
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Aisha Wahab, Chair

2023 - 2024 Regular

Bill No: SB 1144 **Hearing Date:** April 23, 2024
Author: Skinner
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Urgency: No **Fiscal:** Yes
Consultant: AB

Subject: *Marketplaces: online marketplaces*

HISTORY

Source: Prosecutors Alliance California

Prior Legislation: SB 301 (Skinner), Ch. 857, Stats. of 2022
AB 1700 (Maienschein), Ch. 855

Support: California District Attorneys Association; California Public Defenders Association; Californians for Safety and Justice; Californians United for a Responsible Budget; City of Berkeley; City of Oakland; Friends Committee on Legislation of California; Home Depot; League of California Cities; Los Angeles Area Chamber of Commerce; Los Angeles County Sheriff's Department; San Diego County District Attorneys Office; Smart Justice California; The Toy Association (if amended); Uncommon Law; United Food and Commercial Workers, Western States Council; Valley Industry and Commerce Association (VICA); Vera Institute of Justice

Opposition: California Chamber of Commerce; Chamber of Progress; Computer & Communications Industry Association; Internet.Works; Offerup INC.; TechNet

PURPOSE

The purpose of this bill is to

- 1) *Modify existing statutory definitions of “online marketplace” and “high-volume third party seller” to apply to a broader range of buyers and sellers.*
- 2) *Impose disclosure, reporting and corporate policy requirements on online marketplaces related to high-volume third party sellers.*
- 3) *Authorize district attorneys, county counsel and city attorneys to enforce existing laws related to online marketplaces.*

Existing law contains the following definitions:

- “Consumer product” means tangible personal property that is distributed in commerce and normally used for personal, family, or household purposes, including property intended to be attached to or installed in real property regardless of whether it is actually attached or installed.

- “High-volume third-party seller” means a third-party seller who, in any continuous 12-month period during the previous 24 months, has entered into 200 or more discrete transactions through an online marketplace for the sale of new or unused consumer products to buyers located in California resulting in the accumulation of an aggregate total of five thousand dollars (\$5,000) or more in gross revenues. The number of discrete transactions includes only those transactions through the online marketplace for which payment is processed by the online marketplace directly or through its payment processor.
- “Online marketplace” means a consumer-directed, electronically accessed platform for which all of the following are true:
 - The platform includes features that allow for, facilitate, or enable third-party sellers to engage in the sale, purchase, payment, storage, shipping, or delivery of a consumer product in the state, and these features are used by third-party sellers.
 - The platform has a contractual relationship with consumers governing their use of the platform to purchase consumer products.
- “Third-party seller” is a person or entity, independent of an online marketplace, who sells, offers to sell, or contracts with an online marketplace to sell a consumer product in the state by or through an online marketplace.
- “Verify” is to confirm that information provided to an online marketplace pursuant to the requirements below is accurate. Methods of confirmation 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. (Civ. Code, § 1749.8.)

Existing law requires an online marketplace to require each high-volume third-party seller on the online marketplace to provide, not 10 days later after qualifying as a high-volume third-party seller, specified information to the online marketplace, including bank information, identifying information and contact information. (Civ. Code, § 1749.8.1(a).)

Existing law requires an online marketplace to verify the information provided under the above provision within 10 days and, on an annual basis, notify each high-volume third-party seller of the requirement to update any information within 10 days of the notification and certify that the information provided is accurate. If the high-volume third-party seller does not provide the information or certification as required, the online marketplace shall, after providing notice and opportunity to provide the information or certification, suspend any future sales activity until the information or certification is provided. (Civ. Code, § 1749.8.1(b), (c).)

Existing law requires an online marketplace to require a high-volume third-party seller with at least \$20,000 of gross annual revenues from transactions with buyers in California through the online marketplace in either of the prior two calendar years to provide, in addition to the information required in 3), the following to the online marketplace and disclose it to consumers in a clear and conspicuous manner, as specified:

- The full name of the high-volume third party seller, as specified.
- The high-volume third-party seller’s physical address and contact information for the high-volume third-party seller, including a current working telephone, email address, or other means of direct electronic messaging, to allow users to have direct and unhindered communication with the seller. In the event that a seller certifies that they do not have a physical address or telephone number other than their residential address or personal number, the online marketplace shall direct consumers to use other methods of contact, as specified.
- Whether or not another party is responsible for supplying the product to the consumer upon purchase; and upon request from an authenticated purchaser, the high-volume third-party seller shall provide contact information for the party who is responsible for supplying the product. (Civ. Code, § 1749.8.2(a).)

