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Considerations for Chinese E-Tailers Seeking to enter American E-Commerce

By Stacey Anne Mahoney (Bingham McCutchen LLP, United States)

International companies continue to choose initially to expand into the United States through e-commerce outlets. In many instances, e-commerce is a way for these companies to test American waters with relatively minimal expense and exposure before they dive in head first with a brick and mortar presence. Chinese companies may be particularly well positioned to enter the U.S. e-commerce environment; the Chinese e-tail market is now second in size only to that of the United States. There are, however, some important legal and practical differences between the two e-tail environments that a prospective entrant should be aware of and factor into their business plans. This article identifies issues that a Chinese company should consider when engaging in e-commerce in the United States for the first time.

LEGAL ISSUES

There are three primary legal areas that must be considered when developing a nascent e-commerce presence in the United States: antitrust/competition, privacy, and contractual terms and conditions. A Chinese entity should be aware that it must comply not only with U.S. federal laws, but also with numerous state laws that apply as well. Which state's laws will apply will have to be determined on a case-by-case basis considering a number of different factors. The e-commerce entrant must evaluate where its anticipated customers will be located in order to evaluate the applicability of certain statutory regulations; for example, many, but not all, states have registration requirements for companies that sell to customers located in those states if those companies use trade names on their websites, instead of their official corporate name. In addition, there may be different legal requirements based on the type of e-commerce being contemplated, e.g., whether the products sold are subject to additional governmental regulations (i.e., jewelry, appliances, clothing, among many others), and whether the sales audience is other businesses, consumers or children. Further, savvy companies will want to be advised regarding the value of compliance with aspirational codes, like the Better Business Bureau Code of Online Business Practices, that may facilitate successful and prompt sales penetration into their particular e-market segment.

It is also worth noting at the outset that the World Wide

Web is just that, "worldwide." As such, companies doing business internationally would be wise to be aware that, in order to bolster their enforcement efforts, American regulators have been and will continue to be in consistent contact with foreign regulators. For example, the 2006 Undertaking Spam, Spyware and Fraud Enforcement With Enforcers Beyond Borders ("SAFE WEB") Act was enacted to enhance U.S. regulators' ability to engage in successful cross-border enforcement efforts and to obtain more data about possible violations of U.S. law from international sources. Thus, be forewarned that international troubles may not be left behind when a company crosses over onto American shores.

ANTITRUST/COMPETITION

Chinese companies intending to engage in e-commerce in the United States must be aware of numerous federal and state antitrust and unfair competition laws, as well as related deceptive acts and practices statutes, that govern e-commerce. In this regard, companies should understand that not only can enforcement actions be taken by regulators against e-tailers that are in violation of any of these laws, but often, competitors, suppliers and customers may also be able to sue for damages suffered in the United States. As such, not only is it critically important that companies seek advice when they are initially developing their e-commerce sites, but it is also crucial that they regularly monitor their compliance with these laws once their sites are up and running. (This article assumes that e-commerce entry is being contemplated by a single company independently; if multiple companies are working together to develop an e-commerce initiative, an additional review of market shares of the e-commerce participants, as well as those of their customers and/or suppliers, may be warranted, and the terms of their joint e-commerce arrangement must be closely analyzed for possible criminal or civil horizontal antitrust implications.)

The Federal Trade Commission of the United States ("FTC"), as well as many individual states, have rules and regulations that prohibit unfair competition, and preclude, among other things, the inclusion of statements on websites that are intended to be, or have the likely effect of being, misleading. There is a whole body of law that has developed around where and how product pricing, characteristics and qualities can be represented on websites, and whether

a company has an affirmative duty to disclose certain information about its products on its website. In addition, there are myriad rules about whether and how a company can compare itself to its competitors on its website. And now, with the explosion of mobile commerce, these rules are in the process of being adopted to accommodate e-commerce accessed via numerous different types of mobile devices; specifically, the FTC is seeking to develop rules regulating what information must appear, and where that information must be displayed, on increasingly smaller mobile device screens. Obtaining proper antitrust advice before an e-tail website goes live will minimize the likelihood of defending against potentially expensive investigations and litigations resulting from easily avoided inadvertent mistakes.

