

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 1227 Online Marketplace Transparency

**SPONSOR(S):** Judiciary Committee, Toledo and others

**TIED BILLS:** **IDEN./SIM. BILLS:** SB 944

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Regulatory Reform Subcommittee	16 Y, 0 N	Wright	Anstead
2) Judiciary Committee	20 Y, 0 N, As CS	Brascomb	Kramer
3) Commerce Committee			

### SUMMARY ANALYSIS

As e-commerce grows, the sale of counterfeit and stolen goods continues to increase. E-commerce platforms may enable counterfeiters or thieves to produce or sell products at lower prices, while also reaching a larger number of potential customers.

CS/HB 1227 creates s. 559.953, F.S., which establishes that an online marketplace must require high-volume third-party sellers (HVTPS) to provide the online marketplace with specific verification and disclosure information. Additionally, an online marketplace must require HVTPS with an aggregate total of \$20,000 or more in annual gross revenues on its online platform to provide consumers with disclosure information.

The bill requires an online marketplace to provide consumers with a reporting mechanism that allows for electronic and telephonic reporting of suspicious activity to the online marketplace.

The bill provides that a violation of its newly-created provisions constitutes a violation of the Florida Deceptive and Unfair Trade Practices Act (FDUTPA), except that there is no private cause of action under FDUTPA. The Department of Legal Affairs (DLA) may adopt rules to collect and verify information required by the bill. Such regulation is preempted to DLA.

The bill does not appear to have any fiscal impact on local governments, but may have an indeterminate fiscal impact on state government.

The bill has an effective date of January 1, 2023.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### Background

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

Enacted in 1973, the Florida Deceptive and Unfair Trade Practices Act (FDUTPA)<sup>1</sup> 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> FDUTPA is based on federal law and states that it should be interpreted in light of the Federal Trade Commission's and the federal courts' interpretations of section 5 of the Federal Trade Commission Act.<sup>3</sup>

The State Attorney or the Department of Legal Affairs (DLA) under the Attorney General may bring actions on behalf of consumers or governmental entities when it is in the public interest.<sup>4</sup> The Office of the State Attorney may enforce violations of FDUTPA if the violations take place in its jurisdiction.<sup>5</sup> DLA 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 enforce FDUTPA through private civil actions.<sup>7</sup>

DLA 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>

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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 ss. 501.202 & 501.203, F.S.

<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> S. 501.203(2), F.S.

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

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

<sup>8</sup> Ss. 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. S. 501.2105, F.S.

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

## Federal Unfair and Deceptive Trade Practices

The Federal Trade Commission's (FTC) 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> 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>13</sup>

The FTC provides "online shopping" guidance to consumers.<sup>14</sup> Such guidance includes how to confirm an online seller's physical address and phone number, scrutinize details provided about a product, pay with a credit card, keep records of any transaction, and protect personal information.<sup>15</sup> Additionally, the FTC offers resources on how to compare products online as well as where to go to report online shopping fraud.<sup>16</sup>

### E-commerce Marketplace

As e-commerce grows, the sale of counterfeit and stolen goods continues to increase.<sup>17</sup> In 2020, the Department of Homeland Security published a report detailing potential strategies and policies to combat the trade of counterfeit goods.<sup>18</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>19</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>20</sup>

The report also discusses how the online marketplace is changing consumer attitudes and perceptions.<sup>21</sup> For instance, shopping online makes it harder for consumers to identify 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>22</sup> The report points out that this dynamic creates a lack of consumer trust, and harms the reputations of brands or businesses.<sup>23</sup>

In 2019, the Organization for Economic Cooperation and Development (OECD) in partnership with the EU Intellectual Property Office also published a study detailing trends in counterfeit and pirated goods.<sup>24</sup> According to the OECD, trade in fake goods infringe on trademarks and copyright, while also

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<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 Feb. 1, 2022). See also Federal Trade Commission, *A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority* (revised, May 2021) available at <https://www.ftc.gov/about-ftc/what-we-do/enforcement-authority> (last visited Feb. 1, 2022).

