

B2B EXCHANGES AND FRANCHISING: A LEGAL AND STRATEGIC OVERVIEW

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Introduction

Business to business exchanges ("B2Bs") have great potential to reduce business costs and increase efficiency for franchisors and their franchisees in a wide variety of industries and at various levels of operations. Even federal regulatory authorities recognize that B2Bs could radically change the way we do business in this evolving Internet era. In the October 26, 2000 FTC Report on *B2B Electronic Marketplaces*, Federal Trade Commission ("FTC") Chairman Robert Pitofsky describes "...the great promise that B2B electronic marketplaces offer as means through which significant cost savings can be achieved, business process can be more efficiently organized, and competition may be enhanced."

A B2B exchange is a collaboration among entities to create an Internet-based platform to either purchase supplies or sell products or services. For example, in a single-firm platform one seller can offer its products to a group of buyers, or one buyer can attract multiple suppliers to bid on that buyer's required supplies. In other types of B2Bs, groups of suppliers interact with groups of buyers leading to economies of scale, and helping to eliminate the transaction costs associated with traditional paper-based ordering systems.

Although just emerging in some industries, B2Bs are expected to grow quickly in coming years alongside the growth of the Internet. Spending on B2Bs currently accounts for 79% of all e-commerce spending, and this percentage is expected to swell to 87% by 2005. Although B2B marketplaces now spend only \$2.1 billion on infrastructure such as technology and services, that number is projected to grow to \$80 billion by 2005.

B2Bs have entered a critical state of transition. While hundreds, if not thousands, of B2B websites have been proposed, few of these websites are fully operational. And despite the expectations for enhanced efficiency, few websites have had the time to develop a track record to prove whether such expectations are merited. Many B2B stocks now trade well below their historic highs amid a general slowdown in growth in

the technology sector. Nevertheless, many analysts remain optimistic about the future of B2B e-commerce because of its inherent potential to increase efficiencies.

Some of the world's most important industries have established viable B2Bs. For example, automobile manufacturers, including Ford, General Motors, DaimlerChrysler, Renault, and Nissan, participate in the Covisint exchange. Defense companies including Boeing, Lockheed Martin, Raytheon, BAE Systems, and EADS, participate in the Exostar exchange. Honeywell and United Technologies participate in the airline industry's MyAircraft.com exchange. These are just a few of the many B2B exchanges that have arisen in recent years.

B2Bs will soon be tested on a much larger scale in franchising, a segment of the national and world economy that continues to grow increasingly more important. A franchising B2B could take the form of a franchisor implementing a B2B on a stand-alone basis for its franchisees, multiple franchisors joining together to create a collective B2B for all the franchisors' franchisees, or franchisees alone uniting in a B2B format. The world's second-largest lodging franchisor Choice Hotels International, Inc. has already launched an award-winning Internet B2B for its hotel properties. And one of the world's largest franchise systems, McDonald's Corporation, recently announced the creation of a new Internet-based procurement website for its 27,000 worldwide franchisees that is scheduled to launch in mid-2001. As with Choice Hotels and McDonald's, franchisors of all sizes that seek to reduce costs for their franchisees and remain more competitive will increasingly turn to B2B exchanges, either as a participant or as an organizer, to create these cost savings. The goal of greater efficiency remains the same whether two competing franchisors seek ways to streamline purchasing systems for their franchisees, or two franchisees on different continents wish to utilize the same one-stop online shopping environment. In theory at least, B2Bs and franchise networks seem like a match made in heaven.

The legal issues surrounding B2B exchanges are not new. Issues faced by trade associations, joint ventures, group purchasing organizations, commodity markets, and auctions should apply with similar force in the B2B context. This Article for [Franchise Law Journal](#) reviews the important legal and strategic issues relevant to the formation and operation of B2Bs in the franchising community. Because issues of antitrust

law are critically important when analyzing B2Bs, a large segment of our discussion will focus on the antitrust aspects of establishing and operating a franchise-related B2B exchange as well as how the antitrust laws have been interpreted by regulatory agencies and the courts. We end our discussion with a summary of those strategic and business issues that any franchisor or franchisee should consider before committing time, energy, or financial resources to participating in or even attempting to organize a B2B exchange.

