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THE US-CHINA BUSINESS COUNCIL

美 中 贸 易 全 国 委 员 会

US-China Business Council Comments on the Third Draft of the Ecommerce Law

July 28, 2018

(Notes: Final submission made in Chinese, English language translation provided for reference.
Suggested additions are indicated in red.)

On behalf of the more than 200 members of the US-China Business Council (USCBC), we appreciate the opportunity to provide comments to the National People's Congress on the third revision of the *Draft Ecommerce Law (Draft Law)*. USCBC and our members recognize that this law reflects the desire of the Chinese government to set rules for ecommerce transactions and support the development of a regulatory system for ecommerce.

美中贸易全国委员会代表 200 多家美资会员公司感谢全国人民代表大会给予我委员会这个机会，让我们能够就《中华人民共和国电子商务法（草案三次审议稿）》（以下简称“草案”）提出意见。美中贸易全国委员会和我们的会员公司都充分意识到这部法律反映了中国政府制定电子商务交易规则，支持电子商务监管体系发展的愿望。

We encourage the National People's Congress to actively consider USCBC's comments while reviewing the *Draft Law*. Addressing these concerns in a comprehensive manner will help to clarify any misunderstandings, so as to improve the effectiveness of this law. USCBC would like to offer the following recommendations:

我委员会希望全国人民代表大会在审议草案过程中积极考虑我委员会的意见——全面解决这些问题将避免误解，有助于强化这部草案的法律效力。我委员会谨提出以下几点建议：

Chapter I: General Principles

第一章：总则

Article 2

第二条

USCBC recommends the second paragraph of this article be revised as follows: "for transactions and services involving financial products, **computer software or applications**, use of telecom networks to news, broadcast audio and video programs, online publications, cultural products, and other services regarding content, this law is not applicable." (suggested changes indicated in red). USCBC believes computer software or application transactions and services, financial products and services, as well as audio and video programs and web publishing services have special properties. Since other relevant laws and regulations have made the corresponding specifications, these items should therefore should be expressly excluded from this draft.

我委员会建议将此条第二款修改为：“**金融类产品和服务，计算机软件或应用程序交易和服务**，利用信息网络提供新闻信息、音视频节目、出版以及文化产品等内容方面的服务，不适用本法。”我委员会认为，计算机软件或应用程序的交易和服务，与草案提出的金融类产品和服务以及利用信息网络提供音视频节目及出版内容具有同样的特殊性质，并已有其他相关法律法规作出了相应的规范，因此在草案中也应明确予以排除。

Chapter 2: Ecommerce Operating Entities

第二章：电子商务经营者

Article 16

第十六条

USCBC recommends defining the term “homepage” so as to clarify whether this refers to the home page of an operator’s own corporate website, or the landing page of an operator’s branded area on a third-party platform. USCBC recommends that “homepage” be defined as an operator’s own corporate website and exclude the landing page of an operator’s branded area on a third-party platform. Because ecommerce operators display product information through the platform, they may not all have a "homepage.” The publicly visible location of the business license information and the administrative license information related to its business operation should be posted in a location for the convenience of the consumer to access, and USCBC recommends that the specific publicly available position be determined by each ecommerce operator.

我委员会建议对“首页”这一术语进行定义，因为对于电子商务经营者而言，“首页”是指电子商务经营者自有官方网站的首页，还是在第三方平台上经营者店面的首页，这一点并未明确。我委员

会建议“首页”应定义为电子商务经营者自有官方网站的首页，不包括经营者在第三方平台上的店面首页，因为电子商务经营者通过平台展示产品信息，未必都有“首页”。营业执照信息和与其经营业务有关的行政许可信息的公示位置，核心在于方便消费者查阅，而具体公示位置建议由各个电子商务经营者自主决定。

USCBC recommends that the first paragraph be changed to read “the ecommerce operator should continuously publicize the **latest** information regarding its business license and administrative licenses related to its other business operations on the homepage **of the ecommerce operator’s own official website or in a location convenient for consumers to access**. Ecommerce operators covered under Article 11 of this Law are not required to be registered as market entities or to display a link to the above information.” (suggested changes indicated in red).

