

E-Commerce Law

“Measures for the Supervision and Administration of Online Transactions” are Rolled Out to Refine the Regulations for Online Markets

In furtherance of the *E-Commerce Law*, China's State Administration of Market Regulation (SAMR) released a draft version of *Measures for the Supervision and Administration of Online Transactions* for public comment on October 20, 2020, the official version of which was promulgated on May 15, 2021 (the “**Measures**”). The Measures, when coming into force on May 1, 2021, will supersede the previous *Measures for the Administration of Online Transactions* enacted by the former State Administration of Industry and Commerce on January 26, 2014 and couple with the *E-Commerce Law* to regulate online markets. The Measures feature the following highlights:

I. Clarification of the Roles of New E-Commerce Operators

The Measures clarify the roles of e-commerce operators engaged in new models of online transactions, such as live streaming campaigns and social media platforms.

Article 7 of the Measures explicitly states that providers of network services, such as social networking and live streaming, who provide business operators with online business premises

and support services such as product browsing, order generation and online payment to facilitate online transactions, shall perform the obligations of e-commerce platform operators; and the duties of e-commerce operators operating through social media, live-streaming platforms or other network services shall be governed by and comply with the provisions that the Measures apply to operators on the platform. Article 20 of the Measures provides that a person who engages in online transactions via social media or live-streaming campaigns shall display the information or URL related to the actual business entity in a prominent manner. Live-streaming service providers are required to retain e-commerce live-streaming videos for at least three years from the end of the live-stream.

II. Exceptions to Market Participant Registration

For exceptions to market participant registration, Article 8 of the Measures further defines the term “sporadic and small value transaction” stipulated in the *E-Commerce Law* to mean that an individual e-commerce operator will be exempt from the requirement for registration of market participant to the extent that their aggregate

annual transaction volume is less than RMB 100,000; provided that the same e-commerce operator operates multiple online stores whether on the same platform or on different platforms, the transaction volume of each online store shall be calculated on a consolidated basis. Also, the term “labor services for the convenience of the public” is defined as the labor services that an individual renders via the Internet that are not subject to a license requirement in accordance with the law, including, among other things, cleaning, laundering, sewing, hairdressing, household moving services, key cutting, pipeline plumbing and appliance and furniture repair.

Article 12 of the Measures stipulates the general obligations of e-commerce operators regarding information disclosure, and further clarifies the content of the information disclosure and the specific timeframe for updating the disclosure, distinguishing whether the registration of the market participant is mandatory.

III. Introduction of Tougher Responsibilities for E-commerce Platform Operators

Articles 24 to 32 of the Measures further specify the obligations of e-commerce platform operators that the *E-commerce Law* imposes, particularly in regard to verifying the information of operators on the platform. It establishes an inspection and monitoring system, publicizing disciplinary actions taken against non-compliant operators on the platform and protecting the independent discretion of the operators on the platform to carry out business activities.

1. Information management for the operators on the platform

Under the Measures, e-commerce platform operators are obliged to verify, register and update at six monthly intervals information related to the operators on the platform (*art. 24*), submit such information to the provincial AMRs in January and July of each year (*art. 25*), provide technical support for the information disclosed by

the operators on the platform (*art. 26*), and retain the identity information of the operators on the platform for at least three years from their exit from the platform (*art. 31*).

2. Implementing the inspection and monitoring system

In accordance with Article 29 of the Measures, an e-commerce platform operator is obliged to establish an inspection and monitoring system for operators on the platform and the information related to the goods or services they offer. Upon it becoming aware of any violation of the law by the operator on the platform, the e-commerce platform operator shall report such violation to the AMR at or above the county level where the platform is domiciled.

3. Publicizing disciplinary action taken against operators on the platform

In accordance with Article 30 of the Measures, the e-commerce platform operator shall, within one business day after deciding on disciplinary action, publicize information regarding the name of the online store operated by the non-compliant operator on the platform, the illegal conduct and the disciplinary action taken, until the expiry of such disciplinary action.

4. Protecting the operational rights of operators on the platform

Under Article 32 of the Measures, the e-commerce platform operator may not impose unreasonable restrictions or conditions on the business activities of operators on the platform, which include, among others:

- (1) Obstructing or restricting operators on the platform from choosing to conduct business activities on multiple platforms by lowering the operators’ position in search results, removing products, restricting operations, blocking stores or increasing service fees, or limiting the operators to conducting business

activities on a specific platform by improper means;

- (2) Obstructing or restricting operators on the platform from selecting service providers in their sole discretion for providing courier, logistics or other support services; or
- (3) Otherwise interfering with the operators on the platform to conduct their regular course of business in their own discretion.

