

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

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Prepared By: The Professional Staff of the Committee on Commerce and Tourism

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BILL: SB 1072

INTRODUCER: Senator Baxley

SUBJECT: Online Marketplace Transparency

DATE: March 26, 2021

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>McMillan</u>	<u>McKay</u>	<u>CM</u>	<b>Favorable</b>
2.	_____	_____	<u>JU</u>	_____
3.	_____	_____	<u>RC</u>	_____

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**I. Summary:**

The bill creates s. 559.953, F.S., which establishes that an online marketplace must require high-volume third-party sellers to provide the online marketplace with verification and disclosure information.

The bill provides that a violation of s. 559.953, F.S., constitutes a violation of the Florida Deceptive and Unfair Trade Practices Act, and the Department of Legal Affairs may adopt rules to collect and verify the required information. Additionally, regulation under s. 559.953, F.S., is preempted to the Department of Legal Affairs.

The bill takes effect July 1, 2021.

**II. Present Situation:**

**Florida Deceptive and Unfair Trade Practices Act (FDUTPA)**

*History and Purpose of FDUTPA*

The Florida Deceptive and Unfair Trade Practices Act (FDUTPA) became law in 1973.<sup>1</sup> The FDUTPA is a consumer and business protection measure that prohibits unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in trade or commerce.<sup>2</sup> The FDUTPA is based on federal law, and s. 501.204(2), F.S., provides that it is the intent of the Legislature that due consideration and great weight must be given to the

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<sup>1</sup> Ch. 73-124, Laws of Fla.; codified at part II of ch. 501, F.S.

<sup>2</sup> See s. 501.202, F.S. Trade or commerce means the advertising, soliciting, providing, offering, or distributing, whether by sale, rental, or otherwise, of any good or service, or any property, whether tangible or intangible, or any other article, commodity, or thing of value, wherever situated. "Trade or commerce" shall include the conduct of any trade or commerce, however denominated, including any nonprofit or not-for-profit person or activity. See s. 501.203(8), F.S.

interpretations of the Federal Trade Commission and the federal courts relating to section 5 of the Federal Trade Commission Act.<sup>3</sup>

The State Attorney or the Department of Legal Affairs may bring actions when it is in the public interest on behalf of consumers or governmental entities.<sup>4</sup> The Office of the State Attorney may enforce violations of the FDUTPA if the violations take place in its jurisdiction.<sup>5</sup> The Department of Legal Affairs has enforcement authority if the violation is multi-jurisdictional, the state attorney defers in writing, or the state attorney fails to act within 90 days after a written complaint is filed.<sup>6</sup> Consumers may also file suit through private actions.<sup>7</sup>

### ***Remedies under the FDUTPA***

The Department of Legal Affairs and the State Attorney, as enforcing authorities, may seek the following remedies:

- Declaratory judgments;
- Injunctive relief;
- Actual damages on behalf of consumers and businesses;
- Cease and desist orders; and
- Civil penalties of up to \$10,000 per willful violation.<sup>8</sup>

Remedies for private parties are limited to the following:

- A declaratory judgment and an injunction where a person is aggrieved by a FDUTPA violation; and
- Actual damages, attorney fees and court costs, where a person has suffered a loss due to a FDUTPA violation.<sup>9</sup>

### **Federal Unfair and Deceptive Trade Practices**

The Federal Trade Commission's (FTC's) unfair and deceptive trade practices regulations prohibit unfair<sup>10</sup> or deceptive<sup>11</sup> acts or practices in or affecting commerce.<sup>12</sup> The FTC's regulations include "Truth In Advertising" guidelines, which require advertisements to be

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<sup>3</sup> See s 501.204(2), F.S.

<sup>4</sup> See ss. 501.203(2), 501.206, and 501.207, F.S.

<sup>5</sup> Section 501.203(2), F.S.

<sup>6</sup> *Id.*

<sup>7</sup> Section 501.211, F.S.

<sup>8</sup> Sections 501.207(1), 501.208, and 501.2075, F.S. Civil Penalties are deposited into general revenue. Enforcing authorities may also request attorney fees and costs of investigation or litigation. Section 501.2105, F.S.

<sup>9</sup> Section 501.211(1) and (2), F.S.

<sup>10</sup> An "unfair" practice is unfair if it causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition. See 15 U.S.C. Sec. 45(n).

<sup>11</sup> A "deceptive" practice involves a material representation, omission or practice that is likely to mislead a consumer acting reasonably in the circumstances. See FTC Policy Statement on Deception (Oct. 14, 1983) available at [https://www.ftc.gov/system/files/documents/public\\_statements/410531/831014deceptionstmt.pdf](https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf) (last visited March 26, 2021). See also Federal Trade Commission, *A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority* (revised, Oct. 2019) available at <https://www.ftc.gov/about-ftc/what-we-do/enforcement-authority> (last visited March 26, 2021).

