

**SENATE JUDICIARY COMMITTEE**  
**Senator Thomas Umberg, Chair**  
**2023-2024 Regular Session**

SB 1144 (Skinner)  
Version: March 19, 2024  
Hearing Date: April 2, 2024  
Fiscal: Yes  
Urgency: No  
AWM

**SUBJECT**

Marketplaces: online marketplaces

**DIGEST**

This bill modifies existing law requiring online marketplaces, as defined, to collect certain information from high-volume third-party sellers, as defined, and permits a district attorney, city attorney, or county counsel to enforce the requirements.

**EXECUTIVE SUMMARY**

In 2022, the Legislature passed SB 301 (Skinner, Stats. 857, Ch. 2022), which requires online marketplaces – platforms that enable third-party sellers to sell consumer goods directly to consumers – to collect certain information from certain high-volume third-party sellers who sell to California residents on their platforms. These requirements were intended to make it more difficult to sell stolen goods on online marketplaces, thereby making it more difficult to profit from retail theft and, hopefully, disincentivizing such thefts. At the end of 2022, the United States Congress passed the Integrity, Notification, and Fairness in Online Retail Marketplaces for Consumers Act – a.k.a. the INFORM Consumers Act – which imposes, on a nationwide basis, largely the same requirements as SB 301.

SB 301 took effect on July 1, 2023, and the INFORM Consumers Act took effect a few days earlier. Since then, there have been mixed reports on whether retail theft is continuing to increase, is leveling out, or was overstated in the first place, and it is unclear whether there are data showing whether SB 301 and the federal bill have had any effect. According to the author, however, SB 301 and the INFORM Consumers Act have gaps that allow certain large online platforms to avoid those bills' requirements.

This bill is intended to expand the scope of SB 301 and make other changes to the SB 301 regime to make it more difficult for stolen goods to be sold online. The bill modifies certain definitions within current law so that all platforms that connect buyers and

sellers are covered, even if the sale is not conducted through the platform's payment processor. The bill also allows district attorneys, county counsel, and city attorneys to enforce violations of the bill; currently only the Attorney General is permitted to bring an enforcement action, which may be leading to under-enforcement. Finally, the bill requires online marketplaces to take a few additional steps, including certifying to consumers that sellers are in compliance with existing requirements, reporting suspected stolen goods to law enforcement. The author has agreed to amendments to clarify the new definition of "high-volume third-party seller," clarify the new verification requirement, and require a reporting mechanism for users to report the sale of stolen goods.

This bill is sponsored by the author and is supported by the Friends Committee on Legislation California, the Los Angeles County Sheriff's Department, the Prosecutors Alliance of California, Smart Justice California, The Home Depot, the United Food and Commercial Food Workers Western States Council, and the Valley Industry and Commerce Association. This bill is opposed by CalChamber, Chamber of Progress, the Computer & Communications Industry Association, OfferUp, and TechNet. If the Committee passes this bill, it will then be heard by the Senate Public Safety Committee.

### **PROPOSED CHANGES TO THE LAW**

Existing law:

- 1) Establishes, within Title 1.d of Part 4 of Division 3 of the Civil Code (Title 1.4d), requirements for online marketplaces that facilitate sales transactions between third-party sellers and consumers, and on certain third-party sellers on those online marketplaces, as set forth below.
- 2) Defines the following terms:
  - a) "Consumer product" is tangible personal property that is distributed in commerce and normally used for personal, family, or household purposes, including property intended to be attached to or installed in real property regardless of whether it is actually installed or attached.
  - b) "High-volume third-party seller" is a third-party seller who, in any continuous 12-month period during the previous 24 months, has entered into 200 or more discrete transactions through an online marketplace for the sale of new or unused consumer products to buyers located in California, resulting in the accumulation of an aggregate total of \$5,000 or more in gross revenues. For purposes of this definition, only transactions for which payment is processed by the online marketplace directly or through its payment processor are counted.
  - c) "Online marketplace" is a consumer-directed, electronically accessed platform for which all of the following are true:

- i. The platform 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 the state, and these features are used by third-party sellers.
    - ii. The platform has a contractual relationship with consumers governing their use of the platform to purchase consumer products.
  - d) "Third-party seller" is a person or entity, independent of an online marketplace, who sells, offers to sell, or contracts with an online marketplace to sell a consumer product in the state by or through an online marketplace.
  - e) "Verify" is to confirm that information provided to an online marketplace pursuant to the requirements below is accurate. Methods of confirmation include the use of one or more methods that enable the online marketplace to reliably determine that the information and documents are valid, correspond to the seller or an individual acting on the seller's behalf, are not misappropriated, and are not falsified. (Civ. Code, § 1749.8.)
- 3) Requires an online marketplace to require each high-volume third-party seller on the online marketplace to provide, not 10 days later after qualifying as a high-volume third-party seller, all of the following information to the online marketplace:
  - a) A bank account number or, if the high-volume third-party seller does not have a bank account, the name of the payee for payments issued by the online marketplace to the seller.
  - b) The high-volume third party seller's name, if they are an individual; if they are not an individual, a copy of a valid government-issued identification of an individual who has legal authority to act on behalf of the high-volume third-party seller, or a government document that includes the business name and address of the high-volume third-party seller.
  - c) A business or tax identification number for the business or taxpayer.
  - d) A valid email address and telephone number for the high-volume third-party seller. (Civ. Code, § 1749.8.1(a).)
- 4) Requires an online marketplace to verify the information provided under 3) within 10 days and, on an annual basis, notify each high-volume third-party seller of the requirement to update any information within 10 days of the notification and certify that the information provided is accurate. If the high-volume third-party seller does not provide the information or certification as required, the online marketplace shall, after providing notice and opportunity to provide the information or certification, suspend any future sales activity until the information or certification is provided. (Civ. Code, § 1749.8.1(b), (c).)
- 5) Requires an online marketplace to require a high-volume third-party seller with at least \$20,000 of gross annual revenues from transactions with buyers in California through the online marketplace in either of the prior two calendar years to provide,

in addition to the information required in 3), the following to the online marketplace and disclose it to consumers in a clear and conspicuous manner, as specified:

- a) The full name of the high-volume third party seller, as specified.
  - b) The high-volume third-party seller's physical address and contact information for the high-volume third-party seller, including a current working telephone, email address, or other means of direct electronic messaging, to allow users to have direct and unhindered communication with the seller. In the event that a seller certifies that they do not have a physical address or telephone number other than their residential address or personal number, the online marketplace shall direct consumers to use other methods of contact, as specified.
  - c) Whether or not another party is responsible for supplying the product to the consumer upon purchase; and upon request from an authenticated purchaser, the high-volume third-party seller shall provide contact information for the party who is responsible for supplying the product. (Civ. Code, § 1749.8.2(a).)
- 6) Requires an online marketplace to disclose to consumers, in a clear or 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 by the high-volume third-party seller to the online marketplace. (Civ. Code, § 1749.8.2.(b).)
- 7) Provides for the suspension of a high-volume third-party seller by an online marketplace, as follows:
- a) The online marketplace must suspend the high-volume third-party seller if the high-volume third-party seller is not in compliance with the requirements of 4), made a false representation to the online marketplace about its lack of a business address or phone number, or made a false representation to a consumer.
  - b) The online marketplace may suspend the high-volume third-party seller if the high-volume third-party seller has not answered consumer inquiries within a reasonable time.
  - c) Before suspending a high-volume third-party seller, the online marketplace must provide notice and an opportunity to comply, as specified; if the high-volume third-party seller comes into compliance following the suspension, the online marketplace shall restore the seller, as specified. (Civ. Code, § 1749.8.2(c).)
- 8) Requires an online marketplace to retain the information provided to comply with 3)-7) for no fewer than two years, using reasonable security procedures and practices to protect the information, as specified. (Civ. Code, § 1749.8.3.)
- 9) Provides that a person or entity who violates any provision of 3)-8) shall be liable for a civil penalty of up to \$10,000 for each violation, which may be assessed and

recovered only in a civil action brought in the name of the people of the State of California by the Attorney General. If the Attorney General prevails in such an action, it may recover reasonable attorney fees and costs and preventive relief, including a permanent or temporary injunction against any person responsible for the conduct. (Civ. Code, § 1749.8.4.)