Pre-B2B Information Gathering and Scrutiny of Formation by Regulators

Prior to the formation of a B2B, franchisors, franchisees, or vendors might want to evaluate the likely cost savings and other efficiencies that would result from establishing such a collaboration. Because the collection and analysis of competitively sensitive information could expose these parties to antitrust risks, certain rules must be obeyed. Courts evaluate exchanges of price and cost information under the so-called "rule of reason." Under the rule of reason, courts determine whether the exchange of data is justified by a legitimate business reason that outweighs any potential harm to competition. Generally, the sharing or exchange of historical cost information poses less of an antitrust risk than the exchange of price information; however, both types of exchanges of data can pose significant antitrust concerns if there is an intent to restrain competition or if the exchange of data facilitates price-fixing.

The Federal Trade Commission ("FTC") and the United States Department of Justice ("DOJ") have provided some guidance regarding the pre-B2B-formation dissemination of price and cost data in their *Health Care Statements* [add cites], and this guidance is now applied to other industries. The *Health Care Statements* provide that the exchange of cost or price data will satisfy antitrust strictures where a third party manages the survey of price or cost data, the data disseminated is over three months old, the data collected is aggregated, no more than five companies are participating in the exchange of information, and no one company's data represents more than 25% of any statistic.

Generally, to avoid exposure to antitrust risk, it would also be advisable for franchisors or franchisees involved in pre-B2B information exchanges to enter into non-disclosure agreements. Where appropriate, the firms should document meetings with potential partners to minimize antitrust risks. Further,

the discussion of topics should include only those related to the formation of the exchange. The firms should not discuss particular suppliers, and the exchange of price and cost data should occur only through a third party that has established guidelines to ensure antitrust compliance. As the above guidelines hopefully demonstrate, the mere investigation of the potential benefits of joining a B2B can be a risky endeavor for franchisors, franchisees, or vendors, and should proceed with antitrust counsel's guidance.

Once franchisors or franchisees complete their pre-B2B-formation investigations of the potential benefits they may derive from creating an exchange, they must then turn their attention to regulatory issues related to the actual formation of the B2B. Courts will rarely apply the lethal per se standard to the formation of exchanges. The per se standard would only be applied if the B2B was nothing more than a sham to fix prices or divide geographic or customer markets, and not a legitimate integrative activity. Instead, courts and regulators will generally apply a rule of reason analysis when reviewing the formation of a B2B. Regulators will begin their review with an examination of the nature of the B2B agreement, asking about the business purpose of the agreement, and examining whether the agreement, if already in operation, has caused anticompetitive harm. If the nature of the agreement and the absence of market power [new concept needs explanation] together demonstrate the absence of anticompetitive harm, the regulatory agencies will generally not challenge the formation of the B2B. (From the FTC's and DOJ's *Antitrust Guidelines for Collaborations Among Competitors* (April 2000) ("*Collaboration Guidelines*").

According to the Supreme Court, "the true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained are all relevant facts." *Board of Trade of the City of Chicago v. United States*, 246 U.S. 231 (1918).

Given the significant cost savings and supply chain management efficiencies that result from B2Bs, regulators should, in most cases, find the formation of B2Bs to be pro-competitive. In fact, regulatory

authorities have approved the formation of the first two exchanges they have formally examined. The FTC limited approval for the formation of Covisint, the automobile parts exchange formed by Ford, Chrysler, General Motors and other large automobile companies. In doing so, however, the FTC was not closing the door entirely on future antitrust scrutiny. The FTC told the parties that "[b]ecause Covisint is in the early stages of its development and has not yet adopted bylaws, operating rules, or terms for participant access, because it is not yet operational, and in particular because it represents such a large share of the automobile market, we cannot say that implementation of the Covisint venture will not cause competitive concerns." Also, the European Union approved the formation of MyAircraft.com, a B2B exchange formed by Honeywell and United Technologies for aerospace parts and services.

