Internet and Mobile Association of India

IAMAI Submission on the Consumer Protection (E-Commerce) Rules, 2020

The Internet and Mobile Association of India ("IAMAI") is a not-for-profit industry body and we play a key role in ensuring the growth and sustainability of the digital industry. Our members comprise the majority players in India's e-commerce ecosystem today and are representative of the diversity in India's e-commerce ecosystem. They have played a significant role in ensuring that the pain to consumers during the pandemic has been largely assuaged via a robust and widely dispersed e-commerce footprint in India, particularly during the periods of lockdowns. As such, IAMAI is extremely well placed to offer our comments and suggestions to the recent Amendments proposed by the Department of Consumer Affairs (DoCA) on 21 June 2021 (hereinafter **"Amendments"**) to the e-Commerce Rules, 2020 notified by the DoCA on 23 July 2020 (hereinafter **"Rules"**).

Our members are fully committed to supporting the government initiatives and regulatory interventions to protect consumer interests. However, the Amendments raise several concerns and ambiguities from an e-commerce business standpoint, which are also likely to have the unintended negative consequences for consumers ultimately. We humbly submit that in their current form, the Amendments, seek to regulate aspects of the e-commerce sector that have no bearing on consumers' interests at all, and in doing so, could impact consumer interest negatively. The Amendments also include many elements of Platform to Business (P2B) and Business to Business (B2B) e-commerce which are beyond the remit of the parent Consumer Protection Act (CPA). The Rules also seek to regulate aspects already established and covered in existing and established laws / policies applicable to e-commerce.

Moreover, the Amendments fail to recognize the different e-commerce models prevalent such as Goods Vs Services, Inventory Vs Marketplace models etc. A uniform application of these Amendments / Rules across all e-commerce models would not be feasible, is far from ideal, would impact businesses as well as consumers, and will create a high level of uncertainty in an industry that is still in its growth stages and would benefit from light handed regulation.

The Amendments also fail to provide a level playing field between Online and Offline e-commerce/retail. Under the Amendments, e-commerce platforms will face several restrictions and increased compliance burden. However, same will not be applicable on the brick and motor stores. Details of some of the major issues is provided in the subsequent sections, but very briefly, activities such as cross-selling, flash sales etc are all freely prevalent in the offline commerce sector, but are sought to be restricted under these Amendments. It is the same consumer who shops from online as well as offline, so the same set of Rules should apply to both channels[1].

Also, implementation of the Amendments in current form will significantly increase the compliance burden on MSMEs as well as for start-ups who are not even in the e-commerce business, but provide services to e-commerce.

[1] **Our members Reliance Jio and Paytm do not agree with this submission**

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Our comments and inputs have been set out below. We believe addressing these concerns will strengthen the Rules and facilitate Ease of Doing Business for the e-commerce industry, as well as provide greater trust, reassurance and service to the end consumer / customer.

IAMAI Submission

Broad Scope of the Draft Rules, beyond scope of the CPA, overlap with existing laws or provisions of CPA:

The Rules are proposed to be issued under Section 101 (1) (zg) of the Consumer Protection Act, 2019 ("CPA") read with Section 94 of the CPA. These sections give the power to the Central Government to issue Rules with respect to unfair trade practices or to protect the rights and interests of the consumer. However, the Amendments go beyond this mandate and expand its applicability to aspects which are beyond this.

For instance, the logistic service provider of a marketplace entity is defined as *a company engaged in business of providing any one or more services, which include rail / road / sea / air transportation, air cargo, cargo consolidation, ware housing, Inland Container depot, cold chain services, port terminal services or any other such services for the goods and services sold on any marketplace ecommerce entity platform*. The proposed Amendments require a logistic service provider to provide a disclaimer including terms and conditions governing its relationship with sellers on the marketplace e-commerce entity platform. Regulation of logistics service provider relationship with sellers and/or marketplace is entirely out of scope of the CPA as such arrangements are essentially B2B and not customer facing.

The Rules cannot enlarge the scope and object of the Statute, and the power to make Rules (provided under the CPA) is to be exercised within the scope as defined in the Statute. Many provisions of the Amendments go beyond the scope of the CPA and *ultra vires* of the CPA, if implemented in its current form.

Similar to the example provided above, the ambit of the Amendments is much wider given that it deals with aspects of marketplace seller engagement, investments in seller and related parties, data sharing arrangements with the seller, selling of private labels, registration of e-commerce entities with the Department for Promotion of Industry and Internal Trade ("**DPIIT**"), promotion of domestic products vis-à-vis imported products etc., which are issues not within the scope of the CPA, which is to protect the consumer's interest at the time of purchase and recourse against defective products or deficient services. However, the Amendments seek to regulate the entire e-commerce supply chain, which is not the purpose of the CPA. These provisions are broad in scope and ambit and do not in any way contribute to protecting the consumers' rights and interests or preventing unfair trade practices. Further, the CPA also does not envisage requirement of appointment of officers by e-commerce entities. Neither does it impose vicarious liability on such entities for a seller's conduct. Also, the provision relating to mis-selling is already covered under prohibitions on unfair trade practices/misleading advertisements under the CPA.

Further, Rule 5(17) provides that "no e-commerce entity which holds a dominant position in any market shall be allowed to abuse its position." In India, creation of anticompetitive effect or abuse of dominant position by entities in any sector are addressed through the Competition Act, 2002

("Competition Act") and the Competition Commission of India ("CCI") is authorised to investigate and adjudicate such issues. Regulation of any potential entry barriers arising out of abuse of dominant position by large e-commerce players, should be left to the domain of the CCI and the provisions of the Competition Act, failing which application of the prevailing law on this issue will be fraught with ambiguity and conflict. For example, there are several provisions under the Draft Rules which overlap and are likely to conflict with the provisions of the Competition Act. Issues relating to alleged practices of self-preferencing (Rule 6(6)(a)); deep discounting (Rules 3(e) and 5(16)) are currently sub judice (under the Competition Act) in on-going cases related to the e-commerce sector. In addition, in January 2020, the CCI issued the findings of its Market Study on E-Commerce which included measures relating to search ranking parameters, policies on sharing of data collected with third parties, transparency in user ratings, policies on discounts and promotions. In addition to duplicity with existing laws, this is another example of the Draft Rules being beyond the scope of the CPA.