Chinese companies should also understand the potential for the American judicial system to reach into the conduct of those companies in China. Just last month, a New York court adjudicated defendants Hebei Welcome Pharmaceutical and North China Pharmaceutical Group civilly liable in the amount of US\$153.3 million for violating U.S. federal antitrust laws by virtue of their pricing of Vitamin C. The court rejected the defendants' argument that they undertook the challenged pricing at the instruction of the Chinese government, even though a retired Chinese government official in charge of Vitamin C export pricing testified in the U.S. court on behalf of the defendants. This damages verdict serves as a cautionary tale for Chinese companies doing business in the United States, but qualified American antitrust counsel retained before entry into the U.S. market can provide immeasurable assistance in evaluating and managing accompanying risks from the beginning.

PRIVACY

Chinese businesses contemplating entry into U.S. e-commerce would be wise to heed the recommendations subsumed in the FTC's Privacy by Design principles, which are an evolving set of concepts that direct companies to include in the development and implementation of their e-commerce sites robust customer data protection measures. The Privacy by Design paradigm, set forth in a very lengthy FTC report published in March of 2012 entitled "Protecting Consumer Privacy in an Era of Rapid Change: Recommendations For Businesses and Policymakers" (available at <http://www.ftc.gov/os/2012/03/120326privacyreport.pdf>) (the "Privacy Report"), prescribes numerous different privacy protection "best practices" that companies should adopt. For example, the Privacy Report suggests that companies should build their websites to include security for consumer data, and procedures to promote the accuracy of that data, and should only engage in limited collection and retention of such data. Further, e-commerce businesses should give their consumers the option to decide what information pertaining to them is shared and with whom, and should include a Do-Not-Track mechanism that is simple and easy for consumers to use to control the tracking of their online activities. In addition, the

FTC has advised that e-commerce companies should provide consumers access to all of the data collected about them.

The proper placement on the website of the privacy policy will be dictated in part by when and how customer information, including customer payment, searching and purchasing history, is tracked and collected by the site. Failure to display the privacy policy prominently, clearly and accurately could result in liability for the e-commerce entity, including for deceptive advertising, or for unfair practices, under federal or state law.

The continuing evolution of these privacy concepts was confirmed as recently as October 23, 2012, when the FTC announced that it was developing a new model for e-commerce businesses that would require the disclosure on websites of five essential privacy policy terms; these five essential terms have not yet been identified by the FTC. Since the FTC has repeatedly stated that e-commerce companies that do not satisfy the FTC's privacy policies could be subject to liability under Section 5 of the FTC Act, companies need to be mindful as they are developing their e-commerce sites of their potential liability exposure if they fail to adhere to the FTC privacy strictures.

CONTRACTUAL TERMS AND CONDITIONS

In addition to the privacy policy, Chinese e-tailers will need to develop, implement and post on their websites terms and conditions policies that govern the use of their websites, apply to all e-commerce transactions completed via their websites, and completely and accurately set forth the rights and obligations of the company on the one hand, and its website customers on the other. Each of these terms and conditions policies must be developed with the specific website, e-commerce and customer base in mind. For example, a company must determine whether access to the entirety of its website content will be available to all customers, or whether there will be a portion of the site that will only be available to registered customers. If part of the website will be available only to registered customers, the company may use that registration process to obtain explicit agreement to its website terms of use through an "I Accept" click obligation. For websites on which all content is available to all users, an "I Agree" click obligation to the terms of use would likely be unnecessary, cumbersome and interject an unwarranted impediment to the user-friendliness of the site.

In addition to the terms of use, the Chinese e-commerce company will need to develop terms and conditions for purchases conducted through its website that include, at a minimum, terms for payment, delivery, risk of loss, governing law, warranties, and dispute resolution processes. Many of these terms will be influenced by the choice of law provisions that the company determines will govern its e-commerce interactions, so the protections and benefits offered by available U.S. federal and state laws must be considered when developing these policies. It should be noted that certain states have particular rules governing many provisions



commonly included in terms and conditions policies (i.e., warranties, guarantees, methods of payment/financing, delivery obligations and notifications), so care must be taken that the terms and conditions are not only complete recitations of the respective parties' rights and obligations, but also that they comply with all of the federal and local laws that apply to that particular e-commerce business based on the e-tailers' array of products, customers, and sales. Also, similar to the privacy policy, the optimal placement of the terms and conditions policies will be dictated by a number of factors, including the nature of the e-commerce and the expected users of the site, e.g., whether the sales are primarily business-to-business or business-to-customer, and whether payment is made contemporaneously with the order being placed through the site, or subsequently via purchase order or other separate billing method. Thus, it would not be advisable for a new e-commerce endeavor simply to copy any of these corporate policies from other websites.