The approval of the formation of these two large exchanges by regulatory authorities is certainly a good sign for would-be B2Bs. But it is folly to suggest that Internet B2Bs have been fully endorsed by regulators. This is especially true with respect to the formation of franchising B2Bs, which as of the printing of this Article, have never been tested by antitrust regulators.

Significant Legal Issues in the B2B Context

Traditional antitrust laws will apply to the B2B sector, according to the FTC Staff Report *Entering the 21st Century: Competition Policy in the World of B2B Electronic Marketplaces*, October 26, 2000. Familiar antitrust provisions, including Sections 1 and 2 of the Sherman Act, Section 7 of the Clayton Act, the Hart-Scott-Rodino Act, and international laws must all be adhered to when forming and operating B2Bs, including B2Bs organized by franchisors and franchisees.

Section 1 of the Sherman Act

Section 1 of the Sherman Act prohibits "[e]very contract, combination . . . or conspiracy, in restraint of trade . . ." 15 U.S.C. § 1 (1994). Section 1 applies to pre-B2B information exchanges, to the formation of the B2B itself, and to any and all other agreements made among participants in a B2B, whether between groups of franchisees, groups of franchisors, or between franchisees and franchisors. Section 1 is important in the B2B context because of the potential for participating parties to collude. The coordination or

dissemination of purchases, sales, and most of all, prices, by parties, could create unwanted antitrust problems for the B2B.

One way in which regulators can infer that collusion is occurring is through an examination of a B2B's ownership structure. Competitors who together own all shares of a B2B or whose representatives constitute an entire B2B board may raise concerns that price fixing or other types of collusion are taking place. The collusion may occur through the written or oral dissemination of information at board meetings or through the distribution of data-filled reports to owners. *See City of Long Beach v. Standard Oil Co.*, 872 F.2d 1406 (1989) (holding that participation in meetings by competitors supported an inference of conspiracy).

Collusion can also be inferred through the practices of auctions and reverse auctions. While auctions or reverse auctions may result in reduced costs to B2B participants, they may facilitate overt agreements or suggestions of agreements between competitors in violation of Section 1's prohibitions.

In terms of franchising, Section 1 likely poses a greater degree of risk for franchisors because they can potentially collaborate with one another on price-related issues, either at the customer level or in the context of their relationship as an actual or potential supplier to their network of franchisees. Franchisees, although not likely to engage in price fixing in the B2B context, must still be wary of conducting any activities that might tend to restrain trade, or even appear to restrain trade, particularly when coordinating with each other on pricing or related issues in local markets, especially if they have a significant market share in those territories. Franchisees must also be cognizant of the potential for collusion in the context of auctions and reverse auctions.

Section 2 of the Sherman Act

Section 2 of the Sherman Act prohibits monopolies, attempts to monopolize and conspiracies to monopolize. 15 U.S.C. § 2 (1994). Section 2 attempts to minimize the dangers that a large entity, for example, a dominant B2B exchange, will pose to competitors and consumers. The potential for a dominant exchange to exclude minor competitors, enact strict membership rules for its members, and control prices and output, may cause regulators to take notice.

Section 2 may be implicated when a dominant B2B requires its members to make a minimum amount of purchases through the exchange, or requires that members use the exchange as their exclusive mechanism to procure products. Such exclusive arrangements may be beneficial, especially to a nascent B2B, to assure that it will have enough business to sustain itself and facilitate long-term planning. The legality of such exclusive arrangements will depend upon whether such arrangements foreclose suppliers from a significant group of buyers or foreclose buyers from a significant group of suppliers, and whether the arrangement has an adverse effect on competition. According to the Supreme Court, "[i]n determining whether an exclusive-dealing contract is unreasonable, the proper focus is on the structure of the market for the products or services in question -- the number of sellers and buyers in the market, the volume of their business, and the ease with which buyers and sellers can redirect their purchases or sales to others. Exclusive dealing is an unreasonable restraint on trade only when a significant fraction of buyers or sellers are frozen out of a market by the exclusive deal." *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2, 45 (1984). Generally, under 30% market foreclosure has been determined to be unproblematic, with concerns for anticompetitive effects growing as the percentage of market foreclosure increases.