The Amendments also propose to amend (i) Rule 7(5) of the E-commerce Rules to place an obligation on marketplace e-commerce entities to provide best before or use before date; and (ii) Rule 6(3)(a) to require a marketplace e-commerce entity to disclose the country of origin to the consumers. Further, all e-commerce entities are required to identify goods based on the country of origin. Rule 6 of the Legal Meteorology (Packaged Commodities) Rules, 2011 (**LM Rules**) and FSSAI Packaging and Labelling Regulations already provide for such a provision stating that (i) the best before or use by date would have to be declared where applicable or where the commodity can become unfit for human consumption after a period of time; (ii) the name of the country of origin or manufacture must be mentioned in the package in case of imported products. Hence, such provisions are already sufficiently covered under the LM Rules and FSSAI Regulations.

In any case, marketplace e-commerce websites or Apps do not have the ability to ensure compliance at the manufacturing / packaging stage. There is no obligation on marketplace e-commerce entities to provide services such as warehousing and logistics, and therefore, it is very likely that the marketplace e-commerce entity will never physically interact with the goods sold by it, and thus will not be in a position to perform such verification in relation to the goods and provide such information.

Recommendation: Consumer Protection (E-Commerce) Rules should focus only on aspects related to protecting the rights and interests of the consumers or prevent unfair trade practices as specified in the CPA. The consumer protection framework should not seek to bring within its ambit Competition Law or legal metrology law, intermediary law which should be left to the existing jurisdiction of the CCI relevant regulator.

Expansion of definition of e-commerce entity:

The Amendments propose to expand the definition of e-commerce entity to include (i) any entity engaged for the fulfilment of orders placed by a user on the e-commerce platform; and (ii) any 'related party' as defined under section 2(76) of the Companies Act, 2013 (Companies Act). Related party includes inter alia, a holding, subsidiary or an associate company. This may also include all related parties and associated entities including entities not involved in e-commerce activity.

Further, the definition of associated enterprises includes associated enterprises includes enterprises (i) having a common chain of directors or managing partners; (ii) having a common chain of shareholders holding more than 5% of shares, (iii) having 10% or more common ultimate beneficial

interest, (iv) where there is a relationship of mutual interest as prescribed, (v) where one enterprise can veto or influence the other entity's decision making in any manner, or (vi) where one enterprise or person holds, directly or indirectly, shares carrying the voting power in the related entities.

Issue / Impact:

The Amendment to the definition of e-commerce entities goes over and beyond the definition of e-commerce entities provided under other legislations such as the Foreign Exchange Management (Non-Debt Instruments) Rules, 2019 (NDI Rules). The scope is also beyond what is contemplated under the CPA. The term e-commerce has been defined under Section 2(16) of the parent statute, CPA, as "e-commerce" means buying or selling of goods or services including digital products over digital or electronic network". However, the ambit of e-commerce under the Amendments extend beyond this and includes even entities who are related parties and associate enterprises, who will not be carrying out any such activity relating to e-commerce such as manufacturing entities or logistics players. Many such entities are in fact engaged in the b2b business and therefore cannot be regulated under CPA, being a b2c law. The scope of the Draft Rules is therefore beyond what is contemplated under the CPA.

The proposed amendment is too wide and encompasses any party that may have a relationship of mutual interest with an e-commerce entity. All relationships between two parties in business association with each other will be of mutual interest. Merely being a related party of an e-commerce entity cannot automatically be construed that such entity be also classified as 'e-commerce entity', especially since such related party may not have any online business at all.

Also, given this definition, persons engaged by e-commerce entities for fulfilment of orders placed on their platforms, such as for storage, inventory management and order management will be construed as e-commerce entities. Any outsourcing service provider or a vendor will be deemed as e-commerce entity, thereby curtailing such entities right to access the market through ecommerce. Hence, this may also include all entities that do not remotely own / operate or manage the e-commerce platform, and are merely electronic facilitators or 'Electronic Service Providers' defined in CPA, thereby burdening such entities and / or Electronic Service Provider to comply with the compliances expected of an e-commerce entity. This will have a huge impact on start-ups and SMEs, who provide both business to business (B2B) and business to consumer (B2C) products or services and it will affect their constitutional right to carry on any business, trade or profession. Such a restriction will impact the government of India's digital India initiative and prevent smaller business from accessing pan India or global markets. Given this, the proposed amendment to Rule 3(1)(b) of the E-commerce Rules needs to be removed to ensure that non-e-commerce entities are not covered within its scope.

Finally, from a reading of the Rules, it appears that they have been drafted in a manner where the intent is for them to apply to e-commerce entities which are "marketplace" or "inventory" entities. These provisions seem to be irrelevant for certain digital service providers, including content streaming platforms, news publication agencies, etc., and in order to avoid unintended consequences, the Rules should clearly state their applicability, within the definition under CPA.

Recommendation: Definition of ecommerce (marketplace) should not be revised and should remain as defined in original Ecommerce Rules. "Order Fulfilment" and "Related Party" should not be

covered under ambit of Ecommerce entity definition. The Rules should clearly define the intention and type of business that these regulations intend to govern. This is important to avoid the possibility of unintended, inaccurate and irrelevant regulation of certain entities.

Overlapping Consumer Protection Norms for Some Digital Businesses:

Issue / Impact:

It is pertinent to note that a plethora of digital businesses are already regulated and governed by comprehensive consumer protection norms applicable to their sectors. They have to comply with a very exhaustive and detailed grievance redressal procedure under relevant sectoral regulations. This overlap will create confusion in the minds of consumers and create ambiguity in the procedures set-up by such companies.