10) Provides that 3)-9) do not apply to or affect the liability of an entity, including an entity that meets the definition of a high-volume third-party seller, for damages caused by a consumer product that is sold online. (Civ. Code, § 1749.8.5(a).)

11) Provides that 1)-10) became operative on July 1, 2023. (Civ. Code, § 1749.5(b).)

Existing federal law:

- 1) Establishes the INFORM Consumers Act, which imposes largely the same obligations on online marketplaces and high-volume third-party sellers as the state law set forth above. (15 U.S.C. § 45f.)
- 2) Authorizes the Federal Trade Commission (FTC), State Attorneys General, or other state officers authorized by state law to investigate and prosecute violations of the INFORM Consumers Act; however, a state officer may not bring a separate action for a violation while an action brought by the FTC is pending. (15 U.S.C. 45f(c) & (d).)
- 3) Provides that no state or political subdivision of a state, or territory of the United States, may establish or continue in effect any law, regulation, rule, requirement, or standard that conflicts with the requirements of the INFORM Consumers Act. (15 U.S.C. § 15f(g).)

This bill:

- 1) States that the Legislature finds and declares that it is the intent of the Legislature to stop theft from retail stores and community theft by curtailing the sale of stolen property on online marketplaces.
- 2) Modifies the definition of “high-volume third-party seller” so that all of the seller’s transactions utilizing the online marketplace are counted towards the 200-transaction floor, rather than only the transactions processed by the online marketplace directly or through its payment processor.
- 3) Modifies the definition of “online marketplace” to eliminate the requirements that (1) the enumerated features made available to third-party sellers are used by third-party sellers, and (2) the platform has a contractual relationship with consumers governing their use of the platform to purchase consumer products.

- 4) Permits, in addition to the Attorney General, a district attorney in any county, a city attorney in any city, or a county counsel in any county to commence a civil action for violations of Title 1.4d.
- 5) Requires an online marketplace to verify and identify to consumers that each high-volume third-party seller has complied with its obligation to provide the payment and identifying information set forth in item 3) of the “Existing law” section.
- 6) Requires an online marketplace to alert local, regional, or state law enforcement agencies in California if it suspects that a third-party seller is selling or attempting to sell stolen goods to a California resident.
- 7) Prohibits an online marketplace from allowing a business or person to utilize its platform or other services if it suspects that business or person is selling stolen goods.

## COMMENTS

### 1. Author’s comment

According to the author:

In 2022, I introduced SB 301 to address the increasing use of online marketplaces as the mechanism to resell stolen goods. Regulations under SB 301 required online marketplaces to ensure that high volume third party sellers on their platforms were operating legally. While SB 301 made great strides in combating the sale of stolen goods on online marketplaces, there is still more work to be done. This bill strengthens SB 301 by auditing additional regulations on those high volume third party sellers that use online marketplaces to advertise goods, but then collect the money from buyers in “offline” transactions — transactions that make it much more difficult to track whether the goods sold were stolen. SB 1144 also gives law enforcement tools to work together to track large-scale online operations, helping combat organized retail theft rings from using online marketplaces to fence stolen goods, and making such marketplaces safer for consumers and sellers alike.

### 2. The problem of retail theft

In 2022, the National Retail Federation (NRF) claimed that “nearly half” of the shopping industry’s \$94.5 billion in losses due to “shrink” in 2021 were caused by “organized retail theft.”<sup>1</sup> This claim was reported widely and cited in connection with stories about

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<sup>1</sup> Helmore, *US retail group retracts claim that half of \$94.5bn inventory loss was from theft* (Dec. 11, 2023), The Guardian, <https://www.theguardian.com/business/2023/dec/07/retail-theft-losses-inventory-nrf>. All links in this analysis are current as of March 29, 2024.

retail theft incidents. Store owners said that the prevalence of retail theft led them to raise prices.<sup>2</sup> Large companies like Walmart, Home Depot, and CVS agreed that the rate of retail theft was increasing.<sup>3</sup>

