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COMMENTS SUBMITTED TO

FEDERAL TRADE COMMISSION

WORKSHOP ON

COMPETITION POLICY FOR

B2B ELECTRONIC MARKETPLACES

June 29 & 30, 2000

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WASHINGTON, D.C.

Donald S. Clark, Secretary
Office of the Secretary
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, DC 20480

Re: Comments Regarding B2B Electronic Marketplaces

Introduction

Baker & McKenzie is pleased to submit these comments and survey to the Federal Trade Commission in connection with the Commission's workshop on the antitrust issues raised by electronic marketplaces.

Baker & McKenzie is a law firm with 60 offices in 35 countries. We provide a full spectrum of law services to clients in the United States and internationally engaging in e-business and e-commerce, including anti-trust and competition, e-contracting, information technology and privacy, intellectual property, corporate, securities, finance and venture capital, telecommunications, advertising and content, tax, banking, insurance, and employment, employee benefits and stock options. Accordingly, we are seeing a broad, international diversity with the hundreds, if not thousands, of B2B exchanges that have been recently established.



Because of the business and geographic diversity of B2B exchanges that may presumably have some effect on U.S. commerce, and thus arguably be subject to the Commission's jurisdiction,¹ we urge the Commission to proceed cautiously as it begins to apply U.S. antitrust law to this nascent industry. We believe that existing U.S. antitrust law, and primarily the U.S. antitrust law relating to joint ventures, can adequately address any competitive issue raised by B2B exchanges. B2B exchanges are, absent some naked price-fixing or market allocation scheme, inherently efficiency enhancing. Technological developments, as implemented through B2B exchanges, offer immediate transaction cost savings for many standard business practices. We hope that the Commission will recognize the inherent efficiencies in B2B exchanges, and focus its investigation resources only on possible anticompetitive effects in ancillary restraints that B2B exchanges may require of participants.

The following is a survey of business models and related agreements of numerous B2B exchanges. It addresses many of the general questions posed by the Commission in its *Federal Register* notice of this workshop. This survey is neither scientific nor exhaustive, but it contains anecdotal evidence of contractual restrictions in currently operating B2B exchanges. We completed this survey principally by reviewing publicly available B2B exchange operating agreements, by visiting numerous exchange sites, and by reviewing available academic literature on B2B exchanges.²

¹ The Commission's jurisdiction over e-commerce generally and B2B exchanges specifically will be governed, as with the Commission's jurisdiction over all other commerce, by the Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. §§ 6(a) and 45(a)(3) (1988), and precedent such as *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993).

² *E.g.*, ARTHUR B. SCULLEY AND WILLIAM A. WOODS, B2B EXCHANGES (1999).



We welcome the Commission's inquiry into the competitive issues raised by B2B exchanges, and we look forward to this workshop producing a clearer indication of the Commission's enforcement intentions in this area of e-commerce.

BUSINESS MODELS

For purposes of these comments, we use the term "B2B exchanges"³ to refer to the many types and titles of electronic marketplaces that have proliferated with astonishing rapidity recently as the Internet, and electronic commerce generally, have become commonplace parts of the United States' economy, and thus part of the Commission's ever evolving responsibilities.

B2B exchanges are thought to work best in highly fragmented markets of relatively small orders, where sellers would obtain better prices through aggregation of demand while buyers would obtain better prices through aggregation of demand.⁴

While varied, business models for B2B exchanges commonly address 5 key items: (1) trading services; (2) non-trading services; (3) membership and ownership; (4) strategic partners; and (5) revenue sources.

³ Various names such as B2B exchanges, B2B websites, b-webs, Internet trading houses, and virtual marketplaces. All of these terms refer to the same concept – "a distinct system of suppliers, distributors, commerce services providers, infrastructure providers and customers that use the Internet for communications and transactions." Tapscot, *Virtual Webs will Revolutionize Business*, WALL ST. J., Apr. 24, 2000, at A38. See also W. Blumenthal, *B2B Internet Exchanges: The Antitrust Basics*, ANTITRUST REPORT 34 (May 2000), for a good discussion of the rapid growth of B2B exchanges and the numerous antitrust issues raised by this commercial development.

⁴ Hansell, *Assessing the Online Exchanges: From One Expert, a Mixed Grade*, New York Times (June 7, 2000) at www.nytimes.com/library/tech/00/06/biztech/technology/07hans.html. The article contains the views of Eric K. Clemons, professor in the Information Strategy, Systems and Economics group at the Wharton School of the University of Pennsylvania.