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

<sup>13</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 Feb. 1, 2022).

<sup>14</sup> See Federal Trade Commission, *Shopping Online*, available at <https://www.consumer.ftc.gov/articles/0020-shopping-online> (last visited Feb. 1, 2022).

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

<sup>16</sup> *Id.* See also Federal Trade Commission, *Comparison Shopping*, available at <https://www.consumer.ftc.gov/shopping> (last visited Feb. 1, 2022).

<sup>17</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 Feb. 1, 2022).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 21.

<sup>20</sup> *Id.* at 22.

<sup>21</sup> *Id.* at 14.

<sup>22</sup> *Id.* at 15.

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

<sup>24</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\\_g2q9f533-en#page1](https://read.oecd-ilibrary.org/trade/trends-in-trade-in-counterfeit-and-pirated-goods_g2q9f533-en#page1) (last visited Feb. 1, 2022).

potentially harming the health and safety of consumers.<sup>25</sup> The OECD reported that counterfeit and pirated goods were steadily rising, and in March of 2019, accounted for 3.3 percent of global trade.<sup>26</sup>

### Industry Self-Regulation

Because there is documented consumer harm from third-party sellers on online marketplaces, some online marketplaces have started new programs and requirements for verifying third-party sellers in the interests of self-regulation. For example, Amazon is testing using video calls to verify third-party sellers as it attempts to minimize the amount of fraudulent accounts and listings on its platform. The live verification initiative initially used in-person meetings when it began, but pivoted to video conferencing as the COVID-19 pandemic made social distancing measures necessary. Amazon reports that its existing verification process for third-party sellers uses a combination of machine learning and human review to remove suspected bad actors. The company reports that these processes stopped 2.5 million accounts from listing items for sale in 2019.<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 is considered to be inconsistent with state law if the Legislature has preempted a particular subject area or 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>

Local ordinances enacted in the face of state preemption are generally held null and void.<sup>31</sup> Implied preemption may be found by a court in the absence of an explicit legislative directive.<sup>32</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>33</sup> Implied preemption may be found where the local legislation would present the danger of conflict with the state's pervasive regulatory scheme.<sup>34</sup>

### **Effect of the Bill**

CS/HB 1227 creates s. 559.953, F.S., which establishes that an online marketplace must require high-volume third-party sellers (HVTPS)<sup>35</sup> to provide the online marketplace with specified verification and

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<sup>25</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 Feb. 1, 2022).

<sup>26</sup> *Id.*

<sup>27</sup> John Porter, *Amazon testing video calls to verify third-party sellers*, TheVerge.com, <https://www.theverge.com/2020/4/27/21238026/amazon-seller-verification-video-calling-fraud-third-party-sellers> (last visited Feb. 1, 2022).

<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> 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>32</sup> *Phantom of Clearwater, Inc.*, 894 So. 2d at 1019.

<sup>33</sup> *Id.*

<sup>34</sup> *Sarasota Alliance for Fair Elections, Inc.*, 28 So. 3d at 886.

<sup>35</sup> "High-volume third-party seller" (HVTPS) means a participant in an online marketplace that is a third-party seller and that, in any continuous 12-month period during the previous 24 months, has 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. Only sales or transactions made through the online marketplace for which payment was processed by the online marketplace, either directly or through the seller's payment processor, count towards the calculation for the number of discrete sales or transactions or the gross revenues.

disclosure information. "Online marketplace" means any consumer-directed electronically based or accessed platform that:

- 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<sup>36</sup> in the U.S.;
- Is used by one or more third-party sellers<sup>37</sup> for such purposes; and
- Has a contractual or similar relationship with consumers governing their use of the platform to purchase consumer products.

