Date of Hearing: June 21, 2022

ASSEMBLY COMMITTEE ON JUDICIARY
Mark Stone, Chair
SB 301 (Skinner) – As Amended June 15, 2022

PROPOSED CONSENT (As Proposed to be Amended)

SENATE VOTE: 34-0

SUBJECT: MARKETPLACES: ONLINE MARKETPLACES

KEY ISSUE: SHOULD A THIRD-PARTY SELLER THAT SELLS A MINIMUM AMOUNT OF GOODS ON AN ONLINE MARKETPLACE (AND THUS QUALIFIES AS A "HIGH-VOLUME THIRD-PARTY SELLER") BE REQUIRED TO PROVIDE THE MARKETPLACE WITH SPECIFIED IDENTIFYING INFORMATION; SHOULD THE MARKETPLACE BE REQUIRED TO POST CONTACT INFORMATION FOR THE MOST ACTIVE OF THESE THIRD-PARTY SELLERS; AND SHOULD THE ATTORNEY GENERAL (AG) BE AUTHORIZED TO SEEK CIVIL PENALTIES FOR A VIOLATION OF THE BILL'S REQUIREMENTS, EVEN THOUGH THE AG LIKELY WILL NOT HAVE THE INFORMATION NECESSARY TO BRING SUCH AN ACTION?

SYNOPSIS

Online marketplaces are rapidly replacing brick and mortar retail stores as the source of goods for consumers, especially because the COVID-19 pandemic forced consumers to shop online and many small businesses to close. Over the past 10 years, online sales of consumer goods have increased from less than five percent of retail sales to more than 20 percent of retail sales in the United States. While online shopping has provided consumers with a speedy, convenient, and necessary way to obtain goods without leaving home, it has also become a major pipeline for the sale of stolen goods including goods stolen by means of organized retail theft. Retailers have suffered $45 billion in annual losses, up from $30 billion a decade ago.

The purpose of the bill, according to the author, is to curb the sale of stolen goods online by increasing accountability of both online marketplaces and third-party sellers in a manner similar to legislation proposed in Congress, the Inform Act. The bill has three main provisions: (1) requiring that "high-volume third-party sellers" (HVTPSs) provide specified identifying information to online marketplaces, with additional requirements on third-party sellers with the most sales activity; and that online marketplaces verify the information and provide specified disclosures to consumers; (2) providing a mechanism for consumers to report suspicious activity by the HVTPS to the online marketplace; and (3) authorizing the Attorney General (AG) to seek civil penalties for violations of these requirements.

The analysis reviews each component of the bill. While the bill's disclosure and verification provisions are very detailed, its enforcement mechanisms appear to be quite weak. For example, while the bill requires that the online marketplace shall suspend future sales activity of any HVTPS that makes a false representation to consumers, it does not require the marketplace to notify the AG of any misconduct by an HVTPS. And while the AG is authorized to seek a $10,000 civil penalty for each violation of the bill, the AG likely will never know of any violations *because only the online marketplace will know (1) who is subject to the bill's requirements; and (2) whether those requirements are complied with.*

The author proposes a number of amendments to the bill, the vast majority of which are non-substantive and clarifying. More significant amendments include: authority of the AG to recover attorney's fees and obtain preventative relief for prevailing in an enforcement action; a clarification that the bill does not impact liability of an online marketplace for defective goods sold through the marketplace; removal of a confusing exemption; and addition of a timeline for restoring the ability of an HVTPS to sell goods on the marketplace after providing required, but delayed, identifying information. The amendments are incorporated into the bill summary, and explained in the analysis. The bill, which recently was approved by the Assembly Committee on Privacy and Consumer Protection, is supported by a large number of business organizations, chambers of commerce, and individual businesses and has no opposition on file.