(1) **TRADING SERVICES OFFERED BY B2B EXCHANGES**

B2B exchanges usually offer one or more of the following trading services:

(a) **Aggregator**

A one stop shopping venue for procurement, where product catalogs of multiple suppliers are aggregated in one place and in one format.

Aggregators are vertical, meaning they support buyers in specific industries.

Goods may be sold by the aggregator for its account acting as principal, buying product from the individual supplier for resale to the customer, or alternatively, by the individual supplier once the customer's purchase order has been forwarded by the aggregator and accepted for filling by the individual supplier.

Goods are ordinarily sold at fixed prices. Particularly appropriate for the sale of low-priced items bought frequently in small quantities.

The following might be the process:

- (i) a home page, allowing the buyer to choose from any the following: placement of a new order; tracking of an existing order; view of order history; and view detailed information of an order.
- (ii) the product catalog, where the buyer may search, for example, by manufacturer, name, product category and end-use category.
- (iii) a page showing the results of the buyer's search, including quantities, shipment address, and billing location.



- (iv) a "shopping cart", displaying selected products, and allowing the buyer to modify quantities, shipment address, and billing location, and to delete the order.
- (v) a price quote page, indicating the prices and shipping charges for the products in the "shopping cart".
- (vi) confirmation of order.

Examples: chemdex.com (www.chemdex.com), in the life sciences industries, medibuy.com (www.medibuy.com), in the healthcare industry, e-chemicals.com (www.e-chemicals.com), in industrial chemicals, and commerxplasticsnet.com (www.commerxplasticsnet.com), in the plastics industry.

(b) Trading Hub

A venue for buyers and sellers in multiple verticals. The trading hub may be "horizontal", supporting all buyers in many industries, and "diagonal", supporting a specific type of buyer or a specific type of product category across multiple industries.

Trading hubs commonly sell goods through auctions, but might also sell at fixed prices.

The process would be similar to the process of an aggregator or an auction, depending upon the selling device.

Examples: freemarkets.com (www.freemarkets.com), a "horizontal" hub, and shop2gether.com (www.shop2gether.com), energygateway.com (www.energygateway.com), a "diagonal" hub and aXesoEnergia.com, an Argentine exchange also operating as a "diagonal" hub in for the purchase and sale of electricity, natural gas and liquefied fuels in Latin American markets generally and markets in the Southern Cone specifically (www.axesoenergia.com).



(c) **Post and Browse (Requests for Proposals)**

A venue where buyers and sellers post expressions of interest to buy and sell, and after meeting, they negotiate directly and off the exchange.

The exchange will maintain the identity of the buyer and seller in confidence until each indicates to the exchange the intent to negotiate directly with the other.

Particularly appropriate when goods are not standardized, requiring extensive disclosures of information, and/ or when the industry practice calls for extensive one-one-one negotiations.

The following might be the process:

- (i) seller posts a profile or proposal.
- (ii) buyer searches by requirements, and is shown all sellers with posted profiles or proposals meeting those requirements.
- (iii) buyer chooses a seller, and advises that seller of its requirements.
- (iv) seller, if interested, then responds to that buyer, and seller and buyer negotiate directly with each other.

Example: Catastrophe Risk Exchange (CATEX) (www.catex.com), in the insurance industry, it-radar.com (www.it-radar.com), in IT Services, and mondus.com (www.mondus.com), in business services and supplies generally.

(d) **Auction Markets**

A venue where multiple buyers or sellers bid competitively. The exchange may be "vertical", meaning that it supports buyers in specific industries, "horizontal", meaning that it supports all buyers in many industries, and "diagonal", supporting a specific type of buyer or a specific type of product category across multiple industries.



The auctions may be seller-driven, where a seller lists the product and buyers bid against each other.

They may also be buyer-driven, where a buyer specifies the product and sellers bid against each other.

In either case, the exchange once again will commonly act only as a facilitator in assisting buyers and seller to complete transactions. This ordinarily results in three critical facts:

- (i) the exchange will maintain the identity of the buyers and sellers in confidence until agreement has been reached and the transaction must be processed and closed. Thus, for example, no other seller will become aware of the identity of any other competing seller by virtue of the exchange.
- (ii) the sale contract will bind only the buyer and individual supplier.
- (iii) if it purchases the goods for resale, the exchange will do so only by way of exception and as the facilitator of the individual supplier.

