

Date of Hearing: June 14, 2022

ASSEMBLY COMMITTEE ON PRIVACY AND CONSUMER PROTECTION

Jesse Gabriel, Chair

SB 301 (Skinner) – As Amended January 13, 2022

**SENATE VOTE:** 34-0

**SUBJECT:** Marketplaces: online marketplaces

**SUMMARY:** This bill would require online marketplaces, as defined, to require specified high-volume third-party sellers on the platform to provide certain contact, tax, identification, and payment information to the marketplace, and would require the marketplace to make specified seller contact information available to consumers, beginning July 1, 2023. Specifically, **this bill would:**

- 1) Provide that an online marketplace shall require a high-volume third-party seller to provide within 10 days, as specified, all of the following information:
  - A bank account number, or the name of the payee for payments issued by the online marketplace to the seller if the seller does not have a bank account, as specified.
  - Contact information including the seller's name if the seller is an individual, or a copy of a valid government-issued identification, record, or tax document that includes the business name and physical address of the seller if the seller is not an individual; a business tax identification number or tax identification number of the seller; and a valid email address and phone number of the seller.
- 2) Require an online marketplace to verify the information provided in 1), above, within 10 days of any changes, as specified.
- 3) Require an online marketplace to keep the information required by 1), above, for at least five years on a secured server.
- 4) Require an online marketplace to distribute, at least on an annual basis, notifications as to the requirements above; and to require electronic certification of the authenticity of the seller's information.
- 5) Require an online marketplace to suspend future sales of a seller if the seller has not provided the information described above within 10 days of receiving notice to certify their information, as specified.
- 6) Provide that any data collected solely to comply with the provisions above shall not be used for any other purpose unless required by law.
- 7) Provide that an online marketplace shall require a high-volume third-party seller with at least \$20,000 of gross annual revenues in either of the two prior calendar years to provide specified information, including the following information, to the online marketplace, and require the online marketplace to provide the same information to consumers in a clear and conspicuous manner:

- The name of the seller and the seller’s physical address.
  - Contact information of the seller to allow for direct communication with the seller, as specified.
  - Whether the high-volume third-party seller uses a different seller to supply the product to the consumer upon purchase.
- 8) Require an online marketplace to suspend future sales activity of a seller unless the seller consents to the disclosure of the information described the first two bullets in 7), above, if either of the following is true:
- The high-volume third-party seller has made a false representation to the online marketplace in order to justify partial disclosure, as specified.
  - The seller that has received a provision for partial disclosure has not answered consumer inquiries in a reasonable timeframe.
- 9) Require an online marketplace to provide consumers, in a clear and conspicuous manner on the product listing of a high-volume third-party seller, with a reporting mechanism that allows for electronic and telephonic reporting of suspicious activity by the high-volume third-party seller to the online marketplace.
- 10) Require an online marketplace, after providing notice and a 10 day opportunity to comply, to suspend the future sales activity of a high-volume third-party seller that is not in compliance with the requirements above.
- 11) Provide that any person or entity who violates any of the provisions above is liable for a civil penalty not to exceed \$10,000 per violation in an action brought by the California Attorney General.
- 12) Delay the operative date of the above provisions until July 1, 2023.
- 13) Provide a number of definitions including the following:
- “Consumer product” to mean 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 attached or installed.
  - “High-volume third-party seller” to mean 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 *to*, or transactions of *with, buyers located in California* for new or unused consumer products resulting in the accumulation of an aggregate total of \$5,000 or more in gross revenues, as specified.
  - “Online marketplace” to mean a person or entity that operates a consumer-directed, electronically accessed platform in a manner in which all of the following are true:

- 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 this state.
- The features described in the paragraph above are used by third-party sellers.
- The person or entity has a contractual or similar relationship with consumers governing their use of the platform to purchase consumer products.