Section 2 is also relevant in instances where dominant B2Bs enact overly rigid membership rules for its members. A B2B, as a form of cooperative association, may "establish and enforce reasonable rules in order to function effectively." *Northwest Wholesale Stationers Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 296 (1985). Courts are primarily concerned that the membership rule or guideline furthers a legitimate goal, and that it does not merely represent an anticompetitive refusal to deal with a competitor. Membership rules may be per se illegal if the exchange "possesses market power or exclusive access to an element essential to effective competition." *Northwest Wholesale Stationers*, 472 U.S. at 296.

Similarly, B2Bs must also be careful about setting standards for their members that tend to favor only certain participants. Courts will evaluate the standard's effect on competition, the scope of the standard, whether the industry or a third party enforces the standard, and the inclusiveness or exclusiveness of the process used to set the standard. Procedural safeguards are required if and when a B2B sets a standard. The Supreme Court has stated that a court's evaluation of the benefits of a standard setting process "depends upon

the existence of safeguards sufficient to prevent the standard-setting process from being biased by members with economic interests in restraining competition." *Allied Tube*, 486 U.S. at 509. Also in the context of Section 2, B2Bs should be cognizant of restrictions on the practice of B2Bs requiring the terms of sales to be uniform. For instance, the Supreme Court in *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980), found that an agreement to standardize credit terms constituted illegal price fixing, finding that "credit terms must be characterized as an inseparable part of the price." 446 U.S. at 647.

Dominant single B2Bs in an industry should also be aware of the "essential facilities" doctrine which states that all players in an industry must have access to an exchange if such access is required for fair competition. In *MCI Communications Corp. v. AT&T*, 708 F.2d 1081 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983), the court set forth the four elements required to prove that an essential facility exists: (1) control of the facility by a monopolist; (2) an inability to easily duplicate the facility; (3) a denial of the facility by the monopolist; and (4) the feasibility of the monopolist providing others access to the facility.

Section 2 is critically important in the franchising context. Franchisors often have a legitimate interest in restricting franchisees to buying supplies only from certain vendors to maintain the franchise's brand quality, and to protect the franchise's goodwill among its customers. A franchisor creating a B2B might face obstacles under Section 2 when attempting to enforce rigid membership rules and standard setting for franchisee members. How regulatory authorities will reconcile these competing interests is still unknown. [Andrew - this sentence was in Larry's mark up to the original draft but I don't see it covered anywhere in the new draft, so here it is: Consideration should be given to allow participants in one exchange to also participate in other exchanges and offering technological interface with other exchanges to facilitate compatibility of exchanges.]

Section 7 of the Clayton Act

Section 7 of the Clayton Act deserves mention, even though it is less likely to play a role in the Internet B2B antitrust calculus. Section 7 prohibits mergers and acquisitions that substantially lessen competition or tend to create a monopoly. 15 U.S.C. § 18 (1994). Another law, the Hart-Scott-Rodino Act, requires that before certain mergers and acquisitions take effect, DOJ or the FTC must be notified. 15 U.S.C.

§ 18a. Notification is mandatory under the Hart-Scott-Rodino Act for certain limited liability companies and incorporated joint ventures that meet a size of transaction/size of parties test, but the law does not apply to partnerships. Under certain circumstances, a B2B formation may be required to file under the Hart-Scott-Rodino Act, and care should be exercised not to immediately conclude that all such ventures are simply not required to report. Also, a B2B exchange may request what is called a Business Review Letter by having all the relevant parties disclose certain information to the regulatory agencies. The responsible agency will normally respond to the Business Review Letter in writing and explain whether or not the exchange is legal. Such a process can take up to three months. A B2B exchange may also make an informal notification to one of the federal regulatory agencies. If the exchange does not raise significant issues, the responsible agency may quickly respond and inform the parties that they do not intend to challenge the formation of the B2B. Such review letters, however, do not preclude enforcement agencies from later taking action if circumstances change or the implementation of the venture in operation causes anticompetitive concerns.