我委员会建议将第一款修改为“电子商务经营者应当在**电子商务经营者自有官方网站的首页，或者方便消费者查阅的位置**，持续公示**最新**的营业执照信息以及与其经营业务有关的**最新**行政许可信息、属于依照本法第十一条规定的不需要办理市场主体登记情形等信息，或者上述信息的链接标识。”

Article 18 第十八条

USCBC recommends amending this article to read: "ecommerce operators should disclose information of goods or services **owned by the operators** in a comprehensive, true, and accurate manner, and protect consumers' right to know and choose. Ecommerce operators must not use fictitious transactions or fabricate users for false or misleading commercial propaganda that could deceive and mislead consumers.” (suggested addition in red). The information that ecommerce operators need to disclose should be the information they are required to disclose under relevant laws and regulations for the information to be “comprehensive, true and accurate.” USCBC recommends making appropriate changes to reduce possible misunderstandings.

我委员会建议将本条修改为“电子商务经营者应当全面、真实、准确地披露**经营者掌握的商品或者服务信息**，保障消费者的知情权和选择权。电子商务经营者不得以虚构交易、编造用户评价等方式进行虚假或者引人误解的商业宣传，欺骗、误导消费者”。电子商务经营者需披露的信息应该是其掌握的、相关法律法规要求披露的信息，在此基础上才能要求“**全面、真实、准确**”。我委员会建议做适当的修改以减少可能存在的误解。

Article 19

第十九条

USCBC believes this provision is not in line with business reality and is not operable in practice as a mandatory requirement. Ecommerce business models are complex. Some business models require a high degree of customization based on consumers' personal characteristics and consumers have the freedom to make a purchase or to not make a purchase. USCBC recommends this article be deleted or further clarification of the criteria for the specific operation of "the option that should simultaneously be provided to consumers without regard to their personal characteristics."

我委员会认为此条规定如作为强制性要求不符合商业现实，在实践中并不具有可操作性。电子商务模式多样化，有些业务模式需要高度定制和基于消费者个人特征推送，消费者可以有购买和不购买的自由选择权。我委员会建议删除本条款或者进一步明确“应当同时向消费者提供不针对其个人特征的选项”在具体操作中有何种标准。

Article 27

第二十七条

USCBC supports the position that tax payment is a basic obligation of enterprises and citizens, and any operator must submit tax-related information to the tax authorities. The third-party platform can prompt and support the operator to file tax returns, but the platform should not be responsible for tax returns. This article also conflicts with the principles and regulations regarding information and privacy protection.

我委员会支持纳税是企业 and 公民的基本义务，任何经营者都必须向税务部门报送其纳税有关信息。第三方平台可以提示、支持经营者依法报税，但平台不应该承担报税的责任。此条与有关信息及隐私保护的原则和法规也会产生冲突。

USCBC recommends that the second paragraph of this article be amended as follows:

"Ecommerce platform operators should inform ecommerce operators that, in accordance with Article 11 of this Law, ecommerce operators do not need to apply for registration as a market entity to handle tax registration in accordance with the law." (Delete "The ecommerce platform operator shall, in accordance with the provisions of the tax collection management laws and administrative regulations, submit to the tax authorities the identity information and the information related to tax payment of the operators in the platform").

我委员会建议本条第二款删除“电子商务平台经营者应当依照税收征收管理法律、行政法规的规定，向税务部门报送平台内经营者的身份信息和与纳税有关的信息”，修改为“**电子商务平台经营者应当提示依照本法第十一条规定不需要办理市场主体登记的电子商务经营者依法办理税务登记**”

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Article 33

第三十三条

This article stipulates requirements for ecommerce parties to publicize their transaction terms and service agreements. The ecommerce platform is a private sector, rather than the government or public sector, and the agreement with the operator is made by both parties. It should not be mandatory for it to be publicized. USCBC recommends deleting the first paragraph of this article or making relevant changes to the first paragraph, such as revising it to read: **“When an ecommerce platform operator revises the platform service agreement and transaction rules, reasonable measures should be taken to ensure that all parties concerned can fully express their opinions in a timely manner.”**

本条第一款规定了电子商务平台经营者公示其交易规则和服务协议的要求。电商平台为私营机构，并非政府或公共部门，因此电商平台与经营者之间的协议为双方约定，不应该强制公示。我委员会建议删除本条第一款或者做相应的修改，如建议修改为**“电子商务平台经营者修改平台服务协议和交易规则，应当尽量采取合理措施确保有关各方能够及时充分表达意见”**。

At the same time, USCBC believes that this provision lacks feasibility in practice if it is mandatory. The operator may modify the transaction terms and service agreements from time to time due to business objectives or for different promotional activities, without a set frequency for changing transaction terms or service agreements, so offering seven days advance notice is not always feasible. If each time a transaction term or service agreement is formulated or revised it must be open for public comments, this will carry a heavy operating cost and excessive pressure to meet the deadline, which is even more detrimental to the protection of the business secrets of the operator. Even if the operators publicly solicit comments, there may be many differences between the opinions put forward by different parties. As a commercial platform, these opinions may be difficult to address, and thus it is unable to issue relevant terms in time, which will impact normal operations of the platform and the rights of consumers.

