

CORRECTING THE FACTS ON SHOP SAFE

SHOP SAFE is a bipartisan, bicameral bill that has been actively considered in each of the last two Congresses, including active discussions in hearings in this Congress at both the [House](#) and [Senate](#) Judiciary hearings. Please see the timeline included below.

SHOP SAFE: THE FACTS

- SHOP SAFE requires screening for illicit goods in e-commerce, improved third-party seller transparency, and accountability for online platforms that sell unsafe goods. The measure ***holds online platforms contributorily liable*** only if they ***do not put best practices into place to prevent the sale of counterfeit products that put the health and safety of consumers at risk.***
- SHOP SAFE incentivizes online platforms to implement best practices **to screen and vet sellers and products** to keep counterfeit goods out of online marketplaces before they can even *reach consumers*.
- SHOP SAFE requires third-party sellers to agree not to use a counterfeit mark to sell, distribute, or advertise goods, and any use of images should accurately depict goods on the platform. Third-party sellers would also have to provide platforms with the following information: verified place of business, contact info, identity and country from which goods were shipped. Third-party sellers of products **using a registered mark** must take reasonable steps to verify the authenticity of the goods.
- The SHOP SAFE Act is needed to protect consumers from harmful counterfeit products because e-commerce platforms haven't controlled the problem through self-regulation.
- **We urge lawmakers to work together to pass this well-vetted, bicameral, bipartisan SHOP SAFE Act to protect the health and safety of consumers. Don't believe the false narratives and scare tactics deployed by platforms to protect profits over consumers. Examine the facts.**

FACT: The bipartisan, bicameral bill has received feedback, and edits were made from stakeholder meetings and roundtables.

- **March 2020:** Bipartisan [introduction](#)¹ by the U.S. House Judiciary Committee [H.R.6058 - the SHOP SAFE Act of 2020]
- **May 2021:** Reintroduced in the [U.S. House](#)² and introduced in the [U.S. Senate](#)³ [the SHOP SAFE Act of 2021 ([S. 1843](#)⁴ / [H.R. 5374](#))⁵]
- **May 2021:** U.S. [House Judiciary Committee](#)⁶ hearing, "The SHOP SAFE Act: Stemming the Rising Tide of Unsafe Counterfeit Products Online"
- **Summer 2021:** Three House Judiciary Committee stakeholder roundtables

¹ <https://www.congress.gov/bill/116th-congress/house-bill/6058/text>

² <https://judiciary.house.gov/news/documentsingle.aspx?DocumentID=4566>

³ <https://www.coons.senate.gov/news/press-releases/sens-coons-tillis-introduce-bipartisan-bicameral-shop-safe-act>

⁴ <https://www.congress.gov/bill/117th-congress/senate-bill/1843>

⁵ <https://www.congress.gov/bill/117th-congress/house-bill/5374>

⁶ <https://judiciary.house.gov/calendar/eventsingle.aspx?EventID=4567>

- **Edits Made:** Changes to the legislation were based on the House hearing [May 2021], stakeholder meetings and roundtables [Summer 2021]
- **September 2021:** SHOP SAFE advances through markup in the House Judiciary Committee.
- **November 2021:** SHOP SAFE discussed in U.S. [Senate Judiciary Committee](#) hearing, "Cleaning Up Online Marketplaces: Protecting Against Stolen, Counterfeit, and Unsafe Goods."⁷
- **January 2022:** SHOP SAFE included in H.R. 4521- America COMPETES Act.

FACT: This would be the first step to bringing online platforms closer in alignment with the requirements of small brick-and-mortar businesses and retailers as small, mom-and-pop brick-and-mortar shops are held liable under the law for the sale of any counterfeit or illicit products today. However, platforms are not subject to any trademark liability, even when the counterfeit or illicit product harms the health and safety of the consumer.

- The bill does not ask the online platforms for anything beyond what physical retailers have been providing for years.
- SHOP SAFE targets illegitimate sellers and seeks to hold platforms that give illegitimate sellers access to consumers accountable. The bill recognizes that online platforms have different resources in screening for illicit goods and states “the determination of whether proactive measures are reasonable shall consider the size and resources of a platform, the available technological and non-technological solutions at the time of screening, the information provided by the registrant to the platform, and any other factor considered relevant by a court.”

FACT: SHOP SAFE addresses concerns regarding casual and small/used-good sellers, including protection for private information and exempting such sellers from certain disclosure requirements.

- “ (xiii) Provided a verified basis to contact a third-party seller upon request by a registrant that has a bona fide belief that the seller has used a counterfeit mark in connection with the sale, offering for sale, distribution, or advertising of goods on the platform except **that the platform is not required to provide information that constitutes the personal identity of an individual, a residential street address, or personal contact information of an individual (in such case, the provider shall provide an alternative means of contacting the third-party seller).**
- “ (C) Notwithstanding clauses (iii) and (vi) of subparagraph (A), a platform is exempt from the requirements of such clauses for goods, on or in connection with which a registered mark is used, sold, offered for sale, or advertised by a third-party seller for **less than \$5,000 if the third-party seller sells, offers for sale, or advertises on the platform 5 or fewer goods of the same type in connection with the same mark in a 1-year period.**

⁷ <https://www.judiciary.senate.gov/meetings/cleaning-up-online-marketplaces-protecting-against-stolen-counterfeit-and-unsafe-goods>

FACT: Because SHOP SAFE applies only to goods using a counterfeit of a **registered trademark**, sellers of unique or artisanal goods for which someone else does not have a registered trademark would not be covered.