**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, sec. 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 Sec. 6040, et seq.)
- 4) Requires marketplaces to ensure that their terms and conditions regarding commercial relationships with marketplace sellers meet certain requirements, including the following:
  - That they are drafted in plain and intelligible language and are easily available online for marketplace sellers at all stages of their commercial relationship with the marketplace, as specified.
  - If a marketplace permits a marketplace seller to pay the marketplace to influence search results through ranking or preferential placement, the marketplace shall describe those possibilities and the effects of such payment on the ranking or preferential placement, and either (1) the price of that ranking or preferential placement; or (2) how a marketplace seller may obtain written price information for such ranking or preferential placement.
  - If a marketplace decides to suspend or terminate a marketplace seller based upon an alleged violation of law or a term, condition, or policy of the marketplace, the marketplace shall provide the marketplace seller, without undue delay, with a written statement of reasons for that decision, as specified. (Civ. Code Sec. 1749.7.)

**FISCAL EFFECT:** According to the Senate Appropriations Committee:

- The Department of Justice anticipates costs of approximately \$1,096,000 in Fiscal Year (FY) 2023-24 and \$1,053,000 in FY 2024-25 and ongoing (General Fund). Costs include additional staff to address an increase in workload in the Consumer Protection Section within the DOJ's Public Rights Division. The DOJ also estimates annual costs of approximately \$100,000 (General Fund) for outside forensic audit support to its Consumer Protection Section.

- Unknown, potentially significant workload cost pressures to the courts to adjudicate alleged violations of this measure. While the superior courts are not funded on a workload basis, an increase in workload could result in delayed court services and would put pressure on the General Fund to increase the amount appropriated to backfill for trial court operations.

## COMMENTS:

1) **Purpose of the bill:** This bill seeks to curb the sale of stolen goods online by increasing accountability of both online marketplaces and third-party sellers. This bill is sponsored by the Prosecutors Alliance of California.

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

In 2019, a high-profile investigation in the Bay Area uncovered an organized retail theft crime ring that was selling \$5 million annually in stolen goods on multiple online marketplaces. The investigation revealed this crime ring may have sold up to \$50 million in stolen products.

A major contributor to the ease of selling stolen goods is the accessibility and anonymity of many online marketplaces. Many online accounts require sellers to provide little verifiable personal information, enabling an individual or entity to put stolen goods up for sale to unsuspecting consumers. It's estimated that more than \$500 billion in stolen and counterfeit items are sold annually on online marketplaces worldwide.

As a result, consumers buying goods online are increasingly likely to receive stolen or counterfeit goods from purchases they believe to be legitimate. Consumers expect online goods to be legitimate yet they could receive goods that then don't have the usual consumer protections, for example baby formulas that weren't stored properly; exposing the consumer to health risks.

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 that will then help online marketplaces identify and take action against sellers of stolen goods.

3) **SB 301 is modeled after federal legislation:** Over the past few years, California has enacted a number of laws to address unintended consequences associated with the growing popularity of online marketplaces, including the rise of organized retail theft. While many of these laws have dealt with criminal liability, a handful have addressed other commercial aspects of online sales such as AB 147 (Burke, Ch. 5, Stats. 2019), which requires, among other things, online marketplaces to collect sales and use taxes on behalf of their third-party retailers, and AB 1402 (Levine, Ch. 421, Stats. 2021), which requires marketplace facilitators to collect specified state fees from third-party retailers imposed on the sale of tangible personal property. This bill would additionally require online marketplaces to collect information from third-party sellers to verify their legitimacy, and to provide consumers with information about online sellers and a mechanism to report suspicious activity. The bill appears to separate its requirements between two categories of "high-volume third-party sellers": ones who sell over \$5,000 of new or unused consumer products; and ones that sell over \$20,000 of new or unused consumer products per year.