Existing law requires an online marketplace to disclose to consumers, in a clear or conspicuous manner on the product listing of a high-volume third-party seller, a reporting mechanism that allows for electronic and telephonic reporting of suspicious activity by the high-volume third-party seller to the online marketplace. (Civ. Code, § 1749.8.2.(b).)

Existing law provides for the suspension of a high-volume third-party seller by an online marketplace in specified scenarios involving the seller’s noncompliance with existing law, false representations made by the seller, and the seller’s non-responsiveness to consumer inquiries in a reasonable time, as specified. (Civ. Code, § 1749.8.2.(c).)

Existing law requires an online marketplace to retain the information provided to comply with the above provisions for no fewer than two years, using reasonable security procedures and practices to protect the information, as specified. (Civ. Code, § 1749.8.4.)

Existing law provides that a person or entity who violates any of the above provisions regarding online marketplaces shall be liable for a civil penalty of up to \$10,000 for each violation, which may be assessed and recovered only in a civil action brought in the name of the people of the State of California by the Attorney General. If the Attorney General prevails in such an action, it may recover reasonable attorney fees and costs and preventive relief, including a permanent or temporary injunction against any person responsible for the conduct. (Civ. Code, § 1749.8.4.)

This bill modifies the definition “high-volume third-party seller” to count all of the seller’s transactions via the online marketplace toward the 200 discrete transaction threshold, rather than counting only transactions processed by the online marketplace directly or through its payment processor.

This bill modifies the definition of “online marketplace” by eliminating requirements that specified features made available to third party sellers are used by them and that the platform has a contractual relationship with consumers governing their use of the platform to purchase consumer products.

This bill requires that online marketplaces disclose to consumers whether a high volume third party seller has complied with the provision above requiring them to provide payment and identification information.

This bill requires online marketplaces to alert local, regional or state law enforcement agencies in California if it reasonably believes that a third-party seller is selling or attempting to sell stolen goods to a California resident.

This bill requires online marketplaces to establish and maintain a policy prohibiting the sale of stolen goods on the online marketplace, as specified, and provide a mechanism on the online marketplace that allows any individual to notify the online marketplace that a seller is or may be selling stolen goods, both of which must be publicly posted and readily accessible to users.

This bill authorizes, in addition to the Attorney General, a district attorney in any county, a city attorney in any city, or a county counsel in any county to commence a civil action for violations of the provision above related to online marketplaces.

This bill contains a statement of legislative intent to stop theft from retail stores and community theft by curtailing the sale of stolen property on online marketplaces.

COMMENTS

1. Need for This Bill

According to the Author:

In 2022, I introduced SB 301 to address the increasing use of online marketplaces as the mechanism to resell stolen goods. Regulations under SB 301 required inline marketplaces to ensure that high volume third party sellers on their platforms were operating legally. While SB 301 made great strides in combating the sale of stolen goods on online marketplaces, there is still more work to be done. This bill strengthens SB 301 by auditing additional regulations on those high volume third party sellers that use online marketplaces to advertise goods, but then collect the money from buyers in “offline” transactions — transactions that make it much more difficult to track whether the goods sold were stolen.

2. Retail Theft and Recent Legislation Regarding Online Marketplaces

Online marketplaces are rapidly replacing brick and mortar retail stores as the source of goods for consumers, especially because the COVID-19 pandemic drove consumers to shop online and forced 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.¹ 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. In 2022, the National Retail Federation (NRF) claimed that “nearly half” of the shopping industry’s \$94.5 billion in losses due to “shrink” in 2021 were caused by “organized retail theft.”² Large companies like Walmart, Home Depot, and CVS agreed that the rate of retail theft was

¹ (Brewster, Mayumi, *Annual Retail Trade Survey Shows Impact of Online Shopping on Retail Sales During COVID-19 Pandemic* (April 22, 2022), <https://www.census.gov/library/stories/2022/04/ecommerce-sales-surged-during-pandemic.html>.)