IV. Strengthening Consumer Protection

The Measures improve the rules in the protection of consumer rights by protecting consumers' personal information, prohibiting false advertising, banning any type of consent by default to product tying, posting a prominent notification of automatic renewal and standardizing contractual clauses. These rules apply to all types of e-commerce operators. In particular,

1. Protection of consumers' personal information

On the basis of the *Cybersecurity Law* and other current laws and regulations, Article 13 of the Measures indicates that e-commerce operators shall not force or trick consumers to give consent to the collection and use of their information that is not directly related to business activities by using a one-time general authorization, authorization by default, bundling with other authorizations or the suspension of installation and use. In regard to the collection and use of sensitive personal information, the Measures provide that collecting and using sensitive information regarding personal biometrics, medical health, financial accounts and social media accounts shall obtain consent of the data subject on an item-by-item basis. Whether this provision implies that in addition to a privacy policy, multiple pop-ups or other method will be required to obtain the users' consent to the above information separately and on an item-by-item basis, remains to be further specified.

2. False advertising

Article 14 of the Measures sets out particular types of false advertising, including: (1) creating fictitious transactions, fabricating customer reviews; (2) making a misleading display to put favorable reviews up front and unfavorable reviews behind, or failing to clearly and prominently distinguish reviews and feedback among different goods or services; (3) conducting fictitious marketing activities such as fictitious spot, false booking and false panic buying; and (4) fabricating traffic data such as clicks and attention, and fabricating transaction interaction data such as favorites and rewards. Further, e-commerce operators are prohibited from performing any confusing actions or damaging the reputation of their competitors by posting fake information.

3. Commercial marketing

In addition to obtaining consumers' explicit consent for the purpose of sending advertisements or other commercial messages, e-commerce operators are also obliged under Article 16 of the Measures to offer a prominent, free and easy-to-operate opt-out option to consumers. If the consumer opts out, the e-commerce operator shall immediately cease to send any commercial message and shall not otherwise send it again.

4. Service renewal

Article 18 of the Measures provides that if the services are provided by means of an automatic renewal or auto-renewable subscription, the e-commerce operator shall give prominent notification to consumers five days before such automatic renewal or auto-renewable subscription takes effect, and shall offer prominent and easy-to-operate options to consumers for cancellation or change at any time.

5. Forced tying

Article 17 of the Measures bans the tying of

goods or services by using the method of consent by default, and emphasizes that no options selected by the consumer in any previous transaction shall be set as the default for such a customer.

6. Standardized contractual clauses

Article 21 of the Measures expressly provides that the standardized contractual clauses shall not attempt to: (1) relieve, in whole or in part, the e-commerce operator of and from their responsibilities for repair, return or replacement, refund or compensation; (2) exclude or restrict the consumer from exercising their rights to request repair, return or replacement or claim for compensation and liquidated damages; (3) exclude or restrict the consumer from exercising their right to file complaints or reporting, request for mediation, apply for arbitration or bring suits in accordance with the law; (4) exclude or restrict the consumer from exercising their rights to change or rescind the contract under law; (5) specify that the e-commerce operators reserves the right to unilaterally or finally interpret the terms of the contract; or (6) impose other unfair or unreasonable provisions on consumers.

V. Strengthening Supervision and Management and Legal Responsibilities

The Measures strengthens the SAMR's supervision and requires e-commerce operators to submit sales-related information on time (*art. 22*) and other e-commerce service providers to assist the department in investigating and punishing violations (*art. 34*). When investigating suspected illegal e-commerce transactions, the SAMR can take enforcement measures such as on-site inspections (*art. 35*) and conduct interviews and rectifications with the relevant persons in charge (*art. 38*). The Measures also implements credit supervision over e-commerce operators, which complies with the public-oriented industry characteristics of

e-commerce and will effectively maintain the order of online transactions through joint punishment against subjects defaulting in social credit. (*art. 37*).

Articles 39 to 51 of the Measures stipulate the legal responsibilities of e-commerce operators under certain illegal circumstances, such as the refusal of e-commerce platform operators to issue materials related to the network business premises (*art. 40*), liability for violations of personal information protection, commercial promotion, or service renewal. (*art. 41*). In addition, the Measures comprehensively introduces a "safe harbor" platform liability system (*art. 52*). Only those who "know or should know" about the illegal activities of operators on the platform but fail to take the necessary measures shall be jointly and severally liable. Nevertheless, for those involved in products and services relating to "consumer's life and health", platform operators should bear corresponding responsibilities if they fail to fulfill their obligations of qualification review or safety assurance and cannot be exempted regardless of whether they have taken necessary measures afterwards.