<sup>12</sup> 15 U.S.C. s. 45(a)(1).

truthful, not misleading, and, when appropriate, backed by scientific evidence.<sup>13</sup> To enforce these regulations, the FTC takes law enforcement actions, provides consumer and business education, issues reports and policy guidance, leads workshops, and participates in other forums.<sup>14</sup>

The FTC also provides “online shopping” guidance to consumers.<sup>15</sup> The guidance includes confirming an online seller’s physical address and phone number, scrutinizing details provided about a product, paying with credit card, keeping records of any transaction, and protecting personal information.<sup>16</sup> Additionally, the FTC offers resources on how to compare products online, as well as where to go to report online shopping fraud.<sup>17</sup>

### **E-commerce Marketplace**

As e-commerce grows, the sale of counterfeit goods alongside authentic products continues to be a concern.<sup>18</sup> In 2020, the Department of Homeland Security published a report detailing potential strategies and policies to combat the trade of counterfeit goods.<sup>19</sup> According to the report, e-commerce platforms enable counterfeiters to produce products at lower prices, while also reaching a larger number of potential customers.<sup>20</sup> The report points to a scenario where third-party marketplace websites contain photos of the real product, fake reviews of the counterfeit product, and other information designed to mislead consumers.<sup>21</sup>

The report also discusses how the online marketplace is changing consumer attitudes and perceptions.<sup>22</sup> For instance, shopping online makes it harder for consumers to identify what the report calls traditional “red flag” indicators, which has the potential to cause safety risks when consumers rely on false claims that certain products have health or safety certificates.<sup>23</sup> The report points out that this dynamic creates a lack of consumer trust, as well as harming the reputation of brands or businesses.<sup>24</sup>

In 2019, the Organization for Economic Cooperation and Development (OECD) in partnership with the EU Intellectual Property Office (EUIPO) also published a study detailing trends in

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<sup>13</sup> Federal Trade Commission, *Truth In Advertising*, available at <https://www.ftc.gov/news-events/media-resources/truth-advertising> (last visited March 26, 2021).

<sup>14</sup> Federal Trade Commission, *Protecting Consumers from Fraud and Deception*, available at <https://www.ftc.gov/news-events/media-resources/truth-advertising/protecting-consumers> (last visited March 26, 2021).

<sup>15</sup> See Federal Trade Commission, *Shopping Online*, available at <https://www.consumer.ftc.gov/articles/0020-shopping-online> (last visited March 26, 2021).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* See also Federal Trade Commission, *Comparing Products Online*, available at <https://www.consumer.ftc.gov/shopping> (last visited March 26, 2021).

<sup>18</sup> See Department of Homeland Security, *Combating Trafficking in Counterfeit and Pirated Goods* (Jan. 24, 2020), available at [https://www.dhs.gov/sites/default/files/publications/20\\_0124\\_plcy\\_counterfeit-pirated-goods-report\\_01.pdf](https://www.dhs.gov/sites/default/files/publications/20_0124_plcy_counterfeit-pirated-goods-report_01.pdf) (last visited March 26, 2021).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 21.

<sup>21</sup> *Id.* at 22.

<sup>22</sup> *Id.* at 14.

<sup>23</sup> *Id.* at 15.

<sup>24</sup> *Id.*

counterfeit and pirated goods.<sup>25</sup> According to the OECD, trade in fake goods infringe on trademarks and copyright, while also potentially harming the health and safety of consumers.<sup>26</sup> The OECD reported that counterfeit and pirated goods were steadily rising, and in March of 2019, accounted for 3.3% of global trade.<sup>27</sup>

### Preemption

Local governments have broad authority to legislate on any matter that is not inconsistent with federal or state law. A local government enactment may be inconsistent with state law if (1) the Legislature has preempted a particular subject area or (2) the local enactment conflicts with a state statute. Where state preemption applies, it precludes a local government from exercising authority in that particular area.<sup>28</sup>

Florida law recognizes two types of preemption: express and implied. Express preemption requires a specific legislative statement; it cannot be implied or inferred.<sup>29</sup> Express preemption of a field by the Legislature must be accomplished by clear language stating that intent.<sup>30</sup> In cases where the Legislature expressly or specifically preempts an area, there is no problem with ascertaining what the Legislature intended.<sup>31</sup>

