant shoplifters are all too often connected to other crimes. Fourteen out of the 18 subjects charged in our recent operation had extensive criminal histories. Along with "shoplifting," their past charges included felony

burglary, hit and run, drug possession, carrying a concealed weapon, domestic violence, aggravated battery with a deadly weapon, robbery, lewd & lascivious conduct, resisting arrest with violence, and battery on a law enforcement officer – to name a few. These are people who constantly live outside of society's rules.

Many law enforcement agencies have experienced a paradigm shift from their standard focus on violent crime. Years ago, the New York City Transit Police began to place a focus on toll jumpers. At the time, some postulated it was unconscionable that resources were going to be "wasted" on such insignificant violations. However, this new focus proved very beneficial; crime decreased considerably. You see, the murderers, robbers, and other violent criminals haunting the subways were the same ones jumping the toll booths.

My agency followed a similar process called "PROCAP" (Proactive Community Attack on Problems), based on zero tolerance for crime – even seemingly insignificant crime, much like the New York City Transit Police. Our philosophy is to arrest on all "arrestable" offenses; we dig into cases to prevent further crime and not enable it. As a result of our paradigm shift, major crime has decrease 37% in unincorporated Polk County.

Operation Beauty Stop was so intensive and multi-jurisdictional that federal agencies also became involved. As a matter of fact, the illicit organization uncovered during our investigation has tentacles linked to multiple jurisdictions across the country – in states like North Carolina, South Carolina, and New York. These criminals operate secure in the knowledge that local and state law enforcement agencies have neither the resources nor jurisdiction to expose the full extent of their criminal operations. Criminals do not limit themselves to jurisdictional lines for the convenience of law enforcement investigation or prosecution. Crimes perpetrated in this operation crossed city, county, and state lines. This proposed legislation would assist with ease of prosecution for crimes that occur across jurisdictional lines and ensure the significance of these crimes is realized through standardized charges and sentencing across the country. For these reasons, I am in full support of the "Organized Retail Crime Act of 2008."

Those involved in organized retail crime use every means to support their low risk, high profit criminal activity; the Internet has helped facilitate this illegal activity. The Internet adds a new dynamic to law enforcement as we know it. I liken it to the Wild West, with very little regulation or enforcement and many prospects. Along with the vast benefits and endless opportunities derived from the Internet, come the endless opportunities to perpetrate crimes and victimize in new ways. The Internet has indeed become the new frontier for crime. As a result, we must be prepared with resources to combat these new tactics.

I am in full support of the "E-fencing Enforcement Act of 2008" not for the sake of regulation, but to require responsible entrepreneurship that protects consumers, our governments, and our quality of life. I can't tell you the vast number of criminal investigations we have cleared and arrests we have made because of similar reporting requirements the State of Florida has imposed on other industries, such as pawn brokers, scrap metal recyclers, and citrus transporters. These industries understand the need to cooperate with law enforcement. The online marketplaces must be held responsible for collateral damage that occurs by enabling criminal activity through their lack of action. Having said that, I want to make it clear that, with rare exception, online marketplaces have a reputation for cooperating with my agency whenever we need information in conjunction with an investigation. I am simply advocating that they take additional steps to partner with us for the benefit of our consumers and their customers.

We must force ourselves to look beyond the surface of shoplifting and see organized retail crime for what it really is – a large, low risk, high profit criminal operation frequently run by very astute criminals who are taking advantage of our leniency, complacency, and lack of cooperative effort. Organized retail crime is a sinister crime negatively impacting our economy and tied to more violent and dangerous crimes. Look beyond the tentacles to the monster to which they are attached.

Mr. SCOTT. Mr. DelBianco.

TESTIMONY OF STEVE DelBIANCO, EXECUTIVE DIRECTOR, NetCHOICE, WASHINGTON, DC

Mr. DELBIANCO. Thank you, Chairman Scott, Ranking Member Gohmert and distinguished Members of the Subcommittee. And thank you for holding this hearing on this important issue today.

NetChoice, as was described earlier, is a coalition of e-commerce leaders and includes the Electronic Retailing Association, AOL, eBay, Overstock.com, Yahoo! and about 18,000 small retailers who use the Internet to reach customers; and at State and Federal levels and at international venues NetChoice advocates for the integrity in expansion of e-commerce. That is why it is a NetChoice priority to improve consumer trust and confidence in the online space; and we vigorously support efforts to pursue and control and punish criminals who pollute our online markets by selling stolen or counterfeit goods.

We fully support tougher Federal penalties and increased resources and authority for law enforcement. The hearings held and the record that has been built by this Subcommittee since last October, I think they support exactly these kinds of measures. As Detective David Hill said in October, quote, "Professional thieves are getting off with little more than a slap on the wrist because many jurisdictions are still treating ORC crimes like shoplifting."

But compare the committee's record with the rhetoric that you hear from retailers today, particularly that from the National Retail Federation. Their own data show that two-thirds of the stuff that is stolen is stolen by a store's own employees and their own suppliers.

We have heard so much—and you will hear it in the testimony today—about the retailers' trouble with retail theft. But it reminds me of the saying that when someone talks so openly about their problems, they are fixing to blame somebody else. And who do they want to blame? They like to blame the Internet.

NRF's written testimony includes this: That selling online has, quote, "addictive qualities," and that the Internet is causing people who have never stolen before to take up retail theft. Mr. Chairman, that is like saying the back seat of cars causes teenage sex. Retailers are using this extreme rhetoric to justify what they really want in legislation, which we have heard repeatedly over the last 3 years in States and even on the Hill.

The retailers have one course of action and that is to take law enforcement out of the loop by granting retailers their own power to demand investigations and takedowns on the Web sites of businesses they compete with; then, of course, to sue the marketplace if they are not happy with the investigation that occurred.

Now you know how it works today. EBay, Overstock and other markets earn great marks from law enforcement for their quick and thorough attention when law enforcement is involved in asking for an investigation. Therefore, if a retailer has a good reason to suspect that a listing includes a stolen item, he need only get a law enforcement official to get on the phone, send a fax, push "send" on their button, and eBay and Overstock cooperate fully.

But all three of these bills would give retailers unique new power to force an online marketplace to interrogate their own customers about how they obtained the item they are listing for sale. This has the effect of presuming that their customers and sellers are selling stolen items unless they can prove their ownership. How could a seller prove ownership of something they have received as a gift, in a trade for cash or something for which they have lost the receipts a long time ago? The vast majority of online sellers are honest people trying to find the highest bidder for something they have and don't need or something they have acquired legally at a discounted price.

Honest citizens are understandably going to resent having to provide receipts and personal information to prove that they are not involved in organized criminal activity. They will protest, and it could be your in-boxes that get flooded with angry complaints if this becomes law.

Now, to avoid this potential abuse that I am speaking of, Congress should preserve the role of law enforcement in the investigations that a retailer might demand from businesses that they compete with. And it is frankly not quite enough police involvement to just let a retailer use a police report that they filed as much as a year ago and then use that over and over again any time they see a listing for something of a similar description. That leaves law enforcement out of the loop between competitors. I think that someone from law enforcement must review a listing and ask the marketplace to investigate the way it works today.

Now, the retailers are understandably frustrated by their ORC problems, but that is no reason to cut police out of the loop when we are investigating criminal activity. So I have tried here and in my written testimony to alert the Subcommittee to the risks in this legislation, that is, the risk of abuse and harassment of e-markets by competing retailers.

And I guess I don't worry so much about loss prevention professionals like Mr. Muscato here at the table. I don't think he would abuse the law. But think for a moment about a small retail store manager who is trying to maintain margins in a declining economy, and he has got to be incredibly frustrated about losses that are due to theft, in most cases by his own employees and suppliers. So if a batch of items are stolen from his store and he later sees the same items, similar items, online, he is going to pull the trigger on the bill that you are giving him and he is going to use that power to force the online marketplace to interrogate its seller. And the retailer has no cost, he has no downside at all, and he can actually reuse the same investigation notice over and over again for every listing he sees on the Internet.

The legislation could escalate the conflict—in closing here, it could escalate the conflict between retailers and online marketplaces. What is really needed right now is cooperation, because these parties all want to reduce the amount of crime and increase the integrity of what happens online.

In your hearing last October Safeway's Karl Langhorst said that Safeway was forming, quote, "unprecedented alliances" with other retailers to combat ORC. Well, Safeway should build unprecedented alliances with online markets, too, instead of blaming and

battling them. I understand the frustrations the retailers have but that doesn't justify the soliciting of blame. These bills were designed for loss prevention, but they include dangerous tools for competition prevention.

I close by thanking the Committee for considering alternative views and I look forward to your questions.

Mr. SCOTT. Thank you.

[The prepared statement of Mr. DelBianco follows:]

PREPARED STATEMENT OF STEVE DELBIANCO

Chairman Scott, Ranking Member Gohmert, and distinguished members of the Subcommittee: My name is Steve DelBianco, and I would like to thank you for holding this important hearing on the e-Fencing Enforcement Act and related legislation.

I serve as Executive Director of NetChoice, a coalition of trade associations and e-commerce leaders such as AOL, eBay, IAC, Overstock.com, and Yahoo!, plus 18,000 small online retailers. At the state and federal level and in international venues, NetChoice advocates against regulatory barriers to the expansion and integrity of e-commerce.

It's a NetChoice priority to improve consumer trust and confidence in e-commerce, so we naturally support efforts to pursue and punish criminals who pollute online marketplaces by selling stolen or counterfeit goods. Unfortunately, the measures proposed in HR 6491, HR 6713 and S 3434 go too far in two ways: imposing unprecedented liability and unworkable burdens upon online marketplaces.

THE HEARING RECORD DOES NOT JUSTIFY IMPOSING HARSH LIABILITIES AND BURDENS ON ONLINE MARKETPLACES.

We appreciate the chairman's efforts to gather substantial data and testimony on the issue of organized retail crime (ORC). However, nothing in the record thus far would justify imposing criminal liability, civil lawsuits, and new burdens on online marketplaces, especially when these impacts could be triggered by complaints from competing retailers.

In October 2007, this subcommittee heard testimony on ORC, and all witnesses made the case for enacting tougher federal penalties and additional law enforcement attention. As Maryland Police Detective David Hill told this subcommittee, "professional thieves are getting off with little more than a slap on the wrist because many jurisdictions are still treating ORC crimes as shoplifting cases."

In that same hearing, loss prevention officials from Safeway and Target said they needed more information about sellers and listings so they could convince law enforcement officials to investigate. During Q&A, Target's Brad Brekke summed up with, "We're just looking for transparency." And Safeways's Mr. Langhorst said, "We want eBay to tell us who the seller is."

It's therefore understandable why ORC legislation would include tougher penalties for those convicted of crimes, and better transparency and information exchange between retailers and online marketplaces. However, these bills go much further, handing competing retailers a blunt instrument to harass online marketplaces they compete with. A stereo retailer, for instance, could tell Amazon or eBay, *"Those speakers are listed so cheap that I just KNOW they are stolen."* Never mind that big-box retailers fill our weekend newspapers with ads offering deep discounts to draw shoppers into their stores, too.

These bills threaten online marketplaces with *criminal penalties* and even *forfeiture of assets* if they fail to interrogate people about how they acquired an item they want to list for sale. Imposing criminal penalties and asset seizure on an online marketplace is unprecedented at the federal or state level, and would be the harshest *anti* e-commerce law of any major industrialized country.

Specifically, HR 6713, the E-Fencing Enforcement Act, would require marketplaces to conduct investigations if a retailer provides a police report—dated anytime in the last year—claiming theft of goods matching the description of items offered in an online listing. A big-box chain could file a single police report for theft of an item, then use this report all year long to force any online marketplace to investigate every listing of similar items—without any involvement of law enforcement officials.

All three ORC bills would give retailers the power to force online marketplaces to interrogate sellers about where and how they obtained an item they're listing for sale. This would have the effect of presuming that sellers are listing stolen items—

unless they can prove their ownership. But how would a seller prove ownership of items received as gifts, or something received in a trade? What about cash transactions, or purchases where original receipts were lost long ago?

The vast majority of online sellers are honest people trying to find the highest bidder for something they have legitimately acquired. Honest citizens and businesses will naturally resent the presumption that they acquired their goods through organized criminal activity. When sellers protest about having to prove their innocence, online marketplaces would surely reply that Congress passed a new law requiring this unprecedented interrogation. *Your inboxes could be flooded with constituent complaints.*

THE CURE FOR ORC SHOULD *NOT* BECOME A TOOL FOR *AUTHORIZED RETAIL HARASSMENT* OF ONLINE MARKETPLACES.

Forcing online marketplace operators to interrogate innocent sellers is just one aspect of what could become "authorized retail harassment." A flood of new lawsuits is another potential for abuse by retailers.

Specifically, HR 6491 grants retailers the ability to sue online marketplaces in any district court for failing to "expeditiously investigate" a listing based on a retailer notification, even if no law enforcement official ever reviewed the actual listing. After challenging a seller's honesty and reviewing his reply, a marketplace might reasonably conclude that the seller's listing has no connection to organized retail crime. However, a retailer could *still* sue the marketplace for failing to remove a listing, based only on the retailer's belief that the marketplace had "reasonable cause to know" that an item involved organized retail crime.

These ORC bills contain a "notice and take down" regime that's markedly different from what Congress included in another law designed to help property owners stop online theft. The Digital Millennium Copyright Act (DMCA) includes safeguards to prevent abuse of the powers granted to content owners. DMCA notices are submitted under penalty of perjury and must specifically identify the location of allegedly illegal items. Neither of the two House ORC bills include any sanction whatsoever on retailers who could 'game the system' by providing incorrect notices.

The DMCA also includes a mechanism to contest incorrect allegations. Again, these ORC bills provide no such mechanism for online marketplaces to push-back on retailers who repeatedly use a single police report to harass multiple sellers of similar goods. Retailers can harass marketplaces with information requests about sellers—based on undocumented suspicion or a year-old theft of similar items.

The combined threat of legal action combined with customer data and interrogation requirements are burdensome enough on large marketplaces, but would effectively strangle small businesses. NetChoice member Dawdle.com is a small online marketplace for new and used videogames, with 5 employees operating out of Chicago. According to founder Sachin Agarwal, "I can't imagine how I could afford to stay in this business if overzealous retailers swamped me with investigation and take-down requests." Smaller companies simply do not have in-house attorneys or financial resources to conduct legal investigations and answer to multiple lawsuits.

Simply put, these ORC bills create too many opportunities for abuse by retailers who compete with online marketplaces.

STATES HAVE REJECTED LEGISLATION THAT WOULD BLAME E-COMMERCE FOR RETAILERS' ORC PROBLEMS.

Legislation imposing these kinds of obligations on online marketplaces has been introduced in several state legislatures. Colorado, Maryland, New Jersey, New York and Wisconsin have seen retailer-backed bills targeting online resale of merchandise such as baby food, cosmetics, drugs, infant formula and batteries. In spite of intense lobbying by big-box chains, none of these states has passed any version of the retailers' preferred legislation.

In addition, the bi-partisan National Conference of State Legislatures (NCSL) has soundly rejected this approach. At its annual meeting in August 2007, the National Retail Federation (NRF) attempted to modify NCSL policy by adding language that effectively blamed online markets for theft by suppliers, employees, and shoplifters: *"the Internet also has become a tool of Organized Retail Crime gangs that may sell stolen merchandise and gift cards online."* The retailers' attempt to blame e-commerce for their theft problems was overwhelmingly rejected by state legislators at NCSL, by a vote of 45–0.

DOES CONGRESS REALLY WANT TO MAKE WEBSITES LIABLE FOR CONTENT AND CONDUCT PROVIDED BY THIRD PARTIES?

A law that creates legal liability for online marketplaces for the wrongdoings of others violates the intent—if not the letter—of an existing federal law, Section 230 of the Communications Decency Act. Section 230(c) explicitly protects interactive computer services from liability for content provided by third parties.

When Congress passed Section 230, it decided to promote the continued development of the Internet and online services. Congress also sought to "preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." [47 U.S.C. Sect. 230(b)].

Legislation that creates new liabilities on Internet marketplaces for the bad actions of third parties chips away at the goals expressed by Congress in Section 230. The continued development of a competitive marketplace for online commerce would be at risk, as would long-established protections for ISPs, online services, and the entire Internet community. The combined effect of new liabilities and affirmative obligations would result in an unacceptable chilling of online innovation and competition.

THE HOUSE BILLS UNFAIRLY DISCRIMINATE AGAINST ONLINE MARKETPLACES.

Nobody doubts that shoplifting is a serious problem for retailers. And nobody faults retailers for doing whatever they can to deal with inventory losses. But trying to shift blame and burdens to online marketplaces is the wrong approach. It may be true that thieves are tempted to fence their stolen goods online, but shoplifting was a big problem for retailers long before the Internet ever appeared on the scene.

A witness in your October 2007 hearing quoted a 2005 report from this Committee, finding that stolen goods are fenced through multiple channels, including beauty shops, gas stations, flea markets, pawn shops, truck stops, newspaper classified ads, overseas buyers, plus several kinds of Internet sites. While the Senate bill applies to both online and offline resellers, both House bills impose obligations and liability *only* upon online marketplaces. Newspaper classifieds and the many off-line resale marketplaces are not covered by the two House bills.

While the two House bills discriminate against the online channel, all three ORC bills would foster state laws that could create compliance burdens on online businesses that usually serve customers in all 50 states. Different—potentially conflicting—new state laws could create impossibly complex investigation requests and a flood of retailer lawsuits. In last October's hearing, several witnesses called for a federal solution to the ORC problem, yet none of these bills would preempt states from quilting a patchwork of different state laws.

THERE ARE BETTER, LESS RESTRICTIVE WAYS TO STOP ONLINE RETAIL CRIME.

The National Retail Federation's own commissioned surveys, conducted annually by the University of Florida, consistently show that two-thirds of retailer inventory losses are directly attributable to internal causes, including theft by their own employees and suppliers. Year after year, about half of all retail inventory losses are the result of employee theft. To put this in a national context, the retailers' own study concluded that *". . . there is no other form of larceny that annually costs American citizens more money than employee theft."*

These are the retailers' own employees, people who are hired, managed, and paid by the retailers. With that kind of direct control, retailers are in the position to stop employee theft where it starts.