Particularly appropriate for items that are unique and differentiated but simple to describe and understand.

The following might be one process:

- (i) seller identifies the product, including specifications.
- (ii) seller then specifies commercial terms, including shipping terms, payment terms, availability and expiration date of bid.
- (iii) seller submits bid to competing buyers.
- (iv) seller and winning buyer negotiate directly through the exchange, and close the transaction.



Another might be the following:

- (i) buyer searches for seller bids, by specific product or through product categories or available targeted sale items.
- (ii) upon selecting a seller bid, buyer identifies the expiration date and number of units to be purchased, and submits a bid with billing information.
- (iii) buyer's credit card is pre-authorized by the exchange for the amount of the purchase.
- (iv) buyer's bid becomes a binding contract with the seller when the number of units left to bid by the expiration date is zero. The exchange then encrypts and transfers the credit card information to the seller to process buyer's order. In the meantime, buyer may delete the bid.
- (v) buyer's bid will expire if the units left to contract by the expiration date does not become zero.

Yet, a third process might be the following:

- (i) a page displaying the trading floor, indicating auction numbers, product, type of bid, bid to beat and status.
- (ii) a page displaying auction activity, disclosing the identity of the buyers to the particular seller, on the one hand, and, on the other, the identity of the seller to the competing buyers.
- (iii) notification of result.
- (iv) posting of terms of transaction (other than identity of parties), to help establish a dynamic or market price.



Examples: e-STEEL (www.e-STEEL.com), in the steel industry, shop2gether.com (www.shop2gether.com), in the education and business fields, Paper Exchange (www.papereexchange.com), in the paper industry, and Fishmonger.com (www.fishmonger.com) and gofish.com (www.gofish.com) in the fish and seafood industry.

(2) **NON-TRADING SERVICES OFFERED BY B2B EXCHANGES**

Non-trading services are offered to persuade users to remain with the exchange. They are services deemed to be of particular interest to the community of users.

To the extent possible, third party vendors are typically hired to reduce the overhead cost.

The non-trading services may include any one or more of these services:

(a) **Logistics and Systems Integration**

For example, provision of invoicing, accounting and shipping, or allowing exchange members to link to their respective systems.

(b) **Clearing or Financial Services**

For example, credit analysis for sellers and payment processing.

(c) **Industry Rolodex, Newsletters and Calendars**

For example, listings of buyers, sellers and intermediaries; product and services releases; and identification of trade shows and other events.

(d) **News Feeds and Weather Reports**

For example, customized news feeds specific to the industry, and weather reports, whenever of interest, to the industry.

(e) **Directory of Links**

For example, links to Web-based sites relevant to the industry.



(f) **Scrolling Ticker**

For example, displays in real time of bids and offers, contract postings, and transaction prices once they have closed.

(g) **Discussion Forums**

For example, a chat room to allow users to exchange experiences.

(h) **Jobs Search and Ads**

For example, postings of resumes.

(3) **MEMBERSHIP AND OWNERSHIP OF B2B EXCHANGES**

The conventional wisdom is twofold. First, exchanges must remain neutral and balance the competing interests of members and other users, vendors, owners and governments.

Second, exchanges must provide open, fair and transparent markets; otherwise, exchange will fail to attract buyers and sellers, and will, therefore, lack necessary liquidity.

(a) **Membership**

The usual requirements include the following:

- (i) whether the member is fit and proper.
- (ii) relevant experience of member's staff.
- (iii) member's creditworthiness.
- (iv) member's capital.
- (v) authority of member and its staff to transact business.

Membership requirements are normally addressed in a membership or subscription agreement, which will typically incorporate the rules of the exchange as well as its privacy statement.



(b) Ownership

The most prevalent structure has been ownership by commercial investors, with open membership for buyers and sellers. It is thought to promote the following twin goals:

- (i) neutrality, and accordingly, an open, fair and transparent market.
- (ii) liquidity, and therefore, volume, and reduce the likelihood of anti-competitive practices, such as fixed fee trades and collusion.