Recommendation: The Proposed Amendment should exclude digital businesses that are already being governed by robust consumer protection norms and grievance redressal procedures under parallel regulations.

Registration with DPIIT:

The Proposed Amendments require every e-commerce entity, which intends to operate in India, to register itself with the Department of Promotion of Industry and Internal Trade ("**DPIIT**") for allotment of a registration number.

Issue / Impact:

We note that the statement on the Amendments published by the Ministry of Consumer Affairs (MCA) through Press Information Bureau provides that such a registration will help in creating a database of genuine e-commerce entities and ensure that consumers are able to verify the genuineness of an e-commerce entity before transacting through their platform. The E-Commerce Rules already require the e-commerce platform to provide comprehensive disclosures regarding the e-commerce entity itself, such as its geographic address, contact details, etc., as well as disclosures regarding the sellers and products / services being offered on its platform. Therefore, there is no clarity on what additional transparency objectives may be met through the registration requirement.

Under the CPA, there is no provision requiring registration in India, and accordingly the registration requirement appears to be *ultra vires* the parent Act. Additionally, the requirement to register goes against the spirit of improving '*Ease of Doing Business'* of the Government. The registration requirement would substantially increase compliance burden on e-commerce entities and cost of compliance in India. Such requirements are against the spirit of international trade and commerce, and may deter foreign e-commerce entities from offering their goods and services in India, which would be against consumer interests in the long run.

It is unclear what vetting process (if any) an e-commerce entity would have to undergo in order to be considered "genuine" and whether the registration will solve for any observed consumer grievance rather than create an additional bureaucratic step which may impede Ease of Doing Business.

***Recommendation**: E-commerce entities are already registered legal entities and therefore a second registration with Department of Promotion of Industry and Internal Trade appears to be over-regulation, lacks any justified purpose and should be done away with.*

Cross selling:

The Amendments define cross-selling as the sale of goods/ services that are related, adjacent or complimentary to a purchase made by a customer, with an intent to maximise the revenue of the e-commerce entity. If an e-commerce entity is engaged in cross-selling of goods, it must prominently display in a clear and accessible manner on its platform the name of the entity providing data for cross-selling, and the data of such entity that is used for cross-selling.

Issue / Impact:

The Amendments do not provide any clarity as to what goods / services can amount to a related, complimentary or adjacent purchase. Further, the objective of any seller on an e-commerce platform (as is also the case in offline) is revenue maximization, hence the definition that cross sales conducted with the intent of maximising revenue is vague and arbitrary. Also, given that the obligation is casted on an e-commerce entity, it is not clear whether it is applicable to inventory-based seller or even online marketplaces, in the case of the latter it would be even more arbitrary.

This provision also treads upon the scope provided under the Information Technology Act by requiring additional display compliances. The marketplace e-commerce entity is adequately compliant on the requirements under the Legal Metrology Rules requiring display of information. This enables the consumer to make an informed choice while purchasing a product. This additional compliance does not add value to the customer as long as such marketplace entities are compliant with the specific requirements under the respective laws.

Moreover, the Information Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules, 2011 and the Personal Data Protection Bill covers the aspects of data privacy and transparency. Additional compliance should not be made under e-commerce Rules or clarity be provided on intent and purpose of including it in these Rules.

Recommendation: We would recommend review of these provisions as a marketplace e-commerce is not engaged in the sale of inventory and such decisions are solely vested with the seller. The CPA is for the purpose of protecting the rights of the consumers. Cross selling of products would only help consumers in their purchase choices (given consumers are not forced to purchase but only provided with a credible option) and sellers should be free to adopt such practices as per their own discretion when listing their products on e-commerce marketplace websites.

Fall-back liability:

The Amendments proposes insertion of Rule 6(9) which provides that the marketplace e-commerce entity shall be subject to a fall-back liability if a seller registered on its platform fails to deliver the goods or services ordered by a consumer due to negligent actions of the seller in fulfilling duties and liabilities in the manner as prescribed by the marketplace e-commerce entity which causes loss to the consumer.

Issue / Impact:

The requirement with respect to fall back liability goes against the basic concept and business model of marketplaces. Marketplace e-commerce entities do not have operational control over the activities of sellers on their platform or the quality of their services, nor are they expected to have such control. Such entity cannot be held liable for the conduct of the seller, since the same has to be decided contractually between sellers and buyers. The NDI Rules also provide that "in marketplace model, any warranty / guarantee of goods and services sold will be responsibility of the seller." Therefore, any marketplace entity with FDI, accepting fall back liability under the Amendments will end up violating the NDI Rules and thereby the Foreign Exchange Management Act, 1999.

The Amendments fails to provide any justification for imposition of liability on a marketplace entity in which arises solely from sellers conduct. Further, the concept of fall-back liability would be highly misleading in certain situations, e.g. where certain marketplaces offer listing of products only, but any actual transaction only takes place between the sellers and consumers.. E-commerce entities are already subject to various obligations under the E-commerce Rules existing under the CPA and other laws, if an e-commerce entity is in compliance with the obligations imposed on it as required by law, it should not be held liable for a seller's conduct.

Further, the fall back liability clause discriminates against e-commerce entities via-a-vis their offline counterparts. To take an example, a shopping mall has zero fall back liability in case any shop / store / showroom / outlet in the mall fails to deliver the goods or services ordered by a consumer due to negligent actions in fulfilling duties and liabilities which causes loss to the consumer.

Recommendation: We request that the concept of "Fall Back liability" should be done away with because it dilutes the intermediary safe harbour under the provisions of the IT Act as well as the arm's length requirements provided under the FDI Policy. It will open the floodgates for unscrupulous claims against E-Commerce entities. It can significantly change the landscape of e-commerce in India and impede innovation and access of small sellers to marketplace platforms (whom e-commerce marketplace entities may not onboard due to the apprehension from fall-back liability). However, a diluted version of this rule may be applicable on inventory based e-commerce entities, as they control, own and manage the inventory of the goods/services being sold.