SUMMARY: Requires that specified identifying information be provided to online marketplaces by "high-volume third-party sellers" and that specified disclosures are made by online marketplaces to consumers; provides a mechanism for consumers to report suspicious activity by the high-volume third-party seller to the online marketplace; and authorizes the Attorney General to seek civil penalties for violations of the bill's requirements. Specifically, **this bill**:

1) Provides 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) A bank account number, 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, as specified.

    b) 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 who has the legal authority to act on behalf of the high-volume third-party seller; a business tax identification number or tax identification number of the seller; and a valid email address and phone number of the seller.

2) Requires an online marketplace to verify the information provided in 1), above, within 10 days of any changes, as specified.

3) Requires 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.

4) Requires 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.

5) Provides 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:

a) The name of the seller and the seller's physical address.

b) Contact information—including physical address and telephone number--of the seller to allow for direct communication with the seller, as specified.

c) Whether the high-volume third-party seller uses a different seller to supply the product to the consumer upon purchase.

d) Contact information for the party who is responsible for supplying, delivering, or facilitating supply or delivery of the product to the consumer upon purchase – to be provided to a consumer upon purchase, if requested by the purchaser.

6) Allows a high-volume third-party seller to request that an online marketplace accept a combined business and residential address in lieu of a physical address, but provides that the online marketplace may disclose only the country and state, if applicable, in which the seller resides and inform consumers that inquiries should be submitted to the seller by telephone, email, or electronic means provided by the online marketplace.

7) Allows a high-volume third-party seller to request that an online marketplace does not list a telephone number as a method of direct communication with the seller if the seller does not have a telephone number, other than a personal number and that consumers are informed that inquiries should be submitted to the seller's email address or electronic means provided by the online marketplace.

8) 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, 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.

9) Requires an online marketplace to suspend future sales activity of a seller that does not comply with the above requirements; makes a false representation to the online marketplace in order to justify partial disclosure of contact information pursuant to 6) or 7); and allows the online marketplace to suspend future sales activity of a high-volume third party seller that has not answered consumer inquiries within a reasonable timeframe.

10) Requires 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) Requires an online marketplace, if the high-volume third party provides the required information more than 10 days after the date of the notice, to restore the ability of the seller to have transactions facilitated by or through the online marketplace within 10 days of receiving all of the information.

12) Requires an online marketplace to keep the information provided to comply with the requirements of the bill for no less than two years; and provides the following:

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

b) 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.

c) 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:

i) To comply with a requirement of the bill.

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

13) Imposes the following for violations of the bill:

a) 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.

b) In addition to the civil penalty, the Attorney General who prevails in an action to enforce this title shall recover the following, upon request:

i) Reasonable attorney's fees and costs, including expert witness fees and other litigation expenses.

ii) Preventive relief, including permanent or temporary injunction, restraining order, or other order against the person or persons responsible for the conduct.

14) Clarifies that nothing in the bill applies to or affects the liability of an entity, including an entity that meets the definition of a high-volume third-party seller under this title, for damages caused by a consumer product sold online.

15) Delays the operative date of the above provisions until July 1, 2023.

16) Provides a number of definitions including the following:

a) "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.

b) "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.

c) "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:

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 this state.

ii) The features described in the paragraph above are used by third-party sellers.

iii) 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, Section 8; *South Dakota v. Wayfair, Inc.* (2018) 138 S.Ct. 2080, 2091.)

3) Defines "marketplace" to mean 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, that sells or offers for retail sale services or tangible personal property for delivery in this state and has an agreement with a marketplace seller to make retail sales of services or tangible personal property through that marketplace, regardless of whether the tangible personal property or the marketplace has a physical presence in the state. (Civil Code Section 1749.7 (d)(1).)

4) 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 Section 6040 *et seq*.)

5) Requires marketplaces to ensure that their terms and conditions regarding commercial relationships with marketplace sellers meet certain requirements, including the following:

   a) 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.

   b) 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.

   c) 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. (Civil Code Section 1749.7.)

FISCAL EFFECT: As currently in print this bill is keyed fiscal.