Recently, however, buyers and sellers have announced plans to establish exchanges and participate as equity owners. These include the following:

- (i) Covisint, a consortium formed by General Motors, Ford and DaimlerChrysler to connect the world's top automakers and their suppliers. Reportedly, the exchange will be 50% owned by General Motors, Ford and DaimlerChrysler, and several major suppliers have agreed to join, including Delphi Automotive Systems Corp., Meritor Corp., Magna International Inc., Johnson Controls Inc. and Federal Mogul Corporation.
- (ii) GlobalNetXchange, a venture involving Sears Roebuck and Carrefour to connect retailers and their suppliers, partners and distributors.
- (iii) e2open.com, an exchange including IBM, Hitachi, Nortel Networks, Seagate Technology, Solectron, Toshiba, LG Electronics, and Matsushita Electric (Panasonic) to buy and sell computer, electronic and telecommunications products.
- (iv) MetalSpectrum.com, an exchange including Kaiser Aluminum Corp., Alcoa, Inc., Reynolds Metals Co., Allegheny Technologies, Inc. Vincent Metals Goods/ Atlas Ideal Metals and Thyssen Inc. North America to buy and sell aluminum, stainless steel and other metals.



(v) Transora, an exchange including Coca-Cola, General Mills, Kraft Foods, Procter & Gamble, Unilever and 44 other consumer products companies to buy production and non-production goods.

(vi) a European exchange planned by Arbed S.A., Corus Group plc, Thyssen Krupp AG and Usinor S.A. to buy and sell steel products.

(c) **Brokers and Other Intermediaries**

They might be allowed to participate as members to provide additional liquidity.

(d) **Strategic Partners**

They may be allowed to participate as owners, but, if so, they will commonly not be allowed to enjoy control or participate as directors. This is intended to promote commercial neutrality, and accordingly, an open, fair and transparent market.

(4) **STRATEGIC PARTNERS**

(a) **Product Suppliers**

Suppliers are thought to attract buyers who in turn attract suppliers. The result is liquidity and a successful exchange.

(b) **Technology Suppliers**

Exchanges commonly offer technology with universal connectivity through the World Wide Web and adequate security, including encryption, to encourage suppliers and buyers to sign-up with ease and minimal cost.

Technology partners or vendors ordinarily supply that technology, so as to avoid development costs otherwise to be incurred by the exchanges and promote connectivity with sellers and buyers.



(c) **Service Providers**

Any and all of the services offered by exchanges are normally contracted to third parties or partners. They include providers of content, such as news feeds, and logistics and systems integration.

(5) **REVENUE SOURCES OF B2B EXCHANGES**

To date, revenue sources have typically included the following:

(a) **Subscription Fees**

Otherwise known as membership fees.

They might be one-time or annual fees, if charged and not waived.

(b) **Trading Fees**

They might be a fee for each trade, based for example on the value of the transaction, or a percentage of the savings realized by the buyer through the trade.

(c) **Listing (or Hosting) Fees**

They usually assume the ability of suppliers to list products on the exchange's systems, that is, to have a storefront.

(d) **Advertising and Marketing Fees**

They are fees for advertising or sponsorships and other listing services on the exchange's Website, for example, banner advertising as well as "opt-in e-mail marketing" (sending e-mail messages to those who have opted to receive them).



RELATED AGREEMENTS RELATED TO THE TRADING SERVICES

The principal agreements concerning trading services deal with (1) registration and membership, (2) terms of use, (3) the privacy statement, and (4) listings of supply or requirements of product.

(1) REGISTRATION & MEMBERSHIP

In fact, the document is typically an application for membership.

The applicant is asked to disclose information identifying (a) company and individual, (b) billing and payment information, and supporting details for the method of payment, for example, number on credit card, and (c) shipping information. The applicant is also asked to request a password or user I.D.

A standard credit check may then be run on the company.

Thereafter, the company and individual will be invited to participate, subject to the terms of use.

(2) TERMS OF USE

The terms govern access to the trading services offered by the exchange. They bind exchange and its members. The following are the basic concepts:

(a) Acceptance

Acceptance takes place at least by "pointing and clicking" to the respective button, or actually using the services, and occasionally, also by faxing or mailing a hard copy of the signed agreement to the exchange. Acceptance by "pointing and clicking" derives from the "shrink-wrap" licenses used for years by software vendors, where a specified act such as opening the box is deemed to be acceptance of the terms of the vendor's license.



(b) **Definition of Nature of Exchange**

Except when only selling as an aggregator for its own account, the exchange may be defined as only a facilitator or service provider in transactions between buyers and sellers; that is, as a marketplace where buyers and sellers buy and sell products. This is the predicate for a number of waivers of liability, including the following:

- quality, safety or legality of products and services.
- truth, accuracy and completeness of listings, whether for products and services or jobs.
- ability of either seller or buyer to perform.
- warranties, implied and otherwise, of any product or service.
- liability for claims derived from the buy-sell transaction.

