

111<sup>TH</sup> CONGRESS  
2<sup>D</sup> SESSION

# S. 3386

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IN THE HOUSE OF REPRESENTATIVES

DECEMBER 1, 2010

Referred to the Committee on Energy and Commerce

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## AN ACT

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

1        *Be it enacted by the Senate and House of Representa-*  
2        *tives of the United States of America in Congress assembled,*

1 **SECTION 1. SHORT TITLE.**

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

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

5 The Congress finds the following:

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

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

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

24 (4) The Committee showed that, in exchange  
25 for “bounties” and other payments, hundreds of rep-  
26 utable online retailers and websites shared their cus-

1       tomers' billing information, including credit card and  
2       debit card numbers, with third party sellers through  
3       a process known as "data pass". These third party  
4       sellers in turn used aggressive, misleading sales tac-  
5       tics to charge millions of American consumers for  
6       membership clubs the consumers did not want.

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

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

22              (7) The use of a "data pass" process defied  
23       consumers' expectations that they could only be  
24       charged for a good or a service if they submitted

1 their billing information, including their complete  
2 credit or debit card numbers.

3 (8) Third party sellers used a free trial period  
4 to enroll members, after which they periodically  
5 charged consumers until consumers affirmatively  
6 canceled the memberships. This use of “free-to-pay  
7 conversion” and “negative option” sales took advan-  
8 tage of consumers’ expectations that they would  
9 have an opportunity to accept or reject the member-  
10 ship club offer at the end of the trial period.

11 **SEC. 3. PROHIBITIONS AGAINST CERTAIN UNFAIR AND DE-**  
12 **CEPTIVE INTERNET SALES PRACTICES.**

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

19 (1) before obtaining the consumer’s billing in-  
20 formation, the post-transaction third party seller has  
21 clearly and conspicuously disclosed to the consumer  
22 all material terms of the transaction, including—

23 (A) a description of the goods or services  
24 being offered;

1 (B) the fact that the post-transaction third  
2 party seller is not affiliated with the initial mer-  
3 chant, which may include disclosure of the  
4 name of the post-transaction third party in a  
5 manner that clearly differentiates the post-  
6 transaction third party seller from the initial  
7 merchant; and

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

9 (2) the post-transaction third party seller has  
10 received the express informed consent for the charge  
11 from the consumer whose credit card, debit card,  
12 bank account, or other financial account will be  
13 charged by—

14 (A) obtaining from the consumer—

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

17 (ii) the consumer's name and address  
18 and a means to contact the consumer; and

19 (B) requiring the consumer to perform an  
20 additional affirmative action, such as clicking  
21 on a confirmation button or checking a box that  
22 indicates the consumer's consent to be charged  
23 the amount disclosed.

24 (b) PROHIBITION ON DATA-PASS USED TO FACILI-  
25 TATE CERTAIN DECEPTIVE INTERNET SALES TRANS-

1 ACTIONS.—It shall be unlawful for an initial merchant to  
2 disclose a credit card, debit card, bank account, or other  
3 financial account number, or to disclose other billing infor-  
4 mation that is used to charge a customer of the initial  
5 merchant, to any post-transaction third party seller for  
6 use in an Internet-based sale of any goods or services from  
7 that post-transaction third party seller.

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

13 (d) DEFINITIONS.—In this section:

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

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

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

24 (B) solicits the purchase of such goods or  
25 services on the Internet through an initial mer-

1           chant after the consumer has initiated a trans-  
2           action with the initial merchant; and

3                   (C) is not—

4                           (i) the initial merchant;

5                           (ii) a subsidiary or corporate affiliate  
6                   of the initial merchant; or

7                           (iii) a successor of an entity described  
8                   in clause (i) or (ii).

9 **SEC. 4. NEGATIVE OPTION MARKETING ON THE INTERNET.**

10       It shall be unlawful for any person to charge or at-  
11       tempt to charge any consumer for any goods or services  
12       sold in a transaction effected on the Internet through a  
13       negative option feature (as defined in the Federal Trade  
14       Commission's Telemarketing Sales Rule in part 310 of  
15       title 16, Code of Federal Regulations), unless the per-  
16       son—

17                   (1) provides text that clearly and conspicuously  
18       discloses all material terms of the transaction before  
19       obtaining the consumer's billing information;

20                   (2) obtains a consumer's express informed con-  
21       sent before charging the consumer's credit card,  
22       debit card, bank account, or other financial account  
23       for products or services through such transaction;  
24       and

1           (3) provides simple mechanisms for a consumer  
2           to stop recurring charges from being placed on the  
3           consumer's credit card, debit card, bank account, or  
4           other financial account.

5 **SEC. 5. ENFORCEMENT BY FEDERAL TRADE COMMISSION.**

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

16          (b) **PENALTIES.**—Any person who violates this Act  
17          or any regulation prescribed under this Act shall be sub-  
18          ject to the penalties and entitled to the privileges and im-  
19          munities provided in the Federal Trade Commission Act  
20          as though all applicable terms and provisions of the Fed-  
21          eral Trade Commission Act were incorporated in and  
22          made part of this Act.

23          (c) **AUTHORITY PRESERVED.**—Nothing in this sec-  
24          tion shall be construed to limit the authority of the Com-  
25          mission under any other provision of law.



1 **SEC. 6. ENFORCEMENT BY STATE ATTORNEYS GENERAL.**

2 (a) RIGHT OF ACTION.—Except as provided in sub-  
3 section (e), the attorney general of a State, or other au-  
4 thorized State officer, alleging a violation of this Act or  
5 any regulation issued under this Act that affects or may  
6 affect such State or its residents may bring an action on  
7 behalf of the residents of the State in any United States  
8 district court for the district in which the defendant is  
9 found, resides, or transacts business, or wherever venue  
10 is proper under section 1391 of title 28, United States  
11 Code, to obtain appropriate injunctive relief.

12 (b) NOTICE TO COMMISSION REQUIRED.—A State  
13 shall provide prior written notice to the Federal Trade  
14 Commission of any civil action under subsection (a) to-  
15 gether with a copy of its complaint, except that if it is  
16 not feasible for the State to provide such prior notice, the  
17 State shall provide such notice immediately upon insti-  
18 tuting such action.

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

22 (1) be heard on all matters arising in such civil  
23 action; and

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

1 (d) CONSTRUCTION.—Nothing in this section shall be  
2 construed—

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

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

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

Passed the Senate November 30, 2010.

Attest:

NANCY ERICKSON,

*Secretary.*