

103D CONGRESS
1ST SESSION

S. 568

To strengthen the authority of the Federal Trade Commission regarding fraud committed in connection with sales made with a telephone, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MARCH 11 (legislative day, MARCH 3), 1993

Mr. BRYAN (for himself, Mr. MCCAIN, and Mr. GORTON) introduced the following bill; which was read twice and referred to the Committee on Commerce, Science, and Transportation

A BILL

To strengthen the authority of the Federal Trade Commission regarding fraud committed in connection with sales made with a telephone, 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 SHORT TITLE

4 SECTION 1. This Act may be cited as the
5 “Telemarketing and Consumer Fraud and Abuse Preven-
6 tion Act”.

7 DEFINITIONS

8 SEC. 2. As used in this Act, the term—

1 (1) “attorney general” means the chief legal of-
2 ficer of a State;

3 (2) “Commission” means the Federal Trade
4 Commission;

5 (3) “State” means any State of the United
6 States, the District of Columbia, Puerto Rico, the
7 Northern Mariana Islands, and any territory or pos-
8 session of the United States;

9 (4) “telemarketing” means a plan, program, or
10 campaign which is conducted to induce purchases of
11 goods or services by significant use of one or more
12 telephones and which has involved interstate tele-
13 phone calls; the term does not include other use of
14 a telephone in connection with business or personal
15 transactions, nor does the term include the sollicita-
16 tion of sales through the mailing of a catalog
17 which—

18 (A) contains a written description or illus-
19 tration of the goods or services offered for sale;

20 (B) includes the business address of the
21 seller;

22 (C) includes multiple pages of written ma-
23 terial or illustrations;

24 (D) is issued not less frequently than once
25 a year; and

1 (E) is at least the third catalog satisfying
2 the requirements of subparagraphs (A) through
3 (D) that has been issued by the seller within
4 the last five years,

5 where the seller does not place calls to customers
6 but only receives calls initiated by customers in re-
7 sponse to the catalog and during those calls takes
8 orders only without further solicitation; and

9 (5) “credit card laundering” means—

10 (A) the act or practice by a person en-
11 gaged in telemarketing (other than an act or
12 practice permitted in a valid agreement with a
13 member of a credit card system or the mem-
14 ber’s agent) of transferring to another person
15 to be presented to a member of a credit card
16 system or the member’s agent, for payment, one
17 or more evidences or records of transactions in-
18 volving goods or services offered by
19 telemarketing and paid for by credit card;

20 (B) the act or practice by a person acting
21 on behalf of a person engaged in telemarketing
22 (other than an act or practice permitted in a
23 valid agreement with a member of a credit card
24 system or the member’s agent) of causing or ar-
25 ranging for a third person to present to a mem-

ber of a credit card system or the member's agent, for payment, one or more evidences or records of transactions involving goods or services offered by telemarketing and paid for by credit card;

(C) the act or practice by a person (other than an act or practice permitted in a valid agreement with a member of a credit card system or the member's agent) of knowingly presenting to a member of a credit card system or the member's agent, for payment, one or more evidences or records received from another person of transactions involving goods or services offered by telemarketing and paid for by credit card; or

(D) such other acts or practices defined in the rules of the Commission as credit card laundering.

TELEMARKETING RULES

SEC. 3. (a) RULES ON TELEMARKETING ACTIVITIES.—The Commission shall prescribe rules regarding telemarketing activities. In prescribing such rules, the Commission shall consider the inclusion of—

(1) a requirement that goods or services offered by telemarketing be shipped or provided within a specified period and that if the goods or services are

1 not shipped or provided within such period a refund
2 be required;

3 (2) where practicable, authority for a person
4 who orders a good or service through telemarketing
5 to cancel the order within a specified period;

6 (3) restrictions on the hours of the day when
7 unsolicited telephone calls can be made to consum-
8 ers;

9 (4) a prohibition of telemarketing generated by
10 computers on equipment that does not permit the in-
11 dividual called to terminate the telephone call; and

12 (5) recordkeeping requirements.

13 (b) PROHIBITION OF FRAUDULENT TELEMARKETING
14 ACTS OR PRACTICES.—The Commission also shall pre-
15 scribe rules prohibiting fraudulent telemarketing acts or
16 practices and shall include in such rules a definition of
17 the term “fraudulent telemarketing acts or practices”,
18 which may include activities of entities or individuals that
19 assist or facilitate fraudulent telemarketing. Credit card
20 laundering shall be a fraudulent telemarketing act or prac-
21 tice.