COMMENTS: Online marketplaces are rapidly replacing brick and mortar retail stores as the source of goods for consumers, especially because the COVID-19 pandemic forced consumers to shop online and many small businesses to close. Over the past 10 years, online sales of consumer goods have increased from less than five percent of retail sales to more than 20 percent of retail sales in the United States. Given that online sales of goods are expected to continue increasing, it is clear that online retailers play a substantial role in the distribution of goods to consumers in the State of California. According to the most recent US Census Bureau's Annual Retail Trade Survey (ARTS), e-commerce sales increased by $244.2 billion or 43% in 2020, the first year of the pandemic, rising from $571.2 billion in 2019 to $815.4 billion in 2020. (Brewster, Mayumi, *Annual Retail Trade Survey Shows Impact of Online Shopping on Retail Sales During COVID-19 Pandemic* (April 22, 2022), available at: https://www.census.gov/library/stories/2022/04/ecommerce-sales-surged-during-pandemic.html.) Since 1998, e-commerce has grown from just five billion dollars to more than $800 billion. (*Ibid.*)

While online shopping has provided consumers with a speedy, convenient, and necessary way to obtain goods without leaving home, it has also become a major pipeline for the sale of stolen goods, including goods stolen by means of organized retail theft. Retailers have suffered $45 billion in annual losses, up from $30 billion a decade ago, according to the Coalition of Law Enforcement and Retail, a retail loss prevention and law enforcement trade group. (Hope King, *Retailers push for new rules stopping online sale of stolen goods*, Axios (Dec. 9, 2021), available at https://www.axios.com/2021/12/09/retail-online-seller-rules.)

The purpose of the bill, according to the author, is to curb the online sale of stolen goods by increasing accountability of both online marketplaces and third-party sellers in a manner similar to legislation proposed in Congress, the Inform Act. 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.
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> 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.
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> 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.

While the bill is modeled on the Inform Act and does not appear to conflict with the Act – in either its form in print, or as proposed to be amended-- it does vary from the Act in a number of minor ways, including in regard to the clarifying amendments proposed by the author, as explained below.

Proposed federal legislation is the model for the bill. 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.

In December of last year, the CEOs of nearly two dozen retail companies threw their weight behind The INFORM Consumers Act, federal legislation aimed at marketplaces like Amazon and eBay. (King, *Retailers push for new rules stopping online sale of stolen goods, supra.*) Virtually identical to this bill, the Act would require online giants to verify sellers and enable buyers to verify sellers and to see contact information. (*Ibid.*)

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.
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> 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.

The bill. The bill has three main provisions: (1) requiring that "high-volume third-party sellers" provide specified identifying information to online marketplaces, with additional requirements on third-party sellers with the most sales activity that is posted on the marketplace, allowing buyers to directly contact those sellers; and that online marketplaces verify the information and make specified disclosures to consumers; (2) providing a mechanism for consumers to report suspicious activity by the high-volume third-party seller to the online marketplace; and (3) authorizing the Attorney General to seek civil penalties for violations of these requirements.

(1) Requirements that "high-volume third-party sellers" provide specified identifying information to online marketplaces and that online marketplaces verify that information and provide disclosures to consumers

This bill would require online marketplaces to collect information from *all* third-party sellers who, in any continuous 12-month period during the previous 24 months, sell more than $5,000 worth of new or unused consumer products through the marketplace to buyers located in California (thus qualifying as "high-volume third-party seller" or HVTPS). Specifically those sellers must provide the following to the online marketplace: (1) a bank account number (or, if the HVTPS does not have a bank account, the name of the payee for payments issued to the third-party seller); (2) the HVTPS's name, if they are an individual; (3) a business tax identification number; and (4) valid email address and telephone number.

Regarding the bank account or payee information, the HVTPS would be required to provide that information either to the online marketplace, or a payment processor or other third party designated by the online marketplace (at the discretion of the online marketplace). If the information were provided to a third party designated by the online marketplace, that third party would be required, pursuant to a contract with the online marketplace, to maintain the information in a confidential manner and make it available only to the online marketplace upon its request, or in response to a court order.