Flash Sale:

As per Rule 5(16), all e-commerce entities have been prohibited from organising any flash sale of goods or services on its platform.

Flash sale has been defined to mean a sale organized by an e-commerce entity at significantly reduced prices, high discounts or any other such promotions or attractive offers for a predetermined period of time on selective goods and services or otherwise with an intent to draw large number of consumers provided such sales are organised fraudulently by intercepting the ordinary course of business with technological means with an intent to enable only a specified seller or group of sellers managed by such e-commerce entity to sell goods or services on its platform.

Issue / Impact:

In the definition of "flash sale", there needs to be clarity on what the phrases "significantly reduced prices", "high discounts" and "fraudulently intercepting the ordinary course of business" mean. These terms and their varied interpretations are likely to cause significant confusion, and prevent the benefits of flash sales to percolate to the end consumers. Also, no rationale has been provided for the proposed prohibition on flash sales, given the fact that lower prices benefit the consumer and are not antithetical to consumer interests.

While it has been clarified through a Press Release that conventional flash sales will not be covered under this, it is unclear what ingredients of a sale will trigger a liability under these Rules. The Press Release says that Amendments prohibit "back to back" or specific "flash" sales wherein one seller selling on the platform does not carry any inventory or order fulfilment capability but merely places a "flash or back to back" order with another seller controlled by the platform. This explanation has no bearing on consumer interests, and deals solely with the actions of sellers on a platform, and therefore do not fall within the purview of the CPA.

The Rules also mention flash sales in the context of an "e-commerce entity" and not a "marketplace e-commerce entity". It needs to be clarified whether it applies to single brand e-commerce retail.

Inventory based e-commerce entities sell their own goods and services and have control over the inventory, therefore, as such they cannot be restricted from conducting flash sales of their own goods and services. Further, the proposal to ban flash sales even in relation to marketplace entities, is vague and arbitrary.

The proposed amendment doesn't provide any exception with respect to the seller offering their Services on discounts (as opposed to Goods). The Services pertaining to the travel sector, for instance, are perishable i.e. an airline ticket for a particular flight is perishable after the flight takes off, and hence there could be a need to usher a flash sale for such tickets in order to incentivize customers to travel cheap. This could also be the case for other similar services. Further, these services are not governed by any Maximum Retail Price (MRP) that would entail determination of discount to be high or significant.

Flash sales are not antithetical to consumer interest and lower prices only benefit the consumers. Hence, it is unclear as to how prohibition of such flash sale will protect the consumers. It is also arbitrary that no such restriction exists or is applicable to the offline sector, where deep discounting practices during holiday season, change of season are rampant and accessible to consumers. Such a provision creates an imbalance and results in a non-level playing field between online and offline retail businesses.

Recommendation: ***Department of Consumer Affairs should reconsider the clause on "Flash Sale" because definition of flash sales in the Amendments is vague and ambiguous. Flash sale should be very clearly and explicitly defined from a customer / consumer standpoint, to avoid any ambiguity both in letter and spirit, to ensure consumers do not suffer on account of not benefiting from Flash sales. Moreover, it is against the theme of the Consumer Protection Act as offering reduced prices and discounts to the customers is only in keeping with the spirit of the Consumer Protection Act. Further, a normal brick and motor store can offer flash sale and therefore there is no reason to restrict these flash sales on an e-commerce platform.***

Mis-selling:

E-commerce entities are prohibited from indulging in mis-selling. Mis-selling is defined as the sale of goods/ services by deliberate misrepresentation of information. This includes (i) making a positive assertion in a manner which is not true or warranted by the entity making it; (ii) display of wrong information with the intent to deceive or gain an advantage by misleading the consumer or (iii) causing a consumer to purchase goods/ services and make a mistake as to the substance or the thing which is the subject of the purchase.

Issue / Impact:

A marketplace model of an e-commerce entity does not sell goods or services, but only provides a platform for the sale of goods or services. A marketplace e-commerce entity is merely an intermediary, and such entities cannot be mandated to perform such checks. A marketplace entity has no means to determine whether the information displayed is genuine or not.

The accuracy of the information relating to a specific product is the responsibility of the seller (and not the E-commerce entity). Absolute liability should not be attributed to e-commerce entities in the event that third-party sellers on the platform provide wrong or unwarranted information or assertions with the intent to deceive consumers. This proposed change is in contradiction to the Legal Metrology, Information Technology Act and the FDI policy. Thus, this obligation is unreasonable for a marketplace model of an ecommerce entity, which has no control over the inventory. We would recommend to narrow the scope to put the onus of veracity of the information on the Seller. E-commerce entities can be asked to ban sellers, in case such mis-selling is quoted by any customer and is proved by any law.

Recommendation: There is contradiction with sellers' liabilities in Ecommerce Rules and the intermediary role that must be performed by all marketplace e-commerce entities under the FDI laws, and the IT Act. This is an issue which constitutes primary responsibility of the Seller under the e-commerce rules (original) and such additional responsibility on marketplace ecommerce should be removed.

Data Sharing:

The proposed Amendments prohibit the e-commerce entity from making available consumer information without the express and affirmative consent of such consumer and the automatic recording of such consent; this extends even to non-personal / anonymised data.

They also impose obligations on the marketplace e-commerce entity to ensure that it does not use any information collected through its platform for unfair advantage of its related parties and associated enterprises; and prohibit the use of information collected by marketplace e-commerce entities, for sale of goods bearing a brand or name which is common with that of the marketplace e-commerce entity or promote or advertise as being associated with the marketplace e-commerce entity, if such practices amount to unfair trade practice and impinges on the interests of consumers.