- “ (4) (A) An electronic commerce platform shall be contributorily liable in a civil action under paragraph (1) for a case in which a third-party seller uses in commerce a **counterfeit mark** in connection with the sale, offering for sale, distribution, or advertising of goods that implicate health and safety on the platform, unless the platform demonstrates that the platform took each of the following steps to prevent such use on the platform before any infringing act by the third-party seller:
- “ (1) COUNTERFEIT MARK.— The term ‘counterfeit mark’ has the meaning given that term in section 34(d)(1)(B).

FACT: Several government agencies, including [the U.S. Department of Homeland Security](#)⁸ and [the White House Office of the U.S. Intellectual Property Enforcement](#)⁹ [Coordinator](#), have called for standardized pre-screening “best practices” across online platforms. The need for uniform best practices was raised in the [Senate hearing](#)¹⁰ held in November 2021. This will bring predictability and uniformity across platforms, and help to keep dangerous counterfeits from being placed on platforms for unknowing consumers to purchase. The proactive engagement by platforms that SHOP SAFE brings replaces the current piecemeal (or nonexistent) approach per platform. The measures are scalable per platform and measured based on a “reasonableness” standard. Brand owners will remain engaged with platforms to address dangerous counterfeits as brands have been; the difference under SHOP SAFE is that the bill will bring platforms to the table to partner with brands to address the problem.

- “ (B) (i) This paragraph shall apply—
 - “ (I) to an electronic commerce platform that has sales on the platform in the previous calendar year of not less than \$500,000; or
 - “ (II) to an electronic commerce platform with less than \$500,000 in sales in the previous calendar year, 6 months after the platform has received 10 notices, in aggregate, that qualify under clause (ii).
- (ii) To count toward the aggregate 10-notice threshold under clause (i)(II), a notice shall—
 - “ (I) include a reference to this paragraph;
 - “ (II) include an explicit notification of the 10-notice limit and the requirement of the platform to publish the information in clause (iii); and
 - “ (III) identify a listing on the platform that reasonably could be determined to have used a counterfeit mark in connection with the sale, offering for sale, distribution, or advertising of goods that implicate health and safety.
- (iii) Not later than 1 month after the date on which a platform described in clause(i)(II) receives the first notice described under clause (ii), the platform shall make publicly

⁸ https://www.dhs.gov/sites/default/files/publications/20_0124_plcy_counterfeit-pirated-goods-report_01.pdf

⁹ <https://trumpwhitehouse.archives.gov/wp-content/uploads/2020/11/IPEC-Joint-Strategic-Plan.pdf>

¹⁰ <https://www.judiciary.senate.gov/meetings/cleaning-up-online-marketplaces-protecting-against-stolen-counterfeit-and-unsafe-goods>

available an attestation that the sales on the platform in the previous calendar year were less than \$500,000 and an aggregate count of the notices that qualify under clause (ii). Such count shall be updated upon receipt of additional notices.

- “ (viii) Implemented at no charge from the platform to the registrant reasonable proactive measures for screening goods before displaying the goods to the public to prevent the use by any third-party seller of a counterfeit mark in connection with the sale, offering for sale, distribution, or advertising of goods on the platform. The determination of whether proactive measures are reasonable shall consider the size and resources of a platform, the available technological and non-technological solutions at the time of screening, the information provided by the registrant to the platform, and any other factor considered relevant by a court.

WIDE-RANGING SUPPORT FOR SHOP SAFE

SHOP SAFE is supported by a broad coalition of companies, trade associations, manufacturers, businesses, and retailers formed to advocate for provisions incentivizing e-commerce platforms to address the sale of counterfeits online and to protect consumers from unsafe, unreliable, and unregulated products sold through these channels.

- [Letter](#) by 20 diverse SHOP SAFE Coalition partners sent on World IP Day.¹¹
- The National Association of Manufacturers [letter](#) with more than 130 other trade associations and companies.¹²
- MEMA issues [Alert](#) on Competitiveness Legislation.¹³
- The American Apparel and Footwear Association sends [letter](#) to Members of the Conference Committee.¹⁴
- Kari Kammel, the assistant director of Education and Outreach at Michigan State University’s Center for Anti-Counterfeiting and Product Protection, [writes](#) that it is long past time to update the rules to combat this scourge of dangerous products and safeguard American citizens, workers, and businesses on this “law disruptive technology, where e-commerce has disrupted the current application of law to this new space of selling.”¹⁵
- The Transnational Alliance to Combat Illicit Trade (TRACIT) sends [letter](#) to Congressional Leadership, advocating for anti-counterfeiting legislation.¹⁶

¹¹ [https://www.aafaglobal.org/AAFA/AAFA_News/2022_Letters_and_Comments/AAFA Calls on Congress to Include SHOP SAFE and INFORM in Competitiveness Legislation.aspx](https://www.aafaglobal.org/AAFA/AAFA_News/2022_Letters_and_Comments/AAFA_Calls_on_Congress_to_Include_SHOP_SAFE_and_INFORM_in_Competitiveness_Legislation.aspx)

¹² [https://documents.nam.org/IEA/China Competition Counterfeit Support Letter.pdf](https://documents.nam.org/IEA/China_Compitition_Counterfeit_Support_Letter.pdf)

¹³ <https://www.aftermarketnews.com/mema-issues-alert-on-competitiveness-legislation/>

¹⁴ https://www.aafaglobal.org/AAFA/AAFA_News/2022_Letters_and_Comments/AAFA_Sends_Letter_to_Members_of_Conference_Committee.aspx

¹⁵ <https://a-capp.msu.edu/article/revisiting-the-shop-safe-act-after-markup/>

¹⁶ https://www.tracit.org/uploads/1/0/2/2/102238034/may_25_tracit_letter_to_conferees_re_shop_safe_and_inform.pdf