

S 470 IS

111th CONGRESS

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S. 470

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**February 25, 2009**

Mr. DURBIN (for himself and Ms. KLOBUCHAR) 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 2009'.

**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, medical diagnostic tests, 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 or similar product code label, gift card, stock keeping unit number, radio-frequency identification tag, electronic article surveillance tag,' 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 the 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; and
- (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 the 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. 2324. Physical and 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 \$12,000 or more in gross revenues; or
- (B) 200 or more discrete sales or transactions resulting in the accumulation of an aggregate total of \$5,000 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) the 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 the goods or services; or
 - (ii) has a financial interest in the sale of the 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 not fewer than 1,000 discrete transactions for the sale of goods or

services.

`(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 the goods.

`(6) PHYSICAL RETAIL MARKETPLACE- The term `physical retail marketplace'--

`(A) may include a flea market, indoor or outdoor swap meet, open air market, or other similar environment;

`(B) means a venue or event--

`(i) 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 the goods; and

`(ii) 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

`(C) 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 the 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) SUSPECTED ILLEGAL SALES ACTIVITY FORMS-

`(A) REGULATIONS- The Attorney General shall promulgate regulations--

`(i) establishing a form, called a `suspected illegal sales activity form', through which an authorized person may present evidence showing that a transient vendor of a physical retail marketplace, a user of an online retail marketplace, or a director, officer, employee, or agent of the transient vendor or user, has used or is using a physical retail marketplace or an online retail marketplace to sell or distribute items that were stolen, embezzled, or obtained by fraud, false pretenses, or other illegal means from the authorized person, or has engaged in or is engaging in structuring;

`(ii) requiring that an authorized person who submits a suspected illegal sales activity form shall, in a manner to be specified by the Attorney General--

` (I) refer in the form to 1 or more specific items, individuals, entities or transactions allegedly involved in theft, embezzlement, fraud, false pretenses, structuring, or other illegal activity;

` (II) refer in the form to 1 or more alleged violations of Federal law;

` (III) provide along with the form documentary evidence supporting the allegations of illegal activity, which may include--

` (aa) video recordings;

` (bb) audio recordings;

` (cc) sworn affidavits;

` (dd) financial, accounting, business, or sales records;

` (ee) records or transcripts of phone conversations;

` (ff) documents that have been filed in a Federal or State court proceeding; and

` (gg) signed reports to or from a law enforcement agency; and

` (IV) sign the form;

` (iii) providing that an authorized person who completes a suspected illegal sales activity form may submit the form and accompanying documentary evidence to the operator of a physical retail marketplace or the operator of an online retail marketplace, and that if the authorized person submits the form to the operator, the authorized person shall submit the form and documentary evidence to the Attorney General; and

` (iv) ensuring that a suspected illegal sales activity form and accompanying documentary evidence are able to be submitted by an authorized person to the operator of a physical retail marketplace or online retail marketplace and to the Attorney General by mail and by electronic means.

` (B) AUTHORIZED PERSONS-

` (i) IN GENERAL- For purposes of this section, an authorized person is a person who--

` (I) offers goods or services for sale to the public as part of a business operation;

` (II) has submitted to the Attorney General in writing, on a form that shall be promulgated by the Attorney General and made available on the Internet, a request to serve as an authorized person; and

` (III) has been approved by the Attorney General to serve as an authorized person.

` (ii) APPROVAL- The Attorney General shall approve a request by a person to serve as an authorized person if the person offers goods or services for sale to the public as part of a business operation. An approval under this clause shall remain in effect unless the authorized person requests that the Attorney General terminate the approval.

` (iii) FEES- The Attorney General may charge a processing fee to a person solely to cover the cost of processing the approval of the person as an authorized person.

` (iv) AGENTS- An individual who serves as an officer, employee, or agent for a person who offers goods or services for sale to the public as part of a business operation may serve as an authorized person on behalf of that person.

` (v) LIST- The Attorney General shall maintain a list of authorized persons, which shall be made available to the public upon request.

` (C) AVAILABILITY OF FORMS- The Attorney General shall make suspected illegal sales activity forms available on the Internet to authorized persons.