In last October's hearing, Rep. Forbes asked Safeway what they doing to prevent in-store theft, and Mr. Langhorst answered, "our associates are there to sell groceries, not to be police officers." Yet witnesses from both Target and Safeway stressed the importance of limiting and deterring theft "in the first place." The first place that theft occurs is in their own stores, most often by their own employees and suppliers. Rather than shifting blame and burdens to online marketplaces, retailers should improve their employee screening, inventory control measures, and store security systems.

Another essential step to combat ORC is to create better working relationship between crime prevention professionals at retailers and online marketplaces. In your hearing last October, Safeway's Karl Langhorst said, "In spite of Safeway's best efforts and unprecedented alliances with other retailers to combat ORC, we continue to suffer significant losses." Rather than continue to battle with eBay and others, Safeway should build 'unprecedented alliances' with online marketplaces, too. Work-

ing together, retailers and online marketplaces can raise the effectiveness of the "best efforts" they are now making individually.

CONCLUSION

These three ORC bills would impose extraordinary and discriminatory restrictions on Internet marketplaces that help millions of people to legitimately buy and sell products every day.

I understand that retailers feel frustrated about their efforts to stop ORC, but that does not justify shifting blame and burdens to online marketplaces. These ORC bills are intended for loss prevention, but they include dangerous tools for *competition prevention*—preventing online marketplaces from competing with big retailers.

I close by thanking the Committee for considering alternative views in this hearing, and I look forward to your questions.

Mr. SCOTT. Mr. Torpoco.

TESTIMONY OF EDWARD TORPOCO, SENIOR REGULATORY COUNSEL, eBAY, INC., WASHINGTON, DC

Mr. TORPOCO. Mr. Chairman, Ranking Member Gohmert and Members of the Committee, I would like to thank the Committee for giving eBay this opportunity to discuss the importance of fostering real and effective solutions to the problem of organized retail theft.

Prior to joining eBay in 2006, I was a State and Federal prosecutor for 7 years. At eBay I work with the law enforcement community, government regulators, private sector companies and eBay's own policymakers to help keep the eBay marketplace a safe site for eBay's community of consumers and small businesses.

EBay recognizes that organized retail theft is a serious challenge facing many retailers. When we appeared before this Committee last year we made it clear that eBay does more than any other Internet company to make sure that online consumers have a safe and well-lit place to buy and sell goods, and that includes stopping the sale of stolen goods.

EBay has strong policies in place that specifically prohibit the sale of stolen and illegal items. We employ more than 2,000 employees worldwide to enforce those policies, and we work closely with law enforcement officials at all levels to help them prosecute criminals. More than any other Internet company, we work to put criminals and thieves behind bars.

But that is not all. In response to this Committee's calls last year for greater cooperation in the fight against stolen goods, we stepped up and we created a new program called the PROACT program to foster evidence-sharing among victimized parties. Retailers that have joined this voluntary program now have an easy, streamlined mechanism to submit reports on eBay's hotline, showing that an eBay member has sold or is attempting to sell stolen items.

We investigate all evidence-based reports, and when we find proof of wrongdoing, we restrict or suspend the account and we will forward proof of criminality to law enforcement for prosecution. We want criminals arrested and prosecuted because criminal behavior on eBay undermines trust in the eBay brand.

So with all eBay has done to combat nefarious activity on our platform, why are we here today to debate legislative proposals that almost exclusively target one Internet business model, that of online marketplaces like eBay, for liability in the context of organized retail theft?

Our site is the most transparent. Our antifraud teams are the biggest and most active and we work most closely with law enforcement. Rather than work with us to prosecute criminals, some retail giants are actively promoting proposals to restrict online marketplaces that primarily serve small retail competitors and provide consumers low prices. To be honest, we believe that the focus of some giant retailers on large and popular Internet marketplaces is colored by competition.

The Internet, including eBay, has empowered consumers and small businesses. It is a revolutionary tool that drives down prices by increasing competition, including through a completely legal gray market, closeout and end-of-cycle goods. Many big brick-and-mortar retailers who are themselves online want to dominate Internet retail the same way they dominate in store retail. They like the Internet, but they don't like Internet-based competition from small sellers who drive down prices and give consumers more choices. One way to attack pesky secondary market competitors that sell at low prices is to suggest that there is something shady about them.

By our estimates, there are roughly 750,000 honest, hardworking Americans who make all or a significant share of their income actively selling items on eBay. They will be directly impacted by the legislative proposals that the big retailers are asking you to consider.

If this Committee is going to legislate on the issue of organized retail theft, we believe such legislation should recognize that efforts to stop organized retail theft must be built on deterring criminals from stealing in the first place, through adequate investment in inventory control and antitheft technologies. Recognize that any solutions must be technology neutral and business model neutral.

Impose tougher penalties, including mandatory sentences, on the actual criminals who are selling stolen goods rather than scapegoat the Internet service provider for such conduct in a way that would undermine Internet growth. Protect the privacy interests of consumers and small businesses who provide their personal data to Internet service providers and trust that their personal data won't be disclosed to retailers or government agencies based on unsupported accusations of wrongdoing. Protect legitimate gray markets that expand consumer choice and purchasing power.

In conclusion, we continue to be committed to working with this Committee on ways to effectively empower law enforcement to fight the problem of retail theft. We stand ready to work on balanced and responsible solutions. We are committed to protecting the privacy and rights of law-abiding Americans and small business people. And we hope that this Committee will work with us to ensure that the Internet continues to thrive as a place that benefits consumers, especially in these challenging economic times, and allow small businesses to compete on a level playing field with even the biggest retail giants.

Thank you. And I am happy to answer questions.

Mr. SCOTT. Thank you.

[The prepared statement of Mr. Torpoco follows:]

PREPARED STATEMENT OF EDWARD TORPOCO

Mr. Edward Torpoco
Senior Regulatory Counsel
eBay Inc.

Before the House Subcommittee on Crime, Terrorism and Homeland Security
September 22, 2008

Mr. Chairman, Ranking Member Gohmert and members of the Committee,

My name is Edward Torpoco, and I am a Senior Regulatory Counsel for eBay Inc. I would like to thank the Committee for giving eBay this opportunity to discuss the importance of fostering real and effective solutions to the problem of retail theft, and I ask that my full statement be entered into the Committee record.

Prior to joining eBay in 2006, I was a state and federal prosecutor for seven years. During that time, I prosecuted a variety of criminal offenses, including organized crime cases. As an attorney for eBay, I now help eBay to keep the eBay marketplace a safe site for consumers and small businesses, by working with the law enforcement community, government regulators, the private sector, policymakers, and consumer protection agencies. I very much appreciate the opportunity to speak with you today on behalf of eBay about this important topic.

eBay recognizes that organized retail theft is a serious problem facing many retailers in this country. This Committee should be applauded for the commitment it has shown to addressing this problem. We believe that it is a problem that deserves serious attention by lawmakers, law enforcement and all aspects of the retail businesses impacted. eBay stands ready to work with all stakeholders on balanced and thoughtful responses, including responses that account for the Internet as one among many and varied ways that criminals attempt to sell stolen goods to unsuspecting consumers.

Let me be clear, eBay takes the problem of stolen goods, and all forms of illegal activity that can impact our users, very seriously. We have the most pro-active policies and tools to combat fraud and illegal activity of all the major internet commerce companies. This fact was recognized in a recent federal court case, where the court praised eBay for the massive resources it employs to stop the sale of illegal goods (*Tiffany v. eBay*). As we have grown as a business over the last 12 years, we have understood that our success depends on our ability to keep our platform a safe and well-lit place to do business.

At the Subcommittee's 2007 hearing on this important issue, we provided great detail on the steps eBay has taken to fight fraud and illegal activity on its website:

- Our website features a member feedback system, which enables consumers to rate publicly the performance of eBay sellers;
- We have clear policies in place about what is allowed and not allowed to be listed on the site, including a policy that specifically places our membership on notice

that we will not tolerate the sale of stolen goods on eBay, and built state-of-the art tools to enforce those policies;

- We employ over 2000 employees around the world who work to combat all forms of on-line fraud, including the sale of stolen goods;
- We have developed advanced anti-fraud tools to identify suspicious behavior, remove members who engaged in harmful practices, and take steps to keep them from coming back on the site;
- Our teams of fraud investigators partner with law enforcement agencies around the world to prosecute Internet criminals, including criminals who sell stolen goods, and train officers around the world on how to fight Internet crime; and
- We offer consumers a safe way to pay online through PayPal.

Largely as a result of these efforts, we now have trading platforms that serve 39 markets with more than 84 million active users. At any given time, approximately 112 million items are listed for sale on eBay around the world. Millions of transactions take place everyday on eBay where both the buyer and seller walk away totally satisfied. Here in the United States, over 750,000 Americans make all or a significant percentage of their income selling items on eBay.

Our policies and commitment to combating the sale of stolen goods on eBay are straightforward. eBay is no place for the sale of stolen goods, and the transparency of our site combined with our commitment to working with law enforcement makes it an unwelcome venue for "fencing." The reality is that eBay is the riskiest place for a criminal to try to sell stolen products over the internet. We work both reactively and proactively with law enforcement, often referring cases out to the appropriate agency when we detect illegal behavior by a seller. When any retailer presents us with specific, credible evidence that stolen property is being sold on our site, we gladly work with law enforcement and the reporting party to address the problem, including sharing information about an illegitimate seller with the appropriate law enforcement agency. This process already exists, and we believe it works well.

In addition to our work with the law enforcement community, we have been engaging manufacturers and the retail industry to find ways that we can work together to combat the sale of stolen property on eBay. We have held meetings with retailers and their trade associations all over the U.S. to hear their concerns and to explain how we can work directly with retail loss prevention teams on organized retail crime cases. And, since we last appeared before this Committee, we have acted based on what we have heard. That is why, last April, eBay introduced a new program, called PROACT, that is specifically dedicated to working with retailers to combat organized retail theft.

Retailers that are participating in the PROACT program have a streamlined, easy mechanism to submit reports to eBay's fraud investigators concerning the suspected sale of stolen goods on eBay. The program features a dedicated fax and email hotline for the exclusive use of retail loss prevention departments. Under PROACT, eBay's investigators leverage all internal data retained by eBay and PayPal, in combination with specific evidence submitted by the retailers, to investigate whether a member has violated

eBay policy by selling stolen goods. Where eBay finds evidence of such a policy violation, we have pledged to restrict and suspend the account at issue, in consultation with loss prevention teams and law enforcement. Moreover, where there is evidence of criminality, we will proactively refer cases to law enforcement authorities for prosecution. Under this process, we will also put retailers in contact with any law enforcement agencies to which we have made a referral and provided member records.

While the program is in its pilot phase, we have seen real success and support from those retailers who have joined the program thus far. We believe that this success will continue to grow as we work to expand the program this fall. We continue to invite additional retailers to join with us in this effort.. Over the long term, we believe it is this kind cooperation between online marketplaces and the retail industry that is the best way to combat the sale of stolen goods online.

This Committee has done significant work developing a record about the nature and scope of organized retail theft. Your March 2005 Committee Report listed the following major venues as places where stolen items are illegitimately re-sold: small shops (including beauty shops, gas stations, music stores, bars and gyms), flea markets, pawn shops, local fences, truck stops, newspaper ads, overseas buyers, and yes, the Internet through all types of web sites and chat forums. The Committee report also described how unscrupulous middlemen sell significant volumes of stolen goods back to traditional retailers blended in with legitimate products, at times in re-packaged form.

My point in mentioning the Committee's prior findings is to highlight an important fact that must underpin any legislative solutions to the problem of organized retail theft: most of the ways that stolen goods are fenced are decidedly low-tech in nature. While some tech savvy criminals are finding ways to abuse internet technologies, serious and effective solutions to this problem must address the entire range of distribution methods that can be exploited by criminals, not disproportionately focus on one method or business model.

Many large manufacturers and retailers have a negative view of the eBay marketplace because eBay empowers small businesses and consumers by providing an incredibly efficient secondary market for the sale of high demand goods. Our sellers are perceived by some retailers as competition that drives down prices -- good for consumers, good for small business sellers who gain access to consumers, but bad for big established retailers. One way for large retailers to attack efficient secondary market competitors that sell goods at low prices is to suggest that there is something shady about those sales. And they are actively engaged in such an effort.

Inventory shrinkage is a massive problem for retailers, but Internet marketplaces are not the cause of it. By far, most inventory loss, according to the retailers' own studies, are attributable to causes such as employee theft, administrative error, vendor fraud, and non-professional shoplifting. Organized retail theft is, by comparison, a small subset of inventory shrinkage, and the online fencing of stolen goods is a further subset. We are concerned that currently proposed legislative solutions, which single out internet

marketplaces for regulation, would make only a small dent in a much larger problem, while placing disproportionate burdens on lawful small businesses and consumers that rely on internet marketplaces.

The Internet is central to the survival of small retailers in a world otherwise increasingly dominated by massive retail giants. Many small retailers use "online marketplaces" to reach customers on a much larger scale than would otherwise be possible if left to their own devices. By imposing new investigation and disclosure burdens on these marketplaces, Congress would inevitably force new costs onto small businesses already struggling to survive, thereby raising the cost of competing with retail giants. When considering bills to address the problem of retail theft, we ask Congress to take care to protect the kind of competition that is so valuable to both small businesses and consumers alike.

In addition, the Internet community as a whole has raised concerns that these bills would undermine a fundamental concept that has been key to the Internet's success – that Internet Service Providers like eBay should not be held liable for content posted by third parties – in this case, eBay's members. Creating new liability standards for Internet Service Providers that operate online marketplaces erodes this critical legal protection, which Congress extended to Internet Service Providers out of desire to ensure that the internet would flourish unhindered to the benefit of all Americans. Contrary to this Congressional intent, one of the proposed bills would hold online marketplaces to higher liability standards than a person actually engaged in the theft of retail goods. Other proposals create invitations for endless lawsuits by exposing internet marketplaces to new civil liability regimes.

As Congress debates legislation to combat stolen goods, it is also important to note the importance of consumer privacy. Some of the proposals that we have seen would force online marketplaces to release private member data directly to unaffiliated third party competitors. This type of information sharing would pose a significant threat to individual privacy and security, which will ultimately reduce the appeal of the Internet for consumers. Even the proposed creation of new government data warehouses should be considered very carefully and should be reserved for instances where there is concrete evidence of illegality, not mere suspicion.

If there is a place for legislation on this subject, the first step this Committee should take is to increase the criminal penalties for the criminals who are actually selling stolen goods in interstate commerce. If these crimes are currently classified as misdemeanors, upgrade them to felonies. If the jail sentences tied to these crimes are too short, lengthen them. We have supported legislation in a number of states calling for tougher penalties, mandatory sentences and higher priority prosecutions of these criminals. We would support the same at the federal level. These steps will make these cases more attractive to law enforcement and will make judges more likely to put these criminals in jail rather than giving them probation. If these thieves make the unwise choice to use eBay to try and sell their stolen goods, we don't just want them off of eBay, we want them to see the inside of jail cell.

If I could leave this Committee with one message concerning efforts to combat organized retail theft, it is that legislation alone cannot and will not solve this problem. Any legislative solution must be considered in tandem with cooperative private sector efforts to stop retail thieves. That is why eBay takes its PROACT program so seriously. It is our hope that these types of coordinated efforts between the retail and Internet communities will finally get the word out to retail criminals that if they try to sell stolen goods on the Internet, they will get caught.

We look forward to working with this Committee on ways to effectively empower law enforcement to fight the problem of organized retail theft. We stand ready to do our part to combat the long-term problem of retail theft in a balanced and responsible way. We are committed to protecting the privacy and rights of law-abiding citizens and small business people. We want to work with this Committee so that the Internet can continue to thrive as a place that benefits consumers, especially in these tough economic times, and allows small businesses to compete on the level playing field with the biggest retail giants.

Mr. SCOTT. Mr. LaRocca.

TESTIMONY OF JOSEPH J. LaROCCA, VICE PRESIDENT, LOSS PREVENTION, NATIONAL RETAIL FEDERATION, WASHINGTON, DC

Mr. LAROCCA. Thank you, Mr. Chairman, Ranking Member Gohmert, Members of the Subcommittee. Good afternoon. Thank you for the opportunity to testify before you on organized retail crime.

My name is Joseph LaRocca, and I am the Vice President of Loss Prevention with the National Retail Federation. Today, we are testifying on behalf of the larger Coalition Against Organized Retail Crime in support of H.R. 6713 and H.R. 6491.

As we have heard, organized retail crime refers to professional shoplifters who engage in illegally obtaining substantial quantities of retail merchandise and gift cards as part of a criminal enterprise. Stolen merchandise is then resold through illegal street vendors, pawnshops, flea markets and large-scale distribution networks and the Internet. Due to these black market operations, State and local sales tax is not collected, and in the case of returns fraud, actually takes money out of State funds. This type of criminal activity can even put consumers' health and safety at risk, particularly when items such as infant formula and over-the-counter medications are mislabeled and stored improperly.

According to the NRF's 2008 ORC survey, 85 percent of retailers nationwide reported being a victim of organized retail crime. Precise measurements and the true scope of this problem are difficult to determine given the inherent secretive nature of these criminal operators. However, according to one prominent study, retail losses amount to over $30 billion a year.

FBI Director Mueller also testified before Congress that ORC losses are estimated between $15 and $30 billion annually. When compared to other retail crimes across the country, retail losses are double those of property crimes nationwide, robbery, burglary, larceny and auto thefts combined, as reported in the FBI's 2006 Uniform Crime Report.

People have quickly learned that the Internet presents a low-risk way to sell stolen goods, primarily due to its anonymous nature. More disturbing, however, is, the Internet seems to be contributing to the creation of a brand-new retail thief, people who have never stolen before but are lured by the convenience and anonymity of the Internet. Internet auction sites have been blaming retailers for security lapses in order to justify the conduct of some of the biggest sellers on their site.