同时，我委员会认为此条规定如作为强制性要求在实践中缺乏可操作性。经营者可能因不同时期的商业目标需要或不同的促销活动，不定期修改交易规则和服务协议，提前七日不具有可操作性。如果每次制定和修改交易规则和服务协议都要公开征求意见，将给经营者带来繁重的经营成本负担和时间压力，更加不利于保护经营者的商业秘密。而且，即使经营者公开征求意见，各方因立场不同而可能提出的意见存在诸多差异，作为一个商业平台对这些意见可能存在难以处理的局面，导致无法及时出台相关的规则，影响到平台的正常运营和消费者的实际权益。

Article 35

第三十五条

This article stipulates that the ecommerce platform operators shall publicize the violations of laws and regulations by operators on the platform. However, illegal acts that do not involve consumer rights should not be disclosed in the market environment of the ecommerce platform. Rather, these should be publicized on the platform of the relevant government department supervision platform. USCBC proposes **adding a statement that “If the illegal act involves the legitimate rights and interests of consumers, it should be promptly publicized.”**

本条款规定电子商务平台经营者对平台内经营者违反法律、法规的行为进行公示。然而，不涉及消费者权益的违法行为，不应该在电商平台的 market 环境中公示，而是应该在相应的政府部门监管平台进行公示。我委员会建议**增加表述“如违法行为涉及消费者合法权益，应当及时公示”。**

Article 36

第三十六条

This article stipulates that “ecommerce platform operators that have self-operated businesses on their platforms should distinguish between their self-operated business and the business carried out by the operators within the platform.” However, the reference to “self-operated business” or “third-party business” is not a strict legal concept. At the legislative level, on the basis of protecting consumers' rights to know, the division of powers and responsibilities according to the principle of “who is responsible for the sale” should be clearly defined. USCBC recommends that this article be amended to read: **“Ecommerce platform operators should clearly indicate to the consumer the business offering particular goods or services and must not mislead the consumer. The seller of goods or services should bear civil liability for the transactions involving their goods or services, according to relevant laws.”**

本条款规定“电子商务平台经营者在其平台上开展自营业的，应当以显著方式区分标记自营业和平台内经营者开展的业务”。但是，“自营业”或“第三方业务”的提法并不是严格的法律概念。在立法层面，应该在保障消费者知情权的基础上，明确按照“谁销售谁负责”的原则进行权责划分。我委员会建议将此条修改为**“电子商务平台经营者应当向消费者明示商品销售者或服务提供者开展的业务，不得误导消费者。商品销售者或服务提供者，对其商品交易或者服务交易依法承担商品销售者或者服务提供者的民事责任”。**

Article 37

第三十七条

USCBC recommends clarifying several points in this article to help ecommerce operators comply with the requirements of the law and limit them to a reasonable degree of liability. These points include what product information an ecommerce operator is reasonably expected to know, the removal notice process for unqualified goods, the scope of “joint liability,” and the scope of obligations to guarantee safety.

我委员会建议进一步明确本条中的几点，以帮助电子商务平台经营者合规并将其限制在合理的责任范围内。这些要点包括电子商务平台经营者在合理预期范围内应当知道的产品信息，对于不合格商品的通知以及删除的流程，“连带责任”的范围以及担保安全义务的范围。

USCBC recommends amending the first paragraph of this article to read: "When the ecommerce platform operator **receives notification from the authoritative department** that the goods or services provided by the operator in the platform do not meet the requirements for the protection of personal and property safety, (delete ‘or other acts that infringe the legitimate rights and interests of consumers’), the ecommerce platform **should take measures to fix the problem within the prescribed time**. If the necessary measures are not taken, the platform operator shall bear **limited** joint liability with operators within the platform according to law.” (suggested additions indicated in red, delete “or other violations of the legitimate rights and interests of consumers”)

我委员会建议将本条第一款修改为：“电子商务平台经营者**在收到有关部门通知**平台内经营者销售的商品或者提供的服务不符合保障人身、财产安全的要求后，(删除‘**或者有其他侵害消费者合法权益行为**’),**应当在规定时间内采取措施**，未采取必要措施的，依法与该平台内经营者承担**有限**的连带责任。”