Issue / Impact:

The CCI is mandated under the Competition Act to ensure level playing field amongst competitors. There is no reasonable basis for endowing CCPA with the power to regulate the level playing field amongst competitors especially given that its objective is to protect the interests of consumers only, and not to protect stakeholders inter-se.

Furthermore Information Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules, 2011 and the Personal Data Protection bill that proposes to govern personal data is already being deliberated and debated before Parliament for quite some time (where multiple versions of this Bill have been released and various corporate entities including e-commerce entities have been party to the consultation process in respect of each version of the Bill), it would not be appropriate for the consumer protection framework to attempt to address data protection issues through the introduction of overbroad clauses which do not reflect the extensive public-private consultation process already ongoing in respect of this subject matter.

Separately, under existing data protection law under the Information Technology Act, 2000, no additional compliance or restriction is imposed on e-commerce entities who may wish to collect anonymized information that cannot be traced back to individual consumers which enables product/service development that benefits consumers. It is unclear why user consent would be required for such information sharing, when no such requirement is contemplated under the existing data protection law, and even the proposed personal data protection bill (refer above).

Recommendation: The issues relating to the usage of data should be left to the Indian data protection framework and the competition law framework where applicable.

Invoicing Requirements:

Rule 4(2) and 5(19) of the proposed Amendments casts specific obligation on the E-commerce entities for the invoices raised on its platform, such as display of invoice and requirement to mention the seller and E-commerce entities names on the invoice (in same font), which indirectly casts the responsibility on the E-commerce entity (including a marketplace E-commerce entity) to raise and display invoices for the sellers selling on its platform.

Issue / Impact:

This requirement is not in line with provisions of India's GST Law and overrides the statutory mandate as per the Central Goods & Services Tax Act, 2017 (CGST Act). Per the CGST Act, the responsibility of raising invoices is on the seller (of goods and services) and not on the marketplace E-commerce entity (except in certain cases of aggregator model as per section 9(5) of the CGST Act). The seller is mandated to include the following details in the tax invoice: the name and address of the supplier as well as the recipient, the description of goods or services, the quantity of the goods, and the total value and taxable value of the goods and services, among other details. Hence, the consumer's interest of having an invoice detailing the particulars of the transaction is already secured by the GST invoicing Rules.

Responsibility to raise invoice on behalf of the suppliers would create burden on the marketplace E-commerce entity as the invoice is required to comply with the requirements as per Rule 46 of the Central Goods & Services Tax Rules (CGST Rules) such as description of the products, details of sellers and customers, including e-invoicing requirement of sellers etc.

GST law also casts responsibility on the sellers to report sales in the sellers return. Raising of invoices by marketplace E-commerce entities for the sellers could impact reporting by the sellers, such as non-consecutive serial numbers of invoices, mismatch in product or seller details etc.

This provision may be applicable only to inventory based e-commerce entities.

Recommendation: ***Unlike inventory-based E-commerce entities, since marketplace E-commerce entities are not obligated to issue invoices under India's GST law, obligations casted by Proposed Amendments are inappropriate for and do not apply to marketplace E-commerce operators. The E-Commerce Rules should not cast any additional compulsory obligation on the marketplace E-commerce entities which overrides / contradicts the provisions of India's GST law. Based on the above, the above provisions should be amended to only apply to inventory-based e-commerce entities.***

Misleading Advertisements:

The proposed Amendments seeks to prohibit e-commerce entities from 1) allowing any display or 2) promoting misleading advertisement 'whether in the course of business on its platform or otherwise.

Issue / Impact:

This provision appears to directly conflict with Section 21(6) of the CPA, which provides a statutory defence for liability for misleading advertisements if the advertisement is published *in the ordinary course of business.* The mischief sought to be addressed by this provision is already addressed under the CPA and other special advertising laws, such as the Code for Self-Regulation in Advertising adopted by the Advertising Standards Council of India. In addition, certain models of marketplace entities merely function as an "intermediary" with respect to content on its platform. They do not host or publish or edit any such information published. Therefore, such entities are exempt from liability for

any content on their platform under the Intermediary Guidelines and are entitled to a safe harbor protection so long as they are in compliance with the IT Rules.

If a marketplace reviews the content of the advertisement, it could be seen to be diluting its intermediary defence, since an intermediary is expected not to engage in review of the content. Such marketplace entities would have no wherewithal to ascertain the legality or otherwise of the content of the advertisement. It has been recognized by the Supreme Court in past judgements that such intermediaries could not be expected to judge the merits of content on their platform.

Recommendation: This provision should be reconsidered as it is adequately covered already under existing law and is also inconsistent with intermediary principles applicable to marketplace model of e-commerce.

"Country of Origin" Declarations on E-Commerce Platforms:

The proposed Amendments introduce a filter mechanism in relation to country of origin of products, notifications regarding origin of goods at pre-purchase stage and obligations to suggest alternatives to ensure fair opportunity for domestic goods. Separately, the Proposed Amendments require marketplace e-commerce entities to provide the country of origin of sellers on their platform.

Issue / Impact:

Given that e-commerce entities are already undertaking compliances to provide country of origin of products, it is unclear why a "filter mechanism" is necessary. The suggestion of alternatives is usually based on consumer choice and past transactions undertaken on a platform. The proposed Amendments with prescriptive Rules to provide suggestions of "domestic alternatives" on a mandatory basis would severely impact consumer choice and may not be ultimately in consumer's favour. Further, it may require a thorough assessment and comparison of all products on a platform, which operationally may not be possible for a marketplace e-commerce entity to undertake. E.g. marketplaces have no wherewithal to determine what products should be considered as "alternatives". Requiring marketplace entities to do this will result in direct conflict with their obligations under law such as FDI policy wherein they must only act as a facilitator and ensure that all like products and sellers are to be treated alike.

