

The FTC's Warning to Online Marketplaces: Comply with the New INFORM Consumers Act or Face Civil Penalties

June 27, 2023

On June 20, 2023, the Federal Trade Commission ("FTC") [announced](#) that it sent [letters](#) to 50 online marketplaces nationwide notifying them about the obligation to comply with the new Integrity, Notification, and Fairness in Online Retail Marketplaces for Consumers Act (or the "INFORM Consumers Act"). The new law, intended to limit the online sale of counterfeit and stolen goods, went into effect on June 27, 2023, and the FTC warned companies that it expects immediate compliance. The FTC's warning is noteworthy because it emphasizes that noncompliant companies may be subject to civil penalties for first-time offenses.

The INFORM Consumers Act was signed into law in December 2022 as part of the 4,000-page Consolidated Appropriations Act. The new law imposes new obligations on online marketplaces. These obligations include collection, verification, safeguarding and disclosure of identifying information of "high-volume third party sellers" that sell new or unused consumer products through the marketplaces' platforms.

"Online marketplaces" subject to the INFORM Consumers Act are defined as electronically based platforms 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" and are used by one or more third party sellers for such purposes. Many companies that meet the definition of "online marketplace" are national names (such as Amazon, eBay and Etsy), but smaller platforms may also come within the "online marketplace" definition.

If a company operates an "online marketplace" that sells consumer products, the next question is whether there are any "high-volume third party sellers," defined as entities (independent of the online marketplace) that in any continuous 12-month period during the previous 24 months have 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. The law specifically exempts businesses that have made their name, business address and contact information available to the general public; that have a contractual relationship with the marketplace to manufacture, distribute, wholesale or fulfill shipments of consumer products; and

that provide the marketplace with identifying information that the marketplace has verified.

If an online marketplace identifies any high-volume third party sellers, a number of statutory requirements are implicated. For example, the company operating the online marketplace is required to obtain significant information from the high-volume third party seller, including bank account, tax ID and contact information (and the online marketplaces must suspend sellers that don't comply). The company must verify this information and require sellers to keep their information current and certify to its accuracy at least once per year. In addition, the company operating the online marketplace would be required to disclose specified contact information applicable to the high-volume third party seller to the public on its website and provide consumers with a way to report suspicious activity.

In its public letter, the FTC notes that violations of the INFORM Consumers Act will be treated as a violation of an FTC rule, and section 5(m)(1)(A) of the Federal Trade Commission Act ("FTCA") authorizes the FTC to obtain civil penalties against companies or individuals who violate existing FTC rules. Following the FTC's 2021 defeat in *AMG Capital Management, LLC v. FTC*, when the Supreme Court unanimously held that section 13(b) of the FTCA does not grant the FTC authority to obtain monetary remedies in federal court, the agency has moved to aggressively enforce the remaining mechanisms through which it can obtain monetary remedies, including civil penalties for rule violations under section 5(m)(1)(A) of the FTCA.¹ The maximum civil penalty amount is currently \$50,120 per violation, and the FTC may argue that every consumer transacting without the required information constitutes a separate violation.

In order to bring an action under section 5(m)(1)(A) of the FTCA, the FTC must establish that the defendant had actual or constructive knowledge (i.e., "actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair or deceptive and is prohibited by such rule."). The letters issued by the FTC to the 50 online marketplace recipients appear to be intended to establish actual or constructive knowledge. In addition, section 19(a) of the FTCA authorizes the FTC to obtain consumer redress in federal court from companies violating existing FTC rules, subject to a three-year statute of limitations.

The FTC also warned companies that the INFORM Consumers Act gives enforcement authority to state attorneys general, who could "file an action in federal court to enjoin

¹ Additional background on the FTC's administrative and judicial enforcement options to obtain monetary remedies can be found in [Debevoise In Depth: A New Era of Federal Trade Commission \("FTC"\) Privacy and Cybersecurity Oversight: Top Ten Things Companies Should Know When Assessing FTC Compliance and Exposure \(Jan. 12, 2022\)](#). See also [Debevoise In Depth: Flurry of New FTC Rules and Policies Signals Era of Aggressive Enforcement Despite Recent Supreme Court Defeat \(Jul. 13, 2021\)](#).

further law violation, seek civil penalties and other remedies permitted under state law, and obtain damages, restitution, or other compensation for residents of that state.”

Given the FTC’s public warning, it is clear that the agency will waste no time in scrutinizing the compliance of regulated entities following the effective date this week. Companies should take immediate steps to assess whether they are subject to the new law, and if so, to develop procedures to ensure compliance.

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Please do not hesitate to contact us with any questions.

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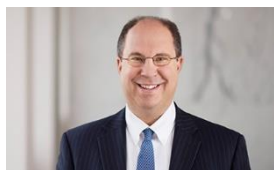


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