VI. Our Observation

The Measures includes online transactions carried out via social networking and live-streaming into the scope of e-commerce law application and elaborate in detail the obligations of various types of entities in online transactions stipulated in the *E-commerce Law*, by incorporating the features of online transactions in the digital era. From a corporate compliance perspective, all types of e-commerce businesses, including e-commerce platforms, operators on the platform and self-hosted e-commerce platforms, will need to perform compliance assessment as to whether their platform design, internal compliance system, trading rules, interface design and user terms and conditions comply with the Measures and make timely and appropriate adjustments.

Marissa DONG Partner Tel: 86 10 8519 1718 Email: dongx@junhe.com
Tong ZHU Associate Tel: 86 10 8519 1739 Email: zhutong@junhe.com

This document is provided for and only for the purposes of information sharing. Nothing contained in this document constitutes any legal advice or opinion of JunHe LLP. For more information, please visit our official website at www.junhe.com or our WeChat public account “君合法律评论”/WeChat account “JUNHE_LegalUpdates”.



电子商务法律热点问题

《网络交易监督管理办法》正式出台，细化网络交易监管要求

为了落实《电子商务法》的有关规定，国家市场监督管理总局于2020年10月20日发布《网络交易监督管理办法（公开征求意见稿）》，并于2021年3月15日正式印发《网络交易监督管理办法》（以下简称“《办法》”），替代原国家工商行政管理总局于2014年1月26日发布的《网络交易管理办法》，作为《电子商务法》时代规范网络交易市场秩序的具体规定，将于2021年5月1日正式生效。以下为《办法》的一些新变化。

I 明确新电商业态经营者角色

《办法》明确了网络直播带货、社交媒体电商等新型电商角色划分。

《办法》第7条明确规定网络社交、网络直播等为经营者提供经营空间，并提供商品浏览、订单生成、在线支付等与完成交易有关的支持性服务的，应履行网络交易平台经营者的责任；而通过网络社交、网络直播等其他网络服务开展网络交易活动的网络交易经营者，应当参照适用关于平台内经营者的有关规定。特别的，《办法》第20条规定，通过网络社交、网络直播开展网络交易活动的，应当以显著方式展示实际经营主体的信息或链接。网络直播服务提供者应当保存直播视频不少于自直播结束之日三年。

II 办理市场主体登记的例外情形

针对依法无需办理市场主体登记的情况，《办法》第8条在《电子商务法》基础之上进一步明确，“零星小额交易”是指个人从事网络交易活动，年

交易额累计不超过10万元的，不需要进行登记。同一经营者在同一平台或者不同平台开设多家网店的，各网店交易额合并计算。“便民劳务活动”是指个人通过网络从事保洁、洗涤、缝纫、理发、搬家、配制钥匙、管道疏通、家电家具修理修配等依法无须取得许可的便民劳务活动。

此外，《办法》第12条规定了网络交易经营者的信息公示义务，区分是否办理市场主体登记的情形，明确了信息公示内容以及更新公示的具体时间。

III 强化网络交易平台经营者的主体责任

《办法》第24-32条在《电子商务法》的基础之上从核验平台内经营者的信息、建立检查监控制度、公示对违规平台内经营者的处理措施、保障平台内经营者的自主经营权等方面规定了网络交易平台经营者的义务。

5. 对于平台内经营者的信息管理

《办法》要求网络交易平台经营者核验、登记、并每6个月更新一次平台内经营者信息（第24条），于每年1月和7月向省级市场监督管理部门报送该等信息（第25条），为平台内经营者公示信息提供技术支持（第26条），对平台内经营者身份信息的保存时间自其退出平台之日起不少于三年（第31条）。

6. 关于建立监控制度

《办法》第 29 条要求网络交易平台经营者对平台内经营者及其发布的商品或者服务信息建立检查监控制度。如果平台内经营者存在违法行为，平台经营者需报告平台住所地县级以上市场监督管理部门。

7. 对于公示平台内经营者处理措施

《办法》第 30 条规定网络交易平台经营者应当自决定作出处理措施之日起一个工作日内公示违法平台内经营者的网店名称、违法行为、处理措施等信息至处理措施实施期满之日止。

8. 关于保护平台内经营者自主经营权

《办法》第 32 条规定，平台经营者不得设置不合理限制或者附加不合理条件，具体包括：

- (1) 通过搜索降权、下架商品、限制经营、屏蔽店铺、提高服务收费等方式，禁止或者限制平台内经营者自主选择在多个平台开展经营活动，或者利用不正当手段限制其仅在特定平台开展经营活动；
- (2) 禁止或者限制平台内经营者自主选择快递物流等交易辅助服务提供者；
- (3) 其他干涉平台内经营者自主经营的行为。

IV 强化消费者权益保护

《办法》主要从消费者个人信息保护，不得虚假宣传，不得默认同意搭售商品，显著提示自动展期，格式条款内容等方面强化了对消费者权益的权益，该等要求将适用于所有电子商务经营者。具体包括：

