

Legislative Analysis



ONLINE MARKETPLACES / INFORM ACT

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House Bill 5486 (H-4) as reported from committee
Sponsor: Rep. Samantha Steckloff

Analysis available at
<http://www.legislature.mi.gov>

House Bill 5487 (H-4) as reported from committee
Sponsor: Rep. Mark A. Tisdell

House Committee: Judiciary
Complete to 6-21-22

SUMMARY:

House Bills 5486 and 5487 would amend the Michigan Consumer Protection Act to regulate online marketplaces and high-volume third-party sellers on those marketplaces. Among other things, the bills would require high-volume third-party sellers to provide certain information to online marketplaces, require the marketplace to verify specified information and disclose specified information to consumers, and add a violation of the new regulations to the list of actions that constitute the unlawful practice of trade or commerce.

House Bill 5487 would add sections 3n and 3o to the act to provide requirements for the collection and verification by an *online marketplace* of certain information of *high-volume third-party sellers* and also to require the online marketplace to disclose that information to consumers.

Online marketplace would mean a person that operates a consumer-directed electronically based or accessed platform that meets all of the following criteria:

- It 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 this state.
- It is used by one or more third-party sellers for the purposes described above.
- It has a contractual or similar relationship with consumers governing their use of the platform to purchase consumer products.

Third-party seller would mean a *seller* that is independent of an online marketplace and that sells, offers to sell, or contracts to sell a consumer product in this state through an online marketplace's platform. Third-party seller would not include either of the following:

- A seller that operates the online marketplace's platform.
- A business entity to which all of the following apply:
 - It has made its name, business address, and working contact information available to the general public.
 - It has an ongoing contractual relationship with owner of the online marketplace to provide the online marketplace with the manufacture, distribution, wholesaling, or fulfillment of shipments of consumer products.

- It has provided to the online marketplace identifying information that has been verified in accordance with provisions of the bill.

Seller would mean a person that sells, offers to sell, or contracts to sell a consumer product through an online marketplace platform. Seller would not include a new motor vehicle dealer licensed under the Michigan Vehicle Code.

High-volume third-party seller would mean a participant on an online marketplace’s platform 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** through the online marketplace, and for which payment was processed by the online marketplace, either directly or through its payment processor, with an aggregate total of \$5,000 or more in gross revenues.

Consumer product would mean any tangible personal property that is distributed in trade or commerce and that is normally used for personal, family, or household purposes, regardless of whether the property is or is intended to be attached to or installed in real property.

Required information

Under the bill, an online marketplace would have to require a high-volume third-party seller on the online marketplace’s platform to provide, not later than 10 days after qualifying as a high-volume third-party seller on the platform, all of the following information to the online marketplace:

- A bank account number or, if the high-volume third-party seller does not have a bank account, the name of the payee for payments issued by the online marketplace to the high-volume third-party seller. The required bank account or payee information could be provided by the high-volume third-party seller in either of the following ways:
 - To the online marketplace.
 - To a payment processor or other third party contracted by the online marketplace to maintain the bank account or payee information, if the marketplace ensures that it can obtain that information on demand from the payment processor or other third party.
- Contact information for the high-volume third-party seller that includes all of the following:
 - If the high-volume third-party seller is an individual, the individual’s name.
 - If the high-volume third-party seller is not an individual, one of the following:
 - A copy of a valid government-issued identification for an individual acting on behalf of the high-volume third-party seller that includes the individual’s name.
 - A copy of a government-issued record or tax document with the business name and physical address of the high-volume third-party seller.
 - A business tax identification number, or, if the high-volume third-party seller does not have one, a taxpayer identification number.
 - A current working email address and telephone number of the high-volume third-party seller.

An online marketplace would have to disclose the information described above to consumers in a clear and conspicuous manner in the order confirmation message or other document or communication made to a consumer after a purchase is finalized and in the consumer's account transaction history.

Information collected solely to comply with the new section 3o could not be used for any other purpose unless required by law.

Updating required information

An online marketplace would have to do both of the following:

- At least annually, notify any high-volume third-party seller on the online marketplace's platform of the requirement to keep current any information collected under the bill.
- Require any high-volume seller on the platform to electronically certify, not later than 10 days after receiving a notice, that any changes to the information were provided to the online marketplace or that there were no such changes.

Failure to provide or update required information

If a high-volume third-party seller did not provide the required information or certification, the online marketplace, after providing the seller with written or electronic notice and an opportunity to provide the information or certification not later than 10 days after the notification was issued, would have to suspend the high-volume third-party seller's future sales activity until the seller complied with the applicable requirements.

Verifying required information

Within 10 days of collecting information as described above or being notified of a change in the information, the online marketplace would have to *verify* the information and verify any changes to it. If a high-volume third-party seller provided a copy of a valid government-issued tax document, information in that document would be considered verified as of the date the document was issued.

Verify would mean to confirm information provided to an online marketplace as described above and could include the use of one or more methods that enable the online marketplace to reliably determine that any information and documents provided are valid, correspond to the seller or an individual acting on the seller's behalf, are not misappropriated, and are not falsified.

Identify information

A high-volume third-party seller that uses an online marketplace's platform and that has an aggregate total of \$20,000 or more in annual gross revenues on the online marketplace would have to disclose both of the following to the online marketplace:

- Except as otherwise provided, the identity of the high-volume third-party seller as detailed in the bill. The identity would have to include the full name of the high volume third-party seller, its physical address, and its contact information, as described in the bill.
- Whether the high-volume third-party seller used a different seller to supply the consumer product to the consumer upon purchase and, upon the request of an authenticated purchaser, the information described above relating to any seller that

supplied the product to the purchaser if it is different from the high-volume third-party seller listed on the product listing prior to purchase.