Regarding the name of the HVTPS, if the HVTPS were not an individual, the HVTPS would be required to provide one of the following in lieu of a name: (1) a copy of a valid government-issued identification for an individual who has the legal authority to act on behalf of the HVTPS that includes the individual's name, or (2) a copy of a valid government record or tax document dated within the past 24 months that included the business name and physical address of the HVTPS.

The online marketplace would then be required, on at least an annual basis, to notify each HVTPS operating on the online marketplace of the requirement to inform the online marketplace of any changes to the information within 10 days of receiving the notification; and to instruct each high-volume third-party seller, as part of the notification, to electronically certify that the information is accurate and that either that the seller's information is unchanged, or that the seller is providing updated information.

Additional identifying information required from the highest volume HVTPSs. The bill imposes additional disclosure requirements on HVTPSs that sell over $20,000 of new or unused consumer products per year through the online marketplace. Those sellers would be required to *also* provide the online marketplace with the following information: (1) the full name of the HVTPS, which may include the seller's name or company name, or the name by which the seller or company operates on the online marketplace; (2) the HVTPS's physical address; (3) contact information, including a current working telephone number, email address, or any other means of direct electronic messaging, to allow users of the online marketplace to have direct and unhindered communication with the seller; (4) whether or not another party is responsible for supplying the product to the consumer upon purchase; and (5) if appropriate and requested by an authenticated purchaser, contact information for the party who is responsible for supplying the product to the consumer upon purchase.

The bill allows a HVTPS to request that the online marketplace accept the following partial disclosures in lieu of the enhanced disclosures described above:

- If the high-volume third-party seller certified to the online marketplace that they did not have a physical address, other than a residential physical address or a combined business and residential address, the online marketplace could disclose only the country and state, if applicable, in which the seller resides and inform consumers that inquiries should be submitted to the seller by telephone, email, or electronic means provided by the online marketplace.
- If the high-volume third-party seller certified to the online marketplace that they did not have a telephone number other than a personal telephone number, the online marketplace would be required to inform consumers that no telephone number were available for the seller, and inquiries should be submitted to the seller's email address or electronic means provided by the online marketplace.

If a HVTPS did not comply with the disclosure requirements, the online marketplace would be required to provide the HVTPS with a notice of its failure to comply, and to suspend the HVTPS's future sales if it failed to provide the information within 10 days. If the HVTPS provided the required information more than 10 days after the date of the notice, the bill, as proposed to be amended, would require the online marketplace to restore the ability of the seller to have transactions facilitated by or through the online marketplace within 10 days of receiving the required information.

Thus, while HVTPSs are required to make disclosures, the online marketplace is required to monitor and ensure compliance. According to the analysis of the Assembly Committee on Privacy and Consumer Protection, which recently heard and passed this bill, 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.

Verification and disclosure duties of online marketplaces. An online marketplace would be required to verify the information provided by the HVTPS within 10 days and to verify, within 10 days, any changes to the information. If a HVTPS provided a copy of a valid government-issued tax document, information contained within the tax document would be presumed to be verified as of the date of issuance of the record or document. The bill defines "verify" as confirming that information provided is accurate. The bill further explains that methods of confirmation may 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.

The online marketplace would be required to make two significant disclosures to consumers. First, as explained below, the marketplace would have to disclose a reporting mechanism that allows for electronic and telephonic reporting of suspicious activity to the online marketplace. Second, for a HVTPS which is subject to the enhanced identification requirements described above, the online marketplace would be required to disclose the HVTPS's contact information to consumers in a clear and conspicuous manner in any order confirmation message, or other communication made to a consumer after a purchase is finalized, and in the consumer's account transaction history.

Data retention, confidentiality, and security requirements. Whereas the bill as introduced had piecemeal data retention and security requirements, likely similar to the proposed federal Inform Act, recent amendments taken in the Assembly Committee on Privacy and Consumer Protection, provide comprehensive guidelines for data retention, confidentiality, and security that are consistent with similar provisions of existing law. These issues are under the jurisdiction of that committee, which thoroughly explained them in its analysis of the bill.

