

Considerations for Launching an E-commerce Platform

COVID-19 is the biggest disruption to consumer retail spending patterns in recent history. Store closures and stay-at-home orders have accelerated the adoption of e-commerce, and U.S. consumers are expected to spend more than \$700 billion on e-commerce in 2020 (representing an increase of approximately 18% over the prior year's spend). Even as brick-and-mortar stores begin to reopen, the impact of the pandemic will have a long-lasting effect on consumer behavior and e-commerce sales are expected to steadily rise over the next few years. Businesses planning to invest more heavily in a digital strategy will find in the checklist below a summary of critical legal issues.

TOPIC	CONSIDERATIONS
Existing Relationships	<ul style="list-style-type: none"> • Consider the terms of existing distributor relationships and the full scope of distribution channels to evaluate freedom to engage in e-commerce. • Establish a channel management process to maintain rights and obligations among channel partners, as appropriate (see also Brand Enforcement below). • Establish or refine the brand management process to ensure consistent messaging among e-commerce and other channel partners.
Terms of Service	<ul style="list-style-type: none"> • Terms of Service are necessary to establish the relationship between the business and the online shopper, as well as the rights and responsibilities of each party. The Terms of Service address concepts such as: <ul style="list-style-type: none"> ○ Eligibility to use the platform and make purchases (e.g., age and geographical restrictions). ○ Ownership of, and licenses to, intellectual property. ○ Acceptable use provisions. ○ User content restrictions. ○ Disclaimers, indemnities, and limitations of liability. ○ Dispute resolution.
Terms of Sale	<ul style="list-style-type: none"> • Terms of Sale can be incorporated into the Terms of Service or presented as a stand-alone document. In either case, these terms address concepts such as: <ul style="list-style-type: none"> ○ Payment and billing. ○ Pricing and taxes. ○ Product availability. ○ Shipping and delivery. ○ Returns, refunds, and exchanges. ○ Product warranties and limitations of liability. ○ Automatically renewing subscriptions and free trials.
Privacy Policy	<ul style="list-style-type: none"> • A privacy policy typically <ul style="list-style-type: none"> ○ Describes online and offline data collection practices and explains how the business uses and discloses personal information. ○ Includes content required under applicable privacy laws, such as the California Consumer Privacy Act (CCPA) and the EU's General Data Protection Regulation (GDPR).

TOPIC	CONSIDERATIONS
Privacy Practices	<ul style="list-style-type: none"> • Ensure compliance with applicable privacy laws, such as the CCPA and GDPR. • Consider documenting the business' data practices in a data map/record of processing. • Review the platforms' user interface to ensure privacy notices and consents are presented in a way that complies with applicable laws. • Ensure compliance with international data transfer restrictions if transferring data internationally. • Establish mechanisms for receiving and responding to consumer rights requests (e.g., customer requests to access and delete personal information), where required by law. • Develop internal policies and procedures to ensure proper handling of customer personal information by the business' personnel. • Train personnel regarding their privacy obligations.
Data Security	<ul style="list-style-type: none"> • Review existing security measures to ensure compliance with applicable laws and adherence to industry standards and best practices, including: <ul style="list-style-type: none"> ○ New York's SHIELD Act. ○ Massachusetts' Standards for the Protection of Personal Information of Residents of the Commonwealth. ○ Payment Card Industry Data Security Standard (PCI DSS). • Consider adopting security measures such as encryption, pseudonymization, access controls, multifactor identification, and backups. • Develop internal policies and procedures to ensure the confidentiality and security of personal information. • Develop an incident response plan to ensure compliance with various data breach notification laws and conduct tabletop exercises to test the plan. • Establish plans and procedures to monitor and audit data security measures.
Intellectual Property and Domain Name	<ul style="list-style-type: none"> • Identify company trademarks and copyrights and evaluate eligibility for and benefits from federal registration. • Ensure that none of the content on the platform, including the design and any third-party trademarks appearing on the platform, infringes another party's intellectual property rights. • Comply with applicable country code top-level domain (ccTLD) and generic top-level domain (gTLD) requirements when registering a domain name.
Brand Enforcement	<ul style="list-style-type: none"> • Analyze how products and digital content can be protected during the manufacturing, distribution, and use of products and services through registration, licensing, agreements, and other means. • Engage in channel monitoring and enforcement efforts, as necessary, to reduce the availability and visibility of counterfeit goods. • Consider defensive domain name registrations to prevent others from registering confusingly similar domain names and be prepared to respond to such registrations should they occur.
Digital Content	<ul style="list-style-type: none"> • Ensure compliance with content-specific regulations (e.g., in-game virtual items available for purchase). • If integrating with social media feeds, review social media platform requirements and third-party moderation.

