

Date of Hearing: April 30, 2019

ASSEMBLY COMMITTEE ON PRIVACY AND CONSUMER PROTECTION

Ed Chau, Chair

AB 1790 (Wicks) – As Amended April 12, 2019

SUBJECT: Online e-commerce marketplaces

SUMMARY: This bill would, among other things, prohibit an online e-commerce marketplace, as specified, that offers for sale goods or services sold by companies that are not owned by the online e-commerce marketplace, from requiring the disclosure of certain customer information from those companies. The bill would additionally prohibit marketplaces from retaining or using customer information required to complete those transactions for marketing purposes or providing that information to another company for marketing purposes. Specifically, **this bill would:**

- 1) Prohibit an online e-commerce marketplace with more than 200,000,000 active customer accounts that, in whole or in part, offers to customers for sale goods or services sold by companies that are not owned by the online e-commerce marketplace, from doing the following:
 - As a condition of permitting a company not owned by the online e-commerce marketplace to offer for sale goods or services, requiring that company to share or disclose information about a customer that purchased the goods or services, except as required to complete the transaction.
 - Retaining or using customer information required to complete the transaction described above for marketing purposes or to provide that information to another company for marketing purposes.
 - Retaining or refusing to disburse funds in its possession, custody, or control, to a company with gross revenues of less than \$5,000,000 annually that has sold and caused to be delivered goods or services, through the online e-commerce marketplace, to a customer for more than 90 days without paying 10% interest per day, compounded.
- 2) Define “online e-commerce marketplace” for these purposes to mean an internet-based platform that offers for sale goods or services provided by third-party companies.
- 3) Make various legislative findings and declarations, including:
 - E-commerce retail companies such as Amazon that have obtained a vast share of online retail sales have, as a result, accumulated a vast amount of valuable consumer marketing data. Concentration of valuable customer data in the hands of a small number of corporations, each of which already dominates a substantial sphere of internet-based activity, creates de facto barriers to competitive innovation. This may happen for a variety of reasons, including that a corporation’s deeply entrenched knowledge of individual consumers’ habits can make it nearly impossible for a rival or potential rival to target advertisements with comparable efficiency or accuracy, or recruit third-party online advertisers based on a dramatically thinner accumulation of historical data.

Additionally, companies with an asymmetric advantage in consumer data might simply be able to identify competitive rivals at a very early stage and eliminate competition by preemptively acquiring them.

- By some estimates, one company, Amazon, will capture more than 50% of the e-commerce retail market by the end of 2019. This is akin to a single brick-and-mortar store in a city capturing half of all retail activity in the city. As of 2018, Amazon has captured more than 40% of the e-commerce retail market, selling more than \$200,000,000,000 worth of goods in 2018.
- The next largest e-commerce retail seller is eBay, which holds 6.6% of the market. Walmart holds 3.7% of the market.

EXISTING LAW:

- 1) Establishes the Unfair Competition Law to prohibit untrue or misleading advertising, and protect against unlawful, unfair, or fraudulent business acts and practices. (Bus. & Prof. Code Sec. 71200 et seq.)

FISCAL EFFECT: None. This bill has been keyed nonfiscal by the Legislative Counsel.

COMMENTS:

- 1) **Purpose of the bill:** This bill seeks to ensure transparency and fairness for third party sellers in their relationships with e-commerce platforms. This bill is sponsored by Working Partnerships USA.

- 2) **Author's statement:** According to the author:

The market dominance of one online marketplace company puts the businesses who sell their goods at on that platform at competitive disadvantage. The one company, in this case, is Amazon. Amazon binds itself to Marketplace sellers not to withhold their money for more than 90 days. (Amazon keeps its referral fee during the 90 days and keeps the money it makes as the exclusive processor of the transaction, too.) Marketplace small business sellers have zero leverage over Amazon and are largely powerless when it comes to disputes about their products generally and withholdings lasting more than 90 days.

- 3) **Online marketplaces are growing rapidly:** A Forbes article recently detailed the dramatic growth of online marketplaces, describing how “research conducted by Altus Group predicts that 23,000 shops in Britain are set to close in 2019, affecting over 175,000 high-street jobs. This trend has been accelerating in recent years, as digital retail sales continue to rise at a double-digit pace, outstripping the single-digit growth of their in-store counterparts.” (Correia da Silva, *Can Social Retail Therapy Save the World's Brick-and-Mortar Marketplaces?*, Forbes, (Mar. 22, 2019).) Similarly, National Public Radio (NPR) recently reported that, “[c]lose to two-thirds of Americans now say they’ve bought something on Amazon, according to a new NPR/Marist poll. That is 92 percent of America’s online shoppers — which is to say, almost all of them. More than 40 percent say they buy something on Amazon once a month or more often.” (Selyukh, *What Americans Told Us About Online Shopping Says A Lot About Amazon*, NPR, (Jun. 6, 2018).)