But then in 2023, the NRF retracted its claim about organized theft because they lacked evidence to support it.<sup>4</sup> There are increasing questions about whether the scope of retail theft is as high as the NRF and other sources claim.<sup>5</sup> Accepting the NRF's claim that retailers lost \$112 billion to shrink in 2022, the rate of retail theft as a percentage of overall sales is the same as it was in 2020 and 2019.<sup>6</sup> More fundamentally, however, there is a debate over whether the data on retail theft are reliable at all.<sup>7</sup> Reported numbers can vary wildly; for example, one study showed that monthly shoplifting incidents in Los Angeles were between 200-300 per month in the latter half of 2022, while another reported 500-700 monthly shoplifting incidents in the same time frame.<sup>8</sup> There is also a debate over whether retailers are under-reporting retail theft – making it difficult to track stolen products – or actually reporting more incidents of retail theft than in the past – giving rise to the appearance of higher retail theft rates.<sup>9</sup>

The problem with missing data, of course, is that they are missing, so there is no reliable way to determine how many incidents are not being counted.<sup>10</sup> Some have suggested that retailers could provide more accurate information, both with respect to the number of retail thefts and the responses of law enforcement (or whether law enforcement were notified), to help the Legislature craft policy solutions.<sup>11</sup>

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<sup>2</sup> Stark, *Are you spending more because of retail theft? Can California workers chase shoplifters?*, Sacramento Bee (Nov. 9, 2023), available at <https://www.sacbee.com/news/california/article281619043.html>.

<sup>3</sup> Fonroque, et al., *America's biggest companies say retail crime is an epidemic, but just how big is it?*, CNBC (Mar. 18, 2023; updated Mar. 20, 2023), <https://www.cnbc.com/2023/03/18/organized-retail-crime-debate.html>.

<sup>4</sup> E.g., Helmore, *supra*.

<sup>5</sup> E.g., Fonroque, *supra*.

<sup>6</sup> Selyukh, *Retailers Howled About Retail Theft Last Year. Why Not Now?*, KQED (Mar. 12, 2024), <https://www.kqed.org/news/11978954/retailers-howled-about-theft-last-year-why-not-now>.

<sup>7</sup> Fonroque, *supra*.

<sup>8</sup> Compare Lofstrom, Presentation, Crime Data on Retail Theft and Robberies in California (Dec. 19, 2023), p. 8, presented to the Assem. Select Com. on Retail Theft, hg. on Retail Crime: Community Impacts and Solutions (Dec. 19, 2023) (relying on Department of Justice data) available at <https://www.assembly.ca.gov/committees/selectcommitteeonretailtheft>, with *id.* at p. 9 (relying on Council on Criminal Justice, Shoplifting Trends: What You Need to Know (Nov. 2023), fig 2 (selected for Los Angeles), <https://counciloncj.org/shoplifting-trends-what-you-need-to-know/>).

<sup>9</sup> Compare, e.g., Selyukh, *supra* (some retailers are not reporting retail thefts to the police), with Council on Criminal Justice, Shoplifting Trends: What You Need to Know (Nov. 2023), *supra* (discussing data suggesting that retailers in some cities are reporting shoplifting at a greater rate).

<sup>10</sup> Assem. Select Com. on Retail Theft, hg. on Retail Crime: Community Impacts and Solutions (Dec. 19, 2023), testimony of Magnus Lofstrom.

<sup>11</sup> *Ibid.*

In the last few months, retailers have been more neutral about the threat of retail theft.<sup>12</sup> According to retailers, the reduced threat is due to some changed behavior on their part – such as cutting back on self-checkout and locking up certain merchandise – as well as state and federal legislation targeted at retail theft.<sup>13</sup>

### 3. SB 301 and the INFORM Consumers Act

In 2021, the Legislature passed, and the Governor signed, SB 301 (Skinner, Ch. 857, Stats. 2022). SB 301 added Title 1.4d to the Civil Code, which sets forth requirements for online marketplaces and the third-party sellers on those marketplaces.<sup>14</sup> As explained by the author in connection with the bill, SB 301 was intended to:

[H]elp 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.<sup>15</sup>

Broadly speaking, the bill requires online marketplaces – defined as online platforms that facilitate the sale of consumer goods by third-party sellers to consumers in California, processed through the platform’s payment mechanism<sup>16</sup> – to collect certain information about high-volume third-party sellers – defined as sellers with a minimum of 200 annual transactions on the platform of at least \$5,000.<sup>17</sup> All high-volume third-party sellers must provide the platform with information about their bank account or the payee accepting payments from the platform, as well as identifying and contact information for the seller.<sup>18</sup> SB 301 also imposes additional requirements for high-volume third-party sellers with at least \$20,000 in sales on a platform, such as providing customers with contact information and informing a customer if their order will be fulfilled by another party.<sup>19</sup> The online marketplace is required to take certain steps to ensure that the covered third-party sellers comply and to suspend noncompliant sellers.<sup>20</sup> The Attorney General is authorized to seek civil penalties, as well as injunctive or other preventive relief, from any person or entity that violates any of the provisions of SB 301.<sup>21</sup> SB 301 took effect on July 1, 2023.<sup>22</sup>

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<sup>12</sup> Sulyukh, *supra*.

<sup>13</sup> *Ibid*.

<sup>14</sup> See Civ. Code, §§ 1749.8-1749.8.5.

<sup>15</sup> Sen. Com. on Judiciary, Analysis of Sen. Bill No. 301 (2021-2022 Reg. Sess.) as introduced.

<sup>16</sup> Civ. Code, § 1749.8(c).

<sup>17</sup> *Id.*, § 1748.8(b).

<sup>18</sup> *Id.*, § 1749.8.1.

<sup>19</sup> *Id.*, § 1749.8.2.

<sup>20</sup> *Id.*, § 1749.8.3.

<sup>21</sup> *Id.*, § 1749.8.4.

<sup>22</sup> *Id.*, § 1749.8.5(b).



At the end of 2021, Congress passed the INFORM Consumers Act as part of the Consolidated Appropriations Act of 2023.<sup>23</sup> The INFORM Consumers Act is nearly identical to SB 301, except that it applies to the United States as a whole and gives the Federal Trade Commission (FTC) first crack at enforcement.<sup>24</sup> State Attorneys General are also entitled to bring INFORM Consumers Act suits, but they may not commence such an action while an FTC action is pending, and the FTC may intervene in a pending state suit.<sup>25</sup> The INFORM Consumers Act further states that “[n]o State or political subdivision of a State, or territory of the United States, may establish or continue in effect any law, regulation, rule, requirement, or standard that conflicts with the requirements of this section.”<sup>26</sup> The INFORM Consumers Act took effect on June 27, 2023.<sup>27</sup>

#### 4. This bill expands SB 301’s scope and permits enforcement by certain public prosecutors

This bill builds on SB 301 by extending its application to online marketplaces and third-party sellers not currently covered by SB 301, by allowing specified local actors to enforce violations, and by adding additional obligations on covered platforms.

First, the bill modifies the definitions of “online marketplace,” “high-volume third-party seller” and “third party seller.” Title 1.4d currently applies only to marketplaces in which the online marketplace and the consumer have a contractual relationship relating to the sale<sup>28</sup> (such as eBay or Amazon), and to third-party sellers who use the online marketplace’s payment processor.<sup>29</sup> According to the author, these definitions are a loophole that exclude online marketplaces like Facebook Marketplace and Craigslist on which stolen goods may be sold. The bill, therefore, removes the requirements (1) that the online marketplace have a contract with the consumer, and (2) that the sales transaction be conducted through the platform’s payment processor.

Opponents of the bill have raised the concern that the amended language would require online marketplaces to track a seller’s sales across *all* online marketplaces, which they say would be difficult, if not impossible. The author has agreed to amendments to clarify that a seller’s status is determined on a marketplace-by-marketplace basis, based on the number of sales on each particular platform. The amendments are set forth in Part 6 of this analysis.

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<sup>23</sup> See Pub. L. No. 117-328 (Dec. 29, 2022) 136 Stat. 4459, div. BB, § 301; 15 U.S.C. § 45f.

<sup>24</sup> 15 U.S.C. § 45f.

<sup>25</sup> *Id.*, § 45f(d).

<sup>26</sup> *Id.*, § 45f(g).

<sup>27</sup> *Id.*, § 45f(h).

<sup>28</sup> Civ. Code, § 1749.8(c).

<sup>29</sup> *Id.*, § 1749.8(b).