22 (c) DEADLINE; ADMINISTRATIVE PROCEDURE.—The
23 Commission shall prescribe the rules under subsections (a)
24 and (b) of this section within 180 days after the date of

1 enactment of this Act. Such rules shall be prescribed in
2 accordance with section 553 of title 5, United States Code.

3 (d) TREATMENT OF RULE VIOLATIONS.—Any viola-
4 tion of any rule prescribed under subsection (a) or (b) of
5 this section shall be treated as a violation of a trade regu-
6 lation rule promulgated under section 18 of the Federal
7 Trade Commission Act (15 U.S.C. 57a) regarding unfair
8 or deceptive acts or practices (subject to any remedy or
9 penalty applicable to any violation thereof).

10 (e) EFFECT OF STATE LAW.—The rules promulgated
11 under this section shall not be construed as preempting
12 State law.

13 ACTIONS BY STATE ATTORNEYS GENERAL

14 SEC. 4. (a) AUTHORITY OF STATES.—Whenever the
15 attorney general of any State has reason to believe that
16 the interests of the residents of that State have been or
17 are being threatened or adversely affected because any
18 person has engaged or is engaging in a pattern or practice
19 of telemarketing which violates any rule, regulation, or
20 order of the Commission under this Act, the State may
21 bring a civil action on behalf of its residents to enjoin such
22 telemarketing, to enforce compliance with any rule, regula-
23 tion, or order of the Commission under this Act, to obtain
24 damages on behalf of their residents, or to obtain such
25 further and other relief as the court may deem appro-
26 priate.

1 (b) COURT JURISDICTION.—The district courts of the
2 United States, the United States courts of any territory,
3 and the District Court of the United States for the Dis-
4 trict of Columbia shall have exclusive jurisdiction over all
5 civil actions brought under this section to enforce any li-
6 ability or duty created by any rule, regulation, or order
7 of the Commission under this Act, or to obtain damages
8 or other relief with respect thereto. Upon proper applica-
9 tion, such courts shall also have jurisdiction to issue writs
10 of mandamus, or orders affording like relief, commanding
11 the defendant to comply with the provisions of any rule,
12 regulation, or order of the Commission under this Act, in-
13 cluding the requirements that the defendant take such ac-
14 tion as is necessary to remove the danger of violation of
15 any such rule, regulation, or order. Upon a proper show-
16 ing, a permanent or temporary injunction or restraining
17 order shall be granted without bond.

18 (c) RIGHTS OF COMMISSION.—The State shall serve
19 prior written notice of any such civil action upon the Com-
20 mission and provide the Commission with a copy of its
21 complaint, except in any case where such prior notice is
22 not feasible, in which case the State shall serve such notice
23 immediately upon instituting such action. The Commis-
24 sion shall have the right (1) to intervene in the action,

1 (2) upon so intervening, to be heard on all matters arising
2 therein, and (3) to file petitions for appeal.

3 (d) VENUE; SERVICE OF PROCESS.—Any civil action
4 brought under this section in a district court of the United
5 States may be brought in the district wherein the defend-
6 ant is found or is an inhabitant or transacts business or
7 wherever venue is proper under section 1391 of title 28,
8 United States Code, and process in such cases may be
9 served in any district in which the defendant is an inhab-
10 itant or wherever the defendant may be found.

11 (e) EFFECT ON STATE POWERS OF ATTORNEYS
12 GENERAL.—For purposes of bringing any civil action
13 under this section, nothing in this Act shall prevent the
14 attorney general from exercising the powers conferred on
15 the attorney general by the laws of such State to conduct
16 investigations or to administer oaths or affirmations or to
17 compel the attendance of witnesses or the production of
18 documentary and other evidence.

19 (f) EFFECT ON ACTIONS UNDER STATE STATUTE.—
20 Nothing contained in this section shall prohibit an author-
21 ized State official from proceeding in State court on the
22 basis of an alleged violation of any general civil or criminal
23 statute of such State.

24 (g) CIVIL ACTION BY COMMISSION.—Whenever the
25 Commission has instituted a civil action for violation of

1 any rule prescribed under this Act, no State may, during
2 the pendency of such action instituted by the Commission,
3 subsequently institute a civil action against any defendant
4 named in the Commission's complaint for violation of any
5 rule as alleged in the Commission's complaint.