Mr. Chairman, retailers take this issue very, very seriously and spend an estimated $11 billion each year on loss prevention. Our industry relies heavily on external theft controls such as electronic article surveillance, external theft training and closed circuit television systems in many stores. You may have noticed that more and more product is being placed under lock and key in your neighborhood pharmacy and other retailers. This comes at great inconvenience to honest customers. But these controls are no match for professional shoplifters determined to steal. Criminals will always find a way to get the product out of our stores.

One of the biggest obstacles in apprehending thieves who sell and resell through online marketplaces is the lack of resources available to law enforcement and the lack of cooperation offered by Internet providers. EBay, for example, will only provide assistance on a case-by-case basis and only to law enforcement.

Due to the lack of manpower and resources, law enforcement will typically not undertake a suspected Internet fraud case unless there is irrefutable evidence or a written statement of theft. Then most State and local police departments run into jurisdictional issues since most online cases encompass multiple stores in multiple jurisdictions in multiple States.

Recently eBay unveiled a new program called PROACT. Although, on the surface, it may seem like a good start, the burden is still on retailers. It requires retailers to investigate, identify and determine that the product online may be stolen. This is why a vast majority of retailers eBay approached have declined to participate.

With over a million auctions on any given day, we need to proactively change criminal behavior, Mr. Chairman; we cannot keep addressing this issue by investigating and apprehending one seller at a time. We need a new approach to this problem. We need responsible Internet auction sites to make modest changes to help reduce the sale of stolen property in the first place, and thieves need to know when they try and fence their wares on a site like eBay, for example, they will be taking a huge risk and likely be caught.

Organized retail crime is a serious issue affecting retailers, consumers and law enforcement officials nationwide. This criminal activity can put consumers' health and safety at risk, particularly when items such as infant formula and over-the-counter medicines are mislabeled and stored improperly. ORC creates enormous financial losses and negatively impacts revenue for businesses and States.

I wish to commend you, Chairman Scott and Ranking Member Gohmert, for today's hearing. The focus on this very serious issue is a timely and appropriate response to a problem that is victimizing practically every segment of the retail industry.

Thank you for your time and attention.

Mr. SCOTT. Thank you.

[The prepared statement of Mr. LaRocca follows:]

PREPARED STATEMENT OF JOSEPH L. LAROCCA

INTRODUCTION

Chairman Scott, Ranking Member Gohmert, and members of the Subcommittee, good afternoon. Thank you for the opportunity to testify before you today on the growing problem of organized retail crime. My name is Joseph LaRocca and I am the Vice President of Loss Prevention with the National Retail Federation. Based in Washington D.C., our membership comprises all retail formats and channels of distribution. As the industry umbrella group, NRF also represents more than 100 state, national and international retail associations. I work closely with retail organizations, as well federal, state, and local law enforcement officials across the country. Prior to joining the Federation in 2005, I spent 18 years working in retail loss prevention witnessing these crimes and their impact first hand. I am here today testifying on behalf of the National Retail Federation and the larger Coalition Against Organized Retail Crime in support of H.R. 6713, the "E-fencing Enforcement Act of 2008" and H.R. 6491, the "Organized Retail Crime Act of 2008."

As we have heard, Organized Retail Crime refers to the growing problem of professional shoplifters who engage in illegally obtaining retail merchandise or gift cards through both theft and fraud in substantial quantities and as part of a criminal commercial enterprise. Some of the more sophisticated criminals even engage in changing the UPC bar codes on merchandise so they ring up differently at checkout. This is commonly called "ticket switching." Others use stolen or cloned credit cards and gift cards to obtain merchandise. Yet others steal merchandise with the express intent of returning it to stores for cash or credit (most often in the form of gift cards). Stolen merchandise is resold through illegal street vendors, pawn shops, flea markets, the Internet, and even large scale distribution networks. Due to these black-market operations, state and local sales tax is not collected and, in the case of returns fraud, can actually diminish general fund holdings.

HIGH-PROFILE CASES ILLUSTRATE THE SERIOUS NATURE OF ORC

In 2005, Operation Blackbird, as Texas investigators dubbed their multi-state baby-formula investigation, led to felony charges against more than 40 suspects; about half of those were illegal immigrants. Authorities seized some $2.7 million in stolen assets, including $1 million worth of formula.

Sherriff Grady Judd from Polk County Florida will discuss his case, announced in January, in which $60–100 million in product was stolen from retailers and resold, primarily through the Internet.

This May (2008) in New Jersey, one of the highest-ranking officers in the Gambino crime family was arrested and indicted along with 23 reputed crime family members and associates. A 30-count indictment that was unsealed in Newark alleges a variety of schemes, including forging bar codes to obtain electronics equipment from big box stores at extremely low prices, and making those purchases with credit cards obtained using stolen identities.

In June, a joint task force of federal agents and the San Jose Police Department conducted a series of raids and arrested 17 members of two crime families they say employed hundreds of shoplifters to steal from stores, including Safeway, Wal-Mart, Walgreens, Longs Drugs, Save-Mart and Target. The stolen loot was resold for millions of dollars from homes, store fronts and flea markets, authorities said.

These important investigations rely upon the ongoing partnership between law enforcement and the retail sector. The successful take down and prosecution of these theft rings is a positive development, but more needs to be done on the federal level because the problem is growing and these theft rings are becoming more aggressive and violent in their behavior. In fact, in the Texas case, hits were put out on the federal investigators involved in the infiltration of that gang. To bring it to an even more troubling conclusion, the proceeds from the crime were eventually traced back to the terrorist group Hamas. To put it succinctly, baby formula theft was funding assassination plots and international terrorism.

These are just a few extreme examples. However according to NRF's National ORC Survey released on June 4, 85 percent of retailers surveyed report being victims of ORC and 66 percent saw increases in ORC activity last year. Precise measurements of the true scope of this problem are difficult to determine given the inherently secretive nature of these criminal operators. However, according to one prominent study, industry-wide retail fraud and theft losses amount to over $30 billion a year. When compared to other property crimes across the country, according to the FBI's Uniform Crime Report in 2006, retail losses are double those from robbery, burglary, larceny, and auto thefts combined ($16.9 billion) nationwide.

Most disturbing is the fact this type of criminal activity can put consumer's health and safety at risk. For example, consumers are potentially at risk when professional shoplifting rings steal consumable products, such as over-the-counter medications and infant formula. Pilfered products may not be kept under ideal or required storage conditions which can threaten the product's integrity. And often times these organized thieves will repackage and re-label stolen products to falsely extend the product's expiration date or to disguise the fact that the merchandise has been stolen.

THE INCREASED USE OF INTERNET AUCTIONS TO DISPOSE OF STOLEN GOODS

Dishonest people have quickly learned the Internet presents a low risk way to sell stolen goods, primarily due to its anonymous nature. They are surfing the web and learning about the limitless opportunities offered by auction sites. Criminals are even setting up their own sites and enabling "secure" customer payments through tools offered by companies such as PayPal and Yahoo! Checkout. In the past, these same people were selling at flea markets and pawnshops, but not in 2008. Online marketplaces are being used as the Internet equivalent of pawnshops, but, unlike

pawnshops, they are largely unregulated. More disturbing, however, is the fact that the Internet seems to be contributing to the creation of a brand new type of retail thief—people who have never stolen before, but are lured in by the convenience and anonymity of the Internet.

Sophisticated "professionals" or not, what all of these thieves have in common is that they often are—or become—career criminals. They have "shopping lists," if you will. Some target luxury clothing, accessories, and perfume, while others focus on baby formula and expensive over-the-counter medications or beauty aids. Gift cards and electronics are other popular targets. Believe it or not, these criminals are even stealing vacuum cleaners and power tools. Whatever is new; whatever is hot; that's what the criminals want. The Internet not only makes it easier for ORC "rings" to unload merchandise at near retail prices, it also enables sophisticated single-operators to realize a huge profit off of their crimes as well.

In videotaped admissions of people who have stolen from retail stores and resold the product on e-Bay, for example, thieves often tell the same disturbing story: they begin legitimately selling product on e-Bay and then become "hooked" by its addictive qualities, the anonymity it provides, and the ease with which they gain exposure to millions of customers. When they run out of "legitimate merchandise," they begin to steal intermittently, many times for the first time in their life, so they can continue selling online. The thefts then begin to spiral out of control and, before they know it, they quit their jobs, are recruiting accomplices (some are even hiring "boosters"), and are crossing state lines to steal—all so they can support and perpetuate their online selling habit. At least one major retailer has reported that 80 percent of thieves interviewed in their e-Bay theft cases admit that selling stolen property on e-Bay is their sole source of income. In fact, many of the e-Bay sellers have used those proceeds to obtain mortgages, new cars, and even boats.

To give you a clear example of the high-dollar figures involved, in February of this year the Kansas City Police Department, FBI and U.S. Postal Inspection Service, charged 7 suspects with $1.2 million of theft and resale of stolen items online. According to court records, boosters were hired to steal merchandise and then paid a percentage of the booty and given gas cards for their expenses. The ring leader sold the product on e-Bay and used part of the money to bail the boosters out of jail when they were arrested!

As a Loss Prevention professional a question I am often asked is why we don't just catch the thieves in stores before the thieves have the opportunity to sell the product online. In meetings, we have also heard from folks representing the Internet auction sites who have taken the tack here on Capitol Hill to blame retailers for security lapses in order to justify, or obviate scrutiny of, the conduct of the sellers on their site. Mr. Chairman, retailers take loss prevention very, very seriously. Our industry relies heavily on external theft controls such electronic article surveillance (EAS), external theft training, and closed circuit television systems (CCTV) in many stores. You may also have noticed that more and more retail product is being placed under lock and key in your neighborhood pharmacy, department stores and other specialty retailers—at great inconvenience to honest customers. But, as we have learned, these controls are no match for professional or habitual shoplifters determined to steal. As you have heard today and in previous hearings, committed criminals will always find a way to get the product out of retail stores. Some of these thieves are masters at fraud or concealment, others are bold and brazen and potentially put employees and consumers at risk.

THE CHALLENGES OF LAW ENFORCEMENT AND FAILURE OF ONLINE MARKETPLACES TO ADEQUATELY ASSIST RETAILERS

One of the biggest obstacles in investigating and apprehending the thieves who steal and resell through online marketplaces is the lack of resources available to local, state, and even federal law enforcement to investigate these crimes and the lack of cooperation offered by Internet auction providers themselves.

e-Bay, for example, will only provide assistance and information on a case-by-case basis, and only when requested by law enforcement. However, law enforcement, due to lack of manpower and resources, will typically not undertake a suspected Internet fraud case unless there is irrefutable evidence or a written statement of theft. Even then, most state and local police departments run into "jurisdictional" issues since, in most online cases, the thefts encompass multiple stores, in multiple states, in multiple jurisdictions. Further, even when retailers provide law enforcement with a written statement and videotaped admission, they are reluctant to take the case because the company investigator did not observe the actual theft, nor provide proof that a specific item came from a unique store.

Recently, e-Bay unveiled a new program called PROACT. Although on the surface it may seem like a good start, it still requires retailers to investigate, identify, and determine that the product being sold online may be stolen. Thus the burden is still placed on retailers to identify each discrete seller that may be selling stolen product on their site. That is why the vast majority of retailers that they approached with the program declined to participate. With over a million auctions on any given day, we need to proactively try to change criminal behavior in partnership with the Internet auction companies. Mr. Chairman, we can't keep addressing this issue by investigating and apprehending one seller at a time; we need a new approach to this problem.

Mr. Chairman, we need to have responsible Internet auction sites make modest changes to their businesses to help reduce the sale of stolen property in the first place. In other words, we need to create affirmative deterrents to this illicit behavior. Thieves need to know that if they try to fence their wares on a site like e-Bay, for example, they will be taking a huge risk and will likely be caught. We can do this by applying traditional models of stolen property regulation to the Internet and inject some much-needed transparency to these transactions. These are the type of approaches taken in the bills we are discussing today.

H.R. 6491 imposes specific obligations on online marketplaces. Specifically, the requirement that an online marketplace investigate certain goods when a retailer provides "credible evidence" that the goods are stolen is essential. Such an obligation does not exist today. Similarly, if after investigation the online marketplace determines that in fact the goods are stolen, the marketplace would be required to remove them from sale from the marketplace. This is common sense. Goods that are known by an online marketplace to be stolen should no longer be sold on the site and, if they are, the marketplace should be liable for such behavior.

The bill would also require that information about merchandise that is otherwise only offered for sale exclusively by a retail source be posted conspicuously. There are many instances where goods that are known to only be sold by a particular retailer are available for sale by third parties in large quantities on an online marketplace. Many times these sales warrant additional investigation by retailers due to the exclusive nature of the product. Finally, we strongly support the provision that would require high-volume sellers to make contact information available online. Retailers have difficulty obtaining seller contact information from the online marketplaces even though that information is vital to conduct a preliminary investigation. Oftentimes, the identity of the seller leads to a quick confirmation that the sales are in fact legitimate and the investigation can be closed.

The second of the two bills, H.R. 6713, the "E-fencing Enforcement Act," focuses exclusively on the E-fencing problem just described. We thank the Chairman for his recognition that this is a problem that is getting worse, not better. We believe that the status quo will not solve the problem and that this bill takes the appropriate approach to limiting e-fencing. Like H.R. 6491, this bill would require that certain information about high volume sellers be available to retailers. Similarly, an online marketplace would be required to take down goods where there is good reason to know that they were not acquired lawfully.

NRF feels strongly that companies like e-Bay should also no longer be able to hide behind the assertion that they are "merely a platform" with little responsibility to supervise sellers on their site when they earn listing fees and commissions from each and every sale on their site. That is a fee for both stolen and legitimate goods. In the case of e-Bay these fees and commissions have earned them billions of dollars in profits and made them one of the fastest growing companies in American history. Isn't there some greater responsibility here to take some simple, and quite frankly, commonsense steps like those outlined in H.R. 6713, H.R. 6491, and S. 3434? It seems like a no-brainer to me.

CONCLUSION

While retailers will continue to invest billions of dollars in trying to prevent organized retail crime and apprehend and prosecute the perpetrators, it is clear that the problem cannot be solved by fighting these cases one-by-one and only in the shopping aisles. Without new Federal laws in place, such crimes are far too often treated as petty theft or a misdemeanor. As a result, organized retail crime cases are rarely appropriately prosecuted, and when they are, individuals who are convicted usually see limited jail time or are placed on probation if they have no prior arrests.

Organized Retail Crime is a serious priority for large and small retailers nationwide. Locking everything behind glass may reduce sales, dramatically impacting the revenue for businesses and tax revenues for states. Expenditures against retail theft have become part of construction budgets, merchandising budgets and information

technology and staffing budgets. This is an enormously important and expensive effort for the retail industry. The continuing growth of retail crime and the damage it causes to communities dictates something needs to be done to control the theft and resale market for stolen goods. Further, at the rate the Internet is growing and the constantly and rapidly escalating scale at which any criminal is now able to operate, it is clear that there is an immediate need to update the law to cover these 21st century criminal operations.

I wish to commend Chairman Scott and Ranking Member Gohmert for scheduling today's hearing. The focus on this very serious issue is a timely and appropriate response to the problem of organized retail crime and Internet auction fraud that is victimizing practically every segment of the retail community. Thank you for your time and attention.

Mr. SCOTT. And we thank all of our witnesses for your testimony.

We will now direct questions to you under the 5-minute rule. And I will recognize myself to begin with for 5 minutes.

Mr. DelBianco and Mr. Torpoco, we know that some of the stuff online is stolen. What chance is there that there would be legal sales of consumer products in the amount of $5,000 in one sale or $12,000 over the course of a year? How often would that be actually legal?

Mr. TORPOCO. Mr. Chairman, on eBay it is quite common for a seller to sell, for example, an automobile. And so the language is currently drafted to define "small seller" as somebody, for example, who has over $5,000 in sale, which would sweep in a large number of individuals who are not selling very frequently, but who are selling items that are high-ticket, big-priced items. And that is one of the concerns that we have with the legislation as drafted, that in reality there are actually many, many thousands, if not tens of thousands, of sellers on eBay who don't sell all that frequently, but sell big-ticket items.

Mr. SCOTT. How often does somebody sell small-ticket items in the $5,000 to $12,000 level that would be actually legal, that could not immediately produce some records to show where they got the product from?

Mr. TORPOCO. I imagine, Mr. Chairman, that there are thousands of small retailers that are using eBay that probably exceed the $5,000 level threshold and which are selling commonly marketed goods, such as the goods that you would find in a brick-and-mortar retailer or a pharmacy.

What we see on eBay is that a lot of small businesses have used eBay to sell perfectly legitimate and legal gray-market goods that are the result of exceptions in the supply chain, as well as out of season, oversupplied, liquidated sorts of goods that are looking for a secondary market to be sold; and there is nothing illegitimate with that conduct.

But unfortunately, some of the legislative proposals that we are hearing really assume that anybody who is selling goods at a substantial discount and in a large quantity on an online marketplace must be a thief. And the presumption is, let's put the blame and burden on the seller that is using the eBay marketplace to prove that they are innocent by providing records before there is actually any specific evidence indicating that they have done anything wrong.

Mr. SCOTT. Mr. Muscato, what happens when you make a complaint to police if you notice some suspicious activity.

Mr. MUSCATO. When we contact the police on these cases, they will get the information that we need, if that is what they are going to do. The problem is when we take cases to the police, we need to take the case to the police, not just suspicion. They have a thousand things to do—been there, done that—thousand things to do, and if we go and say, "Would you call eBay to find out why this guy is selling these test strips for $50 when they are $100 in the store, you just can't do it unless there is something wrong with this," they are going to say, "Frank, put it together for me and bring it to me." They are not going to just call out.

Now, I am lucky enough that I have friends that I can call and ask to do that because I work with. But I won't do that; I wouldn't take advantage of them like that. But that is what makes it difficult to do that.

And to call eBay, even under PROACT, the program they had, was too hard for us to do, because by giving them the information and giving that, we are giving the case away. We have no control in what they do with it. So we are not going to reach out and give them that information without some kind of guarantee on the side.

And when they talk about working together, gosh, there is no two bigger competitors in the Nation than Walgreens and CVS. Stand at almost any Walgreens in the Nation and look across the street and you will see a CVS. But we work side by side. We purchase radios with the same channels, so when we do surveillance together we can talk to each other. And other retailers are doing that.