However, as reported by Wired:

When you buy something on Amazon, the odds are, you aren't buying it from Amazon at all. Plansky is one of 6 million sellers on Amazon Marketplace, the company's third-party platform. They are largely hidden from customers, but behind any item for sale, there could be dozens of sellers, all competing for your click. This year, Marketplace sales were almost double those of Amazon retail itself, according to Marketplace Pulse, making the seller platform alone the largest e-commerce business in the world.

For sellers, Amazon is a quasi-state. They rely on its infrastructure — its warehouses, shipping network, financial systems, and portal to millions of customers — and pay taxes in the form of fees. [...]

Amazon is far from the only tech company that, having annexed a vast sphere of human activity, finds itself in the position of having to govern it. But Amazon is the only platform that has a \$175 billion prize pool tempting people to game it, and the company must constantly implement new rules and penalties, which in turn, become tools for new abuses, which require yet more rules to police. The evolution of its moderation system has been hyper-charged. (Sterling, *Gaming the Amazon Marketplace*, Wired, (Dec. 20, 2018).)

In 2012, the Seattle Times reported that dozens of online sellers had filed complaints with the Washington State Attorney General, alleging that Amazon arbitrarily withheld their payments for as long as three months, jeopardizing their ability to replenish inventories and state in business:

All told, the AG's Office received more than 370 complaints against Amazon, ranging from customers worried about their online privacy to game-app developers demanding better financial terms.

But about 40 percent of the complaints came from small merchants who use Amazon's Web platform to sell their products. And of those, three-fourths - nearly 120 sellers - complained that Seattle-based Amazon abruptly suspended or closed their accounts, tying up anywhere from several hundred dollars to more than \$20,000.

Largely based on reports of this practice, the author and sponsor introduced this bill to create greater transparency and fairness for third party sellers using e-commerce platforms.

In opposition to this bill, a coalition of companies including the Internet Association, TechNet, and the California Chamber of Commerce (hereinafter "coalition") argue that it is inappropriate for the Legislature to "to impose restrictions on one company that would disadvantage it from its competitors," and that this bill would "will hurt thousands of small and medium-sized businesses who use e-commerce marketplaces to reach new customers throughout the world by limiting their access to advertising and recommendation tools used by the marketplace." Specifically, the coalition argues:

AB 1790 would impose restrictions on a very specifically defined e-commerce marketplace that both its domestic and international competitors - who offer the same services- would not face. By imposing these unnecessary rules, the customer shopping

experience would be degraded and the marketplace would become less attractive to customers and businesses listing their products.

E-commerce marketplaces, such as the one singled out in this legislation, enable sellers to offer their products to a wide audience that they would not otherwise reach. Because marketplaces provide sellers this opportunity, customers are able to access a broad and diverse selection of products at competitive prices. These customers are the customers of the marketplace. They actively go to the marketplace to find the products they need because they trust the marketplace. AB 1790 fundamentally confuses the way these marketplaces work by assuming the key relationship is between the customer and the seller. [...]

AB 1790 will cripple a marketplace that provides an opportunity for sellers around the world. The e-commerce ecosystem, including the marketplace, sellers, and customers, will suffer when one part of it is handcuffed. Marketplaces invest and innovate to drive more customers to sellers, operate servers and infrastructure to keep the online store open at all times, combat fraud and abuse, and develop fulfillment and distribution networks that benefit both customers and sellers. AB 1790 will unnecessarily and negatively impact the opportunities available for sellers and customers provided by this innovative marketplace. It is not good public policy to single out one company and impact the competitiveness of the e-marketplace industry, without any clear benefit or policy rationale.

Staff notes that while Amazon is indeed the largest e-commerce platform, it is by no means the only digital marketplace enabling third party sellers to reach a global audience. Other successful online retailers include eBay (which was ranked as the most popular online marketplace by online sellers in the United States), Walmart, Apple, Etsy, and Target. Arguably, as a matter of public policy, all e-commerce marketplaces should be transparent with regard to their third party sellers and treat them with fairness and consistency. Such a requirement should not be reserved only the most dominant marketplace.

- 4) **European regulations promote transparency and fairness:** In recent years, European Union (EU) trade and industry leaders have grown increasingly concerned about the market power of large digital platform companies, which now account for up to 60% of all private transactions in the digital economy. To a large extent, it has been noted that the largest online platforms tend to attract more buyers and sellers, further cementing their dominance of a particular market, and giving them significant leverage over third party sellers that rely on these platforms to reach or transact business with customers.

Examples of digital platforms targeted in the EU regulation include e-commerce websites that serve as intermediaries between sellers of goods or services and consumers, price comparison and travel booking websites, app stores, voice assistants, social media companies that offer services to businesses, and internet search engines.