6 ACTIONS BROUGHT BY PRIVATE PERSONS

7 SEC. 5. (a) DEFINITION.—As used in this section, the
8 term “person adversely affected by telemarketing”
9 means—

10 (1) any person who has incurred loss or damage
11 in connection with telemarketing and who actually
12 purchased goods or services through telemarketing,
13 or paid or is obligated to pay for goods or services
14 purchased through telemarketing;

15 (2) any financial institution that has incurred
16 loss or damage in connection with telemarketing; or

17 (3) any member organization comprised of fi-
18 nancial institution members, or any parent organiza-
19 tion of such member organization, if one or more of
20 the financial institution members is eligible to bring
21 a civil action under this subsection.

22 Such term does not include a governmental entity.

23 (b) PRIVATE RIGHT OF ACTION.—(1) Any person ad-
24 versely affected by any pattern or practice of
25 telemarketing which violates any rule, regulation, or order
26 of the Commission under this Act may, within three years

1 after discovery of the violation, bring a civil action against
2 a person who has engaged or is engaging in such pattern
3 or practice of telemarketing if the amount in controversy
4 exceeds the sum or value of \$50,000 in actual damages
5 for each person adversely affected by such telemarketing.
6 Such an action may be brought to enjoin such
7 telemarketing, to enforce compliance with any rule, regula-
8 tion, or order of the Commission under this Act, to obtain
9 damages, or to obtain such further and other relief as the
10 court may deem appropriate.

11 (2) The district courts of the United States, the Unit-
12 ed States courts of any territory, and the District Court
13 of the United States for the District of Columbia shall
14 have exclusive jurisdiction over all civil actions brought
15 under this section to enforce any liability or duty created
16 by any rule, regulation, or order of the Commission under
17 this Act, or to obtain damages or other relief with respect
18 thereto. Upon proper application, such courts shall also
19 have jurisdiction to issue writs of mandamus, or orders
20 affording like relief, commanding the defendant to comply
21 with the provisions of any rule, regulation, or order of the
22 Commission under this Act, including the requirement
23 that the defendant take such action as is necessary to re-
24 move the danger of violation or of any such rule, regula-
25 tion, or order. Upon a proper showing, a permanent or

1 temporary injunction or restraining order shall be granted
2 without bond.

3 (3) The plaintiff shall serve prior written notice of
4 the action upon the Commission and provide the Commis-
5 sion with a copy of its complaint, except in any case where
6 such prior notice is not feasible, in which case the person
7 shall serve such notice immediately upon instituting such
8 action. The Commission shall have the right (A) to inter-
9 vene in the action, (B) upon so intervening, to be heard
10 on all matters arising therein, and (C) to file petitions for
11 appeal.

12 (4) Whenever the Commission has instituted a civil
13 action for violation of any rule prescribed under this Act,
14 no person may, during the pendency of such action insti-
15 tuted by the Commission, subsequently institute a civil ac-
16 tion against any defendant named in the Commission's
17 complaint for violation of any rule as alleged in the Com-
18 mission's complaint.

19 (5) Any civil action brought under this section in a
20 district court of the United States may be brought in the
21 district wherein the defendant is found or is an inhabitant
22 or transacts business or wherever venue is proper under
23 section 1391 of title 28, United States Code, and process
24 in such cases may be served in any district in which the

1 defendant is an inhabitant or wherever the defendant may
2 be found.

3 (c) AWARD OF COSTS AND FEES.—The court, in is-
4 suing any final order in any action brought under sub-
5 section (b), may award costs of suit and reasonable fees
6 for attorneys and expert witnesses to the prevailing party.

7 (d) RIGHTS UNDER STATUTE OR COMMON LAW.—
8 Nothing in this section shall restrict any right which any
9 person may have under any statute or common law.

10 VENUE

11 SEC. 6. Subsections (a) and (b) of section 13 of the
12 Federal Trade Commission Act (15 U.S.C. 53) are each
13 amended by adding at the end thereof the following:
14 “Whenever it appears to the court that the interests of
15 justice require that any other person, partnership, or cor-
16 poration should be a party in such suit, the court may
17 cause such person, partnership, or corporation to be sum-
18 moned without regard to whether they reside or transact
19 business in the district in which the suit is brought, and
20 to that end process may be served wherever the person,
21 partnership, or corporation may be found.”.

22 SUBPOENA

23 SEC. 7. (a) PHYSICAL EVIDENCE DEFINED.—Section
24 20(a) of the Federal Trade Commission Act (15 U.S.C.
25 57b–1(a)) is amended—

1 (1) by redesignating paragraph (7) as para-
2 graph (8); and

3 (2) by inserting immediately after paragraph
4 (6) the following new paragraph:

5 “(7) The term ‘physical evidence’ means any
6 object or device.”.

