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INTRODUCTION

Ever since the emergence of the World Wide Web less than a decade ago, the Internet has been hailed as a technological innovation that held the potential to transform our society.[1] The recent economic slowdown and the accompanying fall off of the stock markets, however, have severely dampened enthusiasm for firms focused on developing Internet applications.[2] Regardless of the fate of any individual Internet company, however, the Internet itself appears here to stay, and in the past few years a new Internet platform has emerged which allows multiple businesses to easily engage in commerce with each other in real time. The importance of these

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1. *See* Jane Katz, *Business-To-Business Use of the Internet is Slowly Transforming the Economy. But there is No Frictionless Transition*, REGIONAL REVIEW OF THE FEDERAL RESERVE BANK OF BOSTON 2, (September 19, 2000) ("To the army of geeks and programmers who were [the Internet's] early proponents, the new open technology seemed to offer limitless possibilities-borderless free markets, a close-to-costless way of making transactions, and a fluid and effortless medium for collaboration.").

2. At least 210 Internet companies shuttered their doors in the year 2000, and nearly 60% of the failures occurred in the fourth quarter of that year. *See* Carol Sliwa, *Facing Tough Rivals, eToys Nears Oblivion*, COMPUTERWORLD 1 (January 8, 2000) <http://www.computerworld.com/cwi/story/0,1199,NAV65-665_STO55934,00.html>. Observing the demise of dot.coms has become something of a sport, with sections of some web sites devoted to the task. *See e.g.*, Upside (visited June 16, 2001) <http://www.upside.com/graveyard/>. Each failed dot.com listed is accompanied by a quote from the firm, often taken from the defunct company's web site. *See id*. Some of the more interesting comments include: "[s]ince we're all seeking challenging new opportunities, please check out the resumes of our company's talented employees." *See* TheMan (visited June 16, 2001) <http://www.theman.com>. "Rome fell. Napoleon was defeated at Waterloo. Knight Rider was pulled off the air. Things end." *See* Free Scholarships (visited June 16, 2001) <http://www.freescholarships.com> (message posted in an attempt to explain its demise).

transactions, known in the trade as Business-to-Business, or B2B, transactions, may eventually come to dwarf the impact that the Internet has had on consumers.[3]

In spite of the promises inherent in this new business model, B2B exchanges necessarily involve collaboration between competitors in a market, and thus raise potential antitrust concerns. Because of the infancy of the B2B exchange model, little antitrust attention has been paid to these entities until recently.

This Note proposes that the FTC exercise great caution in its approach to the regulation of B2B exchanges, but recommends that some additional steps be taken to ensure that these exchanges do not become a center of anticompetitive pricing behavior. Part I examines in some detail the design and benefits of the B2B business model. Part II lays out the FTC's traditional framework in analyzing antitrust issues involving collaborations among competitors, of which B2B exchanges form a subset. Part III critiques the FTC's response to the antitrust issues raised by B2B exchanges and recommends that these exchanges be required to take steps to protect the confidentiality of data concerning buyers, sellers, and prices on the exchange.

I. THE PROMISES OF B2B INTERNET EXCHANGES

A B2B electronic marketplace (exchange) consists essentially of a software package which enables buyers and sellers of one or more goods to transact with each other through the Internet.[4] It is estimated that the total value of B2B e-commerce will be $7.29 trillion dollars by 2004, of which 37% will consist of transactions taking place on B2B exchanges.[5]

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3. Business purchases of goods and services amount to over 70% of the total sales in the economy. *See* Katz, *supra* note 1, at 1 (citing Princeton economist Alan Blinder). The change in the structure of the economy caused by the emergence of business-to-business commerce, therefore, may far exceed the changes wrought by the purchase of goods over the Internet by consumers. *See id.*

4. *See* Donald S. Clark, *Notice of the Federal Trade Commission Announcing the Public Workshop on Competition Policy in the World of B2B Electronic Marketplaces* (visited Apr. 9, 2001) <http://www.ftc.gov/os/2000/05/ b2workshop.htm>.

5. *See Comments Regarding B2B Electronic Marketplaces*, Memorandum from Arthur B. Sculley & W. William A. Woods to the Federal Trade Commission Public Workshop on Competition Policy in the World of B2B Electronic Marketplaces. Estimates of the current value of B2B sales in the

Since B2B electronic exchanges are a relatively recent innovation, the various business models utilized by the exchanges remain in rapid evolution. The exchanges may be grouped into three main types, however. The first and earliest model, and the most common overall, is the independent vertical exchange, in which an independent third party forms the exchange and brings buyers and sellers of certain goods within a specific industry together.[6] The second type, and most popular model, is the buyer vertical exchange, in which the exchange is formed by a group of buyers in a given industry.[7] A third type, designated as the horizontal model, is not limited to firms of any particular industry; rather, it seeks to serve any business that purchases or sells a given category of goods.[8]

Regardless of which model a given B2B exchange represents, a variety of methods may be used to match orders between buyers and sellers. A catalog system may consist of nothing more than the online grouping together of the sale catalogs of a number of suppliers in a given industry, for example auto parts.[9] Such an arrangement allows a buyer, for example, an automaker, which is a member of the exchange, to quickly compare prices and other variables for a desired auto part among the different suppliers, thereby reducing the time and expense of gathering information from different suppliers offline.