² Helmore, *US retail group retracts claim that half of \$94.5bn inventory loss was from theft* (Dec. 11, 2023), *The Guardian*, <https://www.theguardian.com/business/2023/dec/07/retail-theft-losses-inventory-nrf>.

increasing.³ More recently, however, it has come to light that many claims about the prevalence and impact of organized retail theft may have been overstated. In 2023, the NRF retracted its statement above and other companies walked back similar comments, often citing lack of data.⁴ While some cities may have seen spikes in retail theft, what data there is does not bear out a nationwide increase in such thefts. In any event, many experts and researchers in this area agree that the data available regarding organized retail theft is generally difficult to interpret.⁵

In 2022, the Legislature passed SB 301 (Skinner, Ch. 857, 2022), which imposed requirements on online marketplaces and third-party sellers aimed at curbing the resale of stolen goods, and established definitions of those terms that are the subject of this bill. “Online marketplaces” are defined as online platforms that facilitate the sale of consumer goods by third-party sellers to consumers in California, processed through the platform’s payment mechanism,” while “high-volume third-party sellers” are defined as a seller who “has entered into 200 or more discrete transactions through an online marketplace for the sale of new or unused consumer products to buyers located in California resulting in the accumulation of an aggregate total of five thousand dollars (\$5,000) or more in gross revenues.” Generally, SB 301 required online marketplaces to collect specified data from high-volume third-party sellers, and required third-party sellers with at least \$20,000 in sales to provide additional information that the marketplaces must disclose to consumers. The bill required online marketplaces to take certain steps to remedy noncompliance by a seller, and also authorized the Attorney General to seek civil penalties and injunctive relief for any violations.⁶

Another measure passed in 2022, AB 1700 (Maienschein, Ch. 855, Stats of 2022), while more limited in scope, also aimed to curb resale of stolen goods on online marketplaces by third party sellers. Specifically, that bill required the Attorney General to establish a reporting mechanism on its website for the public to report suspected stolen items on online marketplaces and share any information collected with local law enforcement. The bill also required online marketplaces to provide a link on their websites connecting the public to the Attorney General’s suspected stolen goods reporting mechanism.⁷

On January 9, 2024, Governor Newsom called for legislation to crack down on large scale property crimes committed by organized groups who profit from resale of stolen goods.⁸ The proposals include: 1) creating new penalties targeting those engaged in retail theft to resell, and those that resell the stolen property; 2) clarifying existing arrest authority so that police can arrest suspects of retail theft, even if they didn’t witness the crime in progress; 3) clarifying that theft amounts may be aggregated to reach the grand theft threshold; 4) creating new penalties for professional auto burglary, increasing penalties for the possession of items stolen from a vehicle with intent to resell, regardless of whether the vehicle was locked; 5) eliminating the sunset date for the organized retail crime statute; and 6) increasing penalties for large-scale resellers of

³ Fonroque, et al., *America’s biggest companies say retail crime is an epidemic, but just how big is it?*, CNBC (Mar. 18, 2023; updated Mar. 20, 2023), <https://www.cnbc.com/2023/03/18/organized-retail-crime-debate.html>.

⁴ *Walgreens Executive Says Shoplifting Threat Was Overstated*, New York Times, (Jan. 6, 2023) <https://www.nytimes.com/2023/01/06/business/walgreens-shoplifting.html>; *Retail Group Retracts Startling Claim About ‘Organized’ Shoplifting*; New York Times, (8 Dec 2023). [Retail Group Retracts Startling Claim About ‘Organized’ Shoplifting - The New York Times \(nytimes.com\)](https://www.nytimes.com/2023/12/08/business/retail-group-retracts-startling-claim-about-organized-shoplifting.html)

⁵ *Myth v. Reality: Trends in Retail Theft*. Brennan Center for Justice. 7 March 2024. [Myth vs. Reality: Trends in Retail Theft | Brennan Center for Justice](https://www.brennancenter.org/our-work/reports-publications/myth-vs-reality-trends-in-retail-theft)

⁶ See 1749.8 et. seq.

⁷ Gov. Code, §7599.110 et. seq.