7 (b) ISSUANCE OF DEMAND.—Section 20(c)(1) of the
8 Federal Trade Commission Act (15 U.S.C. 57b–1(c)(1))
9 is amended—

10 (1) by inserting “physical evidence or” imme-
11 diately after “any” the second time it appears;

12 (2) by inserting “to produce such physical evi-
13 dence for inspection,” immediately before “to
14 produce”;

15 (3) by inserting “physical evidence,” imme-
16 diately after “concerning”; and

17 (4) by inserting “evidence,” immediately before
18 “material, answers,”.

19 (c) CONTENTS OF DEMAND.—Section 20(c)(3)) of
20 the Federal Trade Commission Act (15 U.S.C. 57b–
21 1(c)(3)) is amended—

22 (1) by inserting “physical evidence or” imme-
23 diately before “documentary material”;

24 (2) in subparagraph (A)—

1 (A) by inserting “physical evidence or” im-
2 mediately before “documentary”; and

3 (B) by inserting “evidence or” immediately
4 after “permit such”;

5 (3) in subparagraph (B), by inserting “evidence
6 or” immediately before “material”; and

7 (4) in subparagraph (C), by inserting “evidence
8 or” immediately before “material”.

9 (d) PRODUCTION OF EVIDENCE IN RESPONSE TO
10 DEMAND.—Section 20(c)(10) of the Federal Trade Com-
11 mission Act (15 U.S.C. 57b–1(c)(10) is amended by in-
12 serting “physical evidence or” immediately before “docu-
13 mentary material” each place it appears.

14 FALSE ADVERTISEMENTS CONCERNING SERVICES

15 SEC. 8. Section 12(a) of the Federal Trade Commis-
16 sion Act (15 U.S.C. 52(a)) is amended by inserting “serv-
17 ices,” immediately after “devices,” each place it appears.

18 CLEARINGHOUSE

19 SEC. 9. The Commission shall establish a clearing-
20 house for inquiries made to Federal agencies concerning
21 telemarketing. The clearinghouse will provide information
22 (other than information which may not be disclosed under
23 section 522(b) of title 5, United States Code, or under
24 regulations prescribed by the Commission to implement
25 section 552(b) of title 5, United States Code) to anyone
26 making inquiries respecting persons engaged in

1 telemarketing or direct such inquiries to the appropriate
2 Federal or State agency.

3 FINANCIAL DATA

4 SEC. 10. Section 1109(a)(3) of the Right to Financial
5 Privacy Act of 1978 (12 U.S.C. 3409(a)(3)) is amended—

6 (1) by redesignating subparagraph (E) as sub-
7 paragraph (F);

8 (2) by striking “or” at the end of subparagraph
9 (D); and

10 (3) by inserting immediately after subpara-
11 graph (D) the following new subparagraph:

12 “(E) dissipation, removal, or destruction of
13 assets that are subject to forfeiture, seizure, re-
14 dress, or restitution under any law of the Unit-
15 ed States by reason of having been obtained in
16 violation of law; or”.

17 CRIMINAL CONTEMPT AUTHORITY

18 SEC. 11. Section 16(a)(1) of the Federal Trade Com-
19 mission Act (15 U.S.C. 56(a)(1)) is amended—

20 (1) in subparagraph (A) by striking “civil” the
21 first place it appears and inserting in lieu thereof
22 “Federal court”; and

23 (2) by adding at the end the following: “The
24 Commission may bring a criminal contempt action
25 for violations of orders obtained in cases brought
26 under section 13(b) of this Act in the same manner

1 as civil penalty and other Federal court actions to
2 which this subsection applies. Such cases may be ini-
3 tiated by the Commission on its own complaint, or
4 pursuant to its acceptance of an appointment by a
5 court to assist it in enforcing such orders pursuant
6 to Rule 42(b) of the Federal Rules of Criminal Pro-
7 cedure.”.

8 ADMINISTRATION AND APPLICABILITY OF ACT

9 SEC. 12. (a) ENFORCEMENT.—Except as otherwise
10 provided in sections 4 and 5 of this Act, this Act shall
11 be enforced by the Commission under the Federal Trade
12 Commission Act (15 U.S.C. 41 et seq.).