PRACTICAL AND BUSINESS ISSUES

American e-commerce is different in a number of salient ways from the e-tailing environment that Chinese companies may be most familiar with. The Chinese e-tailer should be aware that most U.S. e-commerce is not conducted through digital marketplaces like PaiPai, Taobao or Tmall, and likewise, is not characterized predominantly by customer-to-customer transactions. eBay, which is the most similar to these Chinese digital marketplaces, represents only a small portion of American e-commerce and would not likely be a suitable distribution outlet for a Chinese e-tailer.

In America, most e-commerce is business-to-customer, and is conducted by the retailer, whether they be traditional brick and mortar companies like Best Buy or online companies like Amazon, that sell directly over the internet to their customers. American e-tailers design and operate their

own e-commerce sites, providing all the customer services, payment processing, product marketing, IT services, etc., necessary to operate the site and the e-commerce that it is designed to facilitate. In addition, a Chinese e-tailer doing business in the U.S. will have to address the significant product fulfillment and delivery issues that accompany doing business thousands of miles away from company headquarters. The Chinese e-tailer that is able to master these capabilities in-house or develop partnerships with U.S. service providers will have a competitive advantage over their Chinese peers when entering the U.S. e-commerce market.

In China, presently, the primary feature on which e-tailers compete in selling their goods and services is price. Although price is an important competitive criterion in the U.S., it is not the only one. The successful Chinese e-tailer will develop an understanding that product variety, quality, brand name and identity, and customer service all play important roles in e-tailers' efforts to compete for the American consumer. For the Chinese e-tailer that is able to develop a meaningful value proposition along all of these dimensions, the U.S. e-commerce market presents an obvious prospect for growth.

CONCLUSION

The United States, with its available consumer surplus, represents a very significant, and potentially profitable, e-commerce environment characterized by robust, but not irrationally self-destructive, competition. As the only e-tail market larger than China, there are real opportunities for a nimble Chinese retailer to be among the first to break into the U.S. e-commerce market. Through planning ahead and with proper legal counseling, companies seeking to enter the American market through e-commerce can gain access to one of the largest economies of the world with relatively small monetary expense and legal exposure. 

中國網絡零售商尋求進入美國電子商務市場時的注意事項

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在市場拓展初期，外國企業通常會優先選擇通過電子商務模式將業務擴展到美國市場。多數情況下，在魯莽進軍實體店之前，這些企業首先會通過電子商務模式，在保持投入和風險相對較低的情況下，對美國市場進行試水。雖然中國企業進軍美國電子商務市場具有特別的優勢，並且目前中國網絡零售市場在規模上僅次於美國，但是針對不同的網絡零售環境，中、美兩國在法律、實務方面存在著一些顯著區別。因此，中國企業在擬定進入美國市場之前應該瞭解這些區別並在商業計劃內加以考慮。本文以下部分將對中國企業首次涉足美國電子商務領域時需要斟酌的問題做出闡述。

法律適用問題

中國企業在美國通過電子商務模式經營業務時，主要有三個方面的法律規定必須考慮。即反壟斷 / 競爭、隱私、合同條款及條件。中國企業應該瞭解，除了必須遵守美國聯邦法律規定外，還必須遵守所在州的法律。至於具體適用哪一個州的法律，需要考慮多種不同因素並根據個案而確定。電子商務經營者必須先確定其預期客戶所在區域後再評定特定法律規定的適用性。例如，許多州都規定，向本州客戶銷售產品的企業如果在企業網站上使用商號而非企業正式名稱，則需要在該州進行註冊登記。此外，基於所擬定的電子商務形式的不同，可能會要求適用不同的法律規定，例如：所售產品是否受政府其他法規規範（如珠寶、服裝、工具等）、銷售對象是否是其他企業、消費者或兒童。此外，如《商業促進局網上業務規範》

等規定，可能會促進企業成功迅速地滲透特定電子商務細分市場，精通經商之道的企業可能會希望向有關專家諮詢該類規範，以瞭解遵守這些規範可以實現的價值。

同時，互聯網具有「全球」性。因此，一開始就值得注意的是企業開展跨國經營業務時應該瞭解到，美國監管機關為了提高執法力度，已經並將繼續和外國監管機關保持聯繫。例如，美國在 2006 年通過了《跨境合作開展防治網絡詐騙執法》（《網絡安全法》），以提高美國監管機關有效開展跨境執行任務的能力，並通過國際途徑就潛在違反美國法律的境外行為獲得更多資料。為此，在企業進入美國境內經營業務之前必須認識到，其在國際上的經營問題不會因域外活動而被甩在背後。