The following clause is illustrative:

X is only a marketplace. X acts as an electronic marketplace for sellers and buyers. X is not involved in the actual transaction between buyers and sellers. As a result, X has no control over the quality, safety, or legality of the products or services advertised, the truth or accuracy of the listings, the ability of sellers to sell products or services, or the ability of buyers to buy products or services. X cannot and does not control whether or not sellers will complete the sale of products or services they offer or buyers will complete the purchase of products and services. In addition, note there are risks of dealing across national borders, with underage persons, or with people acting under false pretense. Because user authentication on the Internet is difficult, X cannot and does not confirm that users are who they claim to be.



Because X does not and cannot be involved in user-user dealings, in the event that User has a dispute with one or more users, User releases X (and X's agents and employees) from claims, demands, and damages (actual, direct and consequential) of every nature, known, suspected and unsuspected, disclosed and undisclosed, arising out of or in any way connected with such disputes.

(c) **Eligibility**

Eligibility is restricted to parties who have the capacity and authority to contract, and have submitted a membership or subscription agreement. It may also be restricted to exclude individuals, presumably in part to allow for valid waivers and limitations of liability not valid under applicable law when dealing with individuals, and parties other than those actively engaged in the business or industry served by the exchange. The terms may specifically render employers liable for the trades of designated employees.

The following short and long clauses are illustrative:

The services offered on the Site are only available to persons who can form legally binding contracts under applicable law. By way of example, persons under 18 years of age are not eligible to use X's services, or to offer for sale or purchase any X on or through the Site. In order to offer and/or purchase any X listed on or through the Site, User must complete the registration process and agree to the User Agreement.

X is available only to corporations and business entities (each a "Company") and their designated employee(s) as indicated in the registration form (each a "Designated Employee", who complete the form and are able to form legally binding contracts under applicable law; provided that only a Company actually involved in the buying



and selling of X shall be permitted to enter into transactions. If you do not qualify, please do not use the Exchange. The Company and each Designated Employee shall each be considered a Member under these Rules. A Designated Employee shall be deemed acting on behalf of the Company at all times. In the event that a Designate Employee is no longer an authorized representative of the Company (whether due to termination of employment or otherwise), the Company shall notify X immediately in writing of the removal of such Designated Employee and the appointment of a new Designated Employee, if any, as well as the date of such appointment. The termination and appointment will become effective when X acknowledges receipt of such notice. X may refuse to offer its services to anyone and may change its criteria for membership, at any time, in its sole discretion.

(d) Transaction Rules; Commercial Terms

Alternative ways of bidding may be stated or incorporated by reference when the exchange offers auction services, as well as generally applicable consequences of bidding. For example, the rules may define offers and solicitations of offers, and the manner of accepting or, alternatively, rejecting offers and then counter-offering. Acceptance is then defined, for example, with reference to a confirmation.

An exchange may establish all commercial terms for all orders. For example, acceptance; payment terms; prices and taxes; returns, changes and cancellations; title, delivery and acceptance. This is the case when the exchange is selling for its own account as an aggregator. Occasionally, it may also occur when the exchange is offering hub or auction services but, in those cases, the noted terms simply incorporate and embody the commercial terms of the seller



as indicated in the bid accepted by the buyer, which means that the exchange also regulates the format of the offers to sell so as to standardize them.

(e) **Fees and Circumvention of Exchange**

Fees are defined or incorporated by reference. Exchanges ordinarily reserve the right to amend the fee schedule at their discretion.

They are often paid by the sellers. The terms usually provide for currency and date of payment, for example, U.S. dollars (unless otherwise stated) within 30 days from closing of the transaction.

Exchange may reserve the right to collect the fees out of the purchase price, if payment of the purchase price is made through them.

They also may expressly reserve their rights against sellers typically to collect fees whenever transactions are closed off the exchanges. Moreover, exchanges also reserve their rights to deny the respective parties access to the trading services. The following clause is illustrative:

Member agrees not to identify and engage in negotiations with a counterparty on the Exchange and then agree on the terms of the same Transaction off the Exchange or otherwise circumvent the payment of the Transaction Fee. A Seller who agrees on the terms of a Transaction off the Exchange is still liable to pay the Exchange the applicable Transaction Fee. In addition, any Member that engages in circumvention is subject to having its membership in the Exchange immediately and permanently revoked.



