



The Coalition to
Protect America's Small Sellers

September 28, 2021

The Honorable Jerry Nadler
Chairman, House Judiciary Committee
United States House of Representatives
Washington, DC 20515

The Honorable Hank Johnson
Chairman, Subcommittee on Courts,
Intellectual Property and the Internet
United States House of Representatives
Washington, DC 20515

The Honorable Darrell Issa
Ranking Member, Subcommittee on Courts,
Intellectual Property and the Internet
United States House of Representatives
Washington, DC 20515

The Honorable Ben Cline
United States House of Representatives
2443 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Nadler, Chairman Johnson, Ranking Member Issa, and Congressman Cline,

On behalf of the undersigned member companies of the Coalition to Protect America's Small Sellers (PASS), and the millions of small individual sellers and businesses who use our platforms, we write again to oppose the SHOP SAFE Act, H.R. 5374, as amended. We greatly appreciate the process that Members and staff have undertaken to better understand the complex issue of counterfeits and appreciate this opportunity to provide feedback and recommendations. However, in light of the fact that this legislation continues to view trademark infringement through a one-sided lens, rather than a partnership between rights holders and marketplaces, and places undue burden on even the smallest of online sellers, we have no choice but to oppose this legislation.

Despite multiple meetings and conversations, both independently and in conjunction with the roundtables the Committee organized, the Coalition's fundamental concerns remain unaddressed. As drafted, the SHOP SAFE Act would stifle the economic opportunity afforded by eCommerce by ensnaring millions of individual sellers and small businesses in impossible compliance regimes, and likely prevent new participants from joining the marketplaces with new and burdensome barriers to entry.

While the proponents of this legislation may claim it is designed to eliminate the sale of counterfeit goods, as drafted it appears to be a Trojan Horse for policies that the biggest brands in the world can use to stifle competition and both drive individuals and small businesses offline or out of business. By allowing big brands to effectively pre-screen listings as well as individual sellers, the bill allows brands the ability to pick and choose their competition, or eliminate it entirely, and places all the burden of proof to combat these efforts on individual sellers and small businesses.

Additionally, the legislation would force onerous, impractical, and unnecessary requirements on small sellers – whether you are an individual or a small seller. Most of these sellers cannot possibly meet the unworkable verification, labeling, and disclosure requirements in the legislation. The bill seeks to apply legal structures designed to fit importers managing massive supply chains to average Americans cleaning out their garage. The amended legislation fails to adequately protect small sellers with a confusing and largely unworkable small seller exemption. We recommend that the Committee raise the small seller threshold to include a number of sales and transactions, as well as an aggregate amount of revenue.

The amended legislation also fails to address the significant privacy concerns raised by the Coalition and others. Requiring all sellers to submit government ID to platforms as a requirement of participating in commerce poses privacy, security and equity concerns. The Coalition fails to understand how the dangers of making marketplaces store millions of individuals' personal data outweigh any benefits to the trademark holders. While we support the majority of the bill's vetting requirements, we have strong reservations about the requirement that marketplaces always collect government IDs from sellers in order to sell online. Our marketplaces already engage in robust "Know Your Customer" vetting requirements as part of our approach to trust and safety. We believe requiring mandatory government IDs would disproportionately impact communities with lower prevalence of those forms of identification, including communities of color, the elderly, and the undocumented. Many in these communities rely on marketplaces to earn vital supplemental or primary income.

The members of the PASS Coalition agree with the drafters of this legislation that the sale of counterfeit goods has no place on our marketplaces. However, effectively stopping counterfeiters will require all stakeholders to have a seat at the table. The SHOP SAFE Act should include a section that requires rights holders to act in good faith by performing industry standard best practices prior to being able to send notice and take down requests. As currently written, this legislation is a win-win for brand owners/rights holders, as all of the legal liability is imposed on marketplaces, which are fully responsible for policing trademarks on behalf of rights holders, but then are still subject to be sued regardless of good faith efforts.

In that vein we would, once again, strongly encourage the Committee to include industry-recognized best practices that trademark owners should seek to fulfill prior to issuing notification take down requests. These could include best practices cited by the International Trademark Association (INTA) available at https://www.inta.org/wp-content/uploads/public-files/advocacy/committee-reports/Addressing_the_Sale_of_Counterfeits_on_the_Internet_021518.pdf. Requiring rights holders to work with marketplaces in this manner would accomplish the goals of SHOP SAFE without imposing an unprecedented change to online commerce. PASS members support partnering with brands and rights holders in the most effective fashion necessary to prevent the sale of counterfeits by requiring a universal standard that is enforceable, honest, and transparent.

The members of the PASS Coalition take seriously our obligation to prevent the sale of counterfeit items on our platforms and we have invested considerable time and resources in this regard. While we are disappointed that the Committee has chosen to weigh in on this issue in this manner, we have appreciated

your willingness to hear our concerns and look forward to continuing this conversation with you to protect America's small sellers as the bill works its way through the legislative process.

Sincerely,