USCBC believes that “knowing” and “should know” in the clause will lead to confusion and even rent-seeking behavior in the law enforcement process. Ecommerce platforms can be responsible for acting on notices from relevant authorities when the authorities flag particular products as not meeting safety standards, but ecommerce platforms cannot independently assess with any certainty the safety or veracity of product information for the scores of goods sold by in house vendors. The product information on the platform is provided by the operator, often for hundreds of millions of products, and information is constantly changing or even temporarily generated to meet the visitor's needs. The platform is not able to “know” or “should know” the product description. In the case of food products, since the food business operator cannot obtain the full ingredients of the producer, the product ingredient information cannot be completely verified.

我委员会认为该条款中“知道”与“应当知道”会造成执法过程中的混乱甚至寻租行为。当有关部门通知某一产品不符合安全标准时，电子商务平台可以负责对相关机构的通知采取行动，但电子商务平台无法独立地对平台上数量众多的产品进行安全性或准确性评估。平台上的产品信息由经营者提供，往往数以亿计，不断变化，甚至因访问者需求临时个性化生成。平台无法全部“知道”或者“应当知道”。以食品经营为例，由于食品经营者无法获得生产者的配方，从而对于产品配料信息不能进行完全合规的确认。

USCBC recommends the notification and the removal of unqualified products in the draft should be consistent with internationally accepted principles. At present, the international principle is for a “removal notice,” that is, the platform has the obligation and responsibility to take timely measures after receiving the notice from the authoritative department. For reference, on June 25, 2018, Alibaba, eBay, Amazon and Rakuten (a French ecommerce platform) signed an agreement to promise to the European Union, according to the European Union's 2000 eCommerce Directive, that the four platforms will delete products within two days after receiving notification from the European Union authorities about product safety issues. At the same time, they will establish a fast track to help consumers to realize product safety issues, with a promise for feedback within five days.

我委员会建议草案对于不合格商品的通知以及删除的有关规定，应与国际通行原则相一致。目前国际上是以通知删除为原则，即平台有义务与责任在收到权威部门的通知后，及时采取措施。可供参考的是，2018年6月25日，阿里巴巴、eBay、亚马逊和Rakuten（法国电商平台）共同签署了协议，向欧盟承诺，根据欧盟的2000年电子商务指令（eCommerce Directive），四家平台将在收到欧盟各国权威部门有关产品安全问题的通知后2天内进行删除；同时，建立快速通道帮助消费者通知有关产品安全问题，并承诺在5天内做出反应。

In addition, the scope of “other acts infringing on the legitimate rights and interests of consumers” as stipulated in this article is too broad, which places an unreasonable degree of liability on ecommerce platforms and is not conducive to business operations. In addition, the section on joint liability is too broad for ecommerce platform operators importing retail products via cross-border ecommerce. We recommend this language be further clarified.

另外，本条款规定的“其他侵害消费者合法权益的行为”范围过大，给电子商务平台带来了不合理的责任，不利于商业经营。同时，此部分连带责任对于跨境电商零售进口的平台经营者法律责任过于宽泛，建议进一步明确。

The “safety guarantee obligation” for consumers mentioned in the second paragraph of this article is too broad and difficult for platform companies to implement; USCBC recommends that

this paragraph be appropriately adjusted to read “for goods or services related to consumers’ health, if the ecommerce business platform operator fails to fulfill the auditing qualifications, or fails to fulfill the obligation of providing **necessary safety warnings** to consumers that leads to harm for the consumers, the operator within the platform shall bear **limited joint liability** according to law. ”

本条第二款所提及的对消费者的“安全保障义务”太宽泛，平台企业很难做到；我委员会建议本款做适当调整，即“对关系消费者生命健康的商品或者服务，电子商务平台经营者对平台内经营者的资质资格未尽到审核义务，或者对消费者未尽到**必要的安全提示**义务，造成消费者损害的，**依法与该平台内经营者承担有限的连带责任**。”

Article 38

第三十八条

USCBC recommends the first clause of this article be amended to read: "to **encourage** third-party ecommerce platforms to establish a credit evaluation system and public credit evaluation rules in order to provide an objective, fair, and reasonable credit evaluation for customers." Such provisions have been included in the January 26, 2014 release of the Network Transaction Management Measures by the State Administration of Industry and Commerce to encourage, rather than mandate, a third-party trading platform to establish a credit evaluation system. Therefore, it is recommended that the *Draft Law* can refer to the relevant administrative regulations for legal consistency that the establishment of an ecommerce platform credit evaluation system is encouraged rather than required at present. In addition, with the innovation of technology and new business models, an evaluation system is not necessarily suitable for all trading platforms, and an evaluation system should not be mandatory.