And if eBay would come over here with us or open their doors and let us go over there with them and work together on these cases—I don't know, them send us stuff or we send them stuff—work together on these cases, wow, there would be giant steps ahead. We wouldn't need legislation.

Mr. SCOTT. Well, Mr. Torpoco, you have indicated that you have been working. What have you offered to do?

Mr. TORPOCO. Well, Mr. Chairman, under the PROACT program, what eBay intended to do and what eBay has done in response to the Committee's statements last year was to create an easy mechanism for retail partners to send us any evidence or intelligence they have of wrongdoing by an eBay member. And, frankly, I am stunned by the notion that a company would not join that program because they are concerned about losing control. I mean, the pledge that we have made under the PROACT program is, if you have evidence, provide it to eBay. We will do the right thing. We want to suspend individuals who are violating our user agreement by selling stolen goods.

And if you have trouble getting law enforcement involved on your end, well, eBay is going to leverage its connections to call up the detective and say, "There is a case of somebody who is selling goods stolen goods on eBay, and we want you to prosecute them." It is absolutely in eBay's business interest to make sure that there are not individuals on eBay who are breaking the law and undermining the integrity of the eBay brand.

And I am certainly surprised to hear that a retailer would not join in eBay's efforts to prosecute an individual out of concern about losing control. I think this issue is serious enough that we

need to put aside such irrational fears and really work in a spirit of partnership and cooperation to make sure that the right thing is done.

Mr. SCOTT. Now, what does eBay—I understand that, in Great Britain, eBay has an agreement that puts most of the burden of this problem on the seller so that eBay is not burdened by cooperating; is that right?

Mr. TORPOCO. That is not correct, Mr. Chairman. Under the PROACT program, what we want to do is create an invitation for the retailers who have well-established loss-prevention teams to share their evidence that somebody is misbehaving or to share their intelligence with us so that we can, in turn, look at the data that eBay and PayPal retain and see if there is anything there that would cause us suspicion.

And what we have pledged to do is, once we marry that sort of intelligence both in the retail end and within eBay, and if we find something wrong, we have absolutely no hesitancy about taking action against a member's account and, if necessary, if there is evidence of criminality, referring that case out to law enforcement.

So the intent behind the PROACT program is not to put a burden on any retailer to actually invest in the area. What we want to do is create an invitation for partnership. And of course that is going to require some investment on the retail end, not just eBay's end, to make sure that the right thing is done to further an investigation.

Mr. SCOTT. Now, how is what you do in retail theft different from what you do in trademark and copyright suspicious cases?

Mr. TORPOCO. Mr. Chairman, the liability regimes are vastly different. And what we need to do in the copyright and counterfeiting context is we rely on the expertise that brand owners and right owners have about whether or not a product is genuine and invite them to submit sworn affidavits to us letting us know that something that they see, for example on the eBay marketplace, is not a genuine product. And that sort of regime certainly makes sense when you are talking about the authenticity of goods.

But our concern in this particular context is we are not talking about whether or not an item is authentic on eBay. The issue that is presented to us in any reporting regime where a retailer could submit a report to eBay and demand that it be taken down is a question of where that item came from, I mean, what was the ownership history. And whereas in the motor vehicle context we have a very well-developed program under the VIN number system to be able to track the ownership of an item through its life, in the retail context we don't have that for things like razor blades or baby formula or Crest White Strips.

The reality is there is no adequate inventory tracking of those sorts of items that would enable a police officer, for example, who finds a suspicious amount of quantity of these goods in the back of a van to look at item by looking at the box or the code on it or the SKU number and say, "Aha, that is an item that came from Target and was stolen." That sort of tracking does not exist in the retail system for commonly shoplifted goods.

The only effective tracking system that exists for goods is really in the motor vehicle context. And that is why, in the motor vehicle

context, we require of all eBay members who are listing an item for sale, an automobile, to list the VIN number on the listing. If we had any such sort of airtight tracking system for commonly shoplifted goods, such a regime might make sense. But that sort of regime has not been developed by the retail industry. It certainly does not exist to the extent that having that sort of information would enable us to know the history of the item, where it was purchased, was it given as a gift, was there a receipt for it. I mean, that sort of tracking just does not exist.

Mr. SCOTT. My time has expired.

Mr. DelBianco, did you want to comment?

Mr. DELBIANCO. Thank you, Mr. Chairman.

In response to your question, Mr. Muscato said that there are times it is difficult to get law enforcement to pay enough attention to the cases. And I would point out that two of the three bills here actually dramatically increase the penalties and minimum sentencing guidelines that explicitly spell out what is the ORC crime. And the hope of all of us would be that that will increase the attention that law enforcement will pay to an interstate crime.

But at the same time we have this notion of a PROACT program, it is a voluntary program of cooperation between the parties along here. And retailers would understandably say, we are not ready to sign up for a voluntary program if someone is dangling in front of us legislation that creates a club, a club they can use against their competing retailers and online marketplaces. And that club comes in the form of being able to demand the interrogation of customers without any law enforcement being involved.

Mr. SCOTT. Thank you.

Mr. Gohmert?

Mr. GOHMERT. Thank you, Mr. Chairman.

And I do appreciate all of your testimony.

Mr. SCOTT. I recognize, in fact, the gentleman from California, Mr. Lungren, has joined us. Thank you.

Mr. Gohmert?

Mr. GOHMERT. Okay, thank you.

First of all, Mr. Muscato, I see you have some Rogaine. Why would anybody ever want Rogaine? [Laughter.]

But there are a number of problems, and you all do a good job of pointing out the various difficulties here.

But, Mr. DelBianco, you mentioned the backseat of the car. I actually heard a similar reference from a pawn shop owner about, "Hey, why should we be responsible for theft of things? We are just a legitimate business." So it does go deeper than that.

And, again, as I mentioned previously, there are some parallels. There are pawn shop owners that are completely—I think the vast majority are legitimate businesses, and it is a great source for people to come in, get money, get rid of things they don't need and get some cash back from it. But it does facilitate some theft. So the issue is, how do we go about merging these different interests?

Mr. LaRocca, you mentioned that putting products under lock and key comes at great inconvenience to customers. You are talking to Congress. As I have seen in my 3½ years here, not a lot of people care about great inconvenience. While we were in the majority, my friends passed a bill that makes it extremely difficult for

me to just go get Sudafed. It is the only thing that clears up my head. So I couldn't convince my friends not to make my life more difficult and at great inconvenience to me. So sometimes those things are going to happen if it is for the greater good.

But, Sheriff Judd, you know, Mr. DelBianco, Mr. Torpoco—is that how you pronounce it?

Mr. TORPOCO. That is right.

Mr. GOHMERT. Okay. They bring up a point, you know, whether it is blades or some of those things, how do you identify if those items are stolen? If you went in a pawn shop and saw a bunch of new things like this, is there any way you can identify if they are stolen?

Sheriff JUDD. He brings up a good point. It is a challenge. In fact, we have gone to the industry and suggested to them that there needs to be a way to identify those, because once it comes out of whatever industry—it may go to South Florida, and then that lot number is divided up from there.

But in addition to that, which would be a wonderful help for us, we need to understand that the criminal justice system was not created and currently doesn't have the infrastructure to deal with the speed and the quantity of people we are having to deal with that are into crime on the Internet. We are back riding horses, and the Internet is jet planes. And that is the problem.

So we all need to work together for this to be proactive systems and a proactive approach, so that we can let our colleagues that are doing organized retail theft investigations for eBay, for big industry, to come together and do some of this work for us. And if they will be proactive with that approach, then they can certainly make this a manageable problem.

As I testified to a minute ago, the problem is this is extremely low-risk and extremely high-profit, and the system we have in place today doesn't allow us to change that.

Mr. GOHMERT. Yeah, that is what we are trying to figure out. And my friends in law enforcement that I came to know so well as a judge, they told me that they also started having lots and lots of juveniles that are actually hired to go in and do the theft, because they know, if they are caught, they are probably going to go to a juvenile procedure and it is going to be very easy and they are going to get a wrist slap. So these are very sophisticated people, and they are finding ways to beat the system all the time.

One of them I was wondering about, Mr. Torpoco, is the value of $12,000. How difficult would it be for people to change their e-mail address or change the address and just keep skirting under the $12,000 limit?

Mr. TORPOCO. Sir, on eBay we actually retain detailed records of membership information. So when somebody registers on eBay or changes their e-mail address or changes their physical address——

Mr. GOHMERT. No, but I mean would register with a different e-mail address, the same person. I mean, are you able to track to the same computer or laptop and say, uh oh, this is the same guy that used these four other e-mail addresses?

Mr. TORPOCO. Yes, we are, absolutely. And we have a powerful incentive to do so, because we want to make sure that individuals who are selling on the eBay marketplace are not bad actors. And

if we suspend them, we want to make sure that they don't come back to eBay.

So, in addition to tracking the sort of information that you noted, we actually have internal risk models that predict or note when an individual is trying to change their registration information or other individual account information in a way that would cause us suspicion. That would include, for example, having their account suspended and coming back trying to register with a different telephone number or with maybe the same IP address, which is a good telltale sign that the individual we kicked off previously is trying to come back.

So those sorts of internal safeguards to make sure that bad actors are not trying to game the system by changing their contact information is something we have invested heavily in as a company, because we want to make sure that we know the——

Mr. GOHMERT. When you see those indicators, who do you tell?

Mr. TORPOCO. In addition to taking action on those accounts, for example, if somebody tries——

Mr. GOHMERT. I understand you would take action, but do you know anyone else that——

Mr. TORPOCO. Certainly. If it is a criminal actor, we would notify law enforcement. But obviously——

Mr. GOHMERT. And who with the law enforcement would you notify, local or fed or who?

Mr. TORPOCO. All of them. As a company, we like to say we have a Rolodex full of tens of thousands of law enforcement officials that not only have we trained across the country in how to do eBay investigations but with whom we have worked actual cases.

So I oftentimes hear from the retail industry that they, in an individual case, might have a hard time getting law enforcement interested to take the case. We, as a company, have a really good track record of picking up the phone and calling the detective or somebody with the FBI with whom we have worked a prior case and saying, "Hey, we have a good case for you." And, by and large, if it is a sizable case, law enforcement has been really receptive to our call.

Mr. GOHMERT. So you don't notify them unless you have a good case?

Mr. TORPOCO. As a former prosecutor, I recognize that there are certain thresholds that have to be met before, for example, a Federal agency is going to institute criminal proceedings against somebody.

So what we try to do is try to tailor the loss or the fraud in a particular case to the appropriate jurisdiction. If it is a small petty loss, we might refer it to a local DA's office or a local police department. If it is a massive fraud that we are investigating, we would probably go with a Federal agency. But what we want to do is thoroughly investigate the case and then decide how big is it and who is the appropriate law enforcement agency to refer it to.

And we have a great track within the Internet industry of being one of the most proactive companies in actually making those sorts of referrals to law enforcement. Because we, as a company, decided early on that if the eBay marketplace is going to be a safe place

for consumers to shop with confidence, we need to make law enforcement our allies in going after the criminals.

And that is why, I think, when you compare us with the other companies that have invested in this area, you will see that eBay really has an unmatched track record in working in a spirit of cooperation and partnership with law enforcement. Which is why it is so surprising to us that the regulation that has been proposed targets the player in the industry that is actually doing the most to work with law enforcement in a proactive and cooperative posture.

Mr. GOHMERT. Well, I guess that was my point. Sometimes it helps to get outside looks. You are talking about basically getting a case put together yourselves, and sometimes maybe you miss an indicator. I mean, as a judge, I have had psychiatrists say, if you hear somebody say the words, as you did earlier, "to be honest," then it may mean that you were not honest up to that point, and so you need to watch that witness. And I am sure that is not the case in your situation.

Mr. TORPOCO. Maybe I should have said "to be direct."

Mr. GOHMERT. All right. Anyway, well, thank you for your testimony.

Mr. TORPOCO. Thank you.

Mr. SCOTT. The gentleman from California?

Mr. LUNGREN. We have to watch our language around Judge Gohmert here.

This is one of those interesting things where we all know there is a problem; the question is, how do you solve it?

I remember when I was Attorney General of California, even though eBay existed, we didn't have this as the means by which these goods would be fenced. We had problems basically with swap meets, which we still have. And we used to have task forces that worked with local law enforcement to attempt to try and identify counterfeit and stolen property. But it was very difficult and very time-consuming, and it was really sort of a rifle-shot approach. You would try and have enough presence there that you would have the bad guys worried about what you were doing, but you knew you really couldn't cover the waterfront here.

Mr. Torpoco—Torpoco?

Mr. TORPOCO. That is close enough.

Mr. LUNGREN. What is it?

Mr. TORPOCO. "Torpoco."

Mr. LAROCCA. To be honest.

Mr. LUNGREN. Honestly speaking.

Mr. Torpoco, you have talked about everything that eBay does, and it is very impressive. Can you tell me how many cases you have referred to law enforcement for prosecution over the last year or so?

Mr. TORPOCO. By my understanding, in 2007, for example, we assisted law enforcement in roughly 7,800 cases, criminal cases. And I don't know——

Mr. LUNGREN. In the United States?

Mr. TORPOCO. That is in North America, so that would include the United States and Canada.

Now, I don't know the specific breakdown of how many cases involved reactive responses to requests for information versus proactive responses. But I do know that we have assisted in approximately 7,800 stolen property cases specifically.

And we believe that that sort of figure demonstrates the extent of not only the transparency on eBay, which enables these individuals who misbehave on the eBay Web site to get caught and prosecuted, but the level of our commitment to make sure that individuals who abuse our marketplace are prosecuted to the fullest extent of the law.

Mr. LUNGREN. Mr. LaRocca, that sounds like a pretty impressive record from eBay. Why is that insufficient?

Mr. LAROCCA. Well, Mr. Lungren, as a resident of California, thank you for representing our great State.

And let me say that we are not impressed by that number. Retailers have consistently tried to work with the online marketplaces like eBay on theft cases taking place across the country and in the State of California. And, unfortunately, these terms, PROACT and proactive, when you really cut through all of the fluff, what we are looking at are programs that, if the retailer conducts the investigation and if the retailer contacts eBay and if eBay in their opinion believes that a theft or a crime has taken place, they will contact law enforcement on your behalf.

Retailers, if they can go that far in the investigative process, are perfectly capable of making that call directly. And that is why a majority of retailers have said PROACT for eBay is a good first step, but it doesn't go nearly far enough to prevent or put an affirmative responsibility on eBay to do the work.

And in listening to Mr. Torpoco's answer, he said that they have assisted law enforcement in 7,800 cases. Well, "assisted law enforcement" doesn't recognize the work that went into the sting operations, the surveillance by detectives, and all of the calls that were originated by retailers and law enforcement to eBay for the purpose of assisting in those investigations.

So the number really does need to be parsed out in what is truly assisting versus eBay, with all of these tools that they have available in tracking identification and tracing e-mail addresses and monitoring sellers through eBay and PayPal, taking that information and then using that information to conduct the investigation and coming back to retailers with a notification that a crime has been committed, to file a police report, et cetera.

Mr. LUNGREN. Well, let me ask it this way then: We have noted in this Subcommittee and full Committee that the Federal Justice Department has a lot on its plate. After 9/11, we saw the FBI turning to counterterrorism as its major objective. And there are a number of other things that have been within their bailiwick that they are still responsible for, but, admittedly, they don't have as much time and attention there. The same thing with U.S. attorneys and so forth.

So we can pass Federal legislation which would make the assumption that the obligations we place on eBay and the Federal penalties and the Federal laws would be enhanced over what the situation is today, but I am not certain that, in fact, you would have the attention of the Justice Department in many of these

matters of U.S. attorneys. So I am trying to figure out how to get better cooperation among all of you here.

So here is my question. You say eBay should be doing more. And eBay turns around and says, look, the retailers don't have a tracking system for some of the goods that they are complaining that you can find available on eBay. So it is almost as if I am hearing both sides. And you are all trying to make jobs for people and make some money and enhance commerce in the United States, and you are the victims of the bad guys here.

So the question is, how do you say that eBay ought to do more when eBay turns around and says you guys ought to do more? And I assume your answer to me would be, well, it costs too much for us to have a tracking system for all of our blades and baby formula and other things. And eBay says, well, wait a second, it costs us too much to do these additional things you are asking for, which suggests to me that what I am hearing is it is an acceptable level of loss that we take because it would be too expensive for us to go further.

And if that is the case, we are not going to have additional information, additional evidence being brought forward to law enforcement to prosecute the cases that would be allowed under the laws you wish us to pass.

So I wish both of the two of you at the end would comment on the fact that you both seem to be saying, "Yes, we are doing something, but for us to do more would be too costly for our enterprise." And I am hearing it from both sides. How do you respond to that?

Mr. TORPOCO. If I may, Mr. Chairman, eBay absolutely agrees that that one prong to the solution in this situation has to be to get law enforcement involved, to get them adequate funding, to get them enhanced prosecutorial powers, to elevate the priority of these prosecutions, and, frankly, to increase the cost for the criminal, from a deterrent perspective, by raising the sentencing exposure that these criminals face for abusing online marketplaces and selling stolen goods.

But that is not enough. And that is why eBay, in response to this Committee's hearing back in October of 2007, stepped up and created a specific program specifically designed to get retailers involved in sharing evidence of theft with eBay's investigators on a team-level basis, so that not only could we refer cases to law enforcement, so that as an internal matter eBay could shut off accounts when there was evidence of their misbehavior, irrespective of whatever happens in terms of referrals to law enforcement.

And on that point, I have to correct the record on one important point, and that is something that Mr. LaRocca has represented to the Committee in his written activity and verbally before you today. And he has suggested that the overwhelming majority of retailers that we have approached to join in this PROACT program have rejected eBay's invitation, and that is flatly false—flatly false. I know that it is false, because I am the individual within eBay who has, kind of, overseen our enrollment efforts, trying to reach out to retailers to work with us in a cooperative spirit.

And we have approached roughly, I would say, 30 retailers in the pilot phase of this program to enlist with us in a cooperative basis. And of those 30, roughly six retailers have rejected that invitation,

choosing to pursue politics or whatever else rather than work with us on a case-by-case basis. To this day——

Mr. LUNGREN. Does that mean 24 cooperated, or you just haven't heard from the rest of them?

