

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2021-2022 Regular Session

SB 301 (Skinner)
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Fiscal: Yes
Urgency: No
AWM

SUBJECT

Marketplaces: online marketplaces

DIGEST

This bill requires, starting July 1, 2023, online marketplaces to require specified high-volume third-party sellers on the platform to provide certain tax and payment information to the platform and certain contact information to consumers. The bill authorizes the Attorney General to seek civil penalties from an online marketplace or a third-party seller in violation of the bill's requirements.

EXECUTIVE SUMMARY

According to retailers, organized retail theft is on the rise. One potential factor in this unfortunate phenomenon is the ease of reselling stolen goods on online marketplaces – online platforms that host third-party sellers and connect those sellers with consumers, but do not directly conduct oversight into the sellers' businesses. This bill, which would take effect on July 1, 2023, requires online marketplaces to collect and verify certain business-related information from their high-volume third-party sellers, which is intended to make it more difficult for sellers of stolen goods to evade detection or consequences. The bill also requires certain high-volume third party sellers to provide contact information to consumers, which is intended to aid consumers in making informed purchasing decisions. The bill authorizes the Attorney General to take enforcement action against online marketplaces or in violation of the bill. The author has agreed to amend the bill to specify that the sellers must have a high volume of sales in California, to remove a preemption clause, and to make other nonsubstantive clarifying changes.

This bill is sponsored by the author and supported by the California Retailers Association, the Prosecutors Alliance of California, the San Diego County District Attorney's Office, The Home Depot, and Walgreens. The bill is opposed by the Chamber of Progress.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Provides that the United States Constitution, and the laws of the United States made in pursuant thereof, are the supreme law of the land notwithstanding any state law to the contrary. (U.S. Const., art. IV, cl. 2.)
- 2) Gives Congress the authority to regulate commerce with foreign nations and between states, and prohibits states from imposing a burden on interstate commerce that is clearly excessive in light of the stated local interest in the burden. (U.S. Const. art. I, § 8; *South Dakota v. Wayfair, Inc.* (2018) 138 S.Ct. 2080, 2091.)
- 3) Requires certain online marketplaces to collect sales and use taxes, and certain fees, for sales made by third-party sellers through the marketplace to buyers in California, and to remit those taxes and fees to the state on behalf of the sellers. (Rev. & Tax Code, div. 2, pt. 1, ch. 1.7, §§ 6040 et seq.)

This bill:

- 1) Provides the following relevant definitions:
 - a) "High-volume third-party seller" is a participant in an online marketplace who is a third-party seller and who, in any continuous 12-month period during the previous 24 months, has entered into 200 or more discrete sales or transactions of new or unused consumer products, processed by the online marketplace or its payment processor, resulting in the accumulation of an aggregate total of \$5,000 or more in gross revenues.
 - b) "Online marketplace" is a person or entity that operates a consumer-directed, electronically accessed platform that includes features that allow for, facilitate, or enable third-party sellers to engage in the sale, purchase, payment, storage, shipping, or delivery of a consumer product in this state; that allows third-party sellers to use those features; and that has a contractual or similar relationship with consumers governing the use of the platform to purchase consumer products.
 - c) "Seller" is a person or entity who sells, offers to sell, or contracts to sell a consumer product through an online marketplace's platform.
 - d) "Third-party seller" is a seller, independent of an online marketplace, who sells, offers to sell, or contracts to sell a consumer product in the state through the online marketplace's platform. The definition excludes a seller who either:
 - i. Has made available to the general public its name, business address, and working contract information; has an ongoing contractual relationship with the online marketplace to provide for the manufacture, distribution, wholesaling, or fulfillment of shipments to consumer