` (2) DUTIES OF OPERATORS OF PHYSICAL RETAIL MARKETPLACES AND ONLINE RETAIL MARKETPLACES TO CONDUCT ACCOUNT REVIEWS AND FILE SUSPICIOUS ACTIVITY REPORTS; CONSUMABLE GOODS- If an operator of a physical or online retail marketplace is presented with a suspected illegal sales activity form and accompanying documentary evidence from an authorized person 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 the 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)(i) not later than 30 days after receiving the form--

` (I) conduct a review of the account of the transient vendor or user for evidence of illegal activity; and

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

^ (ii) not later than 24 hours after filing the report described in clause (i)(II), notify the authorized person who submitted the suspected illegal sales activity form that the operator filed the report; and

^ (B) with regard to any items referred to in the suspected illegal sales activity form that are consumable or that are medical diagnostic tests, immediately suspend the ability of any transient vendor or user who is referred to in the form as selling or distributing the items to conduct transactions involving the items, and notify the Attorney General of such action in the suspicious activity report.

^ (3) 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 is presented with a suspected illegal sales activity form and accompanying documentary evidence from an authorized person, the operator shall determine, based on the form, the documentary evidence, and the account review conducted by the operator, whether there is clear and convincing evidence that the transient vendor of the physical retail marketplace, a user of the online retail marketplace, or a director, officer, employee, or agent of the 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 describe the determination of the operator under this subparagraph in the suspicious activity report.

^ (B) ACTIONS- If the operator of a physical retail marketplace or an online retail marketplace determines that there is clear and convincing evidence of an activity described in subparagraph (A), the operator shall, not later than 5 days after submitting the suspicious activity report to the Attorney General pursuant to paragraph (2), 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 the information within 30 days of the 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 the information within 30 days, then the operator shall report the 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.

^ (C) ATTORNEY GENERAL AUTHORIZATION- The Attorney General or a designee may, with respect to the timing of the operator's actions pursuant to this paragraph, direct the operator in writing and for good cause to delay such action.

^ (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 suspected illegal sales activity forms and accompanying documentary evidence presented to it pursuant to this subsection for 3 years from the date the operator received the form and evidence;

^ (ii) a record of the results of all account reviews conducted pursuant to this subsection, 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 the operator, may notify any individual or entity that is the subject of a suspicious activity report or of an account review under paragraph (2) of the fact that the operator filed the report or performed the 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 provide the operator with a valid physical postal address.

^ (B) FAILURE TO PROVIDE-

` (i) IN GENERAL- If a high volume seller has failed to provide a valid physical postal address as required in this paragraph, the operator of the online retail marketplace shall, not later than 5 days after the failure to provide the address, notify the user of its duty to provide a valid physical postal address.

` (ii) CONTINUED FAILURE- If a high volume seller has failed to provide a valid physical postal address 15 days after the date on which the operator of an online retail marketplace provides notice under clause (i), the operator shall--

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

` (II) not later than 15 days after that date, file a suspicious activity report with the Attorney General of the United States.

` (C) POSTAL ADDRESS- If an authorized person submits to the operator of a physical retail marketplace or online retail marketplace a suspected illegal sales activity form that alleges illegal activity on the part of a specific transient vendor or user that is a high volume seller, the operator shall, not later than 15 days after receiving the form, provide the valid physical postal address of the high volume seller to the authorized person.

` (7) CONTENTS OF SUSPICIOUS ACTIVITY REPORTS- The Attorney General shall promulgate regulations establishing a suspicious activity report form. Such regulations shall require that a suspicious activity report submitted by an operator to the Attorney General pursuant to paragraph (2) or (6) shall contain, in a form to be determined by the Attorney General, 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 suspected illegal sales activity form and documentary evidence that led to the filing of a report pursuant to paragraph (2).

` (D) A detailed description of the results of an account review conducted pursuant to paragraph (2).

` (E) A statement of the determination the operator made pursuant to paragraph (3)(A).

` (F) If the suspicious activity report is filed pursuant to paragraph (6), a summary of the events that led the operator to terminate the ability of the user to conduct transactions on marketplace.

` (G) The signature of the operator.

` (H) 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 the 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 (2), (3), (4), (5), or (6) 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) SUSPECTED ILLEGAL SALES ACTIVITY FORMS- Any person who knowingly and willfully makes any material false or fictitious statement or representation on a suspected illegal sales activity form or accompanying documentary evidence may, upon conviction thereof, be subject to liability under section 1001.

` (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 the 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 the 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 relating to section 2323 the following:

` Sec. 2324. Physical and 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 enactment of this Act.

END