Foreign Laws

It is also essential that franchisors and their counsel carefully consider the various foreign laws and regulations enforced by governments and international regulatory authorities which may affect the establishment and operation of the B2B exchange. These provisions will continue to grow in importance as franchises expand globally at a staggering pace. Governments that seek to protect their own citizens and their nation's economic interests will not shy away from enforcing their competition laws against foreign entities. Those involved in franchising must have a global perspective when evaluating their exposure to competition laws.

Issues to Consider and Questions to Ask

The Financial Calculation

Franchisors, franchisees, and vendors thinking of participating in B2B exchanges will need to carefully examine their projected costs and revenues resulting from participation in the B2B. They should understand in advance all fees and expenses associated with participation in the exchange, their initial and

ongoing obligations, including such expenses as membership fees, transactional fees, finders fees, event participation fees, advertising fees or sponsorship fees. The most successful exchanges thus far have lowered costs to franchisees by removing middlemen and by sharing data to create marketplace efficiencies. When they are well-operated and well conceived, B2Bs may help franchisors and their networks of franchisees to better manage inventories, improve customer service and create substantial savings and efficiencies for all links in the supply chain. B2B exchanges hold the promise of enabling participants to procure higher quality goods or services and receive more favorable pricing from vendors and allow them to identify new market partners and potential outsourcing opportunities.

Operational issues - Various Pricing Models

Franchisors, franchisees, and participating vendors should be aware of the different revenue and pricing models and systems, from real-time dynamic pricing systems to forward auctions and reverse auctions. Real-time dynamic pricing, which would favor neither a vendor nor a franchisee, allows entities to engage in real-time bidding for commodities such as oil or semiconductors. This type of system operates on a Bid-Ask system, similar to the Nasdaq stock exchange and as a result is more reflective of the perceived value of the product at the time of the sale. Reverse auctions would most likely be used if a franchisee requests a specific item based upon type, quality or delivery schedule. The franchisee would submit a request for quote (RFQ), asking sellers to respond, and therefore reverse auctions would typically favor the franchisee. Forward auctions work best for unique items like art or antiques. A forward auction would allow a vendor to put a product up for auction and then sell to the highest bidding franchisee. Because pricing trends upward, the process usually favors the vendor.

Each segment of the franchising community can potentially benefit from an Internet B2B. Franchisors could benefit by providing their franchisees with a pre-approved set of vendors, thereby helping to protect the franchisors' brand and quality requirements. Franchisors could also likely negotiate special discounts for their franchisees. Internet B2Bs could allow franchisees to gain access to vendors on a global scale, enabling them to secure the best prices and most favorable terms for purchasing their supplies. The B2B medium would also allow franchisees to order via a paperless, automated process, reducing transactions

costs and speeding deliveries, and provide for "one-stop-shopping" 24 hours each day, 365 days each year. Vendors would benefit through the ability to market their products and services more efficiently to those consumers (franchisees) who need them most. Vendors would also have a new avenue in which to introduce new products to the marketplace, by first testing consumer responses within the confines of an Internet B2B. B2Bs would also help reduce vendors' marketing costs and provide instant access to a large customer base.

Ownership and Management Issues

Before embarking on the Internet B2B path, however, all parties--franchisors, franchisees, vendors, and others--must decide what their respective roles will be in any B2B. Will the franchisor merely organize the exchange, or will it actively participate in and manage the B2B? Who will claim ownership interests in the B2B and will such interests cause legal or regulatory hurdles right from the start or at later stages? How will financial obligations be allocated among the various founders of the B2B? Which party's counsel will be selected to initially organize the B2B? And how will ownership shares be distributed? If two competitor franchisors choose to jointly own a B2B, they must take strong actions to avoid the appearance of collusion in violation of Section 1's prohibitions, by taking actions such as the appointment of independent board members not affiliated with any participant, establishing antitrust guidelines and information firewalls, empowering an audit committee to enforce antitrust guidelines, and ensuring that any information supplied to owners is first aggregated and screened.

