

111TH CONGRESS
1ST SESSION

H. R. 1173

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

FEBRUARY 25, 2009

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

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.

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

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Organized Retail
5 Crime Act of 2009”.

1 **SEC. 2. FINDINGS AND STATEMENT OF PURPOSE.**

2 (a) FINDINGS.—Congress makes the following find-
3 ings:

4 (1) Organized retail crime involving the obtain-
5 ing by fraud and theft of retail merchandise from
6 entities engaged in interstate commerce is a nation-
7 wide problem of an increasing scale and is expected
8 to cost American companies and consumers more
9 than \$30,000,000,000 annually.

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

14 (3) The uncontrolled redistribution and unsafe
15 storage of stolen and fraudulently obtained con-
16 sumer products such as baby formula, over-the-
17 counter drugs, and other products by persons en-
18 gaged in such organized retail crime is a health and
19 safety hazard to American consumers.

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

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

1 believed to benefit persons and organizations engaged
2 in other forms of criminal activity such as drug traf-
3 ficking, gang activity, and terrorism.

4 (6) Organized retail crime rings often obtain re-
5 tail merchandise through the use of checks for which
6 there are insufficient funds or that are forged or sto-
7 len, frequently returning the merchandise to fraudu-
8 lently obtain refunds. Such practices create major
9 problems for the retail industry and the national
10 banking system.

11 (7) Organized retail crime rings are increas-
12 ingly using counterfeit, forged, misappropriated, and
13 improperly transferred Universal Product Code la-
14 bels and other devices employed to identify articles
15 for sale as a method for achieving their ends.

16 (8) The dramatic growth of organized retail
17 crime and the unfettered resale of such stolen and
18 fraudulently obtained goods in national and inter-
19 national Internet-based marketplaces has resulted in
20 effective evasion by such resellers of State and local
21 regulations on secondhand goods and article resellers
22 which had traditionally been used to control the pos-
23 session, resale, and transfer of stolen goods.

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

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

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

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

10 (1) To protect consumers, retailers, the national
11 banking system, and State and local governments
12 from the more than \$30,000,000,000 annual prob-
13 lem of organized retail crime as well as the related
14 adverse health and safety risks it creates.

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

20 **SEC. 3. ORGANIZED RETAIL CRIME.**

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

23 (1) by inserting after the fifth paragraph (relat-
24 ing to the definition of “motor vehicle”) the fol-
25 lowing:

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—

1 “(i) has the contractual right to su-
2 pervise the activities of the person with re-
3 spect to such goods or services; or

4 “(ii) has a financial interest in the
5 sale of such goods or services;”;

6 (3) by inserting after the second paragraph, re-
7 lating to the definition of “cattle”, the following new
8 paragraph:

9 “‘Internet site’ means a location on the Inter-
10 net accessible at a specific Internet domain name, is
11 accessible at a specific address under the Internet
12 Protocol (or any successor protocol), or is identified
13 by a uniform resource locator;” and

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

17 “‘High-volume seller’ means a seller on an on-
18 line marketplace who in the past 12 months has
19 made or offered to make discrete transactions aggre-
20 gating at least \$12,000;”.

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

1 ferring in interstate or foreign commerce any goods,
 2 wares, or merchandise,” after “\$5,000 or more,”.

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

9 (d) FRAUD IN CONNECTION WITH ACCESS DE-
 10 VICES.—Section 1029(e)(1) of title 18, United States
 11 Code, is amended—

12 (1) by inserting “(including gift card)” after
 13 “card”;

14 (2) by inserting “(including a Universal Prod-
 15 uct Code label)” after “code”; and

16 (3) by inserting “(including a radio frequency
 17 identification transponder)” after “identifier”.

18 (e) FACILITATION OF ORGANIZED RETAIL CRIME.—

19 (1) IN GENERAL.—The first paragraph of sec-
 20 tion 2315 of title 18, United States Code, as amend-
 21 ed by subsection (c) of this section, is further
 22 amended by inserting “, or facilitates such organized
 23 retail crime, including, but not limited to, facilitation
 24 through the operation of an online marketplace for
 25 the sale of goods and services, knowing or having

1 reasonable cause to know that such organized retail
2 crime is facilitated by such operation” before “; or”
3 at the end of the paragraph.

4 (2) OPERATOR OF AN ONLINE MARKET-
5 PLACE.—Section 2315 of title 18, United States
6 Code, is further amended by inserting before the last
7 paragraph the following:

8 “It is unlawful for an operator of an online market-
9 place to fail to—

10 “(1) expeditiously investigate when credible evi-
11 dence of sales of goods or services acquired through
12 organized retail crime on its online marketplace
13 comes to its attention, and remove from the online
14 marketplace or disable access to material from the
15 online marketplace of sellers offering goods or serv-
16 ices when the result of the investigation provides
17 knowledge or a reasonable cause to know that the
18 goods or services were acquired through organized
19 retail crime, and maintain a record of all investiga-
20 tions for a minimum of three years;

21 “(2) require the seller of property whose mer-
22 chandise packaging identifies the property as being
23 available from a particular or exclusive retail source,
24 to post such identifying information conspicuously

