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Doing business in the United States

U.S. consumer sector 2019

The United States has the most well-developed consumer economy in the world, with approximately US$13.2 trillion in annual consumer spending, the world's highest per-household spending, and retail space per capita that is more than twice that of the most retail-heavy European country. Not surprisingly, the U.S. has developed a sophisticated regulatory framework focused on consumer protection, product safety, ensuring fair competition, and encouraging innovation. While entering the U.S. environment can be a game changer for businesses in the consumer industry, it comes with some significant legal risks.

Consumer protection

At the federal level, the Federal Trade Commission (FTC) Bureau of Consumer Protection has been established to ensure the fair treatment of consumers and eliminate and prevent anticompetitive business practices. The agency investigates companies that have been the subject of significant consumer complaints, but also obtains leads from the monitoring of advertisements, the evaluation of mobile practices, and direct referrals from other government agencies and the private sector. As online sales have overtaken brick and mortar transactions, the FTC's priorities have shifted to focus more on monitoring companies' online practices. The global nature of the internet has required the FTC to engage in increased cooperation with other nations that have comparable consumer protection authorities.

State consumer protection laws govern everything from consumer warranties to truth in advertising to subscription services and returns. State consumer protection enforcement authorities have used their authority to regulate unfair or deceptive trade.

Product regulation

Myriad federal and state agencies regulate the development, testing, sourcing, content, labeling and recycling and disposal of consumer products. U.S. agencies like the Food and Drug Administration, the Consumer Product Safety Commission, the National Highway Traffic Safety Administration, the Environmental Protection Agency and the Department of Transportation develop and enforce consumer protection regulations and standards, and several states have developed their own laws and regulations. The food, pharmaceutical, cosmetics, textile, electronics, automotive products and toy industries are particularly heavily regulated.

Litigation

Any manufacturer, marketer or retailer whose products are distributed in the U.S. faces the prospect of products liability claims for alleged defects. These claims most often are based on theories of negligent conduct, strict liability, fraudulent representations or breach of express and implied warranties. U.S. consumers are more likely to sue than consumers in other jurisdictions, and cases are decided by juries, which can award damages (including punitive damages) in the millions or tens of millions of dollars in individual cases. Although virtually all manufacturers, marketers and retailers experience some products liability litigation, the risks increase dramatically for products subject to a recall or other adverse regulatory action.

Of potentially greater concern than individual consumer protection or products liability claims, however, is the possibility of a consumer class action. Unlike other jurisdictions, where class actions remain somewhat of a novelty, the U.S. has a thriving class action industry. Under U.S. procedural rules, class actions theoretically allow individual plaintiffs with small claims to prosecute lawsuits on behalf of a large group of product-users; such claims often would not be economically viable if prosecuted separately. In practice, class actions are often driven by plaintiffs' class action attorneys, who leverage the possibility of an adverse class-wide result to extract large settlements from manufacturers, marketers and retailers. Because of this reality, the decision as to whether or not a class will be certified is often the most crucial phase of these "bet-the-company" actions. Often that determination turns on whether common issues predominate. Companies might be able to avoid class actions in consumer protection cases by including arbitration provisions in their consumer contracts.

Intellectual property

The U.S. has one of the most developed and protective intellectual property (IP) frameworks in the world. Manufacturers, marketers and retailers of consumer products can count on a robust set of federal and state laws protecting them from infringement and appropriation of trade secrets. However, U.S. IP litigation is relatively uncommon and tends to be expensive and slow-moving compared to other jurisdictions, and expedited remedies like inventory seizure are rarely granted. IP disputes involving imported goods that infringe on another's IP rights may be resolved by the International Trade Commission (ITC), which has the power to issue exclusion orders prohibiting the importation of infringing goods, but cannot grant monetary damages. ITC investigations are typically less expensive and faster than traditional litigation, with most investigations concluding within one year.

Tariffs and United States customs

All products imported into the U.S. are subject to U.S. Customs and Border Protection (CBP or Customs) rules and regulations. CBP also enforces a number of regulations issued by other agencies. Commercial goods must be formally presented for entry to CBP by the importer of record (i.e., the owner, purchaser, or licensed customs broker) and import duties must be paid. The average applied U.S. tariff across all products is approximately the same as the average tariff rate in the European Union, and slightly higher than the average rate in Japan. Nonetheless, tariff rates differ significantly by type of product and country of origin. Goods from a number of countries enter duty free into the U.S. under trade preference programs and free trade agreements. Meanwhile, certain products are subject to significant additional duties under antidumping and countervailing duty orders placed on goods the U.S. has found to be traded unfairly in the U.S. market (either sold at less than normal value or subject to subsidies in the exporting countries). Importers can also find significant duty savings through tariff, valuation and trade preference planning. CBP can issue significant fines and penalties to importers found to not have exercised reasonable care or who have imported products contrary to law.

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