反壟斷 / 競爭

中國企業如果計劃在美國從事電子商務，必須瞭解美國聯邦和州反壟斷、反不正當競爭以及有關反欺詐法等規範電子商務活動的各項法律。企業應該認識到，不僅監管機關可以就違反上述法律的網絡零售商採取執法行動，而且企業的競爭對手、供應商和客戶往往也能夠起訴要求企業因違反上述規定賠償其在美國遭受的損失。因此，企業在最初開發電子商務網站時，諮詢有關方面意見將至關重要。同樣重要的是，在網站投入運營後，企業應該定期監督自身的守法情況。（本文中，作者假定單獨一家企業計劃單槍匹馬而非多家企業計劃聯合進入美國市場開展電子商務。如果是多家企業聯合進入電子商務市場，則可能需要

對其各自的市場份額及其客戶和 / 或供應商的市場份額作進一步審查。同時，必須仔細分析他們之間的電子商務安排，確定是否存在民事或刑事上的橫向反壟斷影響）。

美國聯邦貿易委員會（「聯邦貿易委員會」）以及美國境內許多州都頒佈了反不正當競爭的法律法規，並且都禁止在網站內刊登任何誤導性或可能引起誤導的陳述。立法部門形成了一整套立法，規範企業在網站上如何以及在怎樣位置上公佈產品定價、特徵和質量，並確定企業是否有積極義務在網站上披露產品特定資訊。此外，美國聯邦政府頒佈有各種管理辦法，規範企業是否可以以及在如何在網站上與其競爭對手進行對比宣傳。當前，隨著移動電子商務的爆炸式增長，聯邦政府正在制定管理辦法，規範通過各種移動裝置開展的電子商務活動。具體而言，美國聯邦貿易委員會正試圖制定管理辦法，規範移動裝置日益變小的螢幕上必須顯示以及在何處顯示哪些必要資訊。在網絡零售網站投入運營之前，事先適當諮詢反壟斷顧問的意見，將會最大限度降低原本可以輕鬆避免的意外錯誤而被提起鉅額訴訟和調查的概率。

中國企業也應該意識到，中國境內企業在美國開展商業活動有可能會涉及到美國司法管轄。就在上個月，紐約東區聯邦法院裁定中國河北維爾康制藥有限公司和華北制藥集團有限責任公司因其維生素 C 定價違反美國聯邦反壟斷法規定，需要承擔 15330 萬美元的民事賠償責任。中國企業主張維生素 C 的定價完全符合中國法律法規規定，是根據中國政府的指令進行定價，同時一名退休前曾負責維生素 C 出口定價的中國政府官員作為中國企業方的證人出庭作證，但法院對中國企業的主張未予認可。該判決對在美國經營業務的中國企業敲醒了警鐘，在進入美國市場之前需要向具有資質的美國反壟斷律師諮詢有關意見，以便對項目伊始評估及專案風險管理提供有益的幫助。

隱私

中國企業計劃進入美國電子商務領域時，要注意美國聯邦貿易委員會倡導的「從設計著手保護隱私原則」所提出的建議。這是一套不斷演進的理念，旨在指導企業在電子商務網站開發和執行中，完善強有力的保護客戶資訊安全措施。美國聯邦貿易委員會於 2012 年 3 月就隱私問題發佈題為《在快速變化的年代

為消費者提供隱私保護：為企業和政策制定者出謀劃策》的長篇報告中（「隱私報告」，鏈接：www.ftc.gov/os/2012/03/120326privacyreport.pdf），對「從設計著手保護隱私原則」進行了闡述：它規定了企業應該採用各種保護隱私的「最佳實踐」，包括建議企業在網站建設中加入消費者資訊安全功能以及促進消費者資訊準確性的程式，並僅進行有限的資訊收集與留存。此外，電子商務企業應該給消費者提供選擇權，由消費者決定哪些個人資訊可對外分享以及向誰分享，並且應該增加簡單易用的「防跟蹤」設置，以便消費者防範商家對其網上行為的跟蹤。此外，美國聯邦貿易委員會建議電子商務企業應該允許消費者查閱商家收集的有關本人的全部資訊。

在一定程度上，隱私政策在網站上的發佈位置取決於網站何時以及如何跟蹤、收集顧客資訊（包括客戶付款資訊、搜索和採購歷史等）。經營者未能在顯著位置清晰、準確展示其隱私政策的，將會承擔聯邦或州法律項下的欺詐廣告或不公平交易等責任。