- products; and has provided to the online marketplace verified tax and payment information.
 - ii. Operates the online marketplace's platform.
 - e) "Verify" means to confirm information provided to an online marketplace by reliably determining that information and documents provided are valid, corresponding to the seller or an individual acting on the seller's behalf, not misappropriated, and not falsified.
- 2) Requires an online marketplace to require a high-volume third-party seller on the marketplace's platform to provide, not later than 10 days after qualifying as a high-volume third-party seller on the platform, the following information to the platform:
 - a) A bank account number or, if the seller does not have a bank account, the name of the payee for payments issued by the online marketplace to the seller. This information may be provided to the online marketplace directly or to a payment processor or other third party contracted by the online marketplace to maintain that information, if the marketplace ensures it can obtain the information from the third party on demand.
 - b) The seller's name, if the seller is an individual; or if the seller is a business entity, a copy of a valid government-issued identification for an individual acting on behalf of the seller that includes the individual's name, and a copy of a valid government record or tax document that includes the business name and physical address of the seller.
 - c) A business tax identification number or, if the seller does not have such a number, a taxpayer identification number.
 - d) A valid email address and telephone number for the seller.
- 3) Requires an online marketplace to verify the information provided pursuant to 2), or any changes to the information provided by the high-volume third-party seller, within 10 days of receipt. For information in valid government-issued tax documents, the information shall be presumed to be verified as of the date of issuance of the document. The online marketplace must keep the information provided for no fewer than five years on a secured server.
- 4) Requires an online marketplace to, on an annual basis, notify each third-party high-volume sellers on its platform of the requirement that the seller must inform the online marketplace of any changes to the information provided by the seller within 10 days of receiving the notification, and to instruct each high-volume third-party seller, as part of the notification, to electronically certify either that the information is unchanged or that the seller is providing changes to the information.
- 5) Requires an online marketplace, if a high-volume third-party seller does not provide the information or certification required in 2) and/or 4), to provide the third-party seller with written or electronic notice of the failure and an opportunity to provide the missing information/certification within 10 days. If the high-volume third-party

seller fails to cure within 10 days of the issuance of the notice, the online marketplace must suspend the seller's future sales activity until the seller provides the information/certification.

- 6) Provides that data collected solely to comply with the above requirements may not be used for any purpose unless the use is required by law.
- 7) Requires an online marketplace to require a high-volume third-party seller with at least \$20,000 of gross annual revenues derived from the online marketplace's platform to provide the following information to the marketplace and disclose it to consumers in a clear and conspicuous manner in the order communication, or other post-transaction communication, and in the consumer's account transaction history:
 - a) The seller's full name or company name, physical address, and direct contact information including a working telephone number, email address, or other means of direct electronic messaging.
 - i. A seller may request that the online marketplace make only a partial disclosure of the above information if the seller certifies that they do not have a physical address other than a residential address or that they do not have a telephone number other than a personal telephone number.
 - ii. Upon receiving such certification, the online marketplace should limit the disclosure to the seller's state and country of residence and/or email or electronic means of contact, and direct customers to use the alternative means.
 - b) Whether or not the seller used a different seller to supply the product to the consumer upon purchase. If the seller was not the seller on the product listing before purchase, the seller must, on request of an authenticated purchaser, provide the information described in 7)a).
- 8) Requires an online marketplace to suspend a seller who consents to make all of the disclosures required above in 7), after providing the seller with 10 days' notice of the requirement to do so, if the seller has either:
 - a) Made a false representation to the online marketplace to justify a partial disclosure of the information set forth in 7)a), or
 - b) After being allowed to make a partial disclosure pursuant to 7)a), fails to answer consumer inquiries within a reasonable timeframe.
- 9) Requires an online marketplace to disclose to consumers, in a clear and conspicuous manner on the product listing of a high-volume third-party seller, a reporting mechanism that allows for electronic and telephonic reporting of suspicious activity to the online marketplace.
- 10) Requires an online marketplace to suspend future sales activity of a high-volume third-party seller that is not in compliance with items 7)-9), if the seller does not

comply with the requirements after 10 days' notice of impending suspension from the online marketplace.