(2) Mechanism for consumers to report suspicious activity by the high-volume third-party seller to the online marketplace

As mentioned above, the bill requires that an online marketplace disclose to consumers, in a clear and conspicuous manner on the product listing of a HVTPS, a reporting mechanism that allows for electronic and telephonic reporting of suspicious activity by the HVTPS to the online marketplace. The bill does not define what "suspicious activity" is, or specify what the online marketplace would be required to do, if anything, when it received a report of such activity. However, the bill does require that the online marketplace would have to suspend future sales activity of any HVTPS that made a false representation to a consumer. The bill would also allow an online marketplace to suspend future sales activity of a high-volume third party seller that did not answer consumer inquiries within a reasonable timeframe (but does not establish what a reasonable timeframe is). The online marketplace would not be required to notify the Attorney General, or another law enforcement, of any misconduct, even if the misconduct amounted to a crime (including organized retail crime) on the part of an HVTPS.

(3) Authorization for the Attorney General to seek civil penalties for violations of the bill's requirements

The bill does not provide any mechanism for a consumer to enforce the requirements of the bill by, for example, bringing a civil action against an online marketplace or a HVTPS. The only entity explicitly empowered to enforce the bill's requirements is the California Attorney General (AG). (It is possible, however, that another public prosecutor could bring an action under Business & Professions Code Section 17200, the state's unfair competition law.) While the bill in print authorizes the AG to obtain a civil penalty not to exceed ten thousand dollars ($10,000) per violation, it does not authorize the AG to recover its attorney fees for prevailing in an action to enforce the bill.

The author proposes to amend the bill to authorize the AG to recover its attorney fees for prevailing in an action to enforce the bill, and explicitly authorize the recovery of injunctive and preventative relief. But even as proposed to be amended, it seems unlikely that such an enforcement action would ever occur. How would the AG know whether a seller qualified as a HVTPS; if a HVTPS were subject to the heightened disclosure requirements of the bill; if the HVTPS misrepresented that it qualified for partial disclosure of identifying information; if the online marketplace complied with all of its duties to collect and disclose identifying information about HVTPSs; or if it had suspend the right of noncompliant HVTPSs to conduct business through the online marketplace? None of this information would be public. The information would only be known to the online marketplace. Only the online marketplace would know if a HVTPS were subject to the bill's requirements and whether the HVTPS complied with those requirements. And only the online marketplace would know whether or not the marketplace itself had complied with the law. In its current form, the bill appears to rely entirely upon the online marketplace to know about and enforce the bill's requirements.

The Marketplace Facilitator Act, added by Assembly Bill 147 (Stats. 2019, Ch. 5), and amended by Senate Bill 92 (Stats. 2019, Ch. 34) and AB 1402 (Stats, 2021, Ch. 421) provides that beginning October 1, 2019, a marketplace facilitator is generally responsible for collecting, reporting, and paying the tax on retail sales made through their marketplace for delivery to California customers. Additionally, starting January 1, 2022, a marketplace facilitator may be required to collect, report, and pay applicable fees on retail sales of certain items. A marketplace includes an online place where marketplace sellers sell or offer for sale tangible merchandise for delivery in California. To the extent that an online marketplace is also a marketplace facilitator, this would not seem to be an onerous additional requirement.

The author may wish to consider, in either this bill, or in future legislation, requiring online marketplaces to report information to the Attorney General about high-volume third-party sellers conducting business through their marketplaces that are subject to the requirements of this bill.

No impact on the liability of online marketplaces, including case law holding that they may be liable for defective products listed on the marketplaces. The question of whether online marketplaces—like *any* party in the supply chain of a dangerous product purchased on an electronic marketplace—responsible for the products sold on their websites is playing out in state and federal courts across the country.