Notably, SB 301 places the burden of enforcing high-volume third-party sellers' disclosure requirements 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. If a third-party seller does not comply with these requirements, the online marketplace is required to provide the third-party seller with notice of the failure to comply and to suspend the third-party seller's future sales if the seller fails to comply within 10 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, which requires certain high-volume online marketplace facilitators to collect state sales taxes paid to third-party sellers by California consumers from those third-party sellers and to remit them to the state. In cases where an online marketplace fails to take the required action with regard to a high-volume third-party seller, or fails to post its own required reporting mechanism, the bill authorizes the Attorney General (AG) to seek a civil penalty not to exceed \$10,000 per violation from the marketplace in a civil action. The AG may also seek a civil penalty, not to exceed \$10,000 per violation, from a high-volume third-party seller.

This bill enjoys wide support from a number of organizations and has no opposition on file. A coalition of organizations including the California Retailers Association and numerous local Chambers of Commerce, among others, writes in support:

While some online marketplaces have made significant investments to root out criminal behavior, an industry-wide standard is needed. SB 301 mirrors H.R. 5502, the Integrity, Notification, and Fairness for Online Retail Marketplaces (INFORM) for Consumers Act, a bipartisan effort supported by both brick-and-mortar retailers and online marketplaces. It will bring much needed transparency to online marketplaces, providing consumers with the real, verified business contact information for high-volume, third-party sellers. The bill will also provide retailers and law enforcement with information to investigate the source of possible stolen or counterfeit items when they are discovered.

Indeed, SB 301 is nearly identical to federal legislation that was recently introduced and appears to have laudable goals. In fact, a number of organizations have requested that the bill remain as similar to the federal legislation as possible. For example, the Coalition to Protect America's Small Sellers writes in support:

While there is not one single solution to eliminating organized retail crime or the sale of counterfeits, passing SB 301 is a positive first step. The legislation requires sensible verification and disclosure requirements designed to disrupt the ability of criminal networks to build a business selling illicit goods online that competes directly with legitimate businesses. Implementing these basic transparency and verification protocols is important and will expose criminals who are selling consumers stolen or fake goods.

In closing, while we believe a federal solution is required to address these important issues versus a patchwork of state solutions, we appreciate your leadership on this matter. And, as long as no additional changes are incorporated into your bill as it moves through the legislative process, we look forward to working with you and other supporters to ensure this bill becomes law in California.

Despite trade groups seeking to ensure that there is not a patchwork of competing laws with which it must comply, the bill as drafted contains a number of inconsistencies that will

arguably create unintended consequences should this legislation be enacted, at either the state or the federal level. For example, the bill appears to set out two different compliance schemes for “high-volume third-party sellers,” i.e. ones that have \$5,000 or more in annual gross revenues and ones that have \$20,000 or more in annual gross revenues, despite using the same definition for both groups. In addition, the bill separately defines and often refers to “sellers” more generally, creating significant ambiguity as to which sellers the bill seeks to regulate in those provisions. The bill also includes redundancies which appear to be unintentional and additionally appears to exempt high-volume third-party sellers from the bill so long as they have an existing contractual relationship with the online marketplace. This, in particular, appears to be a significant loophole that could impair consumer protection.

Given the liability this bill creates (up to \$10,000 per violation), and the onus on the AG for sole enforcement, it would be prudent of the Author to consider reasonable technical amendments as the bill moves through the Legislative process. This analysis will provide some of those technical suggestions.

Staff notes that should this Committee approve this bill, it will be referred to the Assembly Judiciary Committee, whose jurisdiction has traditionally included issues such as preemption and liability. Accordingly, this analysis will focus on the issues more squarely within this Committee’s jurisdiction, including balancing the goals of this bill with the potential unintended consequences arising from the collection of substantial amounts of personal information of third-party sellers.

- 4) **Balancing privacy of high-volume third-party sellers with goal of preventing organized retail theft:** This bill would require high-volume third-party sellers to provide certain information to online marketplaces and would require those online marketplaces to retain that information for, at a minimum, five years. Depending on the seller, that information could include a checking account number, a copy of a valid government-issued ID, a valid government record or tax document, or a business tax identification number/taxpayer identification number.