Given that e-commerce entities are already undertaking compliances to provide country of origin of products, no rationale has been provided for why marketplace e-commerce entities must also declare the country of origin of a seller, and the manner in which such a declaration would achieve the objective of consumer protection. This provision also is discriminatory against digital platforms as no such requirements are imposed on the offline sector where imported products are rampant without any checks or balances – this is a decision solely vested with the consumer and the consumer is free to traverse offline or digital platforms to find the product most suited to his/her purpose.

This provision also includes 'services' under its scope which lacks clarity, as while goods can be imported but services cannot. In the travel and tourism sector for instance, if a customer / individual requests for a hotel in a foreign country or a flight to a foreign destination or any other service in a

foreign country based on his choice / requirement, it is meaningless to offer the customer suggestions or alternatives of similar domestic services.

Recommendation: The current framework on product related country of origin declarations should be retained without any proposed changes

Appointments Of Multiple Officers:

The proposed Amendments seek to require all e-commerce entities to appoint a Chief Compliance Officer (CCO), in addition to the existing requirement to appoint a Grievance Officer (GO), and a nodal contact person (NCP). All three officers are required to be resident and citizen of India.

Issue / Impact:

Under the CPA, there is no provision requiring such appointment of officers, and accordingly this obligation appears to be *ultra vires* the parent Act. The intent behind appointment of multiple officers is unclear, and will entail onerous compliance issues for e-commerce entities. Even smaller / emerging e-commerce entities would be burdened by such expensive and onerous compliances.

The proposed appointments not only unduly add to the compliance burden on e-commerce entities, there is no distinction between the roles and responsibilities of the various appointees. For instance, while the NCP must undertake 24x7 co-ordination with law enforcement agencies to ensure compliance with directions, the GO is also required to receive and acknowledge directions issued by Government authorities and Courts. Thus, it appears that there is an overlap between the responsibilities attributed to the NCP and the GO, and appropriate clarifications would be required to segregate their responsibilities. Similarly, the primary responsibilities of a CCO and the NCP to be appointed by select e-commerce entities also appear to overlap. Further, given that there is already a GO designated for compliance with the existing E-Commerce Rules, it is not clear why very similar functions have been assigned to the CCO as well.

In view of the above, there is considerable functional overlap between the three officers within an e-commerce entity. The presence of a single nodal officer for the purposes of co-ordination with government authorities should be sufficient. It is unclear why the Proposed Amendments seek to mandate appointment of three officers whose roles would overlap in different instances. There is also a discriminatory treatment vis-à-vis offline commerce, where offline entities have no similar requirements to appoint these officers.

Additionally, the concept of **"**personal liability" for the CCO is fundamentally misplaced. In the event that the practices of an e-commerce entity need to be examined from a consumer protection perspective, the CPA already empowers the CCPA to carry out investigations, and therefore, outlines a process where penalties can be imposed after adequate inquiries are conducted. As a result, the need to explicitly set out personal liability for the CCO does not arise.

***Recommendation**: The provisions for additional appointment of CCO under the Proposed Amendments should be reconsidered. The existing Nodal Officer of an e-commerce entity could continue as the point of contact with the government for the purposes of these Rules.*

Uniform Application of Obligations Without Regard to Unique E-Commerce Models:

The E-Commerce Rules impose obligations on (1) e-commerce entities, (2) marketplace e-commerce entities and (3) inventory e-commerce entities, with no regard to or distinction between these unique e-commerce models and *inter se* relationships between the entities, buyers and sellers. The nature of obligations of e-commerce entity (for instance, Rule 5) has been drafted without taking into account inventory-based and marketplace model of e-commerce and have painted the two models with the same brush of operational restrictions and disclosure requirements.

Also, the obligations under the E-Commerce Rules, and more pronouncedly, the proposed Amendments, seem to be based on some specific forms and models of e-commerce activities in India. As such, they do not appear to be appropriate in relation to certain other unique models of e-commerce, nor flexible enough to accommodate emerging models of e-commerce. The imposition of such obligations may hinder growth for the industry, which would be detrimental in the long-run for consumers.

Several obligations under the E-Commerce Rules and the Proposed Amendments appear to have been drafted with the intention of imposing obligations on 'hands on' e-commerce entities \ e-commerce entities involved in every aspect of the transaction and commerce value chain between buyers and sellers, i.e., those entities involved in order placement, confirmation and fulfilment, logistics, delivery, etc.

Many marketplaces are principal-to-principal (P2P) in nature, some act primarily as communication platforms with enhanced communication features, some have provisions to redirect users outside the platform to conclude sales post discovery (and thus act more as sophisticated listing or advertising platforms), and some list sellers and buyers to enable communications and discovery, only. Not all platforms facilitate transactions between buyers and sellers to the same extent.

These obligations are not appropriate nor possible to be implemented in relation to "hands-off" marketplace e-commerce entities which simply provide a platform for facilitating interface between buyers and sellers and have no other role in the transaction such as conclusion of transaction, fulfilment or logistics. Newer platforms could undertake more singular functions such as enabling discovery of buyers and sellers on its platform or undertake significantly lesser functions compared to traditional marketplaces. However, the original Rules as well as proposed Amendments appear to impose the same level of compliance obligations and accountability on all platforms, without taking into consideration the variances in operational models.

***Recommendation**: "Hands off" marketplace e-commerce entities that function as intermediaries and simply provide a platform for search and discovery of goods and not for actual sale and purchase transactions (similar to that of enabling an online window shopping but not actual sales), should not be burdened with such obligations.*

Also, the Amendments should clearly specify requirements of marketplace and e-commerce inventory-based selling entities, without any overlap.

Information Requests by Authorised Agencies:

The proposed Amendments require e-commerce entities to provide information within 72 hours to Government agencies authorised for investigative, protection or cybersecurity activities.

Issue / Impact:

E-commerce entities cannot reasonably be expected to assess, acquire and provide Government agencies with the required information with the compressed timeframe of 72 hours. Given the possibility of a CCO being liable in proceedings for failure to ensure due diligence, the issues posed by the compressed timeframe are critical.