While sole ownership of an exchange does not raise the Section 1 collusion problems that joint ownership raises, Section 2 remains important to any sole owner of an exchange. Any sole owner of an exchange with a large market share should be sure to apply membership rules consistently and to clearly set forth membership criteria in detail and in writing. Courts will, in some instances, consider the kinds of procedural safeguards put into place by B2Bs when evaluating the reasonableness of any membership rule. *Pretz v. Holstein Friesian Ass'n*, 698 F.Supp. 1531 (D. Kan. 1988). Procedural safeguards include providing members with notice and the right to be heard prior to expulsion. Some membership rules are obviously essential in the Internet B2B context. Admission criteria and termination provisions can not be avoided for any viable cooperative to survive. Regardless of the B2B's composition, however, it is probably a good idea

to create from the onset of the B2B some basic membership rules along with sufficient procedural safeguards and rights for B2B participants to avoid regulatory problems later on.

And any exchange with a large market share, whether solely-owned or jointly-owned, would be well advised to keep itself open to all industry participants. The essential facilities doctrine is especially relevant to a B2B owned and controlled by a franchisor that wields a great deal of market power in an industry. If the infrastructure of the B2B would be difficult to duplicate, and it would be feasible for the franchisor to grant access to competing franchisors that wished to have access to the B2B, the essential facilities doctrine might apply. One risk for a franchisor is that it might make a large financial investment in an Internet B2B, only to be ordered by a court or regulator to open up its infrastructure to competitors.

Technology

Another critical issue relates to the technology and infrastructure of the B2B. Although B2Bs work smoothly in theory, never encountering technical glitches or breakdowns, we all know that reality is often not so kind. Franchisors establishing a B2B for its franchisees must ensure before making any significant financial commitment that the B2B has adequate infrastructure and technology not just for present needs, but also sufficient capacity to handle growth in the number of franchisees. Anyone establishing a B2B must ask how and by whom the technology will be maintained, and how responsive technical staff support will be. Participants should also explore the remedies that might be available should the technology falter and business losses result. For franchisors establishing an Internet B2B for a large number of its franchisees, technology becomes ever more critical. Choosing infrastructure that contains even the slightest glitch, or hiring support staff that proves not to be responsive to glitches, can turn what is ordinarily just a minor problem into a disaster that affects all franchisees, and ultimately, the franchisor's brand and goodwill.

The Type of Product or Service

Historically speaking, B2Bs are most effective when organized around a set of commodity products. For those kinds of products, making a large investment in a B2B enterprise might make sense. Industries that are more specialized may not lend themselves well to the B2B medium, however, and as a result, conventional distribution channels should not be abandoned. Instead, for such specialized products or

services, participation in a B2B should be viewed as a supplement to normal channels of sale and distribution, and not as a replacement for existing channels.

Franchisors choosing among existing B2B exchanges must also be sure to select the best one for their own needs and the needs of their franchisees. The recent Internet boom often led to the creation of a dozen or more competing exchanges within the same industry -- a number that is far too high to sustain and probably means that some of the B2Bs will fail, merge, or consolidate. To remain competitive, some B2Bs are developing new features and services, adding special events, industry trend reports by recognized experts, billing and payment services, transportation and logistics services and even private negotiating "rooms," where buyers and sellers can go to finalize the details of a transaction on a confidential basis. These features will undoubtedly become more common as B2Bs become more sophisticated and their users demand the latest technical innovations.

Conclusion

For those franchisors or franchisees who wish simply to enter a B2B arrangement, we urge careful thought, consideration, and research on the matter. B2Bs may indeed come to represent a landmark in how franchising is practiced around the world. Because B2Bs know no national borders, reduce transaction costs, and help speed up response times, they hold the potential for great rewards. As this Article hopefully illustrates, however, potential B2Bs and their members face a host of legal and strategic challenges that must be carefully considered. Neither courts nor regulators have yet provided ample guidance on matters that face Internet B2Bs alone. So while the prospects for the franchising community are indeed exciting, even exhilarating, it is important to remember that this is a trend in its infancy, and is clearly now merely a work in progress.

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