There is no national consensus because the issue of liability for defective products is governed by state law. For example, in *Oberdorf v. Amazon, Inc.*, a retractable leash purchased on Amazon.com broke, snapped back and hit a Pennsylvania dog owner while she was walking her dog, permanently blinding her in one eye. Unable to locate or serve the manufacturer of the dog leash, she sued Amazon.com. A federal district court dismissed the lawsuit, but the 3rd Circuit Court of Appeals reversed, finding that, for policy reasons and in keeping with longstanding principles of strict products liability law, Amazon.com *was* a "seller." Amazon.com requested a rehearing en banc, which was granted, but then the full appellate court certified to the Pennsylvania Supreme Court the question of whether Amazon was a "seller" under Pennsylvania product liability law. (*Oberdorf v. Amazon.com Inc.* (3d Cir. 2020) 818 F.App'x 138, 143.)

In some cases, the level of injuries and property damage caused by defective products is severe, raising the stakes for how the question of online marketplace liability is resolved. For example, in *Fox v. Amazon.com, Inc.*, a defective hoverboard burst into flames and caused a fire that burned down the owner's house, killed their family pets, and nearly killed their two children who escaped certain death by breaking windows and jumping from the second floor of their house into their father's arms. The district court granted Amazon's summary judgment motion and the appellate court affirmed the order. It found that because Amazon did not choose to offer the hoverboard for sale, did not set the price of the hoverboard, and did not make any representations about the safety or specifications of the hoverboard on its marketplace, it did not sufficiently exercise of control of the hoverboard to be deemed a "seller" under the Tennessee product liability law (although it did find that Amazon.com may have had a duty to warn consumers about known defects in hoverboards sold on its website). (*Fox v. Amazon.com, Inc.* (6th Cir. 2019) 930 F.3d 415, 425 - 27.) Such decisions leave severely injured and financially harmed consumers without compensation for their injuries and make no one, as a practical matter, responsible for the act of making dangerous and defective products—that would never be sold in brick and mortar retail stores---available to the public.

Most relevant to California consumers and policy makers, the state's 4th District Court of Appeal held two years ago that Amazon could be strictly liable for defective products sold on its marketplace, at least for product orders that are "Fulfilled by Amazon" (FBA) (*Bolger v.*

Amazon.com, LLC (2020) 53 Cal.App.5th 431, 462). The *Bolger* decision resolved the liability of Amazon's for its FBA program, but not any other business models used by online marketplaces. As a result, online marketplaces with slightly different business models will argue that they are not subject to strict product liability for defective products sold on their marketplaces.

Recent cases show a trend, at least in California, of online marketplaces being held responsible for the sale of dangerous products on their websites. In *Lee v. Amazon.com, Inc.* (2022) 76 Cal.App.5th 200, the plaintiff sued Amazon.com because it failed to include a Prop 65 warning about face creams sold on its website that contained toxic mercury. The appellate court reversed the trial court's grant of summary judgment in favor of Amazon.com, but noted, "The trial court was clearly correct to reject Amazon's claim to be outside the chain of distribution. Proposition 65 imposes the duty to provide warnings on any "person in the course of doing business," which unquestionably includes Amazon's activities here." (*Id.,* at 232.) Likewise, in *Loomis v. Amazon.com,* the Second Appellate District held that the trial court erred when it granted summary judgment in favor of Amazon.com based upon its role in the vertical chain of distribution of a defective hoverboard. Rather, it found the application of strict liability to Amazon's third party seller business model is supported by the relevant public policy considerations underlying the principle. (*Loomis v. Amazon.com LLC* (2021) 63 Cal.App.5th 466, 487 [277 Cal.Rptr.3d 769].) The fact that the defective hoverboard was *not* sold via FBA means that online marketplaces without programs such as FBA, or with slightly different business models, will be unlikely to evade liability for defective products sold on their website, especially when no other party in the supply chain is available to be held accountable. They will be unable to argue they are not retailers, or that they have insufficient control over the quality and safety of the products sold on their platforms, so likely would be held strictly liable for injuries caused by those products. Regardless, our state courts seem to be addressing the topic of online marketplace liability for defective products and resolving those issues in a way that is protective of consumer safety.

