

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.)

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

BILL: SB 944

INTRODUCER: Senator Baxley

SUBJECT: Online Marketplace Transparency

DATE: January 14, 2022

REVISED: _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----|----------|----------------|-----------|--------------------|
| 1. | McMillan | McKay | CM | Pre-meeting |
| 2. | _____ | _____ | CA | _____ |
| 3. | _____ | _____ | RC | _____ |

I. Summary:

SB 944 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. Additionally, an online marketplace must require high-volume third-party sellers 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 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 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, 2022.

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 1973.¹ The FDUTPA is a consumer and business protection measure that prohibits unfair methods of

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

competition, unconscionable acts or practices, and unfair or deceptive acts or practices in trade or commerce.² 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 interpretations of the Federal Trade Commission and the federal courts relating to section 5 of the Federal Trade Commission Act.³

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.⁴ The Office of the State Attorney may enforce violations of the FDUTPA if the violations take place in its jurisdiction.⁵ 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.⁶ Consumers may also file suit through private actions.⁷

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.⁸

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.⁹

² 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.

³ See s 501.204(2), F.S.

⁴ See ss. 501.203(2), 501.206, and 501.207, F.S.

⁵ Section 501.203(2), F.S.

⁶ *Id.*

⁷ Section 501.211, F.S.

⁸ 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.

⁹ Section 501.211(1) and (2), F.S.

Federal Unfair and Deceptive Trade Practices

The Federal Trade Commission's (FTC's) unfair and deceptive trade practices regulations prohibit unfair¹⁰ or deceptive¹¹ acts or practices in or affecting commerce.¹² The FTC's regulations include "Truth In Advertising" guidelines, which require advertisements to be truthful, not misleading, and, when appropriate, backed by scientific evidence.¹³ 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.¹⁴

The FTC also provides "online shopping" guidance to consumers.¹⁵ 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.¹⁶ Additionally, the FTC offers resources on how to compare products online, as well as where to go to report online shopping fraud.¹⁷

E-commerce Marketplace

As e-commerce grows, the sale of counterfeit goods alongside authentic products continues to be a concern.¹⁸ In 2020, the Department of Homeland Security published a report detailing potential strategies and policies to combat the trade of counterfeit goods.¹⁹ According to the report, e-commerce platforms enable counterfeiters to produce products at lower prices, while also reaching a larger number of potential customers.²⁰ 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.²¹

¹⁰ 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).

¹¹ 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 (last visited Jan. 14, 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 Jan. 14, 2022).

¹² 15 U.S.C. s. 45(a)(1).

¹³ Federal Trade Commission, *Truth In Advertising*, available at <https://www.ftc.gov/news-events/media-resources/truth-advertising> (last visited Jan. 14, 2022).

¹⁴ 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 Jan. 14, 2022).

¹⁵ *See* Federal Trade Commission, *Shopping Online*, available at <https://www.consumer.ftc.gov/articles/0020-shopping-online> (last visited Jan. 14, 2022).

¹⁶ *Id.*

¹⁷ *Id.* *See also* Federal Trade Commission, *Comparison Shopping*, available at <https://www.consumer.ftc.gov/shopping> (last visited Jan. 14, 2022).

¹⁸ *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 (last visited Jan. 14, 2022).

¹⁹ *Id.*

²⁰ *Id.* at 21.

²¹ *Id.* at 22.

The report also discusses how the online marketplace is changing consumer attitudes and perceptions.²² 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.²³ The report points out that this dynamic creates a lack of consumer trust, as well as harming the reputation of brands or businesses.²⁴

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

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.²⁸

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

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.³² Implied preemption is actually a decision by the courts to create preemption in the absence of an explicit legislative directive.³³ Preemption of a

²² *Id.* at 14.

²³ *Id.* at 15.

²⁴ *Id.*

²⁵ 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 (last visited Jan. 14, 2022).

²⁶ 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 (last visited Jan. 14, 2022).

²⁷ *Id.*

²⁸ 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).

²⁹ 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).

³⁰ *Mulligan*, 934 So.2d at 1243.

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

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

³³ *Phantom of Clearwater, Inc.*, 894 So.2d at 1019.