A B2B may also be organized around the dynamic pricing of goods.[10] In a dynamic pricing format, the B2B exchange

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United States range from $50 billion and $150 billion, which would represent about 75% of the world's B2B sales. *See id.* The wide variance in estimates is due in part to the lack of consensus on what constitutes a B2B sale, e.g., does it include a transaction that is initiated, but not completed, on the Internet? *See* Katz, *supra* note 1, at 2.

6. *See* Joel Simkins, Vice President of energyLeader.com, *Comments regarding B2B Electronic Marketplaces* (June 20-30, 2000) <http://www.ftc.gov/bc/b2b/comments/>. Thus, for example, an independent vertical exchange may consist of a group of toy manufacturers, a group of toy wholesalers who purchase toys from the manufacturers, and a group of toy retailers who purchase toys from the wholesalers for ultimate resale to consumers.

7. *See id.* at 6.

8. For example, a horizontal exchange may be formed between makers (sellers) of various office supplies and businesses (buyers) of any industry in need of purchasing such goods.

9. *See Entering the 21st Century: Competition Policy in the World of B2B Electronic Marketplaces: A Report By Federal Trade Commission Staff*, Part 1 at 8 (Oct., 2000) <http://www.ftc.gov/os/2000/10/index.htm#26>.

10. *See* Charles Phillips and Mary Meeker, Morgan Stanley Dean Witter,

matches buyers and sellers in real time as bids and quotes are posted onto the system.[11]

B2B's may also function as auctions in which buyers bid to purchase goods offered for sale by sellers, or, alternatively, where buyers post orders for a specified good and suppliers bid for the right to supply the good.[12] A twist on this model is a reverse auction, in which a supplier posts an item for sale, and buyers bid for the right to purchase the item.

The motivating force behind the creation of B2B exchanges is the elimination of costs. The initial efforts focused on reducing the transaction costs involved in procuring goods by, among other things, eliminating paper work and reducing errors in procurement.[13] While these efforts remain perhaps the primary driving force behind B2B commerce, proponents of these exchanges have more recently begun to tout additional benefits that are expected to reduce costs at all stages of the supply chain. For example, B2B exchanges are purported to reduce prices of goods by encouraging competition among

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The B2B Internet Report: Collaborative Commerce, 28 (April 2000) (visited April 9, 2001) <http://www.ftc.gov.bc/b2b/comments/msdw-b2breport.pdf>.

11. *See id.*

12. *See id.* Web-based auction sites such as ebay.com are similar to this format, except that they represent business-to-consumer (B2C) operations rather than business-to-business (B2B) ones. *See* eBay (visited April 9, 2001) <http://www.ebay.com>.

13. *See* Jerry Jasinowski, President, National Association of Manufacturers, *Testimony Delivered to the Federal Trade Commission Workshop on Electronic Marketplaces* (visited April 9, 2001) <http://www.ftc.gov>. As an example of the way B2B activities can cut transaction costs, consider the case of the Norfolk Southern Railway. Previously, each time the firm required the performance of repair work, a manager had to spend hours calling various construction firms for price quotes. *See* Laura Cohn, et al., *B2B: The Hottest Net Bet Yet?* BUSINESSWEEK ONLINE 2 (January 17, 2000) <http://www.businessweek.com:/2000/00_03/ b3664065.htm?scriptFramed>. Now, the manager simply puts the repair work up for bids on the RailNet-USA.com B2B exchange. *See id.* The process results in the reception of bids from a far greater number of firms than before, presumably resulting in more competitive bids, and frees up the manager to work on other projects. *See id*. Carrefour, a French consumer retailer, estimates that it has saved as much as thirty percent on its procurement of goods using the GlobalNetExchange B2B internet Exchange. *See* Maria Seminerio, *All Aboard for Private B2B Marketplaces—Business Exchanges With Controlled Memberships Are Gaining Popularity*, EWEEK, 57 (Sept. 25, 2000) <http://www.zdnet.com/eweek/stories/general/0,11011,2629589,00. html>. At General Electric, which is implementing e-processes throughout the firm, chief information officer Gary M. Reiner estimates that purchases made offline, which typically cost GE fifty to two hundred dollars per transaction, cost only about one dollar if done online. *See id*. at 3.

suppliers[14] and increasing economies of scale.[15]