The sponsors of this bill, the Prosecutors Alliance of California describe themselves as “a nonprofit organization of prosecutors committed to reforming California's criminal justice system through smart, safe, and modern solutions that advance not just public safety, but also human dignity and community well-being. The advisory board of the Prosecutors Alliance consists of the elected district attorneys of Los Angeles, San Francisco, Contra Costa, and San Joaquin counties, representing one-third of all Californians.” They write in support:

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 market places. Through online accounts with little associated personal information that is rarely verified, stolen goods can be sold to unsuspecting consumers. It is estimated that more than \$500 billion in stolen and counterfeit items are sold through online marketplaces worldwide, annually.

SB 301 will help address this problem by requiring online market places 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 market places and will facilitate a 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. SB 301 has been carefully drafted to protect personal privacy and to ensure that it only applies to large, repeat sellers using online market places.

The Home Depot adds in support of the bill:

One trend that alarms us is the steady growth over many years in product loss in 2020 due to Organized Retail Crime (ORC), which spiked 30% in the past year. Sophisticated rings of criminals are brazenly stealing large amounts of product from our store shelves and re-selling it anonymously online. These criminals are a threat to customers, our associates, and our goal of creating a safe shopping experience for all. By focusing on one of the roots of the problem – anonymous sales online – we can work to restore order by deterring these egregious crimes.

This is why The Home Depot is pleased to support SB 301 (Skinner) Online Marketplaces. SB 301 includes commonsense measures that ensure legitimate businesses and consumers in California and across the country are better protected by bringing transparency and accountability to third party sellers online while protecting consumers and legitimate businesses, including entrepreneurs who use marketplaces to grow their business. In short, SB 301 requires online marketplaces to verify third-party sellers' basic business information if they are selling high volumes of new and unused consumer goods. It makes this information transparent to the consumer, so they can make informed purchasing decisions, and have recourse if a purchase is found to be stolen or counterfeit.

[...] Unregulated third-party sellers operating anonymously through online marketplaces continue to grow in size and influence. As Attorney General Rob Bonta said at a recent press conference, "freezing out the secondary marketplace" is an essential component of combatting Organized Retail Crime. (Emphasis omitted.)

The bill includes a number of important provisions that protect seller privacy and limit the purposes for which seller information can be used. For example, the bill specifies that data collected solely to comply with the requirements of the bill may not be used for any other purpose except where required by law. The bill also prudently takes into consideration the fact that not all repeat sellers have contact information that is distinct from their personal information, such as a personal residential address or personal phone number. Accordingly, SB 301 would permit online marketplaces to instead make partial disclosures to the public for high-volume third-party sellers that do not have a physical address or phone number that is distinct than their residential address or personal phone number.

While these provisions protect the privacy of high-volume third-party sellers with regard to personal information that is made available to the public, the bill in print does not appear to include adequate safeguards against the potential of high-volume third-party sellers' personal information being vulnerable to data breach, which increases if online marketplaces are required to collect and retain large amounts of seller information. This increased risk is particularly concerning as the bill would require sellers to submit highly sensitive records to online marketplaces, such as a valid government-issued tax documents, and those records must be maintained for a minimum of five years.

Accordingly, the Author offers the following amendments to address these concerns. The amendments would: reduce the data retention requirement to two years; permit a high-volume third-party seller to redact information from documents submitted to an online marketplace if the information is not necessary to comply with the requirements of SB 301 or to verify the authenticity of the document as a copy of a valid government-issued identification, government record, or tax document, as applicable; require reasonable security procedures and practices appropriate to the nature of the information collected and stored, consistent with other California statutes; and make other clarifying and technical changes. The amendments offered by author prudently apply the protections for personal information in the bill to all information required pursuant to the bill, rather than only the personal information required of the first of the two categories of high-volume third-party sellers, and apply the data use limitations and security provisions to any “*information provided*” solely to comply with the requirements of the bill, rather than for “*data collected*” solely to comply. This latter clarification avoids the use of an undefined term, “data”, that is not used elsewhere in the bill, and ensures that the applicability of the data use limitations and security provisions of the bill depend on the expectations and intentions of the sellers supplying the information, rather than the intentions of the marketplace in collecting that information which could include additional uses in addition to compliance with the bill.