Specifically, the bill requires an online marketplace to:

- Require that any HVTPS provide it with all of the following information within 10 days after qualifying as a HVTPS:
  - Deposit account information from a financial institution, or if none, the name of the payee for payments issued by the online marketplace to the HVTPS, which information must be confirmed by the online marketplace.
  - Contact information, including all of the following:
    - A valid e-mail address and working phone number.
    - If the HVTPS is an individual, the individual's name.
    - If the HVTPS is not an individual, either a copy of a government-issued photo identification for an individual acting on behalf of such seller which includes such individual's name and physical address; or a copy of a government-issued record or tax document that includes the business name and physical address of the HVTPS.
  - A business tax identification number, or, if the HVTPS does not have a business tax identification number, a taxpayer identification number.
- Verify<sup>38</sup> the information the HVTPS provides within 10 days after receiving such information.
  - If the HVTPS provides any changes to the information, the online marketplace must verify such changes within 10 days after receiving the information.
  - If a HVTPS provides a copy of a valid government-issued tax document, the information contained within such tax document shall be presumed verified as of the date of issuance of such document.
- Notify each HVTPS on the online marketplace, on at least an annual basis, that such seller must inform the online marketplace of any changes to the information previously provided by the seller within 10 days after receiving the notification.
  - If the online marketplace becomes aware that a HVTPS has not certified that such information is unchanged or provided such changed information within 10 days after receiving such notification, the online marketplace must suspend the selling privileges of the HVTPS until such seller provides such certification or changed information.
- Disclose to consumers in a clear and conspicuous manner, in the order confirmation message or other document or communication made to the consumer after the purchase is finalized and in the consumer's account transaction history, all of the following information of any HVTPS with an aggregate total of \$20,000 or more in annual gross revenues on its online platform:
  - The full name of the HVTPS.
  - The full physical address of the HVTPS.
    - If the HVTPS certifies to the online marketplace that it has only a residential address or a combined business and residential address, the online marketplace may make other specified disclosures to consumers regarding contact information and other information about the HVTPS.
  - Contact information for the HVTPS, including a working telephone number and working e-mail address or other means of direct electronic messaging to allow for direct, unhindered communication with the HVTPS.

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<sup>36</sup> "Consumer product" means a product that is used or bought for use primarily for personal, family, or household purposes.

<sup>37</sup> "Seller" means a person who sells, offers to sell, or contracts to sell a consumer product through an online marketplace. "Third-party seller" means any seller, independent of an online marketplace, that sells, offers to sell, or contracts to sell a consumer product in the United States through an online marketplace.

<sup>38</sup> "Verify" means to confirm information and documentation provided to an online marketplace by the use of one or more methods that enable the online marketplace to reliably determine that any information and documents provided which correspond to the seller or an individual acting on the seller's behalf are valid, not misappropriated, and not falsified.

- If the only telephone number of the HVTPS is the personal telephone number of the HVTPS, the online marketplace must disclose to consumers that a phone number is not available and that consumer inquiries should be made to the HVTPS's email address or other means of electronic messaging.
- Whether the HVTPS uses a different seller to supply the product to the consumer upon purchase, along with such seller's identification if requested by the consumer.

If an online marketplace becomes aware that a HVTPS seller has made a false representation to the online marketplace to restrict access to its full physical address, telephone number, or e-mail address, the bill requires the online marketplace to, after providing the seller with written or electronic notice, require the full disclosure of the HVTPS's full physical address, telephone number, and e-mail address. If such information is not disclosed within 10 days after notification, the online marketplace must suspend the selling privileges of the HVTPS on the online marketplace until the required information is disclosed.

The bill also requires an online marketplace to provide to consumers, in a conspicuous manner on the consumer product listing of any HVTPS, a reporting mechanism that allows for electronic and telephonic reporting of suspicious activity to the online marketplace.

The bill does not prevent an online marketplace from providing any additional measures, electronic or otherwise, that it deems necessary to prevent the sale of fraudulent, stolen, or counterfeit consumer products on its platform.