Second, the bill expands the scope of who may commence a civil action to enforce Title 1.4d's provisions. Currently, only the Attorney General may bring such a civil action.<sup>30</sup> This bill would additionally authorize a district attorney in any county, a city attorney in any city, or a county counsel in any county to bring an enforcement suit, lessening the burden on the Attorney General to conduct enforcement.

Third, the bill adds new requirements for online platforms. Specifically, the bill (1) requires an online marketplace to verify that the high-volume third-party sellers are in compliance with their disclosure requirements; (2) requires an online marketplace to alert law enforcement if it reasonably believes that a third-party seller is attempting to sell stolen goods to a California resident; and (3) prohibits an online marketplace from allowing a business or person to utilize its platform or other services if it has reason to believe the business or person is selling stolen goods.

Item (2) is within the jurisdiction of the Public Safety Committee, to which the bill is referred after this Committee. Item (1), as currently in print, is slightly unclear; the author has agreed to amendments to clarify the requirement. Opponents of the bill have raised the concern that this requirement is redundant – existing law already requires an online marketplace to suspend a seller that is not in compliance with its obligations – and that the verification mechanism may cause confusion about why smaller sellers are not verified, leading consumers to favor larger sellers. The author may wish to continue working with the stakeholders to ensure that smaller sellers are not prejudiced.

Item (3) raises concerns because it sets an extremely low bar for kicking a person off of an online marketplace due to suspicions about selling stolen goods – even if they were not aware the goods might be stolen – and provides no right of redress for persons wrongfully accused. Given that some persons make their livelihoods off of online marketplace sales, a false positive could be ruinous for a person incorrectly believed to be selling stolen goods, or kicked off of a platform because they sold goods they legitimately did not know were stolen. Opponents of the bill also note that requiring online marketplaces to take action against sellers suspected of stolen goods could give rise to anticompetitive behavior, e.g., competitors filing false reports against each other.

To avoid these concerns, the author has agreed to amendments that instead require an online marketplace to establish and maintain a policy prohibiting the sale of stolen goods, including consequences for knowingly selling stolen goods, including, but not limited to, suspension or termination of the seller's account; to require an online marketplace to post this policy publicly; and to have a mechanism to allow users to report suspected stolen goods on the platform. The amendments are set forth in greater detail in Part 6 of this analysis.

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<sup>30</sup> *Id.*, § 1749.8.4.

## 5. The federal INFORM Consumers Act does not appear to preempt this bill

The Supremacy Clause provides that the laws of the United States take precedence over state laws.<sup>31</sup> Accordingly, federal law may specify whether, and to what extent, it preempts state laws regulating the same subject matter; and even where a law does not contain an express preemption clause, “state law must yield to a congressional Act in at least two circumstances.”<sup>32</sup> First, “[w]hen Congress intends federal law to ‘occupy the field,’ state law in that area is preempted.”<sup>33</sup> Second, “even if Congress has not occupied the field, state law is naturally preempted to the extent of any conflict with a federal statute.”<sup>34</sup> This “conflict preemption” may arise “where it is impossible for a private party to comply with both state and federal law,” and “where under the circumstances of a particular case, the challenged state law stands as an obstacle to the full purposes and objectives of Congress.”<sup>35</sup> The Supreme Court has made clear that “[i]nvoking some brooding federal interest or appealing to a judicial policy preference should never be enough to win preemption of a state law; a litigant must point specifically to a ‘constitutional text or a federal statute’ that does the displacing or conflicts with state law.”<sup>36</sup>

As discussed above in Part 2, Congress passed the INFORM Consumers Act in 2022, and the bill took effect in 2023.<sup>37</sup> The INFORM Consumers Act regulates online marketplaces and high-volume third-party sellers under largely, but not entirely, the same terms as SB 301. The INFORM Consumers Act also states that no state may establish “any law, regulation, rule, requirement, or standard that conflicts with the requirements of” the INFORM Consumers Act.<sup>38</sup> Some of the bill’s opponents have argued that the INFORM Consumers Act therefore preempts this bill. This does not appear to be the case.

