

S 3434 IS

110th CONGRESS
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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

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 vacant lot, which is temporarily occupied by 1 or more persons or entities for the purpose of making sales of goods, or services related to those goods, to the public. A place of business is not temporary with respect to a person or entity if that person or entity conducts business at the place and stores unsold goods there when it is not open for business.

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

`(10) USER- The term `user' means a person or entity that accesses an online retail marketplace for the purpose of entering into transactions for the sale or distribution of goods or services.

`(11) VALID PHYSICAL POSTAL ADDRESS- The term `valid physical postal address' means--

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

`(B) a Post Office box that has been registered with the United States Postal Service; 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 illegal means, or has not engaged in or is not engaging in structuring; and
` (II)(aa) if the transient vendor or user fails to present such information within 45 days of such request, 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
` (bb) if the transient vendor or user presents such information within 45 days, then the operator shall report such information to the Attorney General and notify the transient vendor or user that the operator will not terminate the activities of the transient vendor or user.

`(B) ATTORNEY GENERAL AUTHORIZATION- The Attorney General or a designee may, with respect to the timing of the operator's actions pursuant to this paragraph, authorize the operator in writing to take such action prior to 21 days after submitting the results of the account review to the Attorney General 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 information that the operator receives about the high volume seller.

`(5) CONFIDENTIALITY OF REPORTS- No operator of a physical retail marketplace or online retail marketplace, and no director, officer, employee or agent of such operator, may notify any individual or entity that is the subject of a suspicious activity report filed pursuant to paragraph (1), or of an account review performed pursuant to paragraph (1), of the fact that the operator filed such a report or performed such an account review, or of any information contained in the report or account review.

`(6) HIGH VOLUME SELLERS-

`(A) VALID POSTAL ADDRESS- An operator of an online retail marketplace shall require each high volume seller to display a valid physical postal address whenever other information about the items or services being sold by the high volume seller is displayed on the online retail marketplace. Such valid physical postal address must be displayed in a format clearly visible to the average consumer.

`(B) FAILURE TO PROVIDE- In the event that a high volume seller has failed to display 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 shall serve such notice immediately upon instituting such action.

`(B) ATTORNEY GENERAL ACTION- Upon receiving a notice respecting a civil action under subparagraph (A), the Attorney General of the United States shall have the right--

`(i) to intervene in such action;

`(ii) upon so intervening, to be heard on all matters arising therein; and

`(iii) to file petitions for appeal.

`(3) STATE POWERS PRESERVED- For purposes of bringing any civil action under this subsection, nothing in this chapter shall prevent an attorney general of a State from exercising the powers conferred on the attorney general by the laws of such State to conduct investigations or to administer oaths or affirmations or to compel the attendance of witnesses or the production of documentary and other evidence.

`(4) PENDING FEDERAL ACTION- Whenever a civil action has been instituted by the Attorney General of the United States for violation of any rule prescribed under subsection (e), no State may, during the pendency of such action instituted by the Attorney 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.