我委员会建议将本条第一款修改为：“**鼓励**电子商务平台经营者建立健全信用评价制度，公示信用评价规则，为消费者提供对平台内销售的商品或者提供的服务进行评价的途径。”参考国家工商管理总局对网络交易的相关规定（如2014年1月26日发布的《网络交易管理办法》），鼓励而非强制要求第三方交易平台建立其信用评价体系。因此，建议草案参考相关行政法规的规定并与其立法口径保持一致，当前阶段对电商平台信用评价体系的建立持鼓励态度，而非强制要求。而且，随着技术和商业模式的创新，评价制度不一定适合所有的交易平台，评价制度也不应该是强制性规定。

Article 39

第三十九条

The draft requires that paid search engine results for goods or services should be marked as “advertising.” USCBC recommends that the statement be consistent with the Regulations on the Administration of Internet Information Search Services and the Interim Measures for the Administration of Internet Advertising, as well as differentiate between organic and paid search results for merchandise, rather than applying the requirements of the Advertising Law regarding advertising in mass media. USCBC proposes to amend the language to read “paid search results for goods or services **should be differentiated from non-paid search results.**” (Remove requirements for them to be labeled as advertisements).

草案要求对于竞价排名的商品或者服务，应当显著标明“广告”。我委员会建议该表述应与《互联网信息搜索服务管理规定》和《互联网广告管理暂行办法》的表述一致，即以区分原则来规制竞价排名商品和自然搜索商品，而不是类比适用广告法中在大众媒介发布广告需要做标识的规定。我委员会建议修改为“对于竞价排名的商品或者服务，应当**与非竞价排名的商品或者付费区分**”(删除“应当显著标明广告”)。

Article 41

第四十一条

USCBC recommends that this clause be revised to read as follows: “**Upon receiving notice, ecommerce platforms should immediately forward the notice to all relevant platform operators and require them to provide evidence of non-infringement within a specified period of time. In cases in which the notified party does not provide such evidence in the specified period of time, ecommerce platforms should take necessary measures in a timely manner.** Those platforms that do not take necessary action in a timely manner will be held jointly liable alongside the platform operator. If the intellectual property rights’ holder causes losses to the platform operator as a result of wrongly notifying them, the rights’ holder shall bear civil liability according to the law.”

我委员会建议将本条第二款修改为“**电子商务平台在接到通知后，应立即将通知转送所涉及的平台经营者，要求其在限定的时间内提供没有构成侵权的证据。在被通知方没有在规定时间内提供相应的证据的情况下，电子商务平台应该及时采取必要措施。未及时采取必要措施的，应当对损害的扩大部分与平台内经营者承担连带责任。知识产权权利人因通知错误给平台内经营者造成损失的，依法承担民事责任。**”

Alternatively, we suggest to remove “should adopt necessary measures in a timely manner and send the notice to the platform operators,” to maintain consistency with the provisions of Article 36 of the current Tort Liability Law as it relates to network service providers.

或者，建议去掉“应当及时采取必要措施，并将该通知转送平台内经营者”，以保持与现行《侵权责任法》第三十六条关于网络服务提供者的规定相一致。

According to the draft, after a platform receives notice of infringement from an intellectual property rights holder, in the absence of authoritative department orders or judgment, and without sufficient evidence (only *prima facie* evidence), the platform must first take "necessary measures" such as deleting, blocking, or even terminating the relevant services; otherwise it may be held jointly liable. The article states that: "ecommerce platforms should only stop necessary measures taken under the condition that the operator provides evidence to prove innocence." This provision not only fails to conform to the legal principles used in civil disputes and the principle of notice deletion adopted by most countries, but also causes considerable disruption in practice. It adds confusion to the market and may even encourage unfair competition.