It is also notable that most sellers on e-commerce platforms are legal entities subject to civil liability under various laws and it is not clear why information relating to such entities would be critical to criminal investigations and on such a short timeline.

The CCPA already has the power to conduct inquiries and investigations under Section 19 of the CPA. To the extent that any investigations pertain to malpractices on an e-commerce platform, it is more likely that the CCPA would be investigating it and it has relevant information seeking powers for this purpose.

Recommendation: ***The requirement of specific time-period to comply with a government order for information or assistance should be reconsidered. Alternatively, the time frame should be increased to what is deemed as reasonable by the E-commerce entity and is necessary and proportionate.***

Associated Enterprises and Related Parties:

The scope of the definition of an "e-commerce entity" has been expanded to include any "related party" as defined under the Companies Act, 2013. Several prohibitions have been proposed in relation to associated enterprises and related parties. Additionally, a new definition has been introduced for Associated Enterprise which is overly broad and expansive.

Issue / Impact:

The policy intent or consumer intent behind introduction of these provisions is therefore unclear. A similar provision is not made applicable to brick and mortar stores. E.g. A mall owner entity is not prohibited from leasing spaces to related entities. Further, this provision imposes unreasonable restriction on freedom of trade.

There is no nexus of this provision to Section 94 objective under which the Rules are issued. It imposes restrictions completely outside the purview of the CPA and thus *ultra vires*.

The presence of associated enterprises / related parties as sellers on the marketplace e-commerce entity ultimately benefits the consumer. Accordingly, the prohibition on enlisting such entities as sellers is against the spirit and purport of the CPA. In addition, the obligation to ensure that marketplace e-commerce entities do not use information collected through their platforms for the benefit of related parties / associated enterprises actually has a negative impact on consumer interests due to potential increase in costs of goods or services, and is therefore ultra vires the CPA.

Further, the definition of an Associated Enterprise under the E-Commerce Rules is vague and the thresholds for shareholding and beneficial interest are significantly low, especially as compared to other legislations which define associated enterprises. The result of a vague definition and a low threshold would be the overbroad classification of various entities as associated enterprises and a prohibition on their participation in the e-commerce marketplace. This may result in sellers not being allowed to access marketplaces even when they act independently as determined under the standards set out under other existing laws (e.g. arm's length etc.). Merely because there is a 'related entity' or an 'associated enterprise' cannot be reason to completely prohibit listing if it can be demonstrated that no preferential treatment has been provided by marketplace and treated like any other third party seller/ service.

Separately, the Non Debt Rules issued under the Foreign Exchange Management Act and the FDI policy also have certain obligations and conditions for FDI entities. The Competition Act can adequately address the anti-competitive practices, if any arising out of related party transactions. Without any evidence of any disadvantage to the consumer, the law cannot presume that any related party transaction harms consumer rights. Should there be indeed any harm to consumer rights, the CCPA can take cognizance of the same under Section 20.

***Recommendation*: The prohibitions in relation to associated enterprises and related parties should be reviewed. The definition for associated enterprises is overbroad and the need to incorporate such definitions in the E-Commerce Rules is not apparent from a consumer protection perspective.**

Usage of the name or brand associated with that of the marketplace e-commerce entity:

Rule 5(14)(d) provides that "No e-commerce entity shall permit usage of the name or brand associated with that of the marketplace e-commerce entity for promotion or offer for sale of goods or services on its platform in a manner so as to suggest that such goods or services are associated with the marketplace e-commerce entity."

1. **Rule 5(14)(d) has no basis of operation under CPA**
   As stated in detail above, there is no reasonable explanation as to how consumers are harmed if e-commerce entities use brands to suggest that certain goods or services are associated with the market-place e-commerce entity and accordingly, there seems to be no rationale for prohibiting such practices. Associating a brand with an e-commerce entity is very unlikely to cause any consumer harm – rather it will lend credibility to a certain product and to the e-commerce entity as well.

2. **Rule 5(14)(d) is an indirect attempt to impose *ex ante* prohibition on certain potential anti-competitive conduct which encroaches the domain of the Competition Act**

It appears that the Rule seeks to prevent marketplace e-commerce platforms from providing *preferential treatment* to goods and services associated with the name/brand of the e-commerce marketplace that are being offered for sale on the platforms.

This raises fundamental question as competition related issues in any sector are addressed through the Competition Act, 2002 (Competition Act) and the Competition Commission of India (CCI) is authorised to investigate and adjudicate issues based on evidence (ex-post). In fact, the CCI, based on the statutory principles enshrined Competition Act is currently investigating several cases related to platforms which include allegations of discounting and platform bias/preferential treatment.

Therefore, the field is occupied by the Competition Act and the imposition of the Consumer Protection (E-commerce) Rules in this aspect would amount to encroaching the legislative field occupied by the Competition Act and create uncertainty regarding which statutory authority will have jurisdiction to determine what kind of conduct amounts to preferential treatment/platform bias.

Recommendation: ***The Rule should refrain from imposing such ex-ante Rules without any evidence of harm to consumers from platforms/marketplace offering for sale of goods and services associated with the name/brand of the platform. Any sort of action should be taken on an ex-post basis under Competition Law.***

3. **The broad scope of the Rule will adversely impact India's growing brand licensing and merchandising market.**

According to International Licensing Industry Merchandisers' Association (LIMA) report, brand licensing in India is estimated at $1.26 billion. In terms of market size, *entertainment licensing* is valued at $406 million, *fashion licensing* at $594 million and sports licensing at $30 million. It has been estimated that market size for *character and non-character* licensed products would be in the region of $ 3.5 billion. Another segment is that is gradually commanding its space is in food and beverage (F&B).