(f) Member Conduct; Integrity of Exchange

Members may be asked to comply with all applicable laws, and maintain confidentiality of passwords and verification codes, and avoid engaging in various acts to promote the exchange's integrity .

The covenant to comply with all applicable laws is illustrated by the following short and long clauses:

Users agree to comply with all applicable laws, statutes and regulations regarding this Site and the Services, including in regard to offers, bids, purchases and sales of goods and services.

Member agrees :

- (1) to abide by all applicable local, state, national, and international laws and regulations in Member's use of the Services;*
- (2) not to impersonate any person or entity, or falsely state, misrepresent or not disclose Member's affiliation with a person or entity;*
- (3) to comply with all laws regarding the transmission of technical data from the United States through the Services;*
- (4) not to use the Services for illegal purposes;*
- (5) to comply with all regulations, policies and procedures of networks connecting the Services; and,*
- (6) not to use the Services to collect or harvest personal information, including without limitation, financial information, about other Members or the Services.*



Particular attention is paid in any event to the obligation not to engage in any anti-competitive or fraudulent act. The following specific mandates are illustrative:

-- *Sellers may not manipulate the price of their product or service, either by using a shell (either a secondary account or third party), by bidding themselves, or by any other means.*

-- *Any party is prohibited from manipulation of pricing, on transactions by any means, including the placement of bad faith bids, use of shells in the auction process or collusion between a buyer and seller to cause harm to a competitor.*

The covenant to maintain confidentiality of passwords and verification codes is stated simply as such.

The covenant not to engage in other prohibited acts commonly include any one or more of the following acts: *posting and transmitting libelous or scandalous materials; transmitting materials containing viruses, worms or other harmful components; transmitting bulk e-mails, advertisements, solicitations, offers or any other unsolicited commercial communications; inserting links to other sites; altering any data or information supplied by another user of the site; and, engaging in any activity that infringes on the copyright, patent, trademark or other rights of any person or entity.*

(g) **Intellectual Property**

Members are typically granted a license to the information on the exchange site. The following clause is illustrative:

Upon becoming a Subscriber, you are granted a nonexclusive, nontransferable, limited license to access and use the Site in accordance with this Agreement.



In principle, that license is in exchange for the license granted by members (and vendors) to the exchange to use their information. The following clause is illustrative:

To enable X to use information provided by you in connection with the operation of X and the Site and the advertisements thereon without violating any rights you have in the information, Member grants to X a non-exclusive, worldwide, perpetual, irrevocable, royalty-free right to exercise the copyright, trademark and publicity rights (but no other rights) you have in such information.

(h) **Disclaimer of Warranties and Limitation of Liability**

The exchange will commonly provide the trading services on an “as is” basis, so that it will attempt to avoid any and all liability for the quality and availability of services. In any event, it will typically disclaim liability for consequential damages.

The following clauses are illustrative:

Disclaimer of warranties: the site, including all content, functions, and information made available on or accessed through the site, is provided on an “as is” “as available” basis without representations or warranties of any kind whatsoever, express or implied, including without limitation, non-infringement, merchantability or fitness for a particular purpose. X does not warrant that the site or the functions, features or content contained therein will be timely, secure, uninterrupted or error free, or that defects will be corrected. X makes no endorsement or warranty regarding any goods or services purchased or obtained through the site or any transactions entered into through the site. No advise or information, whether oral or written, obtained by you from X or through the site shall create any warranty not expressly made herein. Some



jurisdictions do not allow the exclusion of certain warranties, so some of the above exclusions may not apply to certain users. X expressly disclaims any endorsement or warranty of any goods sold on or through the site, and any responsibility for any misrepresentations or breaches committed by another user.

Limitation of liability: in no event shall X be liable for any special, incidental or consequential damages that are directly or indirectly related to the use of, or the inability to use the site or the content, materials and functions related thereto, including without limitation, loss of revenue or anticipated profits or lost business or lost sales, even if X or an authorized representative thereof has been advised of the possibility of such damages. Some jurisdictions do not allow the limitation or exclusion of liability for incidental or consequential damages so some of the above limitations may not apply to certain users. In no event shall the total liability of X to you for all damages, losses, and causes of action (whether in contract or tort, including, but not limited to, negligence or otherwise) arising from this agreement or your use of the site exceed, in the aggregate, \$100.00.