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

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

4 “(A) maintain the following information
5 for three years—

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

10 “(ii) all transactions conducted by
11 each high-volume seller on the online mar-
12 ketplace for the most recent three-year pe-
13 riod; and

14 “(B) require any high-volume seller to—

15 “(i) conspicuously post its name, tele-
16 phone number, and legitimate address on
17 the Internet site where other information
18 about the property being sold by the high-
19 volume seller is posted; or

20 “(ii) provide, upon request of any
21 business that has a reasonable suspicion
22 that goods or services at the site were ac-
23 quired through organized retail crime, its
24 name, telephone number, and legitimate
25 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

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

3 (B) consider the extent to which the Fed-
4 eral sentencing guidelines (including its policy
5 statements) adequately address violations of the
6 sections amended by this Act to sufficiently
7 deter and punish such offenses;

8 (C) maintain reasonable consistency with
9 other relevant directives and sentencing guide-
10 lines;

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

15 (E) consider whether to provide a sen-
16 tencing enhancement for those convicted of con-
17 duct proscribed by this Act, where such conduct
18 involves—

19 (i) organized retail crime;

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

22 (iii) a threat to public health and
23 safety, including but not limited to alter-
24 ation of an expiration date or of product
25 ingredients;

1 (iv) theft, conversion, alteration, or re-
2 moval of a product label;

3 (v) alteration, transfer, theft, conver-
4 sion, counterfeiting, or reproduction of a
5 Universal Product Code label; and

6 (vi) use of a fire or emergency exit.

7 (g) CIVIL FORFEITURE.—

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

11 “This section shall have the following civil forfeiture
12 provisions:

13 “(1) Any property used, in any manner or part,
14 to commit organized retail crime or the facilitation
15 of organized retail crime shall be subject to for-
16 feiture to the United States.

17 “(2) The provisions of chapter 46 of this title
18 relating to civil forfeitures, including section 983 of
19 this title, shall extend to any seizure or civil for-
20 feiture under this section. At the conclusion of the
21 forfeiture proceedings, the court, unless otherwise
22 requested by an agency of the United States, shall
23 order that any forfeited article be returned to the
24 rightful owner or otherwise disposed of according to
25 law.

1 “(3)(A) The court, in imposing sentence on a
2 person convicted of an offense under this section,
3 shall order, in addition to any other sentence im-
4 posed, that the person forfeit to the United States—

5 “(i) any property constituting or de-
6 rived from any proceeds the person ob-
7 tained, directly or indirectly, as the result
8 of the offense of organized retail crime or
9 the facilitation of organized retail crime;
10 and

11 “(ii) any of the person’s property
12 used, or intended to be used, in any man-
13 ner or part, to commit, facilitate, aid, or
14 abet the commission of either such offense.

15 “(B) The forfeiture of property under subpara-
16 graph (A), including any seizure and disposition of
17 the property and any related judicial or administra-
18 tive proceeding, shall be governed by the procedures
19 set forth in section 413 of the Comprehensive Drug
20 Abuse Prevention and Control Act of 1970 (21
21 U.S.C. 853), other than subsection (d) of that sec-
22 tion. Notwithstanding section 413(h) of that Act, at
23 the conclusion of the forfeiture proceedings, the
24 court shall order that any forfeited article or compo-

1 nent of an article bearing or consisting of a counter-
2 feit mark be destroyed.

3 “(4) When a person is convicted of an offense
4 under this section, the court, pursuant to sections
5 3556, 3663A, and 3664, shall order the person to
6 pay restitution to the owner of the property and any
7 other victim of the offense as an offense against
8 property referred to in section 3663A(c)(1)(A)(ii).

9 “(5) The term ‘victim’, as used in paragraph
10 (4), has the meaning given that term in section
11 3663A(a)(2).”.

12 **SEC. 4. ACTIONS AGAINST AN OPERATOR OF AN ONLINE**
13 **MARKETPLACE.**

14 (a) IN GENERAL.—Any business whose goods or serv-
15 ices were sold or otherwise used in the facilitation of orga-
16 nized retail crime through the operation of an online mar-
17 ketplace may bring a civil action against the operator of
18 the online marketplace for violations of section 3(e) with
19 respect to such goods and services in any district court
20 of the United States to enjoin further violation of this Act
21 by the person or entity and to recover damages for any
22 loss resulting from such violation.

23 (b) SUBSEQUENT ACTIONS.—A final judgment or de-
24 cree rendered in favor of the United States in any criminal
25 proceeding brought by the United States under this Act

1 shall stop the defendant from denying the essential allega-
2 tions of the criminal offense in any subsequent civil pro-
3 ceeding brought by any business whose goods or services
4 were sold or otherwise used in an act of organized retail
5 crime.

6 **SEC. 5. NO PREEMPTION OF STATE LAW.**

7 No provision of this Act, including any amendment
8 made by this Act, shall be construed as indicating an in-
9 tent on the part of Congress to occupy the field in which
10 that provision or amendment operates, including criminal
11 penalties, to the exclusion of any State law on the same
12 subject matter that would otherwise be within the author-
13 ity of the State, unless there is a positive conflict between
14 that provision or amendment and that State law so that
15 the two cannot consistently stand together.

16 **SEC. 6. EFFECTIVE DATE.**

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

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