從 2013 年 10 月 23 日美國聯邦貿易委員會發佈的公告中可以看出，上述隱私保護理念仍在持續演變。美國聯邦貿易委員會在該公告中提到，正在開發新模型，屆時電子商務企業需要在其網站上披露五項基本的隱私保護政策條款，不過尚未確定具體包括哪些條款。但美國聯邦貿易委員會已多次表示，電子商務企業不符合聯邦貿易委員會隱私政策規定的，將會承擔聯邦貿易委員會法案第 5 條項下的法律責任。因此，企業在開發電子商務網站時需要警惕不符合聯邦貿易委員會隱私規定的潛在風險責任。

合同條款及條件

除了隱私政策之外，中國網絡零售企業還需要制定、執行並在網站上公佈有關網站使用以及各種網上交易條款及條件政策，同時完整並準確地規定企業和網絡用戶各自的權利和義務。在制定上述條款及條件時，必須考慮具體涉及的網站、電子商務以及客戶。例如，企業必須確定是否將網站全部內容向所有用戶開放，還是網站中有的部分內容僅限於向註冊用戶開放。如果是後者，公司可通過註冊程式，由用戶點擊「我同意」選項，以便用戶明確同意網站使用條款。而對於前者，由用戶點擊「我同意」選項接受網站使用條款這一環節或許不再必要，這個環節不僅繁瑣，而且



會不必要地影響網站的用戶友好性。

除了使用條款之外，中國電子商務公司還需要制定網上購物條款與條件，其中至少包括付款條款、交貨條款、損失風險條款、管轄法律條款、質保條款和糾紛解決程式。上述多數條款都會因企業選擇的電子商務交易管轄法律而受到相應的影響。因此，在制定本項內容時，必須考慮適用美國聯邦和州法律項下賦予的各項保護和利益。需要注意的是，某些州制定有具體法規，對上述條款及條件範圍內通常包含的條款（如質保、保證、付款方式／融資、交貨義務和通知）進行規範，因此，必須注意做到這些條款和條件不僅要完整陳述各方權利和義務，並且基於網絡零售商的產品、客戶和銷售，遵守其所適用的全部聯邦和地方法律。此外，與隱私政策類似，條款和條件政策的最佳發佈位置取決於一系列因素，包括電子商務性質以及網站預期用戶，即判斷電子商務主要是企業對企業還是企業對消費者，以及貨款是採用在下訂單時同時支付還是隨後通過採購訂單或其他分開付款方式支付。因此，不建議新電子商務網站只簡單拷貝其他網站的有關企業規定。

實務與商務問題

美國電子商務環境與中國企業可能熟悉的網絡零售環境存在一些顯著的不同。中國網絡零售商應該認識到，美國電子商務多數不是通過拍拍網、淘寶或天貓等電子商城平臺進行的，同樣不是以消費者對消費者模式為主導。美國的 eBay 與中國電子商城平臺形式是最接近的，但它在美國電子商務領域僅佔到很小的份額，而且對於中國網絡零售商而言，可能並不是最合適的分銷管道。

在美國，多數電子商務以企業對消費者模式為主導，並且是由零售商完成的，無論是 Best Buy 等傳統實體店還是亞馬遜等電商企業都直接通過因特網面向其客戶銷售產品。美國網絡零售商設計並自營電子商務網站，提供網站以及有關電子商務運營所需的全部客服、付款程式、產品營銷、IT 服務等。此外，中國網絡零售商在美國經營業務時要解決因總部遠在千里之外而產生的產品配售和交貨問題。中國網絡零售商如能夠通過企業內部能力或與美國服務供應商合作解決這類問題，則在進入美國電子商務市場時，會具有其他中國同行所不具備的競爭優勢。

在中國，網絡零售商目前主要靠產品和服務價格進行競爭。雖然在美國價格也是一項十分重要的競爭指標，但不是唯一指標。中國網絡零售商要想成功，就需要理解產品種類、質量、品牌和認知度，以及客戶服務對於其贏得美國消費者認同起著至關重要的作用。中國網絡零售商如果能夠在以上各個方面為消費者提供優質服務，那麼在美國電子商務市場競爭中將會大有作為。

結論

美國擁有過剩的消費能力，為電子商務發展提供了具有很大利潤空間的巨大市場，這個市場中競爭激烈，但還不至於失去理性達到破壞性的競爭程度。美國是唯一一個規模超過中國的網絡零售市場，這為那些運作靈活的中國零售企業率先進入美國電子商務市場提供了機遇。企業在計劃以電子商務形式進軍美國市場時，建議事先作出規劃並諮詢有關法律意見，這樣可以在資金投入較少、承擔較小法律風險的情況下，打入全球最大經濟體之一的美國市場。^[6]