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Proponent Testimony for Sub. HB 272

Good morning, Chairman Wilson, Vice Chair Hottinger, Ranking Member Maharath and members of the Senate Committee on Financial Institutions and Technology. My name is Adam Sherman. I am a partner in the eControl law practice of the Vorys, Sater, Seymour and Pease LLP law firm. I am pleased to offer this testimony today in support of House Bill 272 on behalf of the Ohio Council of Retail Merchants and its more than 7,000 members.

Before I turn things delve into the details of the legislation, I want to briefly discuss the Council's reasons for supporting the legislation. In many ways, House Bill 272 provides necessary updates to consumer protection provisions which currently govern transactions made at brick-and-mortar locations. The legislation simply extends those similar protections to e-commerce transactions. Think of online marketplaces as virtual malls, which provide a platform for third-party sellers (tenants). When you visit a mall, you understand the products you are purchasing are from those tenants or sellers, not from the mall itself. You can see the products, inspect them, and hold them in your hand. You have a certain level of confidence that the product you are purchasing is legitimate and you have some recourse if you are not happy with your purchase. Unfortunately, such basic guarantees are not always extended to the consumers purchasing products via online marketplaces. By simply verifying readily available information provided by third-party sellers, online marketplaces can better guarantee those consumer protections are in place. That is what House Bill 272 is all about. To be clear, there are online marketplaces which already do the right thing by requiring that the information provided by their third-party sellers is verified. In fact, many of the Council's members operate e-commerce platforms and they stand behind this legislation. We believe all online marketplaces should do that which is within their power to protect consumers as well.

Online Marketplaces Present Various Risks to Consumers

Online marketplaces present some unique challenges to consumers. A consumer buying a product online is not able to inspect the product or determine its condition. They can't confirm that the product is actually what the listing says it is, or whether it is damaged, expired, or tampered. Instead, consumers must rely on the information provided on the online marketplace. Depending on the marketplace, the information provided—the listing content—is often not created or customized by the particular seller offering a product. Any seller that simply tells the marketplace that they have a particular product to sell uses the same content as

every other seller. Because consumers only get to see the stock listing before making a purchase, a consumer doesn't truly know what they'll be getting until it arrives at their home.

Some of the most popular online marketplaces use a "buy box" system, where multiple sellers offer products for sale on the same listing. These listings contain the exact same information about the product being offered, without providing any information about where the seller obtained the product. Consumers see the same information regardless of whether the seller is a professional operation selling items obtained from the manufacturer or an individual sourcing products from other online marketplaces, flea markets, liquidation outlets, or other sources, including outright theft. As part of the Vorys eControl law practice, we do hundreds of test buys from online marketplace sellers every month. The range of quality of products we receive through these test buys varies considerably. It is not unusual for us to receive products damaged or with incomplete packaging, expired products, or products with a retail store's labeling.

Online marketplace models can create opportunities for disreputable sellers to take advantage of consumers. One way marketplaces enable these opportunities is by freely allowing sellers to change their storefront names. Most marketplaces allow a seller to change their storefront name at will, making it more difficult for consumers to keep track of sellers.

Presently, major online marketplaces allow sellers, as a practical matter, to operate with near anonymity. Online marketplaces determine on their own what seller information is shared with consumers. This results in varying information on the marketplaces.

Even when the online marketplaces require disclosure of some seller information, they often do little to verify the information disclosed by sellers. As part of our practice, we investigate hundreds of online sellers a month, and frequently find that the information disclosed by the seller on the marketplaces is inaccurate. This ability for sellers to conceal or mislead as to their identities provides the opportunity for bad actors.

For example, I regularly deal with counterfeiters on online marketplaces. Online marketplaces are especially attractive to counterfeiters because consumers cannot see the product before it is purchased and delivered. Thus, they have no chance to determine whether a seller's product is counterfeit prior to purchase. It is easy for bad actors to offer a product for sale on a legitimate listing and fulfill the order with a counterfeit product. Consumers, who may not be familiar with the product they're ordering, often cannot identify the product as counterfeit even once they receive it. When counterfeits are reported, sellers can hide behind the anonymity provided by the marketplace to avoid legal consequences, and online marketplaces are typically slow to take permanent action to ban even reported counterfeiters. Because the online marketplaces do not appear to verify the information provided by sellers, it is easy for these counterfeiters to create new storefronts using fake information and start re-listing products even if their previous storefront was reported and taken down.