In addition to reducing costs, some experts believe that B2B exchanges may have additional benefits, including encouraging the introduction of new products,[16] leveling the

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14. *See id.* By collecting a number of suppliers together in a B2B exchange, buyers will be able to easily and quickly compare prices and terms among all suppliers, forcing them to compete on price for their business. *See* William Holstein, *B2B is Rewriting the "Old Economy"*, U.S. NEWS & WORLD REP. (April 10, 2000) <http://www.usnews.com/usnews/issue/00410/b2b.htm>. Under these circumstances, the resulting competitive market eliminates the ability of a supplier to set prices. *See id.* at 5 (quoting Kannan Srinivasan, management and information-systems professor at Carnegie Mellon, as stating that "[t]he good news is that if you're a manufacturer, you can get suppliers to compete against each other . . . but if you're a supplier and you're not the most efficient one, this is a serious threat to you."). The danger to suppliers is most acute if their products are "commoditized," i.e., indistinguishable from those of competitors. *See id.*

15. *See id.* A firm's total costs are equal to its fixed costs of production (such as overhead, land, and factories) plus its variable costs of production, which includes such things as the price of the components used to produce the goods. *See id.* As the number of goods produced increases, the variable costs increase accordingly, but the fixed costs remain stable up till the point where the firm is at maximum production. *See id.* Hence, a firm's total cost per unit of produced goods decreases as more goods are produced. *See id.* This principle produces a distinct advantage for firms which sell to larger, more dense markets, since the larger demand for the firm's goods allows the firm to increase its production and thereby reduce its costs per unit of output. *See id.* A firm serving a small, unconcentrated market, however, can reduce or eliminate this advantage by participating in a B2B exchange. *See id.* For the cost of setting up a Web site, the firm can potentially expand its market to include buyers from around the globe, enabling it to produce efficiencies of scale rivaling that of its larger competitors. *See id.* The ability to carry on transactions at lower prices, and to produce goods at a lower cost per unit of output, leads to a higher total output of goods and services in an economy. *See id.* This result stems from the fact that as prices decline, the average inflation rate decreases. *See id.* Hence, a higher lever of GDP results, since real GDP is equal to the nominal GDP minus inflation. *See id.*

16. *See* Katz, *supra* note 1, at 3. The theory is that as a membership in a B2B exchange increases a firm's market, a large enough customer base could exist for a niche product that would previously have been unprofitable, and therefore never produced. *See id*.

The niche products manufactured as a result of the existence of B2B exchanges may even include goods custom built to meet the needs of the buyer. The benefit of custom-made products need not be limited to business-to-business transactions either. At least one dot.com, Toybuilders.com, promises to produce custom made toys for consumers who visit its web site. *See* Toybuilders (visited June 16, 2001) <http://www.Toybuilders.com>. The process involves the consumer filling out an online questionnaire defining the parameters of the desired toy. *See id*. The consumer is then given a price quote within 24 hours, and if accepted, the company will forward formal "eDrawings" of the proposed product to the consumer via email for final approval. *See id*. Examples of possible toys include, upon submission of playing field for smaller competitors,[17] and even reducing the risk of an economic recession.[18]

The importance of B2B's in maintaining economic growth in today's disinflationary economy is potentially staggering. Under current economic conditions, firms experience difficulty in raising prices to increase profits or absorbing increases in the costs of labor or raw materials. In this context, the existence of B2B's provides an attractive, alternative route to enhance profitability through the reduction of transactional costs as opposed to raising prices,[19] as well as reducing the risk to the financial health of the firm caused by excessive inventory levels during periods of economic contraction. One recent Goldman Sachs study concludes that the growth of electronic B2B commerce will eventually increase the economic growth of industrialized nations by about 0.25% annually.[20]

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personal photographs, action figures bearing the likeness of the purchaser. *See id*. "The only limiting factor here is literally your imagination!" boasts the website. *Id*.

17. *See* Jasinowski, *supra* note 13.

18. *See id.* The smoothing out of the business cycle is attributable to the claim that B2B's will improve a firm's ability to manage its inventory. *See id*. Inappropriately large inventory levels can aggravate or even cause an economic downturn. A firm with a large inventory will respond to a decrease in consumer demand for its goods by cutting back production. *See id*. The resulting deleterious effect of reducing production, such as the layoff of workers, can lead to a vicious circle in which consumer demand is further reduced by the lowered buying power of the unemployed workers, causing further reductions in production at other firms. This downward spiral can cause an economy to enter a period of overall contraction. *See id.*

19. *See, e.g.,* Denver Management Group, *E-Business or Out of Business* (visited April 9, 2001) <http://www.denvermanagement.com/ebizout.htm> (quoting Thomas Carpenter, managing director of ASB Capital Management, Inc., as saying "[t]he Internet represents the most powerful engine of deflation in the modern era."). At least one analyst has predicted that the Internet will cut the cost of producing a car by 14%, or about $3,650.00. *See* Andrew Cassel, *E-commerce in Infancy: Internet Trade Could Make Purchases Faster, Cheaper for Consumers, Businesses,* DETROIT FREE PRESS (May 22, 2000) <http://www.freep.com/money/business/eecon22_20000522.htm>.