- 11) Provides that a person or entity that violates any provision of the bill shall be liable for a civil penalty not to exceed \$10,000 for each violation, which may be assessed and recovered only in a civil action brought by the Attorney General of California.
- 12) Provides that the bill addresses a matter of statewide concern and therefore supersedes and preempts all rules, regulations, codes, ordinances, and other laws adopted by a city, county, city and county, municipality, or local agency regarding online marketplaces' requirements in relation to verification of information from high-volume third-party sellers.
- 13) Provides that the bill will become operative on July 1, 2023.

COMMENTS

1. Author's comment

According to the author:

Organized retail crime is on the rise nationwide. In 2021, 69 percent of retailers reported an increase in organized retail crime since the beginning of the pandemic. Both the Governor and State Attorney General have announced measures to curb retail theft in CA.

A major contributor to the ease of selling stolen goods is the accessibility and anonymity of many online marketplaces. Through online accounts with little associated and verifiable personal information, stolen goods can be sold to unsuspecting consumers. It is estimated that more than \$500 billion in stolen and counterfeit items are sold on online marketplaces worldwide annually.

SB 301 would help combat the sale of stolen goods on online marketplaces by providing higher standards of accountability and verification for third-party-sellers on online platforms, helping online marketplaces identify and take action against sellers of stolen goods.

2. This bill requires online marketplaces to require certain disclosures from high-volume third-party sellers on their sites

This bill is modeled after H.R. 5502, legislation currently pending before the United States House of Representatives.¹ Both this bill and H.R. 5502 are intended to require online marketplaces – e-commerce websites that connect consumers to third-party sellers of consumer goods – to require certain third-party sellers to make certain disclosures to the online marketplaces and to consumers. As explained by the author, the disclosures are intended to make it more difficult for third-party sellers to use online marketplaces to sell stolen goods; opponents of the bill question the connection between online marketplaces and the rise in retail theft. The bill contains a delayed implementation date of July 1, 2023, to allow the affected persons and entities time to adjust to its requirements.

The bill's requirements apply to two categories of third-party sellers on online marketplaces. The first category is "high-volume third-party sellers," defined as third-party sellers on an online marketplace with at least 200 discrete sales transactions for new or unused consumer goods totaling \$5,000 in gross sales in any continuous 12-month period during the prior 24 months from that particular marketplace; all of the bill's seller-related requirements apply to these high-volume third-party sellers. The second category is the subset of high-volume third-party sellers who derive at least \$20,000 of gross annual revenues from an online marketplace; these sellers are subject to additional disclosure requirements. In both cases, a seller's status as a covered seller is platform-specific: it is the seller's sales volume on a particular platform that qualifies the seller as a high-volume third-party seller required to comply with the bill, rather than a seller's total sales across multiple platforms. A seller with a high volume of sales on Amazon and a low volume of sales on eBay could thus be required to make the required disclosures to Amazon but not eBay. As discussed further in Part 4, the author has agreed to amend the bill to clarify that the requisite volume of sales must be to buyers located in California.

The specific disclosures required of all high-volume third party sellers are as follows: all high-volume third-party sellers, within ten days of becoming a high-volume third-party seller, must provide to the online platform specified banking, location, contact, and identifying information, including a valid business tax or personal taxpayer identification number, as applicable. The online marketplace must then verify the information within ten days of receiving the information. Additionally, on at least an annual basis, the online marketplace must notify qualifying third-party sellers of their obligation to inform the marketplace of any changes. Upon receiving the notice, high-volume third-party sellers have ten days to either certify to the online marketplace that there have been no changes to the information, or provide the online marketplace with

¹ See H.R. No. 5502, 117th Cong., 1st Sess. (2021); see also Sen. No. 936, 117th Cong. 1st Sess. (2021) (INFORM Consumers Act).

any updated information.² The bill specifies that data collected solely to comply with the requirements of this bill may not be used for any other purpose except where required by law. These provisions are intended to make it more difficult for third-party sellers of stolen goods from evading platforms' and law enforcements' efforts to locate them, and from opening multiple seller pages to evade detection.