⁸ *Governor Newsom Calls for Legislation Cracking Down on Property Crime*. 9 January 2024. [Governor Newsom Calls for Legislation Cracking Down on Property Crime | California Governor](https://www.governor.ca.gov/news/governor-newsom-calls-for-legislation-cracking-down-on-property-crime)

stolen goods. Both houses of the Legislature have announced legislative packages that include parts of the Governor's proposals.⁹

3. Online Marketplace Enforcement Authority and Law Enforcement Notifications

Only two enforcement-related provisions of this bill fall within the jurisdiction of this committee. As referenced above, existing law established by SB 301 provides that a person or entity who violates any provision set forth by that measure¹⁰ shall be liable for a civil penalty not to exceed \$10,000, which may be assessed and recovered *only* in a civil action brought by the Attorney General of California. This bill modifies that provision and grants concurrent enforcement authority to a district attorney in any county, a city attorney in any city, or a county counsel in any county. Given the sheer volume of transactions that occur via an online marketplace, and the often highly localized nature of those transactions (i.e. when parties in the same geographic area connect via the platform but complete the transaction off the platform), expanding enforcement authority to these local agencies is likely to improve the efficacy of and compliance with existing requirements enacted by SB 301.

On June 20, 2023, the Attorney General, several “brick and mortar” retailers (such as Rite Aid, Walgreens and Home Depot), and several online marketplaces (such as Etsy, Meta, and eBay) signed a Joint Statement of Principles in which both the retailers and online marketplaces made specific commitments to cooperate with state law enforcement in combating organized retail theft.¹¹ In that signed agreement, the online marketplaces made the following commitments:

- Marketplaces will maintain staff responsible for addressing reports from law enforcement, retailers, and the public of ORC on their platforms.
- Marketplaces will maintain a dedicated webpage, online portal, or point of contact to ensure timely replies to law enforcement requests, including warrants, subpoenas, and other legal process.
- Marketplaces will maintain internal written policies, systems, and staff to monitor listings in order to affirmatively prevent and detect ORC.
- Marketplaces will maintain external policies defining marketplace rules and the consequences of violations. These policies should clearly prohibit the sale of stolen goods and violators should be penalized up to and including removal from future use of the marketplaces.
- Marketplaces will maintain internal written policies that guide collaboration and information-sharing with retailers and other marketplaces, facilitated through a webpage, online portal, or dedicated point of contact, in order to collectively combat ORC.
- Marketplaces will communicate with Retailers to stay updated on trends in ORC. Such communication should focus on sharing general intelligence gathered by retailers, online

⁹ See *State senators respond to fentanyl and retail theft crises with new legislation*, Los Angeles Times. 26 February 2024, [State senators respond to fentanyl, retail theft with legislation - Los Angeles Times \(latimes.com\)](https://www.latimes.com)

¹⁰Title 1.4D. of the Civil Code, commencing with Section 1749.8

¹¹ *Joint Statement of Principles*. Office of the Attorney General. 20 June 2023. [Final ORC Mark-Up\[2\].pdf \(ca.gov\)](https://www.ca.gov)

marketplaces, and law enforcement on how to detect and prevent common methods of ORC. This information should be shared through the establishment of regular industry meetings, either facilitated by Regional Organized Retail Crime Associations, by prosecutors and law enforcement, or independently.

- Marketplaces will maintain internal polices relating to referring identified ORC to the appropriate law enforcement agency.

While these commitments make several references to receiving information and from law enforcement, only the last commitment makes mention of providing information *to* law enforcement. Moreover, that commitment only ensures the maintenance of a policy relating to referring retail crime to law enforcement, not the affirmative delivery of that information in all relevant cases. Notwithstanding that commitment, online marketplaces currently have no formal obligation to report the sale of suspected stolen goods to law enforcement with any consistency or regularity. Accordingly, this bill requires an online marketplace to alert local, regional or state law enforcement agencies in California if it reasonably believes that a third-party seller is selling or attempting to sell stolen goods to a California resident. However, this requirement may benefit from greater clarity with regard to the terms “alert” and “reasonably believes,” which, in their current form, provide little guidance to online marketplaces as to when and how to communicate this information.

4. Prior Committee

On April 2, this bill passed out of Senate Judiciary with a vote of 10-1. For an analysis of the provisions of this bill outside this committee’s jurisdiction and therefore not analyzed above, see the analysis prepared by the Senate Judiciary Committee.

5. Argument in Support

According to the San Diego District Attorney’s Office:

This bill will help combat the sale of stolen goods on online marketplaces by requiring them to collect certain information from high-volume sellers. Higher standards of accountability and verification of third party-sellers will serve to prevent the online marketplace from being used as a market for stolen merchandise. We welcome any support from the Legislature on this pressing issue. This bill would address the major loophole that organized retail crime bad actors utilize which is to use the platform to conduct the illicit sales but not have the monetary transaction go through the platform. This bill would bring uniformity and close those major loopholes. In addition, placing a duty on platforms to report persons who do not comply with the regulations is essential.