As the Supreme Court has noted, the categories of preemption “are not ‘rigidly distinct.’”<sup>39</sup> The INFORM Consumers Act’s preemption clause appears to be a hybrid express/conflict statement of preemption. The clause is express insofar as it is written into the statute itself, but the clause does not explicitly prohibit state legislation to regulate online marketplaces and high-volume third-party sellers. Instead, the clause prohibits any conflicting state laws. Given that this prohibition is baked into the Supremacy Clause anyway,<sup>40</sup> it is difficult to discern what, if any, additional meaning should be given to this provision; Committee staff were unable to locate any court

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<sup>31</sup> U.S. Const., art. VI, cl. 2.

<sup>32</sup> *Crosby v. National Foreign Trade Council* (2000) 530 U.S. 363, 372.

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*

<sup>35</sup> *Id.* at p. 372-373 (cleaned up).

<sup>36</sup> *Virginia Uranium, Inc. v. Warren* (2019) 587 U.S. —, 139 S.Ct. 1894, 1901.

<sup>37</sup> 15 U.S.C. § 45f(h).

<sup>38</sup> *Id.*, § 45f(g).

<sup>39</sup> *Crosby, supra*, p. 372, fn. 6.

<sup>40</sup> *See id.* at pp. 372

decision interpreting this particular preemption clause that could provide guidance on how to proceed.

What is clear, however, is that Congress knows how to draft a preemption clause when it intends to occupy the field. The Federal Meat Inspection Act (FMIA), for example, states that requirements relating to the premises, facilities, and operations of any establishment covered by the act “which are in addition to, or different than those made under [the FMIA] may not be imposed by any State or Territory or the District of Columbia” except for certain exempted recordkeeping requirements.<sup>41</sup> The Supreme Court interpreted the FMIA’s preemption clause to “prevent[] a State from imposing any different – even if non-conflicting – requirements that fall within the scope of the [FMIA] and concern a slaughterhouse’s facilities or operations.”<sup>42</sup>

Congress did not sweep so broadly with the INFORM Consumers Act. The INFORM Consumers Act’s preemption clause prohibits conflicting prohibitions only, and is silent on whether a state may add additional, non-conflicting requirements. Under the *expressio unius est exclusion alterius* principle – which holds that “the expression of one thing in a statute ordinarily implies the exclusion of other things”<sup>43</sup> – it may be appropriate to infer that Congress intended only to preempt conflicting requirements and not to preempt additional, non-conflicting requirements. As the bill’s opponents note, the bill creates obligations in addition to the INFORM Consumers Act, but it does not appear (nor does anyone argue) that the new obligations create a conflict between the two legal frameworks. Accordingly, it does not appear that this bill would be preempted by federal law.

## 6. Amendments

As noted in Part 3, the author has agreed to clarifying amendments, as well as amendments to require an online marketplace to have a policy prohibiting the sale of stolen goods on the platform. The amendments are set forth below, with deletions in strikethrough and additions in bold/underline, subject to any nonsubstantive changes the Office of Legislative Counsel may make:

### Amendment 1

At page 2, modify Civil Code section 1749.8(b) as follows:

(b) “High-volume third-party seller” means a third-party seller **on an online marketplace** who, in any continuous 12-month period during the previous 24 months, has entered into 200 or more discrete transactions utilizing ~~an~~ **the** online marketplace for the sale of new or unused consumer products to buyers located

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<sup>41</sup> 21 U.S.C. § 678.

<sup>42</sup> *National Meat Ass’n v. Harris* (2012) 565 U.S. 453, 459-460.

<sup>43</sup> *In re J.W.* (2002) 29 Cal.4th 200, 209.

in California resulting in the accumulation of an aggregate total of five thousand dollars (\$5,000) or more in gross revenues.

Amendment 2

At page 6, modify Civil Code section 1749.8.9(a) to read:

(a) An online marketplace shall ~~verify and identify~~ **disclose** to consumers ~~that each~~ **whether a** high-volume third-party seller has complied with Section 1749.8.1 ~~lawfully~~.