For the second category of high-volume third-party sellers – those with sales resulting in over \$20,000 in gross revenues – the bill requires additional, consumer-facing disclosures. Specifically, the bill requires those high-volume third-party sellers to disclose the seller's name, physical address, and contact information – including a current working telephone number and email address – to consumers in a clear and conspicuous manner in confirmation messages or other post-sale communications. The bill exempts a high-volume third-party seller from disclosing their physical address or phone number if the seller certifies that they have only a residential address or personal phone number. The bill also requires qualifying sellers to disclose whether the seller used a different seller to supply the product to the consumer, and to provide that seller's information upon request.

The mandated disclosures for both categories of sellers do not appear to conflict with California's online privacy statutes, because they would likely qualify for the exemption for businesses complying with state law obligations.³

Finally, the bill requires online marketplaces themselves to disclose to consumers, in a clear and conspicuous manner on the product listings of high-volume third-party sellers, a reporting mechanism that allows for electronic and telephonic reporting of suspicious activity to the online marketplace.

The bill places the burden of enforcing high-volume third-party sellers' disclosure requirements, in the first instance, on the online marketplaces hosting the sellers. Online marketplaces are required to collect the specified business and tax information and ensure that the proper contact information is posted and, where a third-party seller does not comply with these requirements, to provide the third-party seller with notice of the failure to comply and suspend the third-party seller's future sales if the seller fails to do so within ten days. Thus, while high-volume third-party sellers are required to make the disclosures, it is the online marketplaces that are required to monitor and ensure compliance by their third-party sellers. This structure is similar to California's Marketplace Facilitator Act,⁴ which requires certain high-volume online marketplace

² As drafted, the bill does not require high-volume third-party sellers to provide updated information except after receiving notice from the online marketplace, which could result in online marketplaces having out-of-date information for long periods of time. The author may wish to consider adding such a requirement.

³ See Civ. Code, § 1798.145(a).

⁴ Rev. & Tax. Code, div. 2, pt. 1, ch. 1.7, §§ 6040 et seq.

facilitators to collect state sales taxes paid by California consumers to third-party sellers from those third-party sellers and remit them to the state.⁵

In cases where an online marketplace fails to take the required corrective action against a noncompliant high-volume third-party seller, or fails to post its own required reporting mechanism, the bill authorizes the Attorney General to seek a civil penalty not to exceed \$10,000 per violation from the violating seller or marketplace in a civil action. The bill does not create a private right of action for consumers to seek a civil penalty for a violation of the bill's requirements, though a violation might serve as the basis for a violation of one or more of the state's consumer protection laws.

Given that the bill's requirements are based on a seller's sales volume, determining whether a seller or online marketplace is out of compliance with the bill may be difficult – it might not be immediately obvious to whether a third-party seller has the sales volume requiring some or all of the disclosures, and there is likely no easy way to determine whether a high-volume third-party seller has provided accurate identifying and tax information to its online marketplace. Going forward, the author may wish to work with stakeholders and determine whether there are mechanisms that will allow the Attorney General's office to more readily determine if violations are occurring. As part of those discussions, the author may wish to more precisely determine what constitutes a separate "violation," to put the covered persons and entities on better notice regarding their potential liability.

3. The author has agreed to remove the bill's preemption clause

The bill contains a general preemption clause, stating that the bill's requirements supersede any local, county, or other municipal regulations relating to online marketplaces' requirements in relation to verification of information from high-volume third-party sellers. Committee staff has not received any information suggesting that any such conflicting local regulations exist. To avoid a scenario wherein local governments are prevented from passing measures to enhance consumer or privacy protections, the author has agreed to amend the bill to remove the preemption clause.