The EU has recently approved a set of rules governing digital platform companies, and the final text agreed to by member states is mainly focused on transparency and did not include more onerous provisions, such as blacklists of banned business practices, that had been advocated by the European Parliament during negotiations.

Using the new EU regulations as an example, if this Committee were to pass this bill, it may wish to require a similar framework be applied to e-commerce marketplaces doing business in California. Such an amendment should seek to ensure that all online marketplaces, no matter what size, treat third party sellers with fairness and provide transparency as to their business practices. The California Grocers Association (CGA), writes that it would support this bill if amended in such a way. Specifically, CGA writes:

The California Grocers Association (CGA) supports AB 1790 (Wicks) if it is amended simply to embrace the European Union's regulation requiring online ecommerce marketplaces' terms and conditions for sellers be drafted in plain language. By adopting such an amendment, the author is concretely indicating her willingness to work cooperatively with industry to address the urgent challenge posed by a single company in a way that is workable.

Amazon's current and rapidly expanding growth in the ecommerce market place amply justifies immediate legislative attention. Amazon already has an unprecedented 50-60% of the ecommerce market, with that growth expected to rise by double digits annually. It is urgent that the Legislature consider whether and if so how legislation might sensibly and fairly protect competition and innovation given these facts. The place to begin that discussion is the European Union regulations governing ecommerce marketplaces, as proposed by the amended version of the bill.

Similarly, the California Retailers Association writes, "[o]nline commerce had exploded in recent years, and is projected to grow by double digits annually. The concurrent expansive growth of online platforms requires a set of standards to protect competition and innovation. These standards, to be incorporated into AB 1790 require those terms and conditions to be: 1) drafted in clear and unambiguous language; 2) easily available online for companies at all stages of their commercial relationship with the provider of online intermediation services, including in the pre-contract stage; and 3) making known the objective grounds for decisions to retain or refuse to disburse funds in its possession pending resolution of a dispute. These provisions are straightforward and reasonable and thus we support AB 1790 as proposed to be amended."

To this end, the author accepts the following amendments that would begin establishing a framework for ecommerce marketplaces in their dealings with third party sellers. These amendments are based on the regulations recently adopted by the EU and would apply to e-commerce marketplaces of all sizes.

Author's amendment:

Strike contents of bill and insert the following:

SECTION 1.

The Legislature finds and declares all of the following:

(a) E-commerce retail companies such have obtained a vast share of online retail sales. By some estimates, one company will capture more than 50 percent of the e-commerce retail market by the end of 2019.

(b) One of the critical challenges in today's e-commerce market is transparency. Throughout the supply chain – from manufacturer to distributor to retailer to end consumer – the connections between each party are increasingly remote.

(c) E-commerce retail companies should seek to increase innovation opportunities in online ecosystems through application of consistent rules and enhanced transparency to foster trust and fairness in the market.

(c) Therefore, it is the intent of the Legislature to ensure fairness and transparency in e-commerce retail companies' treatment of third party sellers.

SEC. 2.

Title 1.4C (commencing with Section 1749.7) is added to Part 4 of Division 3 of the Civil Code, to read:

TITLE 1.4C. Clarity of Marketplace Terms and Conditions 1749.7.

Every marketplace shall ensure that their terms and conditions:

(1) Are drafted in plain and intelligible language.

(2) Are easily available online for marketplace sellers at all stages of their commercial relationship with the marketplace, including in the pre-contractual stage.

(3) Set out the grounds for decisions to retain or refuse to disburse funds in its possession pending investigation or resolution of a dispute.

(b) For purposes of this section, a "marketplace" means a physical or electronic place, including, but not limited to, a store, booth, internet website, catalog, television or radio broadcast, or a dedicated sales software application, where a marketplace seller sells or offers for sale services or tangible personal property for delivery in this state regardless of whether the tangible personal property, marketplace seller, or marketplace has a physical presence in this state.

(c) For purposes of this section, "marketplace seller" means a person who has an agreement with a marketplace and makes retail sales of tangible personal property or services through a marketplace owned, operated, or controlled by a marketplace.

SEC. 3.

The provisions of this act are severable. If any provision of this act or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

In support of these amendments, the United Food & Commercial Workers Union - Western States Council writes, "AB 1790 proposes reforms consistent with reforms already enacted in Europe. These reforms are modest, simply ensuring that the terms and conditions for third-party sellers are clearly written and that third party sellers who have no realistic option to refuse to sell on Amazon have some baseline protections when the company seizes their inventory or money."

REGISTERED SUPPORT / OPPOSITION:

Support

Working Partnerships, USA (sponsor)
California Grocers Association (if amended)
California Retailers Association (if amended)
Rosenbaum Famularo, P.C.
United Food and Commercial Workers, Western States Council

Opposition

California Chamber Of Commerce
Computing Technology Industry Association
Internet Association
Technet

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