In cases determining the validity of ordinances enacted in the face of state preemption, the effect has been to find such ordinances null and void.<sup>32</sup> Implied preemption is actually a decision by the courts to create preemption in the absence of an explicit legislative directive.<sup>33</sup> Preemption of a local government enactment is implied only where the legislative scheme is so pervasive as to evidence an intent to preempt the particular area, and strong public policy reasons exist for finding preemption.<sup>34</sup> Implied preemption is found where the local legislation would present the danger of conflict with the state's pervasive regulatory scheme.<sup>35</sup>

### III. Effect of Proposed Changes:

The bill creates s. 559.953, F.S., and provides the following definitions:

- “High-volume third-party seller” means 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

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<sup>25</sup> See Organization for Economic Cooperation and Development, *Trends in Trade in Counterfeit and Pirated Goods* (2019), available at [https://read.oecd-ilibrary.org/trade/trends-in-trade-in-counterfeit-and-pirated-goods\\_g2g9f533-en#page1](https://read.oecd-ilibrary.org/trade/trends-in-trade-in-counterfeit-and-pirated-goods_g2g9f533-en#page1) (last visited March 26, 2021).

<sup>26</sup> See Organization for Economic Cooperation and Development, *Trade in Fake Goods is now 3.3% of World Trading and Rising* (March 18, 2019), available at [www.oecd.org/newsroom/trade-in-fake-goods-is-now-33-of-world-trade-and-rising.htm](http://www.oecd.org/newsroom/trade-in-fake-goods-is-now-33-of-world-trade-and-rising.htm) (last visited March 26, 2021).

<sup>27</sup> *Id.*

<sup>28</sup> See James R. Wolf and Sarah Harley Bolinder, *The Effectiveness of Home Rule: A Preemptions and Conflict Analysis*, 83 Fla. B.J. 92 (June 2009).

<sup>29</sup> See *City of Hollywood v. Mulligan*, 934 So.2d 1238, 1243 (Fla. 2006); *Phantom of Clearwater, Inc. v. Pinellas County*, 894 So.2d 1011, 1018 (Fla. 2d DCA 2005), approved in *Phantom of Brevard, Inc. v. Brevard County*, 3 So.3d 309 (Fla. 2008).

<sup>30</sup> *Mulligan*, 934 So.2d at 1243.

<sup>31</sup> *Sarasota Alliance for Fair Elections, Inc. v. Browning*, 28 So.3d 880, 886 (Fla. 2010).

<sup>32</sup> See, e.g., *Nat'l Rifle Ass'n of Am., Inc. v. City of S. Miami*, 812 So.2d 504 (Fla. 3d DCA 2002).

<sup>33</sup> *Phantom of Clearwater, Inc.*, 894 So.2d at 1019.

<sup>34</sup> *Id.*

<sup>35</sup> *Sarasota Alliance for Fair Elections, Inc.*, 28 So.3d at 886.

entered into 200 or more discrete sales or transactions of new or unused consumer products resulting in the accumulation of an aggregate total of \$5,000 or more in gross revenues;

- “Third-party seller” means any seller, independent of an operator, a facilitator, or an owner of an online marketplace, who sells, offers to sell, or contracts to sell a consumer product in the United States through an online marketplace; and
- “Seller” means a person who sells, offers to sell, or contracts to sell a consumer product through an online marketplace.

The bill establishes that an online marketplace must require high-volume third-party sellers to provide the online marketplace<sup>36</sup> with the following information within 24 hours after becoming a high-volume third-party seller:

- Bank account information, which requires the online marketplace, a payment processor, or another third party contacted by the online marketplace seller to directly confirm the accuracy of such information;
- Contact information;<sup>37</sup>
- A business tax identification number or, if the high-volume third party seller does not have a business tax identification number, a taxpayer identification number; and
- Whether the high-volume third-party seller is exclusively advertising or offering a consumer product<sup>38</sup> on the online marketplace, or if the high-volume third-party seller is currently advertising or offering for sale the same consumer product on any Internet websites other than the online marketplace.

The bill provides that the online marketplace must verify<sup>39</sup> the information the high-volume third-party seller provides under s. 559.953(2)(a), F.S., within 3 days after receiving the information.<sup>40</sup>

The bill requires the online marketplace to annually notify each high-volume third-party seller that they must inform the online marketplace of any changes to the information provided by the seller within 3 days after receiving the notification.<sup>41</sup>

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<sup>36</sup> “Online marketplace” means any electronically based or accessed platform that includes features that allow for, facilitate, or enable third-party sellers to engage in the sale, purchase, storage, shipping, or delivery of or payment for a consumer product in the United States, and hosts one or more third-party sellers.