1、消费者个人信息保护

《办法》第 13 条在《网络安全法》等现行法律法规的基础之上明确网络交易经营者不得采用一次概括授权、默认授权、与其他授权捆绑、停止安装使用等方式，强迫或者变相强迫消费者同意收集、使用与经营活动无直接关系的信息。对于收集、使用个人敏感信息，《办法》规定收集、使用生物识别信息、健康信息、财产信息、社交信息等敏感信息的，应当逐项取得被收集者授权同意。该条规

定是否意味着需要在隐私政策之外通过多个弹窗或其他方式单独、逐项的获取用户就上述信息的同意，仍待实践中进一步明确。

2、虚假宣传

《办法》第 14 条列举了虚假宣传的具体方式，包括：(1) 虚构交易、编造用户评价；(2) 采用误导性展示等方式，将好评前置、差评后置，或者不显著区分不同商品或者服务的评价等；(3) 采用谎称现货、虚构预订、虚假抢购等方式进行虚假营销；(4) 虚构点击量、关注度等流量数据，以及虚构点赞、打赏等交易互动数据。此外，网络经营者不得实施混淆行为，亦不得编造虚假信息损害竞争对手的商业信誉。

3、商业推广

除规定发送广告或商业性信息需经消费者明确同意之外，《办法》第 16 条明确网络交易经营者有义务为消费者提供显著、免费、简便的拒绝接收方式。消费者拒绝的，网络交易经营者应当立即停止发送，并不得更换名义后再次发送。

4、服务续期

《办法》第 18 条规定采取自动展期、自动续费等方式提供服务的，应当在展期、续费等日期前 5 日以显著方式提醒消费者注意，为消费者提供显著、简便的随时取消或者变更的选项。

5、固定搭售

《办法》第 17 条规定不得以默认同意的方式搭售商品或者服务，更强调了不得将消费者以往交易中选择的选项设定为消费者默认选择。

6、格式条款

《办法》第 21 条明确规定格式条款不得含有以下内容：(1) 免除或者部分免除网络交易经营者的修理、退换货、退款、赔偿损失等责任；(2) 排除或者限制消费者提出修理、退换货、赔偿损失以及获得违约金和其他合理赔偿的权利；(3) 排除或者限制消费者依法投诉、举报、请求调解、申请仲裁、提起诉讼的权利；(4) 排除或者限制消费者依

法变更或者解除合同的权利；（5）规定网络交易经营者单方享有解释权或者最终解释权；以及（6）其他对消费者不公平、不合理的规定。

V 加强监督管理与法律责任

《办法》加强了市场监督管理部门对网络交易经营者的监督，要求网络交易经营者按时报送销售相关信息（第22条），其他有关网络交易的服务提供者协助市场监督管理部门依法查处违法行为（第34条），细化规定市场监督管理部门现场检查等执法措施（第35条）并对有关负责人进行约谈、整改（第38条），同时，新增对网络交易经营者实施信用监管的内容，结合网络交易面向公众的行业特性，通过失信联合惩戒有力维护网络交易秩序（第37条）。

《办法》第39至51条规定了网络交易经营者若干违法情形下的法律责任，例如网络交易平台经营者拒不为入驻的平台内经营者出具网络经营场所相关材料（第40条）、在个人信息保护、商业推广、服务续期等方面（第41条）的违法责任等。另外，《办法》全面引入“避风港”平台责任体系

（第52条），对于“知道或者应当知道”平台内经营者的违法行为而未采取必要措施的，需承担连带责任；但是，对于涉及“消费者生命健康”的商品和服务，平台经营者未尽到资质审核、安全保障等义务，应承担相应责任，无法引用“避风港”规则免责。

VI 我们的观察

《办法》结合数字化时代网络交易的特点，聚焦网络社交、网络直播等形式开展的网络交易，对于网络交易的各类主体的义务在《电子商务法》的基础之上作出了更为明确细致的规定和列举。从企业合规角度而言，各类电商企业，包括电商平台、平台内经营者及自营电商，都应当及时对平台设计、内部合规制度、交易规则、界面设计、用户条款等方面是否符合《办法》规定进行合规分析，并相应进行调整。

董 潇 合伙人 电话：86 10 8519 1718 邮箱地址：dongx@junhe.com
朱 彤 律 师 电话：86 10 8519 1739 邮箱地址：zhutong@junhe.com

本文仅为分享信息之目的提供。本文的任何内容均不构成君合律师事务所的任何法律意见或建议。如您想获得更多讯息，敬请关注君合官方网站“www.junhe.com”或君合微信公众号“君合法律评论”/微信号“JUNHE_LegalUpdates”。