4. Federal law questions

This bill currently in print presents two potential federal law issues. The first is, at this point, hypothetical. As noted above, this bill is nearly identical to federal legislation currently pending in the United States House of Representatives.⁶ While the federal bill includes a provision for enforcement by state attorneys general – authorizing those officers to seek injunctions, enforce compliance, obtain civil penalties, and obtain other

⁵ The author may wish to consider whether to adapt the Marketplace Facilitator Act's definition of "marketplace facilitator" (Rev. & Tax. Code, § 6041(b)) for use in this bill in lieu of "online marketplace," for the sake of consistency between statutes regulating the same types of entities.

⁶ See H.R. No. 5502, 117th Cong., 1st Sess. (2021).

remedies for violations of that bill – it limits state enforcement actions in two ways: by requiring state attorneys general to notify the Federal Trade Commission (FTC) of any action to enforce the bill, and granting the FTC the authority to intervene in the action; and by prohibiting state attorneys general from instituting a separate enforcement for violations if the FTC has already commenced an action for the same violations.⁷ The federal bill further states that no state may establish or continue to enforce any state law that conflicts with the federal bill.

The Supremacy Clause of the United States Constitution provides that federal statutes take precedence over state statutes when they are in conflict.⁸ While the judiciary should not infer federal preemption where none was intended, courts will hold that a state law is preempted by a conflicting federal law if the federal law expressly preempts the state law, or if “ ‘the scope of [the federal law] indicates that Congress intended federal law to occupy a field exclusively.’ ”⁹ Here, if the federal bill were to pass as-is, it is possible that a court could find that the federal bill’s restrictions on state action and restriction on conflicting state laws expressly or impliedly conflict with this bill’s enforcement provisions, thereby preempting the state law. However, given that it is unknown whether the federal bill will become law, it is premature due to delay passage of this bill due to any preemption concerns.

The second federal law issue presented by this bill is whether it violates the Dormant Commerce Clause by exceeding the state’s power to regulate out-of-state businesses.¹⁰ Where a state law, like this bill, does not facially discriminate between in-state and out-of-state businesses, a state law will comply with the Dormant Commerce Clause “effectuate[s] a legitimate local public interest” and does not impose a burden on commerce that “is clearly excessive in relation to the putative local benefits.”¹¹

As currently drafted, the bill likely does violate the Dormant Commerce Clause because it places no California-specific limitations on its scope, such as a requirement that high-volume sellers covered by the bill have any sales to consumers in California. The author has clarified that it is not the intent of the bill to regulate all high-volume third-party sellers, but rather only to regulate high-volume third-party sellers who have a high volume of sales in the state. The author has, therefore, agreed to amendments that will clarify that a high-volume third-party seller must have a nexus to the state. The amendments are set forth in greater detail below. With the amendments, the bill’s reporting and contact information requirements are more reasonable in light of the bill’s goals of protecting California’s consumers and brick-and-mortar stores, and promoting

⁷ *Id.*, at § (d).

⁸ U.S. Const., art. IV, cl. 2.

⁹ *Kurns v. Railroad Friction Products Corp.* (2012) 565 U.S. 625, 630.

¹⁰ See U.S. Const., art. I, § 8; *South Dakota v. Wayfair, Inc.* (2018) 138 S.Ct. 2080, 2091.

¹¹ *Wayfair, supra*, 138 S.Ct at p. 2091.

greater transparency in online commerce from sellers who have a high volume of sales in the state.

5. Amendments

As discussed above, the author has agreed to amend the bill to create a nexus between the bill's requirements and sales to California and to remove the preemption clause. These amendments, plus a nonsubstantive, clarifying amendment, are set forth as follows:

Amendment 1

On page 3, in line 17, after "sales," insert "to,"

Amendment 2

On page 3, in line 17, strike out "of" and insert "with, buyers located in California for"

Amendment 3

On page 8, in line 14, after "revenues" insert "from sales to, or transactions with, buyers in California"

Amendment 4

On page 8, in line 15, after "platform" insert "in either of the two prior calendar years"

Amendment 5

On page 9, in line 31, after "activity" insert "by the high-volume third-party seller"

Amendment 6

On page 10, strike out lines 15 to 20, inclusive.