TOPIC	CONSIDERATIONS
User Content	<ul style="list-style-type: none"> • If the platform will permit users to post content, take steps to maximize your business' protections under Section 230 of the Communications Decency Act and the Digital Millennium Copyright Act. • Register a designated agent for copyright complaints with the U.S. Copyright Office. • Establish and enforce a repeat infringer policy. • Establish standards for acceptable content and acceptable use of the content posting features. • Consider establishing a policy and process for moderating user content. • Enable other users to flag/report inappropriate content.
Targeted Advertising and Analytics	<ul style="list-style-type: none"> • Draft and negotiate agreements with ad tech and analytics vendors. • Determine whether data sharing relationships with these vendors trigger additional compliance obligations (e.g., sales-related obligations under the CCPA). • Determine whether specific notices and consents (e.g., cookie banners and/or sale opt-out mechanisms) are required.
Marketing and Advertising	<ul style="list-style-type: none"> • Conduct legal review of marketing and advertising content to mitigate risk of false or misleading claims (e.g., comparative advertisements, "made in America," "green," "sustainable"). • Establish a marketing content review policy. • Ensure compliance with marketing laws such as the CAN-SPAM Act and the Telephone Consumer Protection Act (TCPA). • Evaluate intellectual property and right of publicity issues. • Follow Federal Trade Commission (FTC) endorsement guidelines for testimonials, endorsements, and referral programs. • Ensure that any use of influencers follows FTC disclosure and social media platform guidelines.
Children	<ul style="list-style-type: none"> • If a website is directed to children under age 13, or you know personal information is being collected from children under 13, comply with the Children's Online Privacy Protection Act (COPPA). • Comply with FTC and Children's Advertising Review Unit (CARU) truth-in-advertising standards when advertising directly to children or marketing kid-related products.
Loyalty Programs, Financial Incentives and Rewards	<ul style="list-style-type: none"> • Develop terms and conditions for loyalty and rewards programs and offers to address concepts including eligibility, how the program will operate, any expiration of program points, and conditions for modification or termination of the program. • Consider whether these programs or offers trigger specific requirements under the CCPA. In particular, evaluate: <ul style="list-style-type: none"> ◦ Whether these offerings are "financial incentives" under the CCPA, which will require the business to provide consumers with additional notice, including a calculation of the value of consumers' personal information. ◦ How consumer deletion requests will affect ongoing participation in the program or offer.
Contests, Sweepstakes and Promotions	<ul style="list-style-type: none"> • Evaluate contests, sweepstakes, and promotions for compliance with applicable federal and state laws before offering them on the site. • Draft official rules and other documents and disclosures regarding the promotions. • Prepare and file any required registration paperwork and post any required bond.
Gift Cards	<ul style="list-style-type: none"> • Ensure that gift card programs comply with federal and state laws relating to redemption, expiration, dormancy, unclaimed property, and other obligations. • Draft and negotiate agreements with third parties providing back end gift card administration and processing services. • Ensure gift card program details are factored into privacy policy, privacy practices and data security considerations.

TOPIC	CONSIDERATIONS
Commercial Agreements with Developers, Payment Processors and Other Vendors	<ul style="list-style-type: none"> • Draft and negotiate agreements with third parties providing back-end e-commerce platform services, such as platform providers, web developers, and payment processors. • Analyze existing enterprise resource planning (ERP) and customer relationship management (CRM) systems to ensure compatibility with e-commerce program, including platform and payment processors noted above, and logistics partners noted below. Draft and negotiate new agreements as necessary. • Ensure that agreements adequately address concepts including privacy and data security, indemnification, limitations of liability, compliance with laws, representations and warranties, dispute resolution, and payments.
Commercial Agreements with Supply Chain and Logistics Partners	<ul style="list-style-type: none"> • Draft and negotiate agreements with third-party logistics companies providing back-end warehousing, packaging, shipping, and other logistics services. <ul style="list-style-type: none"> ◦ Analyze existing supply chain and vendor agreements to ensure finished inventory is shipped directly to logistics providers. • Ensure that third-party logistics providers and their services are compatible with the platform providers and payment processors described above. • Ensure that agreements adequately address returns management, including refund and consumer credit processing and management, quarantining of goods, and resale of returned goods. • Ensure that agreements adequately address concepts including privacy and data security, indemnification, limitations of liability, compliance with laws, representations and warranties, dispute resolution, and payments.
Accessibility	<ul style="list-style-type: none"> • Ensure that the platform conforms to accessibility standards such as the Web Content Accessibility Guidelines, the prevailing benchmark for website and mobile app accessibility.
Product Labeling, Warnings and Required Disclosures	<ul style="list-style-type: none"> • Meet all product registration, labeling, warning, and packaging requirements for the jurisdiction(s) to which products will be shipped. • Determine whether state-specific disclosure requirements apply, such as those required under Proposition 65 and the California Transparency in Supply Chains Act. • Determine whether state recycling or electronic waste regulations apply to products sold and make appropriate disclosures as necessary.
Antitrust	<ul style="list-style-type: none"> • Pricing and related terms of sale should be unilaterally determined and should not be the result of agreement with suppliers, customers, or competitors. To the extent a minimum advertised price or retail price policy is implemented, it must comply with federal and state law. • The same product or service should not be sold at different prices to competing buyers, unless approved in advance by antitrust counsel. • The use of pricing algorithms should be unilaterally determined and defined and monitored to ensure pricing does not rise unexpectedly or inappropriately. • During declared states of emergency, precautions should be implemented to ensure price increases for high-demand products and services comply with federal and state law.
Tax and Licensing	<ul style="list-style-type: none"> • Calculate, collect, and remit online sales tax as required by relevant state and local jurisdictions. • Obtain licenses and permits for each applicable jurisdiction, considering business and customer locations and the type of product sold; additional state or local licenses may be required for certain activities (e.g., the sale of secondhand goods). • Secure any required state money transmitter licenses.