Mr. TORPOCO. No. As a matter of fact, our goal was to enroll during the pilot phase of this program only six to 12 retailers until we could assess the cost and effectiveness of the program. But to date, we have roughly 21 or 22 retailers that have said yes to us, that they want to work cases with us.

And, unfortunately, what we have seen in this debate is that, say, the six hardest critics have hijacked the debate and accused eBay of being unwilling to work with the retail community, when the reality is that most retailers recognize that it is an insufficient approach to combating organized retail theft to just scapegoat the marketplace and refuse to work us with on a cooperative basis.

So, actually, I want to make clear to this Committee that many retailers, in fact, have been willing to put aside politics and work with us since this Committee last heard testimony on this subject back in 2007.

Mr. LUNGREN. Mr. Chairman, with your indulgence, could I hear from Mr. LaRocca?

Mr. LAROCCA. Thank you for the question, Mr. Lungren.

To answer your question, about Federal legislation wholistically, the first goal, obviously, for us, is to prevent these losses from occurring in the first place. Retailers spent $11 billion last year in loss prevention. So, ideally, we would like to prevent these losses from occurring. And if we send a strong message to criminals and tell them this is a Federal offense, there are stiffer penalties, we believe that will happen.

The second part is that, by defining organized retail crime specifically, we believe that we can get Federal investigators and assistant U.S. Attorneys more interested in this topic. It is not just a property crime, but it is a serious Federal offense called out to them to investigate.

And you made a point about terrorism and linking that in, and let me just say that in several of the very large cases around the country now there have been illegal immigrants involved in those cases. In one case several years ago, there were funds that were shipped overseas to groups like Hamas and involved some very bad people that put out hits on Federal agents involved in that investigation. So this is absolutely, in some ways, linked to terrorism. And a very big concern for retailers, but we should be concerned as U.S. citizens.

And let me just—I just should ask this question, because I did make the comment about PROACT. With the retailers that have responded, what have the results been? Because we—and we have asked this question of our coalition members—have heard nothing about the results of PROACT, and it has been in operation now for several months.

Thank you.

Mr. SCOTT. Let me ask one additional question to Mr. Torpoco.

One of the things that the retailers are looking for is information on the seller. Does the seller on eBay have an expectation of privacy for their name and address?

Mr. TORPOCO. Yes, absolutely. Most Americans are perfectly law-abiding. We have millions that are using eBay, and most of them absolutely have a privacy interest in making sure that their personal member data that they provided to eBay isn't provided to our competitors, the retailers.

We obviously don't have any problem disclosing information to law enforcement, to the government, in connection with a criminal investigation, which is why eBay took, really, the unique step of creating a privacy policy that is posted on the eBay Web site which says that eBay will provide certain member data to law enforcement and government entities in connection with a criminal investigation, not with the need for a subpoena, not with the need for a court order, but based on a simple letterhead request stating that the agency is investigating criminal conduct.

Very few companies can say that, but we took that extraordinary step because our members expect the eBay marketplace to be a safe place, and they understand that we need to do something like that to make sure that we are not standing in the way of law enforcement investing a case but we are actually viewing them as an ally.

But that is a very different situation than creating a regime where a competitor, like another retailer, can submit some sort of report to eBay and all of a sudden demand, under the threat of liability, that eBay hand over that member data to the competitor.

And I think most Americans when confronted with that situation would say, hold on, we are not talking about giving my personal data, on the basis of this suspicion, to the government in connection with a criminal case; you are talking about handing over my personal member information to a competitor that could potentially use that information to harass and try to curtail the business of a small retailer that is using the eBay marketplace to compete with the big-time retailers.

Mr. SCOTT. You don't make that information available in the United Kingdom?

Mr. TORPOCO. I don't counsel the United Kingdom, so I don't know their specific policies.

But one thing I would also note is that any party on eBay, using the contact eBay member functionality, anybody who is a party to a transaction on eBay like somebody who is a bidder or who has bought an item—and that would include a retailer who creates an undercover account—can actually swap member contact information using the eBay service. It is an automatic swap if you are a party to a transaction.

So oftentimes, you know, eBay is asked to go talk to retail loss-prevention teams or criminal investigators in law enforcement about using the eBay tools that exist on the eBay Web site to facilitate a criminal investigation. And we talk about this functionality that exists that is available to anybody——

Mr. SCOTT. Are you saying that if Walgreens wanted the information, all they would have to do would be to buy one of those razer blades——

Mr. TORPOCO. To do a controlled purchase, for example, or——

Mr. SCOTT.—and they could get that information?

Mr. TORPOCO. Yes, they could use that functionality. If they created an undercover account and they bid on an item or purchased an item, using that functionality they could swap member information with that other member. And it is an automatic swap.

Mr. SCOTT. Thank you.

Mr. LaRocca, do you have a final comment?

Mr. LAROCCA. Thank you, Mr. Chairman. Two very quick comments.

One, eBay does currently release that information to the private sector upon request under a program for intellectual property rights violation called VeRO, the Verified Rights Owner program. So there is also a precedent established by their organization to do exactly what we are asking for. Today it just applies to the intellectual-property-rights side versus stolen or fraudulently obtained merchandise.

And one other quick comment. You asked about the United Kingdom, posting the seller information when a company lists themselves as a business, and this information is required if they are a business seller and it is posted up on their site for consumers to authenticate or to verify who they are and conduct business with them.

Thank you.

Mr. SCOTT. Thank you.

My time has expired. There are a couple who want to make their final comments, but I will recognize the gentleman from Texas.

Mr. GOHMERT. Just a follow-up. In response to Mr. LaRocca's question, do we have results on PROACT?

Mr. TORPOCO. We don't have any systematic results that I could report to the Committee.

Mr. GOHMERT. How about any nonsystematic results?

Mr. TORPOCO. Honestly, the program was launched in April, and I would say that it has been within the past 8 weeks or so that we have actually reached a critical mass of participation to actually make the tracking of reports possible.

What our intent has been all along, after the 6-month trial period, which would be roughly in October, to actually look back at the program, see where it is working, where it is not working, what kind of reports we are getting, how many accounts we suspended, how many referrals we made to law enforcement. But that sort of examination hasn't taken place because——

Mr. GOHMERT. Could you provide those results to our Committee when you get them?

Mr. TORPOCO. Yes.

Mr. GOHMERT. Thank you.

Mr. SCOTT. Mr. Muscato?

Mr. MUSCATO. Thank you, Mr. Chairman. I just wanted to make a comment. And I have heard Mr. Torpoco say this several times, about the competition, that we think they are competing with us. We are a neighborhood drug store. We don't compete with eBay. If someone has eaten a big ol' bowl of chili, they are not going to get on eBay to order some Pepcid AC. They are going to go to our store and get it. We don't compete with them.

The only thing we are trying to do is to keep our property from leaving our stores illegally and being sold on those e-commerce.

That is all we are trying to do. That is why we want to work as partners with them, but not by sending them information to see what they do with it. Let's work together.

Mr. TORPOCO. Mr. Chairman, may I comment on that?

Mr. SCOTT. Wait a minute.

Mr. DelBianco?

Mr. DELBIANCO. Thank you, Mr. Chairman.

I just wanted to mention that, in your opening statement, you talked about the anonymity issue, and then Ranking Member Gohmert talked about the comparison with pawn shops. And I think it is relevant to, sort of, bridge that right now.

And one has to remember that Amazon, eBay, Overstock, they all know exactly who the sellers are behind those user names that show up on the Internet. It is only anonymous to the folks who might want to invade the privacy of that seller.

However, the men at law enforcement, so much as phone call, fax, or e-mail, asks them eBay, Amazon, Overstock always reveal that information to law enforcement. They have all that information in there.

And I would contrast that with a pawn shop, where somebody walks in the door and walks out with a fist full of cash. Their identity then has to be captured, whether it is a fingerprint or a photocopy of a license. It is a fundamentally different transaction than the marketplaces which actually know the identity and the location of the individuals that list long after the sale was closed.

And on the table in front of you, drawing a parallel to pawn shops, none of these items that you see on this table are going to wind up in a pawn shop. Pawn shops are used items that are hocked or sold. These are new items, and they are precisely the kind of new items that legitimate small businesses can get hold of at discount prices through freight liquidators, through businesses that are going out of business, through overstock, hence the name Overstock.com. These are legitimate owners who seek to sell it at big discounts.

And I know, as Mr. Muscato says, that when I have an emergency, I am unlikely to buy it. But if I have to take this stuff every day for the rest of my life, you bet I will go online to try to buy these items at the lowest price I can get from a legitimate source.

Thank you.

Mr. SCOTT. Thank you.

And final comment, Mr. Torpoco?

Mr. TORPOCO. Yes, Mr. Chairman. I have to reiterate what Mr. DelBianco said. I mean, eBay as a marketplace is just so vast that we have moved on from the days of being the site where people could find and collect Beanie Babies, for example, to a site where you can find just about anything. And our policies allow just about anything to be sold, provided that it is legal.

So I would hazard a guess to say that, of the sorts of items that you see displayed on this table, you could probably find all or most of them on this site, provided it is not, like, a prescription item that we don't allow.

So it is not the case to say that a company like Walgreens doesn't compete with the small retailers that are on eBay. You bet Walgreens does compete with them, because those small retailers,

as Mr. DelBianco indicated, have obtained a lot of this perfectly legitimate product and are selling it at deeply discounted prices.

The other thing I would just briefly note is, since we do have a sheriff here who did a massive takedown of a big case, is to kind of put some perspective on what we are talking about when we talk about organized retail theft and the significant—or the share of the loss that is actually attributable to eBay, for example, as a fencing site as opposed to other channels.

Now, one thing that I did prior to coming to this Committee hearing was actually having one of our senior fraud investigators pull up the account record of the account that was used in that big Florida case to actually fence stolen goods. And I wasn't surprised to see that, of the one account that was used in that case, it had approximately $100,000 in sales, $180,000. And we are talking about a takedown that involved, according to the press that I have seen in the case, between $60 million and $100 million of losses to the retail industry.

So it is simply not fair to somehow equate eBay with the Internet and suggest that somehow taking punitive or regulatory actions against eBay is really going to get at the meat of curtailing the problem of organized retail theft, when, in this particular case, for example, the eBay account at issue constituted maybe one-third of 1 percent of the goods that were actually fenced in that case.

So we obviously want to see comprehensive approaches to this problem, not approaches that just scapegoat online marketplaces.

Mr. SCOTT. Well, we are going to try to get something done, because obviously, with the amounts of money that are being stolen, something has to be done.

But I would like to thank our witnesses for being with us today. I would like to thank Mr. Putnam and Mr. Ellsworth for their participation.

Members may have additional written questions for our witnesses that we will forward to you and ask you to respond as quickly as you can so it can be made part of the record.

Without objection, the statement from the senior Senator from Illinois, Senator Durbin, will be made part of the record.

And, without objection, the hearing record will remain open for 1 week for the submission of additional materials.

And, without objection, the Subcommittee stands adjourned.

[Whereupon, at 5:40 p.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

PREPARED STATEMENT OF THE HONORABLE JOHN CONYERS, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN, AND CHAIRMAN, COMMITTEE ON THE JUDICIARY

We all agree that our Nation's economy thrives on strong markets that in a perfect world would operate with no need for oversight and regulation. But, as was made painfully obvious to all of us over the past week through our continuing financial crisis, our economy does not operate in a perfect world and in the absence of appropriate oversight, greed leads to dishonesty and even further to criminal activity. Unregulated financial industries have brought us to the brink of disaster and like banking and the financial markets, retailers whether they be traditional brick and mortar stores or operating online must have appropriate regulation.

The goal of the legislation before the subcommittee today, namely to curb organized retail theft, is very important for three overall reasons. First, organized retail theft costs retailers over $30 billion dollars each year according to the FBI and this financial pinch is not simply shouldered by the retailer. The costs to the retailer are sometimes passed along to the honest consumer in higher prices that the retailer must set to cover losses due to theft and in some instances the retailer must lay off employees to cover costs.

Second, the $30 billion in losses each year translate in to $1.6 billion in lost tax revenue to state and local governments making it increasingly difficult to provide necessary services. Salaries for police officers, firefighters, teachers, sanitation workers, and many others become stagnant as governments cannot raise their salaries even to meet inflation. These workers are already underpaid and overworked and their departments' budgets are stretched beyond their limits hindering their ability to protect us, teach our children and to provide basic quality of life services.

Third, consumer safety is compromised when thieves steal and to not properly store products that are date sensitive or sensitive to elements such as temperature and light and then sell those items to unsuspecting consumers. Over the counter drugs are a favorite target of organized retail thieves because they are easy to steal and easy to sell. We have reports of thieves changing expiration dates on these products and storing them in facilities that are not temperature controlled. They sell these dangerous products with no notice to the consumer and for over the counter medications, this is dangerous enough but we even have evidence of thieves stealing baby formula and selling it beyond its expiration date and not storing it appropriately. This is particularly unconscionable.

Underlying all of these problems is that the poor and minorities are most affected by the higher prices and lay offs more than any other segment of society. Most of the retail stores that thieves target are in less economically developed areas. Consequently, the higher prices that the retailer must charge are passed on directly to that community and any layoffs fuel the chronic unemployment in these areas. And the reduced city services from the reduced revenue of course also hit the poor areas the hardest. Moreover, the organized retail thief's target market is the consumer having difficulty meeting retail prices making the likely purchaser of the outdated medicine or tainted baby formula someone who is poor, trying to find a way to make ends meet and is trying thinks that he or she has simply found a bargain. How tragic would it be for that purchase to be poisonous?

Whether we adopt one or a hybrid of all of these proposals, we must fully address and do our best to curb organized retail theft. Our economy depends on it, our well-functioning governments depend on it, and the safety of our citizens depend on it. I thank the Chairman and I yield back

PREPARED STATEMENT OF THE HONORABLE LOUIE GOHMERT, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS, AND RANKING MEMBER, SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

Thank you, Mr. Chairman.

I would like to thank you for holding this hearing on the very important issue of organized retail theft. As you know, this is the second hearing the Crime Subcommittee has had on this topic during this Congress.

The problem of organized retail theft is growing and involves the theft of large quantities of retail merchandise. Organized retail theft is not a high-profile crime but it is a costly one. Unlike shoplifters or small-time thieves, who steal for their own personal use, organized retail thieves steal merchandise in order to sell it back into the marketplace.

These criminals typically target merchandise that can be easily concealed and easily resold. The stolen items range from low-cost products such as razor blades, baby formula or batteries to expensive products such as electronics or appliances.

Organized retail thieves, commonly referred to as "boosters," will sell the stolen merchandise at flea markets, pawn shops, swap meets and increasingly on Internet websites.

According to the FBI, organized retail theft accounts for between $30 and $37 billion in losses annually. The Coalition Against Organized Retail Crime estimates that states with sales tax annually suffer over $1.5 billion in lost tax revenue due to organized retail theft.

In 2005, Congress directed the Attorney General and FBI, in consultation with the retail community, to establish a task force to combat organized retail theft and create a national database or clearinghouse to track and identify organized retail thefts across the country.

The result of this legislation is the Law Enforcement Retail Partnership Network (LERPnet), which was launched in 2006. This national database allows retailers to share information about suspected theft with each other and law enforcement officials.

In addition, the FBI has created Major Theft Task Forces to identify and target multi-jurisdictional organized retail theft rings. There are currently 9 FBI-led Major Theft Task Forces, staffed by FBI agents and state and local law enforcement officers, located in FBI field offices across the country.

Although federal agencies work to investigate the criminals that engage in this conduct, retail organizations argue that there is too little prosecution of this crime. They argue that state felony thresholds—that stolen goods must amount to $500, or in some states $1000 for the offense to be a felony—are too high to provide for prosecution of organized retail theft. The federal threshold for prosecution for the crime of transportation of stolen goods in interstate commerce is also high as the amount of stolen goods must be in excess of $5000 to trigger federal criminal liability.

Several bills have been introduced this Congress to prohibit organized retail theft and, in particular, "e-fencing"—the sale of stolen goods on online auction sites. Auction sites such as eBay and other online marketplaces such as Amazon.com have expressed concerns about these bills.

I've met with representatives from both industries and I would hope that these groups could come together to find a solution without Congressional action.

Several merchants have used the comparison of pawnshops when discussing "e-fencing" with me. Pawnshops generally are required to keep records of the merchandise available for sale. It seems reasonable to ask online marketplaces to do the same. However, pawnshop records are kept for law enforcement officials, not private third parties. With that in mind, I would like to hear from our witnesses their thoughts on imposing a limited duty to maintain records of merchandise on the websites.

Further, one bill before this subcommittee would create a new federal crime of facilitation of organized retail theft. This provision exposes online marketplaces to incarceration based on a lower mental state than is traditionally required for criminal penalties. Although I appreciate a desire to craft legislation that addresses innovative criminal conduct, I am wary of any legislation that deviates from using the "knowing" or "intentional" mental states that are commonly used in criminal offenses. That is important because criminal offenses are intended to impose penalties against those who consciously act to commit a crime or consciously act in furtherance of a crime.

I look forward to hearing the testimony of our witnesses on the legislation before the subcommittee. I yield back the balance of my time.

PREPARED STATEMENT OF THE HONORABLE SHEILA JACKSON LEE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS, AND MEMBER, SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

Thank you, Mr. Chairman, for convening today's very important hearing addressing organized retail crime. Organized Retail Crime (ORC) has gown in dimension and scope in recent years. It is contended that the amount of ORC exceeds $38 billion per year. At today's hearing, we will explore the problem and consider three bills that present markedly different legislative approaches aimed at addressing the problem. I look forward to hearing from and questioning Representative Brad Ellsworth, the sponsor of HR 6491; Mr. Frank Muscato, an investigator at Walgreens; Sheriff Judd; Mr. Steve DelBianco, Executive Director, Net Choice; Mr. Edward Torpoco, Senior Regulatory Counsel of eBay; and Mr. Joseph LaRocca, Vice President, Loss Prevention of the National Retail Federation. I welcome these distinguished witnesses.