In fact, several foreign licensors have been seeing India as a preferred destination because of its positive cost benefit and robust IP protection. And as global brands, from sports to fashion, license their brand/ characters to *Indian SMEs, they are exposed to global best practices in quality control and manufacturing* and hence licensing and merchandising have huge multiplier effects on manufacturing and "*Make in India"*.

As India emerges one of the top global markets for licensing and merchandising, several brands have created online portals (*branded marketplace ecommerce platforms*) in the name of the brand, where authorized sellers are permitted to sell *only branded licensed products*, many of which are manufactured by SME and MSMEs in India.

However, Rule 5(14)(d), by broadly incorporating prohibitions where a marketplace e-commerce entity may not use *"the name or brand associated with that of the marketplace e-commerce entity for promotion or offer for sale of goods or services on its platform in a manner so as to suggest that such goods or services are associated with the marketplace e-commerce"* will prohibit such

branded marketplace ecommerce platforms. Indeed, any potential foreclosure would remain subject to review by the CCI under the Competition Act.

Clarity is required on the categorization of entities operating digital platforms only for sale of their own branded merchandise eg. movie merchandise or brand merchandise being sold by production companies. In such cases, merchandise may be sold on the platform either by the entity themselves and/or by third party sellers licensed to manufacture and sell branded merchandise. Among others, the proposed rule 14(d) in particular creates operational challenges for and disrupts business models of such entities.

Recommendation: ***Accordingly, we recommend removing such restrictions from the Rules, since as long as such products or services are listed and sold at arm's length on the marketplace akin to third party products, no consumer interest will be specifically served by such a condition.***

Other Issues:

We would like to highlight some additional points which are as under:

Rules	**Our Recommendations**
Rule 7(5)(d) **Best Before / Use before information** E-commerce entities need to display and sellers need to disclose in relation to Products the details of best before/use before dates, information related to return, refund, exchange, expiration date, warranty and guarantee, delivery and shipment, cost and return shipping and mode of payments.	*We would recommend this to be reconsidered.* *For the food products, FSSAI Packaging and Labelling Regulations, 2021, has removed the requirement of mentioning batch number and expiry date on ecommerce platforms. Hence, the addition of this obligation is inconsistent with the FSSAI Regulations for food products. Legal Metrology Packaged Commodities Amendment Rules exempts ecommerce companies from displaying best before and use by date on the platform and hence, this Rule is inconsistent with the Legal Metrology Guidelines as well. Further, as per the Legal Metrology Act, the Seller is responsible for the accuracy of such information provided by him and not the e commerce entity.*
Rules 4 (2) Every e-commerce entity shall ensure that such registration number and invoice of everyday order is	*Clarification is required* *a) Does the term 'Invoice of everyday order' imply each order placed by a user?*

displayed prominently to its users in a clear and accessible manner on its platform.	*b) Does it also mean, that the registration number of ecommerce entity should be displayed prominently on each invoice issued by such e-commerce entity?*
Rule 5(8)- Data sharing with Government ● E-commerce platforms to partner with National Consumer Helpline of the Central Government	*We recommend the restoration of previous language of "best effort basis', as the e commerce entity is not a seller per se and this may impinge on the consumers privacy as there will be a requirement to share their personal data.* *Adequate dispute resolution mechanisms have already been provided in the Rules to protect the interest of the customers.*
Rule 5(14c,d,e,f)- Search Results ● No e-commerce entity shall mislead users by manipulating search result; ● This also prevents marketplace sellers from allowing the use of brands or names in relation to goods or services on the platform in a manner which suggests an association between such brands/names and the marketplace entity. ● E-commerce entity is obligated to seek and record express and specific consent from the consumer each time the consumer's date is shared with a third party. ● Data collected by the e-commerce entity should also not be used to further sell or advertise products bearing brand or names common with the marketplace, in a manner which will be considered unfair trade practice or infringes the consumer's interest.	*Rule 5 (14) (c): We would recommend to clarify the meaning of "manipulation of search results". Tools are provided to consumers to narrow down on the search and the search is being done on the basis of an algorithm.* *We would recommend the deletion of Rule 5 (14) (d), (e) and (f) as:* 1. *This is outside the ambit of the Consumer Protection ECommerce Rules.* 2. *The Legal Metrology Act provides the complete information to the customer to make his purchase decision.* 3. *Obtaining express consent for sharing consumer data falls within the purview of IT Act and the proposed Personal Data Protection Rules.*
6(3)(a) marketplace e-commerce entity shall, on a request in writing made by a consumer after the purchase of any goods or services on its platform by such consumer, provide him with information regarding the seller from which such consumer has made such purchase, including the principal geographic address of its headquarters and all branches, name and details of its website, its email address and any other information necessary for communication with the seller for effective dispute resolution	*This clause may be potentially misused to get information about sellers on any e-commerce platform. Also, there is a risk of parallel communication by customer to e-commerce entity's customer care as well as seller, which may not lead to optimal resolution.* *In case of a dispute an e-commerce entity may be required to submit the seller's information only to the CCPA if the consumer has made a complaint to CCPA and if CCPA has sought such information. Both conditions should be fulfilled.*

Rule 6(5)- Logistics service rate card ● Logistics service providers of marketplace e-commerce entities cannot discriminate between sellers of the same category. Terms and conditions governing relationship with sellers and differentiating between sellers (if any) has to be displayed on the platform.	*We recommend this clause to be reconsidered as:* *1. It is beyond the scope of the Consumer Protection Act and does not lead to the furtherance of the interest of the consumers and are furthermore arrangements entered into between logistics providers and sellers on a b2b basis.* *2. it does not provide any parity between a logistic partner of online and offline trade.* *3. It is not clear how logistics providers who do not operate their own website are required to comply with such requirements.*
Rule 6(8) No marketplace e-commerce entity shall advertise a body of sellers for the purpose of subsidizing a sale on its platform	*The Department of Consumer Affairs should clarify the meaning of 'subsidizing a sale' under this sub-rule.*