根据草案，电子商务平台在接到知识产权权利人的侵权投诉后，在没有权威部门指令或者判决，没有充分证据（只有初步证据）的情况下，必须首先采取删除、屏蔽甚至终止服务等“必要措施”，否则可能承担连带责任。“在被投诉的经营者提供保证不存在侵权行为后，电子商务平台再终止之前采取的措施。”这一规定，不仅不符合一般民事纠纷中的法律原则以及互联网领域内各国普遍采用的通知删除原则，更会在实际中造成巨大困扰，给市场带来混乱，客观上可能会产生鼓励不正当竞争的负面效果。

In most cases, platforms cannot rely solely on the unilateral *prima facie* evidence provided by the complainant to take relevant measures against the reported party. Although these measures can be reversed after the reported party provides evidence, the losses caused during this period may be very large and cannot be recovered. For example, suppose a company points out that an ecommerce vendor is selling its trademark or branded product and presents relevant ownership or authorization evidence. According to the provisions of the draft, the ecommerce platform must stop carrying the product while notifying the respondent. However, in practice, even true intellectual property owners cannot fully know or verify whether the respondent has authorized rights to sell the product in question. For example, some products purchased from retailers may be sold legally via cross-border ecommerce, while other sellers only violate rules concerning regional division between dealers but do not violate intellectual property rights.

In other cases, the complainant may claim that an ecommerce product constitutes an infringement of a technical patent, or an infringement of another type of intellectual property. Although the complainant may in such cases provide relevant *prima facie* evidence, these intellectual property issues are often very complicated. Consider the case between two well-known companies; in such a case, ecommerce platforms are not in a position to render judgment. If the ecommerce platform seeks to remedy the dispute, a number of parties may be harmed.

一般情况下，平台不能仅凭举报方的单方面初步证据即对被举报方采取相关措施。虽然这些措施在被举报方提供证据后可以恢复，但这期间往往造成的损失可能非常巨大而且无法挽回。例如，某公司提出某电商在售卖其商标或品牌的产品，并出示了相关所有权或授权证据，按草案中的规

定，电商平台必须在通知被投诉方的同时停止其产品刊登。但实践中，即便是真正的知识产权拥有者也不能完全了解被投诉方是否拥有授权或合法销售，比如跨境电商很可能在网上销售其通过零售渠道购买的产品，而有些卖家只是违反经销商之间的区域划分，并不是知识产权上的侵权。另一种情况是，投诉方声称某电商产品对其产品构成技术专利或其他方面的知识产权侵权，虽然投诉方可以提供相关初步证据，但由于知识产权问题往往非常复杂，电商平台缺乏判断能力，如果采取措施，极大可能会伤害无辜经营者。

In the two kinds of cases mentioned above, some parties could also file reports of intellectual property violations with malicious intent, in order to undermine the business of competitors. Although measures from platforms can be reversed afterward, the process can have serious consequences for a company's reputation and overall sales. In addition, at present, no countries have such regulations and practices on this issue. Some German regulations bear similarities, but German law also stipulates that the notifier is a judge rather than an intellectual property rights holder.

以上两种情况，都非常可能被竞争对手恶意利用，通过投诉阻碍其他竞争者的销售。虽然事后可以恢复，但对被投诉商家的业绩和账号表现，都会产生极大的负面影响。而且，目前关于这一问题，在国际上都没有相关规定和做法，唯一相近的是德国的有关法规，但也规定了通知人是法官而不是声称的知识产权权利人。

Article 42 **第四十二条**

For the same reason as above, USCBC recommends that the second paragraph of this article regarding statements of infringement be amended to read, "if the notified party submits contradicting evidence, and the ecommerce platform cannot make a judgement based on the preliminary evidence of both parties, the platform will recommend both parties to the relevant authorities for litigation. The platform will act according to the decision of the authority or the judgment of the people's court."

同上条理由，我委员会建议将本条第二款关于存在侵权行为的声明修改为“如果被通知方提出相反证据，电子商务平台经营者无法依据双方初步证据进行判断的，平台将建议双方向有关权威部门投诉或向人民法院起诉。平台将依据权威部门的决定或人民法院的判决采取行动。”

Article 43 **第四十三条**

USCBC recommends deleting this clause. According to the draft, the operators of the ecommerce platform shall promptly publish results of public statements and processes as stipulated in Articles 41 and 42 of this Law. However, the platform is a commercial unit and the

publication of such information would violate the trade secrets or personal privacy of the platform operators. At the same time, because there are a large number of operators on platforms and operators are punished for violating the rules of the platform, the violation is only of a commercial agreement between the platform and the operator. The platform has no right to publish such content and infringe on the rights and interests of operators.