Organized retail crime is not new. Stolen goods have been sold at swap meets, flea markets, pawn shops, and a myriad of other venues for many years. Recently, organized retail crime has found a home on the internet, and on-line marketplaces have provided a haven for individuals to trade and sell in stolen goods. This practicing of selling and trading in stolen goods is known as "E-fencing." By some estimates, the loses suffered by these retail industries and governments is in the billions of dollars. The products stolen and sold on the internet range from items stolen from stores and includes such products as sensitive U.S. military items, baby-formula, and over-the-counter medicines, etc.

The problem of stolen goods has historically been addressed at both the State and Federal level. Existing Federal laws that criminalize the transportation, sale and receipt of stolen goods transported in interstate or foreign commerce have been used to convict organized retail criminals, including those that have turned to the internet. Because of increasing demands on the existing limited resources, very few organized retail crime cases have been brought by the FBI, DOJ, etc.

eBay contends that the laws that we are discussing today will disproportionately affect it and its business. eBay claims that it already has internal controls and regulations that address this issue. We will explore these issues further in this hearing and consider three bills aimed at addressing this practice: HR 6713, the "E-fencing Enforcement Act of 2008", HR 6491, the "Organized Retail Crime Act of 2008", and S. 3434, the "Combating Organized Retail Crime Act of 2008". Each is discussed briefly below.

A. H.R. 6713, THE "E-FENCING ENFORCEMENT ACT OF 2008"

H.R. 6713 recognizes that knowing participation in passing stolen property by online marketplace providers is already a crime under 18 U.S.C. ? 2314. H.R. 6713, however, imposes new duties on online marketplace providers with respect to high volume sellers, defined as those who sell or offer goods or items of a value of $5,000 or more in a single offering, or a value of $12,000 or more in one or more offerings in the last year. Those duties include a duty to retain contact information about high volume sellers and to disclose that information to certain persons with standing when a report has been made by or to law enforcement regarding theft by that seller. It also imposes a duty to initiate an internal investigation, based on available or easily obtained information, and to take-down a site when there is good reason to believe the goods or items offered for sale were unlawfully acquired. The Department of Justice should normally consider compliance with these duties as a negation of culpability under section 2314. The bill also creates a civil cause of action for persons aggrieved by a provider's failure to comply with these duties.

B. H.R. 6491, THE "ORGANIZED RETAIL CRIME ACT OF 2008"

H.R. 6491 amends existing federal code by expressly including organized retail crime and the facilitation of organized retail crime in existing criminal felony statutes. H.R. 6491 also makes it unlawful for online marketplace operators to facilitate organized retail crime by failing to conduct internal investigations and "take-down" suspected sites; by failing to maintain certain records; by failing to require high volume sellers to publicly disclose certain identifying information on the Internet; and by failing to provide certain contact information to businesses who have a reasonable suspicion that online products offered for sale were obtained by ORC.

The bill provides for civil forfeiture of property used or intended to be used to commit or facilitate ORC or constituting proceeds of ORC. It also provides a civil

cause of action for injunctive relief or damages against online marketplace operators. Finally, H.R. 5391 directs the United States Sentencing Commission to review and, if appropriate, amend the sentencing

C. S. 3434, THE "COMBATING ORGANIZED RETAIL CRIME ACT OF 2008"

S. 3434 expands the reach of existing Federal crimes on stolen goods by decreasing the value of goods that would trigger federal jurisdiction from $5,000 to an aggregate value of $5,000 within any 12 month period. It directs the United States Sentencing Commission to review and, if appropriate, amend the Federal sentencing guidelines as they apply to ORC. It defines "high volume seller" as any user of an online retail marketplace who, in any continuous 12-month period during the previous 24 months, has entered into multiple discrete sales with an aggregate total of $20,000 or more in gross revenues, or 200 discrete sales resulting in an aggregate total of $10,000 or more in gross revenues.

S. 3434 imposes duties on both online retail marketplace operators and operators of physical marketplaces. Upon presentation of documentary evidence that a transient vendor at a physical marketplace or a user on an online marketplace has used the marketplace to sell stolen items, the operators must file a suspicious activity report to the Attorney General. Upon clear and convincing evidence that a vendor or user has used or is using the marketplace to sell stolen goods, the operator must terminate the vendor or user's sales activities. In the alternative, the operator may ask the vendor or user for evidence showing that it is not engaging in illegal activity. Upon a clear and convincing showing that the vendor or user is not engaging in illegal conduct, the operator need not shut down the vendor or user. The operator shall notify the Attorney General of its decision to shut-down or allow the vendor or user to continue to sell.

Online marketplace operators must maintain, for three years, contact information for all high volume sellers. They must require such seller to display its contact information along with product information. If the seller fails to do so, the operator must contact the Attorney General, and file a suspicious activity report to the Attorney General.

Any operator who knowingly fails to comply with these duties is liable for a civil penalty of up to $10,000 for each violation. Any person who knowingly makes a material false statement with the intent to influence an operator to file a suspicious activity report is subject to a civil penalty of not more than $10,000 per violation. The bill grants a State Attorney General the authority to bring a civil action on behalf of citizens of its State for injunctive relief, damages, or civil penalties.

Thank you, Mr. Chairman. I welcome today's witnesses. I yield back the balance of my time.

PREPARED STATEMENT OF THE HONORABLE RICHARD J. DURBIN, A U.S. SENATOR FROM THE STATE OF ILLINOIS

Chairman Scott and Ranking Member Gohmert, thank you for holding this hearing and thank you for the opportunity to address the issue of organized retail crime and to discuss the Combating Organized Retail Crime Act of 2008, which I introduced in the Senate on August 1, 2008.

Organized retail crime is a persistent and growing problem that costs retailers billions of dollars and poses serious health and safety risks for consumers. It involves the coordinated theft of large numbers of items from retail stores with the intent to resell those items. Typically, crime organizations hire teams of professional shoplifters to steal over-the-counter drugs, health and beauty aids, designer clothing, razor blades, baby formula, electronic devices and other items from retail stores. Using sophisticated means for evading anti-theft measures, and often the assistance of employees at stores, the thieves target 10–15 stores per day. They steal thousands of dollars worth of items from each store and deliver the items to a processing and storage location. There, teams of workers sort the items, remove anti-theft tracking devices, and remove labels that identify the items with a particular store. In some instances, they change the expiration date, replace the label with that of a more expensive product, or dilute the product and repackage the modified contents in seemingly-authentic packaging. The items are then stored in a warehouse, often under poor conditions that result in the deterioration of the contents.

Organized retail crime rings typically sell their stolen merchandise in different markets, including flea markets, swap-meets, and online auction sites. Online sales are of particular concern, since the internet reaches a worldwide market and allows sellers to operate anonymously and maximize return. A growing number of multi-

million dollar organized retail crime cases involve internet sales. For example, in Florida recently, law enforcement agents arrested 20 people in a $100 million case involving the sale of stolen health and beauty aids on an online auction site and at flea markets.

Organized retail crime has a variety of harmful effects. Retailers and the FBI estimate that it costs retailers billions of dollars in revenues and costs states hundreds of millions of dollars in sales tax revenues. With respect to certain products, such as baby formula and diabetic test strips, improper storage and handling by thieves creates a serious public safety risk when the products are resold. And, the proceeds of organized retail crime are often used to finance other forms of criminal behavior, including gang activity and drug trafficking.

The Combating Organized Retail Crime Act would address this problem in several ways. First, it would toughen the criminal code's treatment of organized retail crime by refining certain offenses to capture conduct that is currently being committed by individuals engaged in organized retail crime, and by requiring the U.S. Sentencing Commission to consider relevant sentencing guideline enhancements.

Second, the bill would require physical retail marketplaces, such as flea markets, and online retail marketplaces, such as auction websites, to review the account of a seller and file a suspicious activity report with the Justice Department when presented with documentary evidence showing that the seller is selling items that were illegally obtained. If the physical or online retail marketplace were presented with clear and convincing evidence that the seller is engaged in such illegal activity, it would be required to terminate the activities of the seller. This requirement will lead to greater cooperation between retail marketplaces, retailers and law enforcement, and will result in an increased number of organized retail crime prosecutions.

Third, the bill would require high-volume sellers on online auction sites (meaning sellers that have obtained at least $10,000 in annual gross revenues on the site) to display a physical address, post office box, or private mail box registered with a commercial mail receiving agency. This requirement will help online buyers get in touch with sellers, and assist law enforcement agents who wish to identify people who may be selling stolen goods online. It is analogous to a provision in the federal CAN-SPAM Act, which also requires persons who send mass emails to disclose their physical addresses.

This legislation has broad support in the retail industry in my home state of Illinois and nationwide. It is supported by the Illinois Retail Merchants Association, the National Retail Federation, the Retail Industry Leaders Association, the Food Marketing Institute, the National Association of Chain Drug Stores, and the Coalition to Stop Organized Retail Crime, whose members include such retail giants as Home Depot, Target, Wal-Mart, Safeway, Walgreens, and Macy's.

In summary, the Combating Organized Retail Crime Act addresses a serious problem that hurts businesses that are struggling to survive in a weak economy, and that harms consumers who unknowingly purchase stolen items that have been subjected to tampering. It would heighten the penalties for organized retail crime, shut down criminals who are selling stolen goods, and place valuable information about illegal activity into the hands of law enforcement. This bill is a big step forward in the fight against a nationwide problem.

Thank you again for holding this hearing and for the opportunity to submit this testimony. I look forward to working with you to enact legislation to crack down on the growing problem of organized retail crime.

September 22, 2008

The Honorable Bobby Scott
Chairman
Subcommittee on Crime, Terrorism and Homeland Security
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Scott:

On behalf of Target, I would like to thank you for holding a hearing on organized retail crime (ORC) legislation. This legislation will provide law enforcement and retailers with more tools to fight ORC and protect online consumers.

Target is an upscale discounter with $62 billion in revenue that operates more than 1,600 stores and employs more than 360,000 team members. The impact of ORC on Target, other retailers and consumers is significant and growing. This criminal activity, especially e-fencing, is quickly evolving due to the opportunity created by online auction sites. Criminals are selling stolen goods with greater frequency at higher prices under the protection of the anonymity provided by these auction sites. They serve as virtual pawn shops without any of the regulations or logistical challenges that restrict fencing through bricks-and-mortar pawn shops. The criminal opportunity created by e-fencing has such low risks and high rewards for criminals that they are applying to work in our stores solely to steal and resell the stolen goods online.

Target spends tens of millions of dollars a year on background checks, theft deterrent technology and security staffing and training to prevent theft in our stores. We also partner closely with law enforcement to investigate cases and support their efforts with our own forensic labs.

Target recently met with eBay executives to seek their partnership in proactively reducing the sale of stolen goods on their site. We were initially encouraged by the conversation. We offered our expertise and technology to develop a risk model to identify potential criminal sellers, while recognizing the vast majority of their sellers are upstanding citizens. Our intent was and is to proactively reduce the sale of stolen goods without burdening law enforcement. We were disappointed that their subsequent PROACT proposal ignored our understanding, instead outlining a reactive and superficial approach toward organized retail crime. Instead of eliminating this criminal opportunity through added transparency, eBay's solution is to burden law enforcement to investigate countless cases one at a time, rather than prevent these crimes in the first place.

The growth in ORC, fueled by technology and Internet fencing, has reached such a scale that retail and law enforcement cannot successfully fight this problem one booster and one fence at a time. We need responsible Internet auction sites to make modest changes to help reduce the sale of stolen property without increasing the burden on law enforcement.

ORC is a serious problem facing not only our industry, but also our communities, as money is redirected from legal commerce and the tax base into a black market that funds criminal activity.

ORC legislation provides important tools to address the sale of stolen goods through online auction sites, thus protecting consumers and reducing this otherwise lucrative criminal opportunity all while minimizing the burden on law enforcement.

Sincerely,

Brad Brekke
VP, Assets Protection
Target

July 15, 2008

Mr. Edward Torpoco
Regulatory Counsel
eBay Inc.
2145 Hamilton Avenue
San Jose, CA 95125

Dear Mr. Torpoco:

Target recently suggested a meeting with eBay executives to seek your partnership in proactively reducing the sale of stolen goods on your site. We were optimistic when you agreed to meet and encouraged by the ensuing conversation. You agreed that eBay would develop a proposal to proactively reduce the sale of stolen goods without burdening law enforcement.

We were very disappointed that your subsequent PROACT proposal ignored our understanding, instead outlining a reactive and superficial approach toward organized retail crime, so we must respectfully decline to participate in the proposal until it is truly proactive.

Despite this setback, we remain committed to continuing our dialogue, and more importantly, to working toward a solution that prevents crime, supports communities and reduces workload for law enforcement.

We have three main concerns with the PROACT proposal.

- **Reactive Not Proactive** – We are disappointed that you have declined our offer to share case information and help you build a risk model that would detect suspicious merchandise sales. By choosing not to cooperate with us on a proactive model that would deter the fencing of stolen goods on eBay, you are passively facilitating this crime.

- **Single Point of Contact** – We operate a nationwide network of investigators that work on more than 1,000 cases a year, so it is not realistic that we be restricted to a single point of contact. Additionally, your commitment of only three people to this problem displays an underestimation of the size and seriousness of this problem.

- **Over Reliance on Law Enforcement** – Your proposed requirement that law enforcement be brought into the process would create a significant burden for law enforcement by forcing them to address countless individual cases instead of preventing the crime by increasing transparency.

1000 Nicollet Mall, Minneapolis, MN 55403

Although we cannot participate in PROACT as currently defined, we still offer our support and expertise in developing a truly proactive approach and respectfully submit our top three priorities.

- **Proactively Identify Criminal Activity** – Most importantly, we would like to proactively identify criminal activity by jointly developing a risk model based on historical case data. We understand this would require significant resources; however, we allocate immense resources toward this problem as part of our commitment to social responsibility and know that this commitment is also important to you and the marketplace you serve.

- **Increased Access to Seller Information** – An efficient process to share information with investigators and increased seller transparency are critical. For example, granting VERO requests and disclosing a seller's city and state would provide critical information to investigators.

- **A Technical Expert Partner** – Our retail investigators and law enforcement would benefit greatly from an eBay technical expert partner who can assist us in connecting multiple cases and conducting covert purchases that provide crucial evidence in e-fencing cases.

By taking these steps, we can greatly reduce the sale of stolen goods on your site, thus protecting your buyers, enhancing your company's reputation and reducing this otherwise lucrative criminal opportunity, all while reducing the burden on law enforcement.

The growing negative impact of this crime across the country is too significant to not work toward a collaborative solution. We hope to work together to develop a truly proactive program that will benefit eBay, retailers, law enforcement and the community.

Sincerely,

Brad Brekke
Vice President
Assets Protection

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(732) 752-1700

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e-mail: lisa_labruno@homedepot.com

April 14, 2008

Edward Torpoco
Regulatory Counsel
eBay Inc.
2145 Hamilton Avenue
San Jose, CA 95125

Dear Mr. Torpoco:

We have reviewed eBay's documentation related to the PROACT Program ("the Program"). The Home Depot has some concerns and we would appreciate eBay's cooperation in addressing these issues while we continue to consider the benefits of participating in the Program.

First, while we agree that a cooperative effort among eBay and retailers to investigate on-line fraud is beneficial, we believe a more proactive approach will serve as the strongest deterrent to criminal activity. As we discussed at our meeting on March 21st, our investigators regularly identify sellers on eBay offering bulk quantities of Home Depot gift cards and proprietary products in their original packaging at significantly reduced prices. Over the course of the many months these investigations can take to complete, the Home Depot's financial losses increase exponentially. If eBay took steps to prevent suspicious auctions from operating in the first place (e.g. expanding the "prohibited list" to include the sale of same proprietary items in multiple quantities by the same seller, prohibit "Buy it Now" gift cards over $100, reduce the dollar limits on gift cards to $200, impose longer time limits for gift card sales, require seller to disclose gift card number during upload of sale), then financial losses would be minimized. We are eager to learn more from eBay regarding any plans for developing a more proactive approach to on-line fraud.

Along these same lines – and as I previously indicated to you via e-mail – eBay's Employee Consent Form ("the Form") is inconsistent with a proactive approach to investigations. As you explained it to me, the target of a criminal investigation who is employed by The Home Depot must sign the Form before eBay will release any information to our investigators. Obviously, any employee who is in fact engaged in criminal activity will be reluctant to sign the Form particularly since he/she faces no adverse consequences for refusing to do so. eBay's purported rationale for the Form – i.e. the employee's privacy rights – makes little sense particularly since eBay does not require a similar form from non-employee targets. At a minimum, we would request that once a case is forwarded to law enforcement, eBay agree to release the seller's personal information to our investigators.

Next, you confirmed that eBay has recently pulled-back on its' cooperation with retailers like The Home Depot in response to lobbying efforts against on-line markets by retailers and the associations representing them. From that, we conclude that participation in the Program is predicated on our agreement that The Home Depot will not advance Organized Retail Crime legislation at the state and federal level. If that is eBay's expectation, then The Home Depot declines your invitation to participate in the Program.

Finally, we propose that the pilot period for the Program be reduced from six months to two months to provide for an early assessment of the Program's value. At that point, eBay and all participants could convene to address any issues and make any necessary adjustments to ensure the success of the Program.

Please advise me of eBay's response to these issues. I look forward to hearing from you.

Very truly yours,

LISA M. LABRUNO
Counsel

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110TH CONGRESS
2D SESSION

H. R. 6713

To amend title 18, United States Code, to provide for more effective enforcement of the Federal prohibition on the interstate shipment of stolen property, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

JULY 31, 2008

Mr. SCOTT of Virginia (for himself and Mr. DAVIS of Alabama) introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To amend title 18, United States Code, to provide for more effective enforcement of the Federal prohibition on the interstate shipment of stolen property, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "E-fencing Enforcement Act of 2008".

SEC. 2. FINDING AND DECLARATION.

The Congress finds and declares that—

(1) the knowing participation, including by willful blindness, in a scheme to fence specific goods the participant knows are stolen, if the scheme involves the shipment of those goods in interstate or foreign commerce, including a knowing participation by providing a marketplace through the Internet for those goods, is a violation of section 2314 of title 18, United States Code, and should be vigorously prosecuted by the Department of Justice; and

(2) the Department of Justice should normally consider compliance with this Act as a negation of culpability under that section.