(i) **Dispute Resolution**

The risks to avoid are to have the exchange become subject to jurisdiction in multiple venues, and to have multiple bodies of law govern claims against the exchange.

Accordingly, the Agreements provide for covenants mandating either binding arbitration in a designated venue, or for exclusive submissions to the jurisdiction of a designated venue.

They also provide for a choice of law, which should be the law of the jurisdiction where the exchange is located to promote certainty of result.



(j) **Amendments**

Exchanges will more often than not reserve the unilateral right to amend the terms of use.

(3) **PRIVACY STATEMENT**

The statement governs use of the information collected by the exchange, beginning with the application for membership.

Privacy practices commonly have two common denominators. First, collected information is information voluntarily disclosed by the user. Second, collected information about the user and related transactions is not disclosed to third parties without approval of the user.

The following are the basic concepts:

(a) **Relationship with Terms of Use**

The statement is typically either incorporated by reference in the terms of use or reproduced in the terms of use.

(b) **When and How Information is Collected**

The user is typically advised that collection takes place at registration and through "cookies".

The following clause is illustrative:

When you register, you provide us with your name, e-mail, shipping address and other contact information. This gives you access to all of the features of our web site, including personalization and verification.

We may use your account information to send customized information, postings and listings that are new on the web site.

X uses "cookies" to make visiting our web site easier by saving your password, purchases and preferences while you are at our site. "Cookies" are used by most



major web sites. They are small pieces of information stored by your browser on your computer's hard drive. They recognize your user name and password if you choose this option when you login.

Most browsers are initially set to accept cookies. The navigation of our site depends on cookies to present your personalized pages -- especially the buying and selling pages. If you do not set your browser to accept cookies then you cannot use our site properly.

(c) **Use of Information**

The user is informed of how the exchange uses the information.

The following short and long clauses are illustrative. The long clause is efficient because it identifies the information collected and the reason for collecting it.

X uses any information voluntarily given by its users to better their experience on the site, whether to provide personalized elements on the site or to better prepare future content and functionality based on the interests of users. X never shares information about any individual users with any third party.

Information is gathered for the following main purposes:

-- To establish identity of the company and user: For these purposes, business contact information, such as name, address and e-mail may be collected at the company and user level during the registration process.

-- To effect posting of opportunities or related communications. For these purposes, information pertaining to opportunities, such as transaction type, transaction amount, payment, shipping and billing information of the participants associated with a transaction may be collected and stored. As part of our efforts to provide participants



with the ability to establish business relationships with trading partners, some aspects of this information may also be used for evaluative purposes.

-- To provide future service and support. This information comprises both contact information related to products and services offered by X, as well as customer and technical support services requested by users. This information is also used to provide users with product and service updates, patches, change in usage policy and similar notices.

-- To better tailor marketing to user needs. Information on site use helps us create website content and navigation that is most relevant and user friendly to customers and enhances the overall customer experience.

(d) External Links; Chat Rooms and other Public Forums

Exchanges containing links to third party sites expressly limit their privacy statements so as to make them inapplicable to the third party sites, although the practice is less frequent than might be anticipated.

The following clause is illustrative:

This site contains links to other sites. X is not responsible for the privacy practices or the content of such Web sites.

They also specifically exclude chat rooms and other public forums from the scope of their privacy statements, although again the practice is less frequent than might be anticipated.

The following clause is illustrative:



This site makes forums available to its users. Please remember that any information that is disclosed in these areas becomes public information and you should exercise caution when deciding to disclose your personal information.

(e) **Opt-Out Policy; Correct and Update Policy**

Members are given the option not to disclose information, and the opportunity to correct and update collected information.

The clauses are typically straightforward, for example:

Opt-Out Policy. Users can opt not to receive our electronic newsletter, e-mail or to provide certain personal information when registering. Users may unsubscribe to any of our electronic newspapers or emails at any time by following the instructions contained at the end of every message.

Correct/ Update Policy. Users can correct or change information collected during registration at any time by going to their user profile, clicking the edit link and making changes to their data, or sending an email to client services@X.com., or calling the following toll free number:

(f) **Security**

A very broad statement on site security is typically included. In fact, it simply advertises that the site is secure, the exchange's view, but without disclosing any significant technical details. The purpose of the statement would seem to be to reassure members at least generally, and allow the exchange maximum flexibility to adapt and adopt new practices as and when technologically developed.