<sup>37</sup> Contact information includes: (1) if the high-volume third-party seller is an individual, a copy of a government-issued photo identification for the individual which includes the individual’s name and physical address; (2) if the high-volume third-party seller is not an individual, either a copy of a government-issued photo identification for an individual acting on behalf of the high-volume third-party seller which includes the individual’s name and physical address of the high-volume third-party seller; and (3) a working e-mail address and working phone number.

<sup>38</sup> “Consumer product” means any tangible personal property that is distributed in commerce and normally used for personal, family, or household purposes. This includes property intended to be attached or installed in any real property without regard to whether it is so attached or installed.

<sup>39</sup> “Verify” means to confirm information provided to an online marketplace as provided under s. 559.953(2), F.S., by the use of a third-party or proprietary identity verification system that has the capability to confirm a seller’s name, e-mail address, physical address, and phone number, or a combination of two-factor authentication, public records search, and the presentation of a government-issued identification.

<sup>40</sup> If the seller provides any changes to the information, the online marketplace must verify the changes within 3 days after receiving the information.

<sup>41</sup> The online marketplace must include in the notification direction to each high-volume third-party seller to electronically certify either that the seller’s information is unchanged or that the seller is providing changes to the information. The high-

The bill establishes that an online marketplace must require a high-volume third-party seller to disclose to consumers in a conspicuous manner the identity of the high-volume third-party seller<sup>42</sup> and any other information determined to be necessary to address circumvention or evasion.

The bill provides that upon request of a high-volume third-party seller, an online marketplace may allow partial disclosure of the identity information required in the following situations:

- If the high-volume third-party seller demonstrates to the online marketplace that the seller does not have a business address and only has a residential street address, the online marketplace may direct the high-volume third-party seller to disclose only the country, and if applicable, the state where the high-volume third-party seller resides on the product listing, and may inform consumers that there is no business address available for the seller and that consumer inquiries should be submitted to the seller by phone or e-mail;
- If the high-volume third-party seller demonstrates to the online marketplace that the seller is a business that has a physical address for product returns, the online marketplace may direct the high-volume third-party seller to disclose the seller's physical address for product returns; and
- If a high-volume third-party seller demonstrates to the online marketplace that the seller does not have a phone number other than a personal phone number, the online marketplace must inform consumers that there is no phone number available for the seller and that consumer inquiries should be submitted to the seller's e-mail address.<sup>43</sup>

The bill requires an online marketplace to conspicuously, on the product listing of any high-volume third-party seller, disclose to consumers a reporting mechanism that allows for electronic and telephonic reporting of suspicious marketplace activity to the online marketplace and a message encouraging individuals seeking to purchase products to report suspicious activity to the online marketplace.

The bill provides that an online marketplace that warehouses, distributes, or otherwise fulfills a consumer product order must disclose to the consumer the identification of any high-volume third-party seller supplying the consumer product if it is different than the seller listed on the product listing page.

The bill establishes that a violation of s. 559.953, F.S., constitutes a violation of the Deceptive and Unfair Trade Practices Act,<sup>44</sup> and the Department of Legal Affairs may adopt rules to collect and verify the required information.

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volume third-party seller's participation on the marketplace must be suspended until they have certified that their information is unchanged or has provided any changed information and the information has been verified.

<sup>42</sup> The identification must include the full name of the seller; the full physical address of the seller; whether the seller also engages in manufacturing; importing, or reselling of consumer products; and contact information for the seller, including a working phone number and a working e-mail address.

<sup>43</sup> If an online marketplace becomes aware that a high-volume third-party seller has made a false representation in order to justify the provision of a partial disclosure or has requested and received a provision for partial disclosure and has not provided responsive answers within a reasonable timeframe to consumer inquiries submitted to the seller by phone or e-mail, the online marketplace must withdraw its provision for partial disclosure and require the full disclosure.

<sup>44</sup>See part II of ch. 501, F.S.

The bill provides that the regulation under s. 559.953, F.S., is preempted to the Department of Legal Affairs.

The bill takes effect July 1, 2021.

**IV. Constitutional Issues:**

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None Identified.

**V. Fiscal Impact Statement:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Marketplace providers will be required to verify high volume third-party sellers, as well as require certain disclosures. This will potentially provide more safety within the online marketplace.

C. Government Sector Impact:

This bill will potentially lead to an increase in the investigations and enforcement actions undertaken by the Department of Legal Affairs relating to violations of the provisions of this bill.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

The bill creates the following section of the Florida Statutes: 559.953.

**IX. Additional Information:**

**A. Committee Substitute – Statement of Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

**B. Amendments:**

None.

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This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

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