Current law only authorizes the Attorney General to bring an enforcement action. However, SB 1144 expands the scope of enforcement by allowing district attorneys, county counsel and city attorneys to bring enforcement actions, thereby greatly increasing the likelihood of enforcement. As District Attorney for San Diego County, I have made prosecuting and preventing organized retail crime a priority. My office formed a specialized team of prosecutors and investigators to combat ORC and to work with local businesses to build stronger cases. Recently, I testified in

Washington, D.C. before the House Sub-Committee on Counterterrorism, Law Enforcement, and Intelligence where I told committee members about three (3) key challenges facing prosecutors across the nation who are working to fight organized retail theft:

- The evolution of more sophisticated criminal networks. Organized retail theft has evolved into highly sophisticated operations, often conducted by well-organized networks, and coordinated across multiple locations. The resale of stolen goods utilizing online markets that are essentially anonymous are major drivers for increased criminal activity. Unlike the pawnshops of the past where regulation allowed law enforcement to track stolen goods and conduct investigations into theft rings, the online marketplaces allow for high profit that fuels additional thefts while escaping any detection or accountability.
- An inadequate legal framework. Existing laws and penalties in many states are not sufficient to support professional investigations into the higher-level organizers of retail theft of small and large businesses. Therefore, the lower-level thieves can be investigated and brought to justice, but the higher level “fences” or resellers of stolen goods can escape detection and accountability. SB 1144 is the type of law desperately needed to address the harms of organized retail theft.
- The need for better coordination. In the past, the lack of coordination and information sharing among retailers, law enforcement agencies, and other stakeholders has hindered the ability to combat organized retail theft effectively. A continued collaborative and multi-faceted approach is necessary to address this issue comprehensively. This bill would also allow the ability to better partner and collaborate with the online marketplaces and with various level of prosecutors and investigators.

Our office has taken a tough stance against organized retail theft and is continuing to explore additional ways to hold individuals accountable amid the most recent high-profile ‘smash and grab’ robberies across California. Last year, our team met with retailers, business association representatives, retail industry employee representatives, law enforcement and others to discuss the scope of the problem in San Diego County, steps law enforcement is taking to stop and prosecute these crimes, and to strategize on future prevention tactics. SB 1144 addresses some of these key challenges in the fight against organized retail theft. SB 1144 will make it more difficult for stolen goods to be sold online because all platforms that connect buyers and sellers will be covered rather than just those that have a contractual relationship.

6. Argument in Opposition

According to the California Chamber of Commerce:

SB 1144 hurts small businesses by layering on new requirements that assume that any seller on an online marketplace is engaged in criminal activity. First, existing law states that high volume sellers are determined on a platform-by-platform basis. But this bill would now re-define high volume sellers in a way that requires aggregating

sales across multiple platforms by removing language referring to payment processing through a platform. It is impossible for any individual platform to determine whether any given seller is “high volume” under this definition, since they have no way to know what activity is occurring on other platforms. In a similar vein, the expansion of this definition aims to include transactions that occur off of the platform. By definition, this is something that cannot be tracked by a platform since it has no access to any information regarding the ultimate transaction. This difficulty was known and heavily negotiated in the state and federal INFORM act. The only way to comply with the law would be to assume every single seller is “high-volume,” and subject every business to the heightened requirements in INFORM and those proposed in SB 1144.

The verification requirements in SB 1144 will also hurt small businesses, and not only because of the level of effort required to comply with these requirements as a seller. These provisions are duplicative of existing requirements in INFORM that govern a seller’s ability to even access the marketplace platform and list items for sale. A separate verification of the same information gains nothing but creates customer confusion. If only high-volume sellers are “verified,” then consumers may think that unverified small businesses are less legitimate and may choose another vendor. Any new verification requirement must be tailored to protect small businesses. In addition, these requirements create incentives for hybrid stores (those that source their own products directly as well as provide a space for third-party sellers to access customers) to source products directly to avoid costs associated with ensuring third-party compliance. This would dry up market opportunities for small businesses. Requiring online marketplaces to take action against sellers based upon allegations by other parties that a given seller is selling stolen goods also creates an environment that could result in anticompetitive behavior. That outcome is bad for small businesses and consumers alike.

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