Author’s amendments:

On page 4, strike line 23 and renumber accordingly.

On page 5, strike lines 3-4 and renumber accordingly.

On page 5 strike lines 21-23.

On page 7, after line 12 add the following and renumber accordingly:

***1749.8.3. (a) (1) An online marketplace shall keep the information provided to comply with the requirements of this title for no less than two years.***

***(2) Information provided solely to comply with the requirements of this title shall not be used for any other purpose unless required by law.***

***(3) An online marketplace shall implement and maintain reasonable security procedures and practices, including administrative, physical, and technical safeguards, appropriate to the nature of the information and the purposes for which the information will be used, to protect the information provided to comply with the requirements of this title from unauthorized use, disclosure, access, destruction, and modification.***

***(b) A high-volume third-party seller may redact from a document provided solely to comply with a requirement of this title any information that is not necessary for either of the following:***

***(1) To comply with a requirement of this title.***

***(2) To verify the authenticity of the document as a copy of a valid government-issued identification, government record, or tax document, as applicable.***



- 5) **Double referral:** This bill has been double-referred to the Assembly Judiciary Committee where it will be heard if passed by this Committee.
- 6) **Prior legislation:** AB 1402 (Levine, Ch. 421, Stats. 2021) requires marketplace facilitators to collect specified state fees from third-party retailers imposed on the sale of tangible personal property.

AB 331 (Jones-Sawyer, Ch. 113, Stats. 2021) extended the sunset until 2026 on the crime of organized retail theft and the corresponding California Highway Patrol (CHP) taskforce on organized retail crime (ORC) to analyze and assist counties affected by ORC.

AB 1182 (Stone, 2021) would have held online marketplaces strictly liable for damages caused by a defective product to the same extent as physical retailers are liable for physical goods sold in stores. This bill was never heard in the Assembly Judiciary Committee.

AB 147 (Burke, Ch. 5, Stats. 2019) requires, among other things, online marketplaces to collect sales and use taxes on behalf of their third-party retailers.

AB 1065 (Jones-Sawyer, Ch. 803, Stats. 2018) established the crime of organized retail theft, and included a sunset date of January 1, 2021.

## **REGISTERED SUPPORT / OPPOSITION:**

### **Support**

Prosecutors Alliance California (sponsor)  
Building Owners and Managers Association of California  
California Business Properties Association  
California Business Roundtable  
California District Attorneys Association  
California Hispanic Chambers of Commerce  
California Retailers Association  
CalPIRG, California Public Interest Research Group  
CAWA  
City and County of San Francisco  
Commercial Real Estate Development Association, NAIOP of California  
El Dorado County Chamber of Commerce  
El Dorado Hills Chamber of Commerce  
Elk Grove Chamber of Commerce  
Family Business Association  
Folsom Chamber of Commerce  
GlaxoSmithKline  
Home Depot  
International Council of Shopping Centers  
Lincoln Area Chamber of Commerce  
Los Angeles County District Attorney's Office  
Rancho Cordova Chamber of Commerce  
Rocklin Area Chamber of Commerce  
Roseville Area Chamber of Commerce

San Diego County District Attorney's Office  
San Francisco District Attorney's Office  
Tides Advocacy  
Torrance Area Chamber of Commerce  
Toy Industry Association  
United Chamber Advocacy Network  
Valley Industry & Commerce Association (VICA)  
Walgreen Company  
Yuba Sutter Chamber of Commerce

**Opposition**

None on file

**Analysis Prepared by:** Landon Klein / P. & C.P. / (916) 319-2200