SEC. 3. E-FENCING ENFORCEMENT.

(a) IMPROVING ENFORCEMENT.—Chapter 113 of title 18, United States Code, is amended by adding at the end the following:

"§ 2323. E-fencing Enforcement

"(a) DUTY TO PROVIDE INFORMATION.—It shall be the duty of each online marketplace provider to disclose contact information for any high volume seller to any inquirer with standing under this section to seek that information.

"(b) DUTY TO RETAIN INFORMATION ABOUT HIGH VOLUME SELLERS.—It shall be the duty of each online marketplace provider to retain contact information for

1 three years after receipt of that information from high vol-
2 ume seller.

3 "(c) TAKE-DOWN REQUIREMENT.—Upon the request
4 of a recipient of contact information under this section,
5 it shall be the duty of the provider to determine, based
6 on information reasonably available to it or that could be
7 obtained by the provider without undue expense, whether
8 the goods or items were lawfully acquired. If the provider
9 determines that there is good reason to believe the goods
10 or items were unlawfully acquired, it shall be the duty of
11 the provider to preclude access by the high volume seller
12 to the online marketplace with respect to those goods or
13 items.

14 "(d) CIVIL ACTION FOR FAILURE TO COMPLY.—Any
15 person aggrieved by a failure of an Internet marketplace
16 provider to comply with this section may, in a civil action,
17 obtain appropriate relief.

18 "(e) DEFINITIONS.—In this section—

19 "(1) the term 'online marketplace' means an
20 Internet site where persons other than the operator
21 of the Internet site can enter into transactions for
22 the sale of goods or other items if—

23 "(A) the goods or items are promoted
24 through inclusion in search results displayed
25 within the site; and

"(B) the operator of the site has the contractual right to supervise those transactions and a financial interest in the sale of the goods or items;

"(2) the term 'contact information' means the name, telephone number, and address at which legal process could be served;

"(3) the term 'high volume seller' means any person who, through the online marketplace, sells or offers for sale goods or items—

"(A) of a value of $5,000 or more in any single offering; or

"(B) of a value of $12,000 or more in one or more offerings during the course of the preceding 365 days; and

"(4) the term 'inquirer with standing under this section to seek' means any person who provides to the online marketplace provider a signed report made to or received from a criminal law enforcement agency reporting the unsolved theft from that person during the preceding 365 days of goods matching the description of those offered on the online marketplace after the theft.".

○

110TH CONGRESS
2D SESSION

H. R. 6491

To amend title 18, United States Code, to combat, deter, and punish individuals and enterprises engaged nationally and internationally in organized crime involving theft and interstate fencing of stolen retail merchandise, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

JULY 15, 2008

Mr. ELLSWORTH (for himself and Mr. JORDAN of Ohio) introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To amend title 18, United States Code, to combat, deter, and punish individuals and enterprises engaged nationally and internationally in organized crime involving theft and interstate fencing of stolen retail merchandise, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Organized Retail Crime Act of 2008".

SEC. 2. FINDINGS AND STATEMENT OF PURPOSE.

(a) FINDINGS.—Congress makes the following findings:

(1) Organized retail crime involving the obtaining by fraud and theft of retail merchandise from entities engaged in interstate commerce is a nationwide problem of an increasing scale and is expected to cost American companies and consumers more than $30,000,000,000 annually.

(2) The increasing losses by retailers as a result of organized retail crime make certain goods and products less available and accessible to American consumers.

(3) The uncontrolled redistribution and unsafe storage of stolen and fraudulently obtained consumer products such as baby formula, over-the-counter drugs, and other products by persons engaged in such organized retail crime is a health and safety hazard to American consumers.

(4) The unregulated black-market sales of such fraudulently obtained and stolen merchandise results in an estimated $1,600,000,000 annual loss in much needed sales and income tax revenues to State and local governments.

(5) The illegal income from the expanding theft and resale of stolen retail goods is reasonably be-

lieved to benefit persons and organizations engaged in other forms of criminal activity such as drug trafficking, gang activity, and terrorism.

(6) Organized retail crime rings often obtain retail merchandise through the use of checks for which there are insufficient funds or that are forged or stolen, frequently returning the merchandise to fraudulently obtain refunds. Such practices create major problems for the retail industry and the national banking system.

(7) Organized retail crime rings are increasingly using counterfeit, forged, misappropriated, and improperly transferred Universal Product Code labels and other devices employed to identify articles for sale as a method for achieving their ends.

(8) The dramatic growth of organized retail crime and the unfettered resale of such stolen and fraudulently obtained goods in national and international Internet-based marketplaces has resulted in effective evasion by such resellers of State and local regulations on secondhand goods and article resellers which had traditionally been used to control the possession, resale, and transfer of stolen goods.

(9) The unrestricted expansion of anonymous Internet-based marketplaces for stolen and fraudu-

lently obtained goods has resulted in a dramatic increase in the deployment of organized retail crime rings seeking to sell stolen goods in Internet-based marketplaces.

(10) Conduct constituting organized retail crime and conduct facilitating organized retail crime both substantially affect interstate commerce.

(b) STATEMENT OF PURPOSE.—In light of the above findings, the purposes of this Act are as follows:

(1) To protect consumers, retailers, the national banking system, and State and local governments from the more than $30,000,000,000 annual problem of organized retail crime as well as the related adverse health and safety risks it creates.

(2) To continue to allow legitimate transactions to occur on online marketplaces while addressing the growing problem of fencing stolen merchandise over the Internet ("e-fencing") that facilitates organized retail crime.

SEC. 3. ORGANIZED RETAIL CRIME.

(a) DEFINITIONS.—Section 2311 of title 18, United States Code, is amended—

(1) by inserting after the fifth paragraph (relating to the definition of "motor vehicle") the following:

1 " 'Organized retail crime' means—

2 "(1) the stealing, embezzlement, or obtain-
3 ing by fraud, false pretenses, or other illegal
4 means, of retail merchandise in quantities that
5 would not normally be purchased for personal
6 use or consumption for the purpose of reselling
7 or otherwise reentering such retail merchandise
8 in commerce; or

9 "(2) the recruitment of persons to under-
10 take, or the coordination, organization, or facili-
11 tation of, such stealing, embezzlement, or ob-
12 taining by fraud, false pretenses, or other illegal
13 means;";

14 (2) by inserting before the paragraph inserted
15 by subsection (a)(1) of this section, the following:

16 " 'Online marketplace' means—

17 "(1) an Internet site where persons other than
18 the operator of the Internet site can enter into
19 transactions for the sale of goods or services and in
20 which—

21 "(A) such goods or services are promoted
22 through inclusion in search results displayed
23 within the Internet site; and

24 "(B) the operator of the Internet site—

"(i) has the contractual right to supervise the activities of the person with respect to such goods or services; or

"(ii) has a financial interest in the sale of such goods or services;";

(3) by inserting after the second paragraph, relating to the definition of "cattle", the following new paragraph:

" 'Internet site' means a location on the Internet accessible at a specific Internet domain name, is accessible at a specific address under the Internet Protocol (or any successor protocol), or is identified by a uniform resource locator;"; and

(4) by inserting before the paragraph inserted by paragraph (3) of this subsection, the following new paragraph:

" 'High-volume seller' means a seller on an online marketplace who in the past 12 months has made or offered to make discrete transactions aggregating at least $12,000;".

(b) TRANSPORTATION OF STOLEN GOODS.—The first paragraph of section 2314 of title 18, United States Code, is amended by inserting "or engages in organized retail crime involving the transporting, transmitting, or trans-

ferring in interstate or foreign commerce any goods, wares, or merchandise," after "$5,000 or more,".

(c) SALE OR RECEIPT OF STOLEN GOODS.—The first paragraph of section 2315 of title 18, United States Code, is amended by inserting "or engages in organized retail crime involving receiving, possessing, concealing, storing, bartering, selling, or disposing of any goods, wares, or merchandise," after "$5,000 or more,".

(d) FRAUD IN CONNECTION WITH ACCESS DEVICES.—Section 1029(e)(1) of title 18, United States Code, is amended—

(1) by inserting "(including gift card)" after "card";

(2) by inserting "(including a Universal Product Code label)" after "code"; and

(3) by inserting "(including a radio frequency identification transponder)" after "identifier".

(e) FACILITATION OF ORGANIZED RETAIL CRIME.—

(1) IN GENERAL.—The first paragraph of section 2315 of title 18, United States Code, as amended by subsection (c) of this section, is further amended by inserting ", or facilitates such organized retail crime, including, but not limited to, facilitation through the operation of an online marketplace for the sale of goods and services, knowing or having

reasonable cause to know that such organized retail crime is facilitated by such operation" before "; or" at the end of the paragraph.

(2) OPERATOR OF AN ONLINE MARKETPLACE.—Section 2315 of title 18, United States Code, is further amended by inserting before the last paragraph the following:

"It is unlawful for an operator of an online marketplace to fail to—

"(1) expeditiously investigate when credible evidence of sales of goods or services acquired through organized retail crime on its online marketplace comes to its attention, and remove from the online marketplace or disable access to material from the online marketplace of sellers offering goods or services when the result of the investigation provides knowledge or a reasonable cause to know that the goods or services were acquired through organized retail crime, and maintain a record of all investigations for a minimum of three years;

"(2) require the seller of property whose merchandise packaging identifies the property as being available from a particular or exclusive retail source, to post such identifying information conspicuously

on the Internet site where other information about the property is posted; and

"(3) in the case of each high volume seller—

"(A) maintain the following information for three years—

"(i) the name, telephone number, e-mail address, legitimate physical address, any user identification, and company name of the high-volume seller; and

"(ii) all transactions conducted by each high-volume seller on the online marketplace for the most recent three-year period; and

"(B) require any high-volume seller to—

"(i) conspicuously post its name, telephone number, and legitimate address on the Internet site where other information about the property being sold by the high-volume seller is posted; or

"(ii) provide, upon request of any business that has a reasonable suspicion that goods or services at the site were acquired through organized retail crime, its name, telephone number, and legitimate physical address.".

1 (f) REVIEW AND AMENDMENT OF FEDERAL SEN-
2 TENCING GUIDELINES RELATED TO ORGANIZED RETAIL
3 CRIME.—
4 (1) REVIEW AND AMENDMENT.—The United
5 States Sentencing Commission, pursuant to its au-
6 thority under section 994 of title 28, United States
7 Code, and in accordance with this section, shall re-
8 view and, if appropriate, amend the Federal sen-
9 tencing guidelines (including its policy statements)
10 applicable to persons convicted of offenses involving
11 organized retail crime under—
12 (A) sections 1029, 2314, and 2315 of title
13 18, United States Code; and
14 (B) any other relevant provision of the
15 United States Code.
16 (2) REQUIREMENTS.—In carrying out the re-
17 quirements of this section, the United States Sen-
18 tencing Commission shall—
19 (A) ensure that the Federal sentencing
20 guidelines (including its policy statements) re-
21 flect—
22 (i) the serious nature of the offenses
23 and penalties referred to in this Act;
24 (ii) the magnitude of organized retail
25 crime; and

(iii) the need to deter, prevent, and punish such offense;

(B) consider the extent to which the Federal sentencing guidelines (including its policy statements) adequately address violations of the sections amended by this Act to sufficiently deter and punish such offenses;

(C) maintain reasonable consistency with other relevant directives and sentencing guidelines;

(D) account for any additional aggravating or mitigating circumstances that might justify exceptions to the generally applicable sentencing ranges; and

(E) consider whether to provide a sentencing enhancement for those convicted of conduct proscribed by this Act, where such conduct involves—

(i) organized retail crime;

(ii) sale or resale of a product in an online marketplace;

(iii) a threat to public health and safety, including but not limited to alteration of an expiration date or of product ingredients;

(iv) theft, conversion, alteration, or removal of a product label;

(v) alteration, transfer, theft, conversion, counterfeiting, or reproduction of a Universal Product Code label; and

(vi) use of a fire or emergency exit.

(g) CIVIL FORFEITURE.—

(1) Section 2315 of title 18, United States Code, is further amended by inserting before the last paragraph the following:

"This section shall have the following civil forfeiture provisions:

"(1) Any property used, in any manner or part, to commit organized retail crime or the facilitation of organized retail crime shall be subject to forfeiture to the United States.

"(2) The provisions of chapter 46 of this title relating to civil forfeitures, including section 983 of this title, shall extend to any seizure or civil forfeiture under this section. At the conclusion of the forfeiture proceedings, the court, unless otherwise requested by an agency of the United States, shall order that any forfeited article be returned to the rightful owner or otherwise disposed of according to law.

"(3)(A) The court, in imposing sentence on a person convicted of an offense under this section, shall order, in addition to any other sentence imposed, that the person forfeit to the United States—

"(i) any property constituting or derived from any proceeds the person obtained, directly or indirectly, as the result of the offense of organized retail crime or the facilitation of organized retail crime; and

"(ii) any of the person's property used, or intended to be used, in any manner or part, to commit, facilitate, aid, or abet the commission of either such offense.

"(B) The forfeiture of property under subparagraph (A), including any seizure and disposition of the property and any related judicial or administrative proceeding, shall be governed by the procedures set forth in section 413 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 853), other than subsection (d) of that section. Notwithstanding section 413(h) of that Act, at the conclusion of the forfeiture proceedings, the court shall order that any forfeited article or compo-

nent of an article bearing or consisting of a counterfeit mark be destroyed.

"(4) When a person is convicted of an offense under this section, the court, pursuant to sections 3556, 3663A, and 3664, shall order the person to pay restitution to the owner of the property and any other victim of the offense as an offense against property referred to in section 3663A(c)(1)(A)(ii).

"(5) The term 'victim', as used in paragraph (4), has the meaning given that term in section 3663A(a)(2).".

SEC. 4. ACTIONS AGAINST AN OPERATOR OF AN ONLINE MARKETPLACE.

(a) IN GENERAL.—Any business whose goods or services were sold or otherwise used in the facilitation of organized retail crime through the operation of an online marketplace may bring a civil action against the operator of the online marketplace for violations of section 3(e) with respect to such goods and services in any district court of the United States to enjoin further violation of this Act by the person or entity and to recover damages for any loss resulting from such violation.

(b) SUBSEQUENT ACTIONS.—A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this Act

shall stop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by any business whose goods or services were sold or otherwise used in an act of organized retail crime.

SEC. 5. NO PREEMPTION OF STATE LAW.

No provision of this Act, including any amendment made by this Act, shall be construed as indicating an intent on the part of Congress to occupy the field in which that provision or amendment operates, including criminal penalties, to the exclusion of any State law on the same subject matter that would otherwise be within the authority of the State, unless there is a positive conflict between that provision or amendment and that State law so that the two cannot consistently stand together.

SEC. 6. EFFECTIVE DATE.

The amendments made by this Act take effect 120 days after the date of the enactment of this Act.

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II

110TH CONGRESS
2D SESSION

S. 3434

To combat organized crime involving the illegal acquisition of retail goods for the purpose of selling those illegally obtained goods through physical and online retail marketplaces.

IN THE SENATE OF THE UNITED STATES

AUGUST 1, 2008

Mr. DURBIN introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To combat organized crime involving the illegal acquisition of retail goods for the purpose of selling those illegally obtained goods through physical and online retail marketplaces.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Combating Organized Retail Crime Act of 2008".

SEC. 2. FINDINGS.

Congress finds the following:

(1) Organized retail crime involves the coordinated acquisition of large volumes of retail merchandise by theft, embezzlement, fraud, false pretenses, or other illegal means from commercial entities engaged in interstate commerce, for the purpose of selling or distributing such illegally obtained items in the stream of commerce. Organized retail crime is a growing problem nationwide that costs American companies and consumers billions of dollars annually and that has a substantial and direct effect upon interstate commerce.

(2) The illegal acquisition and black-market sale of merchandise by persons engaged in organized retail crime result in an estimated annual loss of hundreds of millions of dollars in sales and income tax revenues to State and local governments.

(3) The illegal acquisition, unsafe tampering and storage, and unregulated redistribution of consumer products such as baby formula, over-the-counter drugs, and other items by persons engaged in organized retail crime pose a health and safety hazard to consumers nationwide.

(4) Investigations into organized retail crime have revealed that the illegal income resulting from such crime often benefits persons and organizations

engaged in other forms of criminal activity, such as drug trafficking and gang activity.

(5) Items obtained through organized retail crime are resold in a variety of different marketplaces, including flea markets, swap meets, open-air markets, and Internet auction websites. Increasingly, persons engaged in organized retail crime use Internet auction websites to resell illegally obtained items. The Internet offers such sellers a worldwide market and a degree of anonymity that physical marketplace settings do not offer.

SEC. 3. OFFENSES RELATED TO ORGANIZED RETAIL CRIME.

(a) TRANSPORTATION OF STOLEN GOODS.—The first undesignated paragraph of section 2314 of title 18, United States Code, is amended by inserting after ''more,'' the following: ''or, during any 12-month period, of an aggregate value of $5,000 or more during that period,''.

(b) SALE OR RECEIPT OF STOLEN GOODS.—The first undesignated paragraph of section 2315 of title 18, United States Code, is amended by inserting after ''$5,000 or more,'' the following: ''or, during any 12-month period, of an aggregate value of $5,000 or more during that period,''.

(c) FRAUD IN CONNECTION WITH ACCESS DEVICES.—Section 1029(e)(1) of title 18, United States

Code, is amended by inserting "Universal Product Code label," after "code,".

(d) REVIEW AND AMENDMENT OF FEDERAL SENTENCING GUIDELINES FOR OFFENSES RELATED TO ORGANIZED RETAIL CRIME.—

(1) REVIEW AND AMENDMENT.—

(A) IN GENERAL.—The United States Sentencing Commission, pursuant to its authority under section 994 of title 28, United States Code, and in accordance with this subsection, shall review and, if appropriate, amend the Federal sentencing guidelines (including its policy statements) applicable to persons convicted of offenses involving organized retail crime, which is the coordinated acquisition of large volumes of retail merchandise by theft, embezzlement, fraud, false pretenses, or other illegal means from commercial entities engaged in interstate commerce for the purpose of selling or distributing such illegally obtained items in the stream of commerce.