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.³⁴ Implied preemption is found where the local legislation would present the danger of conflict with the state's pervasive regulatory scheme.³⁵

III. Effect of Proposed Changes:

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

- “Consumer product” means a product that is used or bought for use primarily for personal, family, or household purposes;
- “High-volume third-party seller” means a participant in an online marketplace that 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 or transactions of new or unused consumer products resulting in the accumulation of an aggregate total of \$5,000 or more in gross revenues;³⁶
- “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 in the United States, is used by one or more third-party sellers for such purposes, and has a contractual or similar relationship with consumers governing their use of the platform to purchase consumer products;
- “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 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;³⁷ and
- “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.

The bill establishes that an online marketplace must require high-volume third-party sellers to provide the online marketplace with the following information within 10 business days after qualifying as a high-volume third-party seller:

- Deposit account information from a financial institution;
- Contact information;³⁸and

³⁴ *Id.*

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

³⁶ 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 gross revenues.

³⁷ The term “third-party seller” does not include, with respect to an online marketplace: a seller that operates the online marketplace; a business entity that has made available to the general public the entity’s name, business address, and working contact information; a business entity with an ongoing contractual relationship with the online marketplace to provide the online marketplace with the manufacture, distribution, wholesaling, or fulfillment of shipments of consumer products; or a business entity that has provided to the online marketplace identifying information that has been verified.

³⁸ Contact information includes: a valid e-mail address and working phone number; if the high-volume third-party seller is an individual, a copy of a valid government-issued photo identification for the individual which includes the individual’s name and physical address; if the high-volume third-party seller is not an individual, either a copy of a government-issued photo

- 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.

The bill provides that the online marketplace must verify the information the high-volume third-party seller provides under s. 559.953(2)(a), F.S., within 10 business days after receiving the information. If the high-volume third-party seller provides any changes to the information, the online marketplace must verify such changes within 10 business days after receiving the information.³⁹

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 10 business days after receiving the notification.⁴⁰

The bill establishes that an online marketplace must require a high-volume third-party seller to disclose to consumers in a conspicuous manner on the product listing, through a conspicuously placed link on the product listing, or in the order confirmation message or other document of 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 high-volume third party seller with an aggregate total of \$20,000 or more in annual gross revenues on its online platform:

- The full name of the high-volume third-party seller;
- The full physical address of the high-volume third-party seller;⁴¹
- Contact information for the high-volume third-party seller, including a working telephone number and working e-mail address to allow for direct, unhindered communication with the high-volume third-party seller;⁴² and
- The identification of any seller that supplies the consumer product to the consumer upon purchase, if such seller is different than the high-volume third-party seller listed on the consumer product listing before the purchase.

The bill provides that if an online marketplace becomes aware that a high-volume third-party seller has made a false representation to the online marketplace in order to restrict access to the full physical address, telephone number, or e-mail address required, then the online marketplace, after providing the seller with written or electronic notice, must require the full disclosure of the high-volume third-party seller's full physical address, telephone number, and e-mail address. If such information is not disclosed within 10 business days after notification, the online

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 high-volume third-party seller.

³⁹ If a high-volume third-party seller provides a copy of a valid government-issued tax document, the information contained within such document must be presumed verified as of the date of issuance of the document.

⁴⁰ 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-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.

⁴¹ If the full physical address of the high-volume third-party seller is the primary residential address of such high-volume third-party seller, only the city, state, and country of the high-volume third-party seller is required to be disclosed.

⁴² If the only telephone number of the high-volume third-party seller is the personal telephone number of the high-volume third-party seller, then only the working e-mail address is required to be disclosed or the online marketplace must provide other means of electronic messaging to contact the seller.

marketplace must suspend the selling privileges of the high-volume third-party seller on the online marketplace until the required information is disclosed.

The bill requires an online marketplace to conspicuously, on the product listing of any high-volume third-party seller, provide 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 is not prevented from providing 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 establishes that a violation of s. 559.953, F.S., constitutes a violation of the Deceptive and Unfair Trade Practices Act,⁴³ and the Department of Legal Affairs may adopt rules to collect and verify the required information.

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, 2022.

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.

⁴³See part II of ch. 501, F.S.

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.