我委员会建议删除该条款。根据草案，电子商务平台经营者应当及时公示收到的本法第四十一条、第四十二条规定的通知、声明及处理结果。然而，平台为商业性单位，公布此类信息会侵犯平台内经营者的商业机密或个人隐私。同时，因为平台内经营者数量众多，经营者违反平台规则受处罚，违反的仅仅是平台与经营者之间的商业协议，平台没有权利对此类内容进行公示并侵犯经营者权益。

Chapter III: Ecommerce Contracts and Enforcement

第三章：电子商务合同的订立与履行

Article 48

第四十八条

USCBC recommends deleting this article.

我委员会建议删除此条款。

On the basis of the principle of good faith, the operator shall perform its obligations in a timely manner after the contract is established. However, in practice there may be some problems due to non-end consumers (such as scalpers). If the operator is forced to perform the contract only because these people pay the price, it will seriously affect the legitimate rights and interests of the normal consumers and a stable market order. For example, according to the actual situation faced by the company, a large number of suspected scalper orders will be encountered in daily operations, which will occupy a large amount of product inventory. Therefore, the company needs to conduct an internal review of these suspected scalper orders. After confirmation, the orders need to be cancelled and these products will be released to meet the needs of real consumers. USCBC believes that this clause will not only fail to protect the legitimate rights and interests of real consumers, but will create opportunities for some unscrupulous consumers.

在诚信原则的基础上，经营者应当在合同成立后及时履行其义务。但实践中可能存在一些因非最终消费者（比如黄牛）的原因而导致的各种问题。如果仅因为这些人支付了价款而迫使经营者必须履行合同的话，必将严重影响到正常消费者的合法权益和稳定的市场秩序。比如根据公司面临的实际情况，在日常经营中会遇到大量的疑似黄牛订单，强占了大量的产品库存。因此公司需要对这些疑似黄牛订单进行内部审查，确认后即需要取消该等订单，把这些产品释放出来满足真正

消费者的需求。我委员会认为这一条款不但不能保护真正消费者的合法权益，反而会让一些非正常消费者有机可乘。

Article 52

第五十二条

USCBC recommends that the third paragraph of this article be amended to read, “electronic payment service providers should provide reconciliation services and **transaction record inquiry services for the last two years** free of charge.” (Suggested changes indicated in red).

我委员会建议将本条第三款修改为“电子支付服务提供者应当向用户免费提供对账服务以及**最近两年的交易记录查询服务**”。

Article 28 of the Administrative Measures for Network Payment Services of Non-Bank Payment Institutions only stipulates that the payment institution shall provide customers transaction information inquiry services for a minimum of one year, and the statute of limitations prescribed in the Civil Procedure Law is only two years. The electronic payment service is based on providing small, fast, and convenient micro-payment services to the public, and the transaction volume is huge. If the electronic payment service provider is required to provide the transaction record free of charge for a long period of time, it will face greatly increased technical and service costs. At the same time, considering that electronic payment service providers mainly provide services through electronic payment channels, it is recommended to further refine transaction record query services to be consistent with industry habits.

《非银行支付机构网络支付业务管理办法》第二十八条仅规定支付机构应当为客户免费提供至少最近一年以内交易信息查询服务，《民事诉讼法》规定的诉讼时效也仅为两年。电子支付服务立足于为社会提供小额、快捷、便民小微支付服务，且交易发生量巨大，要求电子支付服务提供者免费提供交易记录时限过长会极大增加技术成本和服务成本。同时，考虑到电子支付服务提供者主要通过电子支付渠道提供服务，因此建议进一步细化为交易记录查询服务，与行业习惯保持一致。

In addition, the transaction reconciliation service is not a fundamental service. At present, the reconciliation service provided by banks is neither a standardized basic service, nor a free one. In the principle of fairness, USCBC recommends considering not requiring electronic payment services to provide reconciliation services free of charge.

另外，对账服务并不属于基础服务，目前银行提供对账服务既不是标准化基础服务也并不都是免费的。本着公平原则，建议避免一概要求电子支付服务领域必须免费提供对账服务。

Article 56

第五十六条

USCBC recommends amending the third paragraph of this article to read "losses caused by unauthorized payment should be borne by the electronic payment service provider; **if the electronic payment service provider can prove that it is not at fault, then it should not be liable.**" (suggested addition indicated in red) According to the provisions of this article, the electronic payment service provider does not assume responsibility for a precondition where it can prove that the user is at fault. However, this burden of proof is too demanding for electronic payment service providers and debatable in terms of reasonability and feasibility.