The following clause is illustrative:

X has implemented multiple security measures to protect the loss, misuse and alteration of any information under our control. The physical server is protected full-time (24/7) by both a full lockdown and human guards.

Transmission of information over the Internet cannot be 100% secure. However, X places a high premium on security and privacy. Access to our site is password protected, and a firewall protects our data base from outsiders. The technology running the Site resides in a secure co-location facility. All our employees are made aware of our security policies and practices, and any changes or updates thereto. We periodically review our security policies and procedures and update them as necessary to ensure the protection of user information obtained via the Site.

(g) **Amendments and Updates**

Finally, exchanges will ordinarily reserve the unilateral right to amend the privacy statement.

(4) **LISTINGS OF SUPPLY OR REQUIREMENTS OF PRODUCT**

These commonly take the form of requirements or supply commitments between buyers and sellers, respectively, on the one hand, and exchanges on the other.

These commitments may be exceptional. As noted, except when acting as aggregators, exchanges ordinarily purchase and sell product only to facilitate transactions between buyers and sellers.

The following is illustrative of the requirements commitment:

1. Listings. BUYER (a) agrees to use its commercially reasonable efforts to list on the Exchange for Purchase a majority of its requirements for XXX and (b) agrees that it



*will list and Purchase on the Exchange at least in the aggregate ***** tons of XXXX during the next two years commencing on the date of this Agreement and in the minimum amount (each a "Minimum Quarterly Amount") during each quarter set forth on Schedule 1 attached hereto (each such quarter being referred to as a "Measuring Quarter"); provided that BUYER shall not be liable hereunder for its failure to Purchase in any Measuring Quarter the corresponding Minimum Quarterly Amount if such failure arises solely as a consequence of the unavailability on the Exchange during such Measuring Quarter of XXXX that is (i) at least of substantially similar quality as the XXXX that BUYER has historically purchased in the ordinary course of its business for similar purposes, either on the Exchange or elsewhere, prior to the date of this Agreement, (ii) for sale at then market or below market prices (in each case after taking into account all available discounts, rebates, marketing subsidies, freight savings and other vendor concessions) and (iii) offered for sale on terms which reasonably meet the logistical requirements of BUYER (such as delivery, packaging, including packaging artwork and pricing codes, and other reasonable logistical requirements of BUYER). Exchange agrees to accept the foregoing listings; provided that in no event shall Exchange be liable to BUYER in the event that BUYER's requirements for XXXX are not met through the Exchange. For the avoidance of doubt, BUYER and Exchange agree that if there is a default in the delivery of XXXX (which otherwise meets the specifications set forth in clauses (i), (ii) and (iii) above) after BUYER has contracted for the Purchase thereof on the Exchange, such XXXX (which was contracted for but not delivered) shall be deemed to*



have been "unavailable" on the Exchange for purposes of the proviso of the immediately preceding sentence. For purposes of this Agreement, the term "Purchase" shall mean when BUYER takes title to XXXX from PaperExchange (in its capacity as a principal and not as agent for a seller) by means of a transaction on the Exchange.

2. Term and Termination. The term of this Agreement shall be for a period commencing on the date of this Agreement through (and including) XXXX (the "Initial Term") and shall automatically renew for one-year terms thereafter unless at any time after the Initial Term, either party terminates this Agreement upon no less than thirty (30) days' prior written notice to the other party.

OTHER AGREEMENTS

These are the final set of agreements commonly related to B2B exchanges.

They deal with ownership, strategic partners and non-trading services.

The agreements are likely to include the following:

- (a) Equity Subscription Agreements, among the exchange owners and venture capitalists.**
- (b) Venture Capital and Financing Agreements, among the exchange owners and venture capitalists.**
- (c) Collaboration Agreements or Joint Venture Agreements, among the exchange owners.**
- (d) Software Development and License Agreements, between the exchange and vendors of software.**



- (e) **System Integration Agreement, between the exchange and vendors of software and hardware.**
- (f) **Content Licenses, between the exchange and suppliers of information.**
- (g) **Web Site Development Agreement, between the exchange and the designer of the site.**
- (h) **Web Site Hosting Agreement, between the exchange and the designer of the site.**
- (i) **Linking Agreement, between the exchange and other sites.**
- (j) **Internet Advertising Agreement, between the exchange and sponsors or advertisers.**

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