The bill provides that a person who violates the provisions of newly-created s. 559.953, F.S., violates FDUTPA and is subject to FDUTPA penalties and remedies. Because the bill regulates online marketplaces (including the information and disclosures that those online marketplaces must elicit and provide), this provision appears to make an online marketplace, and not an HVTPS, subject to a FDUTPA violation. However, the bill does not authorize the right of a private cause of action under FDUTPA. A violator may still be subject to enforcement by the Attorney General or a state attorney under FDUTPA.

The bill provides that the regulation of the requirement for online marketplaces to verify information from an HVTPS on a one-time or ongoing basis and to verify disclosure of information to consumers is preempted to DLA. The bill authorizes DLA to adopt rules with respect to collecting and verifying information under the bill, provided that such rules are limited to what is necessary to collect and verify such information. A local governmental entity may not establish, mandate, or otherwise require the verification or disclosure of such information.

The bill provides an effective date of January 1, 2023.

#### B. SECTION DIRECTORY:

**Section 1:** Creates s. 559.953, F.S.; relating to disclosure of information by online marketplaces.

**Section 2:** Provides an effective date of January 1, 2023.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

#### A. FISCAL IMPACT ON STATE GOVERNMENT:

##### 1. Revenues:

The bill may increase the number of FDUTPA actions taken by DLA, which may increase civil penalties collected by DLA.

##### 2. Expenditures:

The bill may increase the number of FDUTPA actions taken by DLA, which may increase DLA's FDUTPA-related workload.

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

None.

2. Expenditures:

None.

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

The bill may provide buyers with increased security during online sales transactions through online marketplaces. This may save consumers money by preventing them from purchasing fake or counterfeit products.

The bill will require online marketplaces to implement procedures to add and verify certain third-party identifying information to their platforms, as well as provide a consumer reporting mechanism. This may save online marketplaces time and money related to investigating fraudulent sellers.

**D. FISCAL COMMENTS:**

None.

**III. COMMENTS**

**A. CONSTITUTIONAL ISSUES:**

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to require counties or municipalities to spend funds or take action requiring the expenditure of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of state tax shared with counties or municipalities.

2. Other:

For a court to exercise jurisdiction over a respondent, it must have subject matter jurisdiction and personal jurisdiction, which is determined by the court based on the respondent's contacts with the state.<sup>39</sup> A non-resident respondent may have sufficient contacts with Florida if he or she commits acts expressly enumerated in Florida's long-arm statute.<sup>40</sup> Alternatively, the non-resident respondent may be subject to a Florida court's personal jurisdiction because he or she has minimum contacts with the state that are otherwise unrelated to the matter that brings him or her into court.<sup>41</sup> Whether a non-resident online marketplace that shows certain third-party sellers into Florida has sufficient minimum contacts with the state is a fact-specific question that would likely need to be addressed on a case-by-case basis by a court.

**B. RULE-MAKING AUTHORITY:**

<sup>39</sup> *Caiazza v. American Royal Arts Corp.*, 73 So. 3d 245, 250 (Fla. 4th DCA 2011).

<sup>40</sup> *Id.*; S. 48.193, F.S.

<sup>41</sup> *Caiazza*, 73 So.3d 245, 250.

The bill provides that DLA may adopt rules with respect to collecting and verifying information under the bill, provided that such rules are limited to what is necessary to collect and verify such information.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

**IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES**

On February 1, 2022, the Judiciary Committee adopted an amendment and reported the bill favorably as a committee substitute. The amendment:

- Removed the right of a private cause of action under FDUTPA;
- Changed the effective date of the bill from July 1, 2022, to January 1, 2023;
- Changed time period requirements from “10 business days” to “10 days” throughout the bill; and
- Made other changes relating to a definition and the bill’s disclosure requirements.

This analysis is drafted to the committee substitute as passed by the Judiciary Committee.