(B) OFFENSES.—Offenses referred to in subparagraph (A) may include offenses contained in—

(i) sections 1029, 2314, and 2315 of title 18, United States Code; or

(ii) any other relevant provision of the United States Code.

(2) REQUIREMENTS.—In carrying out the requirements of this subsection, the United States Sentencing Commission shall—

(A) ensure that the Federal sentencing guidelines (including its policy statements) reflect—

(i) the serious nature and magnitude of organized retail crime; and

(ii) the need to deter, prevent, and punish offenses involving organized retail crime;

(B) consider the extent to which the Federal sentencing guidelines (including its policy statements) adequately address offenses involving organized retail crime to sufficiently deter and punish such offenses;

(C) maintain reasonable consistency with other relevant directives and sentencing guidelines;

(D) account for any additional aggravating or mitigating circumstances that might justify

exceptions to the generally applicable sentencing ranges; and

(E) consider whether to provide a sentencing enhancement for those convicted of conduct involving organized retail crime, where such conduct involves—

(i) a threat to public health and safety, including alteration of an expiration date or of product ingredients;

(ii) theft, conversion, alteration, or removal of a product label;

(iii) a second or subsequent offense; or

(iv) the use of advanced technology to acquire retail merchandise by means of theft, embezzlement, fraud, false pretenses, or other illegal means.

SEC. 4. SALES OF ILLEGALLY OBTAINED ITEMS IN PHYSICAL OR ONLINE RETAIL MARKETPLACES.

(a) IN GENERAL.—Chapter 113 of title 18, United States Code, is amended by adding at the end the following:

"SEC. 2323. ONLINE RETAIL MARKETPLACES.

"(a) DEFINITIONS.—As used in this section, the following definitions shall apply:

"(1) HIGH VOLUME SELLER.—The term 'high volume seller' means a user of an online retail marketplace who, in any continuous 12-month period during the previous 24 months, has entered into—

"(A) multiple discrete sales or transactions resulting in the accumulation of an aggregate total of $20,000 or more in gross revenues; or

"(B) 200 or more discrete sales or transactions resulting in the accumulation of an aggregate total of $10,000 or more in gross revenues.

"(2) INTERNET SITE.—The term 'Internet site' means a location on the Internet that is accessible at a specific Internet domain name or address under the Internet Protocol (or any successor protocol), or that is identified by a uniform resource locator.

"(3) ONLINE RETAIL MARKETPLACE.—The term 'online retail marketplace' means an Internet site where users other than the operator of the Internet site can enter into transactions with each other for the sale or distribution of goods or services, and in which—

"(A) such goods or services are promoted through inclusion in search results displayed within the Internet site;

"(B) the operator of the Internet site—

"(i) has the contractual right to supervise the activities of users with respect to such goods or services; or

"(ii) has a financial interest in the sale of such goods or services; and

"(C) in any continuous 12-month period during the previous 24 months, users other than the operator of the Internet site collectively have entered into—

"(i) multiple discrete transactions for the sale of goods or services aggregating a total of $500,000 or more in gross revenues; or

"(ii) 1,000 or more discrete transactions for the sale of goods or services aggregating a total of $250,000 or more in gross revenues.

"(4) OPERATOR OF AN ONLINE RETAIL MARKETPLACE.—The term 'operator of an online retail marketplace' means a person or entity that—

"(A) operates or controls an online retail marketplace; and

"(B) makes the online retail marketplace available for users to enter into transactions

with each other on that marketplace for the sale or distribution of goods or services.

"(5) OPERATOR OF A PHYSICAL RETAIL MARKETPLACE.—The term 'operator of a physical retail marketplace' means a person or entity that rents or otherwise makes available a physical retail marketplace to transient vendors to conduct business for the sale of goods, or services related to such goods.

"(6) PHYSICAL RETAIL MARKETPLACE.—The term 'physical retail marketplace' may include a flea market, indoor or outdoor swap meet, open air market, or other similar environment, and means a venue or event in which physical space is made available not more than 4 days per week by an operator of a physical retail marketplace as a temporary place of business for transient vendors to conduct business for the sale of goods, or services related to such goods; and

"(A) in which in any continuous 12-month period during the preceding 24 months, there have been 10 or more days on which 5 or more transient vendors have conducted business at the venue or event; and

"(B) does not mean and shall not apply to an event which is organized and conducted for

the exclusive benefit of any community chest, fund, foundation, association, or corporation organized and operated for religious, educational, or charitable purposes, provided that no part of any admission fee or parking fee charged vendors or prospective purchasers, and no part of the gross receipts or net earnings from the sale or exchange of goods or services, whether in the form of a percentage of the receipts or earnings, salary, or otherwise, inures to the benefit of any private shareholder or person participating in the organization or conduct of the event.

"(7) STRUCTURING.—The term 'structuring' means to knowingly conduct, or attempt to conduct, alone, or in conjunction with or on behalf of 1 or more other persons, 1 or more transactions in currency, in any amount, in any manner, with the purpose of evading categorization as a physical retail marketplace, an online retail marketplace, or a high volume seller.

"(8) TEMPORARY PLACE OF BUSINESS.—The term 'temporary place of business' means any physical space made open to the public, including but not limited to a building, part of a building, tent or va-

1 cant lot, which is temporarily occupied by 1 or more
2 persons or entities for the purpose of making sales
3 of goods, or services related to those goods, to the
4 public. A place of business is not temporary with re-
5 spect to a person or entity if that person or entity
6 conducts business at the place and stores unsold
7 goods there when it is not open for business.

8 "(9) TRANSIENT VENDOR.—The term 'transient
9 vendor' means any person or entity that, in the
10 usual course of business, transports inventory,
11 stocks of goods, or similar tangible personal property
12 to a temporary place of business for the purpose of
13 entering into transactions for the sale of such prop-
14 erty.

15 "(10) USER.—The term 'user' means a person
16 or entity that accesses an online retail marketplace
17 for the purpose of entering into transactions for the
18 sale or distribution of goods or services.

19 "(11) VALID PHYSICAL POSTAL ADDRESS.—The
20 term 'valid physical postal address' means—

21 "(A) a current street address, including
22 the city, State, and Zip code;

23 "(B) a Post Office box that has been reg-
24 istered with the United States Postal Service;
25 or

"(C) a private mailbox that has been registered with a commercial mail receiving agency that is established pursuant to United States Postal Service regulations.

"(b) SAFEGUARDS AGAINST SALES OF ILLEGALLY-OBTAINED ITEMS.—

"(1) DUTIES OF OPERATORS OF PHYSICAL RETAIL MARKETPLACES AND ONLINE RETAIL MARKETPLACES TO CONDUCT ACCOUNT REVIEWS AND FILE SUSPICIOUS ACTIVITY REPORTS.—In the event that an operator of a physical or online retail marketplace is presented with documentary evidence showing that a transient vendor of the physical retail marketplace, a user of the online retail marketplace, or a director, officer, employee, or agent of such transient vendor or user, has used or is using the retail marketplace to sell or distribute items that were stolen, embezzled, or obtained by fraud, false pretenses or other illegal means, or has engaged in or is engaging in structuring, the operator shall—

"(A) not later than 15 days after receiving such evidence—

"(i) file a suspicious activity report with the Attorney General of the United States; and

"(ii) not later than 5 days after filing the report, notify any person or entity that presented the documentary evidence that the operator filed the report; and

"(B)(i) initiate a review of the account of such transient vendor or user for evidence of illegal activity; and

"(ii) as soon as possible, but not later than 45 days after receiving such evidence—

"(I) complete this review; and

"(II) submit the results of such account review to the Attorney General.

"(2) DUTIES OF OPERATORS OF PHYSICAL RETAIL MARKETPLACES AND ONLINE RETAIL MARKETPLACES TO TERMINATE SALES ACTIVITY.—

"(A) IN GENERAL.—If an operator of a physical retail marketplace or an online retail marketplace reasonably determines that, based on the documentary evidence presented to it or the account review conducted by it under paragraph (1), there is clear and convincing evidence that a transient vendor of the physical retail marketplace, a user of the online retail marketplace, or a director, officer, employee or agent of such transient vendor or user, has

used or is using the retail marketplace to sell or distribute items that were stolen, embezzled, or obtained by fraud, false pretenses, or other illegal means, or has engaged in or is engaging in structuring, the operator shall, not sooner than 21 days and not later than 45 days after submitting the results of the account review to the Attorney General pursuant to paragraph (1), either—

"(i) terminate the ability of the transient vendor to conduct business at the physical retail marketplace or terminate the ability of the user to conduct transactions on the online retail marketplace, and notify the Attorney General of such action; or

"(ii)(I) request that the transient vendor or user present documentary evidence that the operator reasonably determines to be clear and convincing showing that the transient vendor or user has not used the retail marketplace to sell or distribute items that were stolen, embezzled, or obtained by fraud, false pretenses, or other

1 illegal means, or has not engaged in or is
2 not engaging in structuring; and
3 "(II)(aa) if the transient vendor or
4 user fails to present such information with-
5 in 45 days of such request, terminate the
6 ability of the transient vendor to conduct
7 business at the physical retail marketplace
8 or terminate the ability of the user to con-
9 duct transactions on the online retail mar-
10 ketplace, and notify the Attorney General
11 of such action; or
12 "(bb) if the transient vendor or user
13 presents such information within 45 days,
14 then the operator shall report such infor-
15 mation to the Attorney General and notify
16 the transient vendor or user that the oper-
17 ator will not terminate the activities of the
18 transient vendor or user.
19 "(B) ATTORNEY GENERAL AUTHORIZA-
20 TION.—The Attorney General or a designee
21 may, with respect to the timing of the opera-
22 tor's actions pursuant to this paragraph, au-
23 thorize the operator in writing to take such ac-
24 tion prior to 21 days after submitting the re-
25 sults of the account review to the Attorney Gen-

eral or direct the operator in writing and for good cause to delay such action to a date later than 45 days after submitting the results of the account review.

"(3) DOCUMENTARY EVIDENCE.—The documentary evidence referenced in paragraphs (1) or (2)—

"(A) shall refer to 1 or more specific items, individuals, entities or transactions allegedly involved in theft, embezzlement, fraud, false pretenses, or other illegal activity; and

"(B) shall be—

"(i) video recordings;

"(ii) audio recordings;

"(iii) sworn affidavits;

"(iv) financial, accounting, business, or sales records;

"(v) records or transcripts of phone conversations;

"(vi) documents that have been filed in a Federal or State court proceeding; or

"(vii) signed reports to or from a law enforcement agency.

"(4) RETENTION OF RECORDS.—

"(A) RETAIL MARKETPLACES.—Each operator of a physical retail marketplace and each operator of an online retail marketplace shall maintain—

"(i) a record of all documentary evidence presented to it pursuant to paragraph (1) for 3 years from the date the operator received the evidence;

"(ii) a record of the results of all account reviews conducted pursuant to paragraph (1), and any supporting documentation, for 3 years from the date of the review; and

"(iii) a copy of any suspicious activity report filed with the Attorney General pursuant to this subsection, and the original supporting documentation concerning any report that it files, for 3 years from the date of the filing.

"(B) ONLINE RETAIL MARKETPLACE.—Each operator of an online retail marketplace shall maintain, for 3 years after the date a user becomes a high volume seller, the name, telephone number, e-mail address, valid physical postal address, and any other identification in-

1 formation that the operator receives about the
2 high volume seller.
3 "(5) CONFIDENTIALITY OF REPORTS.—No op-
4 erator of a physical retail marketplace or online re-
5 tail marketplace, and no director, officer, employee
6 or agent of such operator, may notify any individual
7 or entity that is the subject of a suspicious activity
8 report filed pursuant to paragraph (1), or of an ac-
9 count review performed pursuant to paragraph (1),
10 of the fact that the operator filed such a report or
11 performed such an account review, or of any infor-
12 mation contained in the report or account review.
13 "(6) HIGH VOLUME SELLERS.—
14 "(A) VALID POSTAL ADDRESS.—An oper-
15 ator of an online retail marketplace shall re-
16 quire each high volume seller to display a valid
17 physical postal address whenever other informa-
18 tion about the items or services being sold by
19 the high volume seller is displayed on the online
20 retail marketplace. Such valid physical postal
21 address must be displayed in a format clearly
22 visible to the average consumer.
23 "(B) FAILURE TO PROVIDE.—In the event
24 that a high volume seller has failed to display
25 a valid physical postal address as required in

this paragraph, the operator of the online retail marketplace shall—

"(i) within 15 days notify the user of its duty to display a valid physical postal address; and

"(ii) if 45 days after providing this initial notification the user still has not displayed a valid physical postal address, shall—

"(I) terminate the ability of the user to conduct transactions on marketplace; and

"(II) file within 15 days a suspicious activity report with the Attorney General of the United States.

"(7) CONTENTS OF SUSPICIOUS ACTIVITY REPORTS.—A suspicious activity report submitted by an operator to the Attorney General pursuant to paragraph (1) or (6) shall contain the following information:

"(A) The name, address, telephone number, and e-mail address of the individual or entity that is the subject of the report, to the extent known.

"(B) Any other information that is in the possession of the operator filing the report regarding the identification of the individual or entity that is the subject of the report.

"(C) A copy of the documentary evidence and other information that led to the filing of the report pursuant to paragraph (1) or (6).

"(D) A detailed description of the results of the account review conducted pursuant to paragraph (1).

"(E) Such other information as the Attorney General may by regulation prescribe.

"(c) VOLUNTARY REPORTS.—Nothing in this section prevents an operator of a physical retail marketplace or online retail marketplace from voluntarily reporting to a Federal, State, or local government agency any suspicious activity that such operator believes is relevant to the possible violation of any law or regulation, provided that the operator also complies with the requirements of this section.

"(d) STRUCTURING.—No individual or entity shall engage in structuring as defined in this section.

"(e) ENFORCEMENT BY ATTORNEY GENERAL.—

"(1) IN GENERAL.—Any individual or entity who knowingly commits a violation of, or knowingly

fails to comply with the requirements specified in, paragraph (1), (2), (4), (5), (6), or (7) of subsection (b), or subsection (d), shall be liable to the United States Government for a civil penalty of not more than $10,000 per violation.

"(2) FALSE STATEMENTS.—

"(A) INTENT TO INFLUENCE AN OPERATOR.—Any person who knowingly makes any material false or fictitious statement or representation with the intent to influence an operator of a physical retail marketplace or an operator of an online retail marketplace to file a suspicious activity report under subsection (b) shall be liable to the United States Government for a civil penalty of not more than $10,000 per violation.

"(B) SUSPICIOUS ACTIVITY REPORT.—Any person who knowingly and willfully makes any material false or fictitious statement or representation in any suspicious activity report required under subsection (b) may, upon conviction thereof, be subject to liability under section 1001.

"(f) ENFORCEMENT BY STATES.—

"(1) CIVIL ACTION.—In any case in which the attorney general of a State has reason to believe that an interest of the residents of that State has been or is threatened or adversely affected by any person or entity who has committed or is committing a violation of this section, the attorney general, official, or agency of the State, as parens patriae, may bring a civil action on behalf of the residents of the State in a district court of the United States of appropriate jurisdiction—

"(A) to enjoin further violation of this section by the defendant;

"(B) to obtain damages on behalf of the residents of the State in an amount equal to the actual monetary loss suffered by such residents; or

"(C) to impose civil penalties in the amounts specified in subsection (e).

"(2) WRITTEN NOTICE.—

"(A) IN GENERAL.—The State shall serve prior written notice of any civil action under paragraph (1) upon the Attorney General of the United States, including a copy of its complaint, except that if it is not feasible for the State to provide such prior notice, the State

1 shall serve such notice immediately upon insti-
2 tuting such action.
3 "(B) ATTORNEY GENERAL ACTION.—Upon
4 receiving a notice respecting a civil action under
5 subparagraph (A), the Attorney General of the
6 United States shall have the right—
7 "(i) to intervene in such action;
8 "(ii) upon so intervening, to be heard
9 on all matters arising therein; and
10 "(iii) to file petitions for appeal.
11 "(3) STATE POWERS PRESERVED.—For pur-
12 poses of bringing any civil action under this sub-
13 section, nothing in this chapter shall prevent an at-
14 torney general of a State from exercising the powers
15 conferred on the attorney general by the laws of
16 such State to conduct investigations or to administer
17 oaths or affirmations or to compel the attendance of
18 witnesses or the production of documentary and
19 other evidence.
20 "(4) PENDING FEDERAL ACTION.—Whenever a
21 civil action has been instituted by the Attorney Gen-
22 eral of the United States for violation of any rule
23 prescribed under subsection (e), no State may, dur-
24 ing the pendency of such action instituted by the At-
25 torney General of the United States, institute a civil

action under this subsection against any defendant named in the complaint in such action for any violation alleged in such complaint.

"(5) JURISDICTION.—

"(A) IN GENERAL.—Any civil action brought under this subsection in a district court of the United States may be brought in the district in which the defendant is found, is an inhabitant, or transacts business or wherever venue is proper under section 1391 of title 28.

"(B) PROCESS.—Process in an action under this subsection may be served in any district in which the defendant is an inhabitant or in which the defendant may be found.

"(g) NO PRIVATE RIGHT OF ACTION.—Nothing in this section shall be interpreted to authorize a private right of action for a violation of any provision of this section, or a private right of action under any other provision of Federal or State law to enforce a violation of this section.".

(b) CHAPTER ANALYSIS.—The chapter analysis for chapter 113 of title 18, United States Code, is amended by inserting after the item for section 2322 the following:

"2323. Online retail marketplaces.".

SEC. 5. NO PREEMPTION OF STATE LAW.

No provision of this Act, including any amendment made by this Act, shall be construed as indicating an intent on the part of Congress to occupy the field in which that provision or amendment operates, including criminal penalties, to the exclusion of any State law on the same subject matter that would otherwise be within the authority of the State, unless there is a positive conflict between that provision or amendment and that State law so that the 2 cannot consistently stand together.

SEC. 6. EFFECTIVE DATE.

The amendments made by this Act take effect 120 days after the date of the enactment of this Act.

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