If requested by a high-volume third-party seller with an aggregate total of \$20,000 or more in annual gross revenues on the marketplace, an online marketplace could provide for partial disclosure of the identity information in the following situations:

- The high-volume third-party seller certifies to the online marketplace that it has only a residential street address, or a combined business and residential address, in which case, the online marketplace could do both of the following:
 - Disclose only the country and, if applicable, the state in which the seller resides.
 - Inform consumers that there is no business address available and that inquiries should be submitted to the seller by telephone, email, or another means of electronic messaging provided to the seller by the online marketplace.
- The high-volume third-party seller certifies that it has a physical address for product returns. The online marketplace could then disclose that physical address.
- The high-volume third-party seller certifies that it does not have a telephone number other than a personal telephone number. The online marketplace would have to inform consumers that there is no available telephone number for the seller and that inquiries should be made by email or another means of electronic messaging provided to the seller by the online marketplace.

If a high-volume third-party seller did not comply with the requirements pertaining to providing and disclosing the identity information, the online marketplace, after providing the seller with written or electronic notice and an opportunity to provide or disclose the identity information not later than 10 days after the issuance of the notice, would be required to suspend any future sales activity of the seller until the seller complies with those requirements.

If an online marketplace becomes aware that a high-volume third-party seller with an aggregate total of \$20,000 or more in annual gross revenues on the marketplace made a false representation to justify the provision for partial disclosure or that a seller that requested and received a provision for partial disclosure did not provide responsive answers within a reasonable time to consumer inquiries submitted as described above, the online marketplace, after providing the seller with a written or electronic notice and opportunity to respond not later than 10 days after the issuance of the notice, would have to suspend any future sales activity of the seller unless the seller consents to the disclosure of the identity information required by the bill.

Other provisions

An online marketplace would have to implement and maintain reasonable security procedures and practices, including administrative, physical, and technical safeguards appropriate to the nature of the information and the purposes for which the information will be used, to protect the information collected to comply with the bill's requirements from unauthorized use, disclosure, access, destruction, or modification.

An online marketplace would have to disclose to consumers, in a clear and conspicuous manner on the product listing of a high-volume third-party seller, a reporting mechanism that allows for electronic and telephone reporting to the online marketplace of suspicious marketplace activity.

The bill's provisions could be enforced only by the attorney general. A person other than the attorney general, including a prosecuting attorney, could not bring an action under section 11 or section 15 of the act in relation to a violation of the bill.¹

Finally, the bill would prohibit a *political subdivision* from establishing, mandating, or otherwise requiring an online marketplace to use different or additional measures to verify or disclose the same information or information similar to the information that would be subject to the bill's provisions.

Political subdivision would mean a county, city, village, township, or other political subdivision, public corporation, authority, or district in this state.

Proposed MCL 445.903n and 445.903o

House Bill 5486 would provide that violation of section 3o (which would be added by House Bill 5487) is an unfair, unconscionable, or deceptive method, act, or practice in the conduct of trade or commerce that is unlawful under the act.

Generally speaking, a person who suffers loss as a result of a violation of the act regarding an unfair, unconscionable, or deceptive method, act, or practice in the conduct of trade or commerce may bring a civil action to recover actual damages or \$250, whichever is greater, along with reasonable attorney fees. A person may also bring an action to obtain a declaratory judgment that a method, act, or practice is unlawful under the act or an injunction against a person who is engaging or is about to engage in a method, act, or practice that is unlawful under the act. The act also provides for a class action to be brought under certain circumstances. In addition, the act authorizes the attorney general to bring an action to permanently enjoin a defendant from engaging in a method, act, or practice that is unlawful under the act, and a court may assess a fine of up to \$25,000 if the method, act, or conduct is found to be unlawful.

MCL 445.903

The bills would take effect January 1, 2023.

BACKGROUND:

The bills are identical to Senate Bills 1023 and 1024 as passed by the Senate.

FISCAL IMPACT:

House Bill 5486 would have no fiscal impact on the Department of Attorney General or local units of government. The bill would allow, but not require, the department to promulgate rules,

¹ Section 11 of the Michigan Consumer Protection Act allows a person to bring an action to obtain a declaratory judgment that a method, act, or practice is unlawful under section 3 of the act, or enjoin a person who is engaging or is about to engage in a method, act, or practice that is unlawful under section 3. Section 15 confers on a prosecuting attorney authority to conduct an investigation and institute and prosecute an action under the act in the same manner as the attorney general.

which would result in marginal administrative costs that could be supported through the department's ongoing appropriations.

House Bill 5487 would not likely result in any additional costs to the Department of Attorney General. However, costs would depend on the number of enforcement actions the department takes in response to violations of the bill and whether existing staff attorneys can support the efforts.

POSITIONS:

Representatives of Meijers testified in support of the bills. (6-14-22)

The following entities indicated support for the bills:

- Michigan Manufacturing Association (6-21-22)
- Target (6-21-22)
- Home Depot (6-14-22)
- Michigan Chamber of Commerce (6-21-22)
- Michigan Retailers Association (6-14-22)
- Michigan Licensed Beverage Association (6-14-22)
- Walgreens (6-4-22)
- Consumer Health Products Association (6-14-22)
- Silent Observer (6-14-22)
- Toyota Motor North America (6-14-22)
- CVS Health (6-14-22)
- TechNet (6-14-22)
- International Council of Shopping Centers (6-14-22)

The following entities indicated support for SBs 1023 and 1024, which are identical to HBs 5486 and 5487 (6-14-22):

- Michigan Chemistry Council
- Walmart

Legislative Analyst: Susan Stutzky
Fiscal Analyst: Michael Clossen

■ This analysis was prepared by nonpartisan House Fiscal Agency staff for use by House members in their deliberations and does not constitute an official statement of legislative intent.