6. Arguments in support

According to bill supporter California Retailers Association:

Organized retail crime (ORC) is a complex, multi-faceted problem and combatting it requires a comprehensive approach. SB 301 is a critical part of that effort, as one of the key factors driving the increase in ORC is the availability and use of online marketplaces by ORC as a "fence" for stolen goods. Through the use of third-party accounts, online marketplaces can provide a seller access to a

global market of consumers plus a shield of anonymity from law enforcement. ORC rings have been known to use numerous online accounts on multiple marketplaces to sell stolen goods at scale. Consumers hunting for online bargains are largely unaware that they may become unwitting accomplices to these crimes. They may also be exposing themselves to health risks from items like cosmetics or baby formula that are improperly stored...

While a federal solution would be ideal, California cannot wait for Congressional action while retail theft runs rampant in our state. We can no longer allow organized crime to hide behind phony electronic identities and peddle stolen goods to unsuspecting consumers. SB 301 will help these criminal enterprises out of the shadows.

According to bill supporter Prosecutors Alliance of California:

As prosecutors, we believe it is imperative to address the drivers of organized retail theft, including the ease with which stolen goods may be anonymously sold through online marketplaces. Through online accounts with little associated personal information that is rarely verified, stolen goods can be sold to unsuspecting customers...

SB 301 will help address this problem by requiring online marketplaces to collect identifying information for individuals and companies that sell a large number of items throughout the year, and by providing limited identifying information to consumers. Collecting identifying information for sellers will discourage organized retail theft operations from using online marketplaces and will facilitate law enforcement investigation when the sale of stolen goods is suspected. Providing limited identifying information to consumers will also help consumers make wise choices and avoid inadvertently purchasing stolen goods.

7. Arguments in opposition

According to bill opponent Chamber of Progress:

We appreciate Senator Skinner's effort to make adjustments to SB 301. The thoughtful amendments clearly recognize the need to protect retailers as well as small online sellers, and they are a step in the right direction.

However, we remain concerned about the absence of evidence that online marketplaces have contributed to an increase in retail theft; the continuing hardens this will create for small online sellers; and the state-by-state patchwork that this bill will exacerbate...

[F]ifteen states have rejected bills similar to SB 301, prioritizing the needs of online entrepreneurs and consumer choice. Democratic and Republican legislatures in other states agree this legislation would add additional obstacles that would ultimately hurt small sellers, decrease opportunity, increase red tape, and hinder consumers in search of a deal.

SUPPORT

California Retailers Association
Prosecutors Alliance of California
San Diego County District Attorney's Office
The Home Depot
Walgreens

OPPOSITION

Chamber of Progress

RELATED LEGISLATION

Pending legislation:

AB 1182 (Stone, 2021) imposes strict liability on an online marketplace for defective products sold on that online marketplace. AB 1182 is pending before the Assembly Judiciary Committee.

Prior legislation:

AB 1402 (Levine, Ch. 421, Stats. 2021) amended the Marketplace Facilitator Act to require marketplace facilitators to collect specified applicable sales fees, in addition to use taxes, on items sold into the state by out-of-state third-party retailers and to remit those fees to the state.

AB 331 (Jones-Sawyer, Ch. 113, Stats. 2021) reenacted the crime of organized retail theft after it was allowed to sunset July 1, 2021, and reestablished a regional property crimes task force to identify geographic areas experiencing increased levels of property crimes and assist local law enforcement.

AB 147 (Burke, Ch. 5, Stats. 2019) established the Marketplace Facilitator Act, which requires marketplace facilitators, as defined, to register with the California Department of Tax and Fee Administration (CDTFA), as well as collect and remit applicable state and local sales and use taxes to CDTFA when facilitating sales to purchasers in the state.