13 (b) APPLICABILITY OF FTCA.—The Commission
14 shall prevent any person from violating a rule, regulation,
15 or order of the Commission under this Act in the same
16 manner, by the same means, and with the same jurisdic-
17 tion, powers, and duties as though all applicable terms and
18 provisions of the Federal Trade Commission Act (15
19 U.S.C. 41 et seq.) were incorporated into and made a part
20 of this Act. Any person who violates such a rule, regula-
21 tion, or order shall be subject to the penalties and entitled
22 to the privileges and immunities provided in the Federal
23 Trade Commission Act in the same manner, by the same
24 means, and with the same jurisdiction, powers, and duties
25 as though all applicable terms and provisions of the Fed-

1 eral Trade Commission Act were incorporated into and
2 made a part of this Act.

3 (c) EXEMPTION.—(1) No provision of this Act shall
4 apply to any person exempt from the jurisdiction of the
5 Commission under section 5(a)(2) of the Federal Trade
6 Commission Act (15 U.S.C. 45(a)(2)), and nothing in this
7 Act shall be construed to vest the Commission, or the at-
8 torney general of any State or any person, with jurisdic-
9 tion or authority over any person not otherwise subject
10 to the jurisdiction or authority of the Commission.

11 (2)(A) No provision of this Act shall apply—

12 (i) to a broker, dealer, municipal securities
13 dealer, government securities broker, government se-
14 curities dealer, or investment company in connection
15 with the offer, sale, or purchase of any security, or
16 to an issuer in connection with the offer, sale, or
17 purchase of any security which that issuer has is-
18 sued, or to any investment adviser providing invest-
19 ment advice relating to any security; or

20 (ii) to the solicitation, acceptance, confirmation,
21 or execution of orders for the entry into, purchase
22 of, or sale of any contract, account, agreement, or
23 transaction subject to the exclusive jurisdiction of
24 the Commodity Futures Trading Commission under
25 the Commodity Exchange Act (7 U.S.C. 1 et seq.)

1 by a person registered under the Commodity Ex-
2 change Act in order to engage in such activity, in-
3 cluding as a futures commission merchant, introduc-
4 ing broker, commodity trading adviser, commodity
5 pool operator, leverage transaction merchant, floor
6 broker, or floor trader, or as a person associated
7 with any such person.

8 (B) For purposes of subparagraph (A) (i)—

9 (1) the terms “broker”, “dealer”, “municipal
10 securities dealer”, “government securities broker”,
11 and “government securities dealer” have the mean-
12 ings given them in section 3(a) (4), (5), (30), (43),
13 and (44), respectively, of the Securities Exchange
14 Act of 1934 (15 U.S.C. 78c(a) (4), (5), (30), (43),
15 and (44));

16 (2) the term “investment adviser” has the
17 meaning given it in section 202(a)(11) of the Invest-
18 ment Advisers Act of 1940 (15 U.S.C. 80b-
19 2(a)(11));

20 (3) the term “investment company” has the
21 meaning given it in section 3(a) of the Investment
22 Company Act of 1940 (15 U.S.C. 80a-3(a));

23 (4) the term “issuer” has the meaning given it
24 in section 2(4) of the Securities Act of 1933 (15
25 U.S.C. 77b(4)); and

1 (5) the term “security” has the meaning given
2 to it in section 2(1) of the Securities Act of 1933
3 (15 U.S.C. 77b(1)), section 3(a)(10) of the Securi-
4 ties Exchange Act of 1934 (15 U.S.C. 78c(a)(10)),
5 and section 2(a)(36) of the Investment Company Act
6 of 1940 (15 U.S.C. 80a-2(a)(36)).

7 LIFE CARE HOME STUDY

8 SEC. 13. (a) STUDY.—The Federal Trade Commis-
9 sion shall conduct a study of unfair or deceptive acts or
10 practices in the life care home industry, including acts or
11 practices engaged in by life care homes. Within twenty-
12 four months after the date of enactment of this Act, the
13 Commission shall report the findings and conclusions of
14 the study to Congress. The Commission shall indicate in
15 its report whether it intends to initiate a trade regulation
16 rulemaking under section 18 of the Federal Trade Com-
17 mission Act (15 U.S.C. 57a) respecting unfair or deceptive
18 acts or practices in the life care home industry and the
19 reasons for such determination.

20 (b) DEFINITIONS.—For purposes of subsection (a),
21 the term—

22 (1) “life care home” includes the facility or fa-
23 cilities occupied, or planned to be occupied, by resi-
24 dents or prospective residents where a provider un-
25 dertakes to provide living accommodations and serv-
26 ices pursuant to a life care contract, regardless of

12 SUNSET

SEC. 14. The provisions of section 3, 4, and 5 shall
cease to have force an effect on and after the date that
is five years following the date of enactment of this Act.

○