In addition, online marketplaces are an easy outlet to liquidate stolen products due to the near anonymity permitted by the marketplaces. Thieves can easily create accounts and offer stolen products on online marketplaces. For the most part, online marketplaces do little, if anything, to vet where sellers are obtaining their products. Because online marketplaces provide a centralized place to sell products, it is easy to liquidate stolen goods quickly. Losses to businesses caused by organized retail crime are passed along to consumers in the form of higher prices.

Marketplaces have also become a convenient spot for credit card fraud, with fraudsters offering low prices on popular products, and then using stolen credit cards to fulfill the orders directly to the unknowing consumer. In these cases, consumers unknowingly receive stolen products. Because these sellers are easily able to conceal their identities, they can continue to create new storefronts to perpetuate their fraudulent schemes.

These issues are prevalent for all types of brands and products. In the Vorys eControl practice, we've seen counterfeiting of relatively low-priced dietary supplements and cosmetics, as well as high priced luxury goods. In one instance, a counterfeit dietary supplement caused adverse effects in consumers because of excess vitamin concentration. We also addressed counterfeit cosmetics that contained an ingredient prohibited for use in cosmetics in the United States. Luxury brands we represent also attract a significant volume of counterfeiters and thieves because of the high price of the products. They can provide cheap imitations or stolen products, and offer steep discounts that will lead to fast, high-volume sales.

It is critical to understand that only the online marketplaces themselves are in a position to address these issues. Without laws like the one being considered today, consumers are not given enough information to make informed decisions about whether sellers are reputable or the products legitimate. House Bill 272 puts the responsibility of vetting online sellers and confirming their information on the only parties in a position to do so. The verification requirement would deter bad sellers by making it difficult to provide fake information to hide their identities.

House Bill 272

House Bill 272 is intended to address the issues of stolen, poor quality, and counterfeit goods being sold online. The bill requires high-volume third-party sellers operating on online marketplaces to provide certain information to the marketplaces and consumers and requires the marketplaces to verify that information. This information is simple and straightforward – the sellers' government ID, tax ID, bank account information, and contact information. This is basic information that all legitimate sellers have (or should have).

House Bill 272 is modeled after the Integrity, Notification, and Fairness in Online Retail Marketplaces for Consumers (INFORM) Act, which was introduced in Congress in March

2021. In April 2021, Arkansas became the first state to enact legislation that mirrors the federal INFORM Act. Colorado recently passed it as well. Similar legislation is pending in at least 14 other states.

This legislation provides much-needed transparency and accountability in online marketplaces. House Bill 272 is something Ohio needs to help combat these issues – poor quality product, counterfeiting, and organized retail theft -- and their impact on Ohio's businesses and consumers. It is a good first step to take in curtailing the criminal acts perpetuated by certain online marketplaces.

Differences Between HB 272 and SB 184

While the purposes behind House Bill 272 and the as-passed Senate Bill 184 are likely the same, there are some differences between the two bills, one which warrants further discussion.

The House Bill that you are now considering has two thresholds for sellers that are relevant. A seller is a "high volume" seller if they engage in over 200 sales transactions for at least \$5,000 in gross revenue annually. Once a seller reaches the "high volume" threshold, they are required to provide certain information to the marketplace, and the marketplace is required to verify the information. But House Bill 272 does not require the marketplace to provide that information to consumers unless the seller meets the second threshold of \$20,000 of annual gross sales revenue.

In contrast, Senate Bill 184, which was passed originally, had a single threshold –200 sales transactions and \$5,000 in gross revenue a year—that triggers the collection, verification, and disclosure requirements.

Thank you for the opportunity to testify today. At this time, I would be happy to answer any questions you may have.

United States Customs and Border Protection. (2021, May 3). This Mother's Day – Be Alert for Counterfeit Goods Sold Online. Retrieved from <https://www.cbp.gov/newsroom/local-media-release/mother-s-day-be-alert-counterfeit-goods-sold-online>