Amendment 3

At page 7, delete the existing Civil Code section 1749.8.9(c) and insert:

**(c) An online marketplace shall do both of the following:**

**(1) Establish and maintain a policy prohibiting the sale of stolen goods on the platform, which must include consequences for knowingly selling stolen goods on the platform, including, but not limited to, suspension or termination of the seller's account. This policy shall be posted and readily accessible to users.**

**(2) Provide a mechanism on the platform that allows any individual to notify the online marketplace that a seller is or may be selling stolen goods. The reporting mechanism shall be publicly posted and readily accessible to users.**

7. Arguments in support

According to the Prosecutors Alliance:

The bill strengthens existing law by mandating that all high volume third party sellers who utilize an online marketplace to sell goods must comply with the recently enacted SB 301 (Skinner 2022), by providing to the online marketplace their name, physical location, banking information, a valid tax document or record that demonstrates that they are a lawfully authorized business, and other key information. The information mandated by SB 301 allowed the California Attorney General, working in concert with federal, state and local law enforcement and online marketplaces to identify individuals directing criminal enterprises and to shut them down, charging them for grand theft and other felonies.

SB 1144 will mandate that online marketplaces create a consumer friendly means of identifying which online sellers are in compliance with California law. Further, the bill will also local prosecutors and city and county counsels to

enforce the law, a power that is currently limited to the California Attorney General...

SB 1144 will be a powerful crime prevention and investigatory tool, reducing the opportunity to resell stolen goods, and therefore discouraging those who would profit from breaking the law. For these reasons, PAC strongly supports SB 1144 (Skinner).

#### 8. Arguments in opposition

According to CalChamber, CCIA, and TechNet:

In 2022, online marketplaces and retailers came together to negotiate the federal INFORM Consumers Act, which went into effect just this past summer. These negotiations resulted in legislation that was supported by brick-and mortar retailers and online marketplaces alike. It also created an important federal framework at a time when multiple states were considering their own legislation on the issue of addressing the use of online marketplaces to move stolen goods. This included California, and the California law that passed in 2022 conformed to the language set forth in the federal law.

Now, based on an alleged "loophole" in a brand new law, SB 1144 attempts to change the approach to online marketplaces and would make California operate under a different and more onerous law than the rest of the United States. This means that legitimate businesses using online marketplaces located anywhere in the nation would have to comport with California's unique laws, something that small businesses are not equipped to do. This outcome is exactly the reason that the federal INFORM act included preemption language - the reality of online commerce necessitates consistency across state lines.

In addition to the INFORM Act, in California, brick-and-mortar retailers, online marketplaces, and the Attorney General agreed to a Statement of Principles in June 2023 that laid out additional commitments that are focused on identifying and addressing ORC. In the handful of months that have followed the effective date of the INFORM Act and the agreement to the Statement of Principles, there has been no evidence that there is a loophole that must be closed.

### **SUPPORT**

Friends Committee on Legislation of California  
Los Angeles County Sheriff's Department  
Prosecutors Alliance  
Smart Justice California  
The Home Depot

United Food and Commercial Food Workers Western States Council  
Valley Industry & Commerce Association

### OPPOSITION

CalChamber  
CCIA  
Chamber of Progress  
OfferUp  
TechNet

### RELATED LEGISLATION

#### Pending Legislation:

AB 2943 (Zbur, 2024) among other things, states that it is the intent of the Legislature to enact legislation to prevent the sale of unlawfully acquired products by requiring sellers of specified products to maintain a chain of custody of the products to demonstrate their lawful provenance and by addressing the use of online platforms to advertise and sell unlawfully acquired products; and to require retail businesses of a certain size to periodically report specified data related to thefts and to strengthen laws to prevent stolen goods from being sold via online marketplaces. AB 2943 is pending before the Assembly Public Safety Committee.

AB 1845 (Alanis, 2024) would create the Identifying, Apprehending, and Prosecuting Resale of Stolen Property Grant Program, until January 1, 2030, to be administered by the Board of State and Community Corrections, for awarding grants to county district attorneys' offices and law enforcement agencies acting jointly to investigate and prosecute receiving stolen goods crimes and criminal profiteering. AB 1845 is pending before the Assembly Public Safety Committee.

#### Prior Legislation:

SB 301 (Skinner, Ch. 857, Stats. 2022) see Part 3 of this analysis.

AB 1700 (Maienschein, Ch. 855, Stats. 2022) required the Attorney General to include on its website a feature for reporting suspected stolen goods being sold on an online marketplace, as defined.

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