我委员会建议将本条第三款修改为“**未经授权的支付造成的损失，由电子支付服务提供者承担；电子支付服务提供者能够证明自己没有过错的，不承担责任。**”根据本条规定，电子支付服务提供者不承担责任需要一个前置条件，即能够证明用户存在过错。然而，这对电子支付服务提供者来讲要求过于严苛，从合理性和可操作性来讲值得商榷。

Reasonability: At present, other payment areas follow the principle of fault liability, and the liability for damages is conditional on the fault of the service provider. It is recommended that ecommerce payment maintain the principle of fault in line with other payment areas, which will reduce possible subsequent judicial disputes. China's civil damages compensation is based on the principle of fault liability, with the principle of no-fault liability as an exception. The application of the principle of no-fault liability requires special provisions under the Tort Liability Law. Currently, no-fault liability applies to areas of high-risk, such as environmental pollution. In the field of electronic payment, regardless of whether they are financial institutions or third-party payment institutions, they are closely regulated by financial regulatory agencies and have strict technical guarantees. Practice has proved that electronic payment services are safe and reliable, and the electronic payment business has made evident contributions to society. Therefore, we recommend regulators closely look at the pros and cons of the application of no-fault liability in the field of electronic payment.

合理性：目前其他支付领域遵循的是过错责任原则，损害赔偿以支付服务提供者存在过错为条件。建议电子商务支付领域应保持与其他支付领域一致的过错原则，这也会降低后续相关司法审判可能存在的困扰。我国民事损害赔偿，以过错责任原则为原则、以无过错责任归责原则为例外，无过错责任原则的适用，需要《侵权责任法》做特别规定。而且目前确立的环境污染、高度危险作业等无过错责任领域，基本都是高危领域。在电子支付领域，无论是金融机构，还是第三方支付机构，均受到金融监管机构的严密监管并有严格的技术保障。实践证明，电子支付服务安全可靠，而电子支付业务近年对社会发展的推动是有目共睹的。因此在电子支付领域适用无过错责任归责，建议需要认真权衡利弊。

Feasibility: It is generally infeasible to prove that an unauthorized payment is due to the user's error. In practice, there are a large number of cases where the user complains that an unauthorized transaction occurred, but the transaction occurred by someone such as a relative to whom the user voluntarily divulged the user's account information. Under such circumstances, if the electronic payment service provider cannot prove that the user is at fault, compensation will be required, and it will impact the normal development of the electronic payment service business.

可操作性：证明未授权支付是因用户的过错造成的可操作性低，且实践中存在大量案例，用户投诉主张发生非授权交易，但事实上是其主动泄露个人信息给他人，甚至是其亲友使用了其账户完成交易。在这种情形下，如果只要电子支付服务提供者无法证明用户存在过错就需要赔偿，对电子支付服务业务正常开展将造成极大冲击。

USCBC recommends that if the system facilities and technology of the electronic payment service provider can be proven to be safe and stable; and at the time of the transaction verification and execution was legal, compliant, and contractual; this should be sufficient to prove that the electronic payment service provider is not at fault, and it should not be required to take responsibility.

因此我委员会建议，如果能够证明电子支付服务提供者的系统设施及技术安全、稳定，同时在验证、执行支付指令时合法、合规、合约，即能够证明电子支付服务提供者无过错，那么则不应要求其承担责任。

Chapter VI: Oversight and Management

第六章：法律责任

Article 78

第七十八条

This article stipulates the penalties for illegal behavior by platform operators. USCBC recommends that these align with the current legal requirements for various commodities in ecommerce operations. For example, the penalties for unlicensed business in the *Draft Law* are inconsistent with the *Food Safety Law*, which may easily lead to confusion over which regulatory punishment should be administered.

本条规定了对平台经营者违法行为的处罚措施，我委员会建议平行参考电子商务经营中各类商品的现行法律要求。例如草案与《中华人民共和国食品安全法》中对于无证经营的罚则不一致，这容易导致监管处罚层面执法依据不统一的困扰。

CONCLUSION

总结

USCBC thanks the National People's Congress for providing this opportunity to comment on the draft regulations. We hope that these comments are constructive and useful to the National People's Congress Legislative Affairs Commission as it reviews the draft measures. We would appreciate the opportunity for further dialogue on these issues and are happy to follow up as appropriate.

美中贸易全国委员会感谢全国人大给予机会对《中华人民共和国电子商务法（草案三次审议稿）》提出意见。我们希望这些建议是具有建设性的，能对全国人大立法工作委员会对草案的审阅工作提供帮助。我们希望有机会能够就此议题进行进一步的沟通，并以合适的方式进行跟进。

—END—

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