Two recent bills—introduced before either *Lee* or *Loomis* were decided--sought to clarify the issue of liability on online marketplace for injuries caused by products sold on their platforms. AB 3262 (Stone, 2019-20) would have protected consumers from injuries caused by dangerous and defective products by holding electronic marketplaces, like traditional brick-and-mortar retailers and distributors, strictly liable for the safety of the products they sell. AB 3262 was approved by this Committee, the full Assembly, and the Senate Judiciary Committee, but was never taken up for a vote on the Senate Floor. AB 1182 (Stone, 2021-22) similarly would have imposed strict liability on an online marketplace for defective products sold on that marketplace. AB 1182 was never heard in this Committee because the author wisely could foresee that the courts were resolving the issue of strict liability of online marketplaces in a manner that would be more protective of consumer safety than the Legislature realistically could. While those bills were unable to codify the strict liability of online marketplaces, this bill would codify some issues of liability of online marketplaces relative to the goods sold on their platforms. The issues addressed in this bill therefore should be distinguished from the topics addressed in AB 3262 and AB 1182.

As proposed to be amended, the bill would clarify that point, adding the following to the bill:

> ***(a) Nothing in this title applies to or affects the liability of an entity, including an entity that meets the definition of a high-volume third-party seller under this title, for damages caused by a consumer product that is sold online.***

Additional author's amendments. The author proposes a number of amendments, most of which are non-substantive and merely make the bill's provisions more clear. For example:

- The bill in print defines the term "seller" but never uses that term, except as part of the term "third-party seller." Defining both terms, while only using one, is confusing and unnecessary. The amendments remove the definition.

- The bill in print has a confusing exemption, providing that an entity is not a "third-party seller" and therefore not required to provide identifying information to the online marketplace if the entity has already provided that identifying information to the online marketplace. The amendments remove the exemption.

- The bill in print does not account for the fact that a high-volume third-party seller may have a "combined business and residential address" in addition to a residential address that should not necessarily be disclosed to purchasers. The amendments incorporate that language.

- The bill in print has remedial provisions—requiring the online marketplace to take action when a high-volume third-party seller fails to comply with the requirements of the bill in different places. The amendments propose to consolidate those remedial provisions.

- The bill in print specifies that an online marketplace must suspend a seller who does not comply within 10 days of a notice of noncompliance from the marketplace, but does not say what happens if the seller later comes into compliance. The amendments specify that, "***the online marketplace shall restore the ability of the seller to have transactions facilitated by or through the online marketplace within 10 days of receiving all of the information***."

ARGUMENTS IN SUPPORT: A coalition of business organizations, chambers of commerce, and individual businesses writes the following in support of the bill:

> Organized retail crime (ORC) is a complex, multi-faceted problem and combatting it requires a comprehensive approach. SB 301 is a critical part of this effort. One of the key factors driving the increase in ORC is the use of online marketplaces as a "fence" for stolen goods. Through anonymous, third-party accounts, ORC networks have access to a global market of consumers unaware that they may be purchasing stolen goods, and the ability to hide from law enforcement through faked business names. ORC rings have been known to use numerous online accounts on one or multiple marketplaces to sell their stolen goods at-scale. Consumers hunting for online bargains 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 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 brickand-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.

> We can no longer allow organized crime to hide behind phony electronic identities and peddle stolen goods to unsuspecting consumers. SB 301 will help bring these criminal enterprises out of the shadows.

REGISTERED SUPPORT / OPPOSITION:

Support

Building Owners and Managers Association of California
California Automotive Wholesalers' Association
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
Oakland Chamber of Commerce
Prosecutors Alliance California
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
The Home Depot
Tides Advocacy
Torrance Area Chamber of Commerce
Toy Industry Association
United Chamber Advocacy Network
Valley Industry & Commerce Association
Walgreen Company
Yuba Sutter Chamber of Commerce

Opposition

None on file

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