TOPIC	CONSIDERATIONS
Insurance	<ul style="list-style-type: none"> • Determine whether existing insurance policies will cover online activities, or whether additional policies (or changes in policy limits) are advisable. Consider your company's coverage in the following areas: <ul style="list-style-type: none"> ○ Commercial crime and fiduciary liability. ○ Commercial general liability. ○ Cyber and privacy liability. ○ Directors' and officers' liability. ○ Employment practices liability. ○ Workers' compensation.
Business Continuity and Resilience	<ul style="list-style-type: none"> • Prepare a business continuity plan to keep operations running, or restore them quickly, in the event of a disaster. Such a plan should: <ul style="list-style-type: none"> ○ Assess risks and business impacts in the event of threats, such as cyberattacks, pandemics, or natural disasters. ○ Determine how to maintain essential e-commerce business functions such as: <ul style="list-style-type: none"> ○ Inventory management and supply continuity. ○ Order fulfillment and shipping deadlines. ○ E-commerce platform functionality. ○ Customer service. • Create an emergency response team. • Train the response team and conduct trials to test the business continuity plan.
International Markets	<ul style="list-style-type: none"> • If the business will fulfill orders to consumers outside the United States, consider additional compliance obligations under local laws, particularly related to privacy, marketing and advertising, consumer protection, product-specific regulations, and import/export issues. • Determine whether user-facing terms and policies should be localized for compliance with the laws in key jurisdictions. • Consider translation requirements.

OUR TEAM

Perkins Coie's e-commerce attorneys have worked with leading e-commerce pioneers, as well as more traditional retail companies, in developing their online capabilities. Drawing on our experience, we routinely advise clients on the legal issues identified above. If you have questions or need assistance, please contact one of the attorneys listed below.



SHYLAH ALFONSO
Partner
SAlfonso@perkinscoie.com



AMANDA BEANE
Partner
ABeane@perkinscoie.com



TOM BELL
Partner
TBell@perkinscoie.com



JOE CUTLER
Partner
JCutler@perkinscoie.com



MIRIAM FARHI
Partner
MFarhi@perkinscoie.com



DAVID FENTIN
Partner
DFentin@perkinscoie.com



AMELIA GERLICHER
Partner
AGerlicher@perkinscoie.com



ANDREW GRANT
Partner
AGrant@perkinscoie.com



PATCHEN HAGGERTY
Partner
PHaggerty@perkinscoie.com



MEREDITH HALAMA
Partner
MHalama@perkinscoie.com



KEVIN HAMILTON
Partner
KHamilton@perkinscoie.com



DAX HANSEN
Partner
DHansen@perkinscoie.com



TODD HINNEN
Partner
THinnen@perkinscoie.com



JASON HOWELL
Partner
JHowell@perkinscoie.com



SELENA LINDE
Partner
SLinde@perkinscoie.com



BOB MAHON
Partner
RMahon@perkinscoie.com



BRENDAN MURPHY
Partner
BMurphy@perkinscoie.com



KIRK SODERQUIST
Partner
KSoderquist@perkinscoie.com



RYAN SPEAR
Partner
RSpear@perkinscoie.com



MARK GOODRICH
Counsel
MGoodrich@perkinscoie.com



CHARLYN HO
Counsel
CHo@perkinscoie.com



HEATHER KARELL
Counsel
HKarell@perkinscoie.com



KATIE CRAMER
Associate
KCramer@perkinscoie.com



JENNIFER DECKER
Associate
JenniferDecker@perkinscoie.com



NATHAN DULETZKE
Associate
NDuletzke@perkinscoie.com



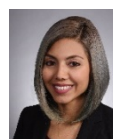
MATTHEW DYBAS
Associate
MDybas@perkinscoie.com



BIPASANA JOSHEE
Associate
BJoshee@perkinscoie.com



VARSHA MANGAL
Associate
VMangal@perkinscoie.com



ELIZABETH MENDOZA
Associate
EMendoza@perkinscoie.com



AMANDA MOBRAND
Associate
AMobrand@perkinscoie.com



D. SEAN WEST
Associate
DWest@perkinscoie.com