20. *See id.* at 3. Since the U.S. GDP is presently about $9 trillion per year, a 0.25% increase in growth would produce an extra $23 billion in goods and services in the first year alone. *See id.*

II. COLLABORATIONS AMONG COMPETITORS AND ANTITRUST LAW

Despite their inherent promise, B2B exchanges may, by their very nature, induce antitrust concerns on the part of the Federal Trade Commission (FTC). Antitrust issues arise because B2B exchanges involve groups of competitors in a given industry joining a single forum in which information on buying and selling patterns may be exchanged between them.

Because the emergence of B2B exchanges is a very recent occurrence, little has been published in the literature on the antitrust issues raised by these exchanges.[21] Furthermore, the FTC has not yet formulated any regulations specifically tailored to B2B entities. However, the following discussion is a description of how the FTC has approached analogous entities in the past.

A. THE FTC APPROACH TO ANTITRUST ISSUES

Business-to-business marketplaces are generally regarded as being similar to joint ventures.[22] In April 2000, the Federal Trade Commission (FTC) and the U.S. Department of Justice (DOJ) issued guidelines ("Antitrust Guidelines")[23] explaining how these two federal agencies analyze the legality of competitor collaborations[24] under antitrust law. The FTC and DOJ utilize one of two types of analysis used by the U.S. Supreme Court when scrutinizing competitor collaborations: the *per se* rule and the rule of reason.[25]

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21. A January 2001 Lexis search of combined law reviews produced 17 journal articles mentioning B2B. Of these, none focused on antitrust issues.

22. *See FTC Enforcers Believe B2B Auctions Are Similar to JVs*, FTC WATCH, Apr. 10, 2000.

23. *See* U.S. DEPARTMENT OF JUSTICE AND FEDERAL TRADE COMMISSION, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS (April 2000).

24. A "competitor collaboration" is defined as "a set of one or more agreements, other than merger agreements, between or among competitors to engage in economic activity, and the economic activity resulting therefrom." *Id.* at 2.

25. *See* National Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 692 (1978).

1. The *Per Se* Illegal Rule

A collaborative agreement[26] that nearly always tends to raise prices or reduce output is usually held to be illegal *per se*.[27] An illegal *per se* collaboration usually involves an agreement not to compete on price or output, and encompasses agreements "to fix prices or output, rig bids, or share or divide markets by allocating customers, suppliers, territories or lines of commerce." [28] Such agreements are presumed illegal without any inquiry to the actual competitive effects or claimed business purposes of the agreement.[29] Even an otherwise *per se* illegal agreement, however, may overcome a presumption of illegality if the agreement results in an efficiency-enhancing integration of economic activity which is reasonably related to the agreement, and is reasonably necessary to achieve procompetitive benefits.[30]

2. The Rule of Reason

Any agreement not presumed illegal under the *per se* rule is analyzed under the rule of reason, wherein the collaboration's procompetitive benefits are weighed against its anticompetitive benefits to determine the overall effect on competition.[31] The rule of reason analysis involves comparing

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26. To qualify as a collaboration, there must be an agreement between competitors to engage in economic activity. *See* ANTITRUST GUIDELINES, *supra* note 23, at 2. The definition implies a "meeting of the minds" or a "conscious commitment to a common scheme." *See* Jonathan B. Baker, *Identifying Horizontal Price Fixing in the Electronic Marketplace*, 65 ANTITRUST L.J. 41 (1996); Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764 n.9 (1984) (stating that to prove a meeting of the minds, "evidence must be documented both that the distributor communicated its acquiescence or agreement, and that this was sought by the manufacturer.").

27. *See* California Dental Ass'n v. F.T.C., 526 U.S. 756 (1999).

28. *See* ANTITRUST GUIDELINES, *supra* note 23, at 8.

29. *See id.*

30. *See* Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332, 339 n.7, 356-57 (1982). An agreement need not be essential in order to be reasonably necessary. *See* ANTITRUST GUIDELINES, *supra* note 23, at 9. The central issue in establishing reasonable necessity is whether or not the collaborators could obtain a comparable efficiency through practical, significantly less restrictive means. *See Maricopa County Medical Soc'y*, 457 U.S. at 352-53 (stating that even though establishing a maximum fee for a physician's service was beneficial, it was not necessary for physicians to create the schedule themselves as opposed to insurers).

31. *See* ANTITRUST GUIDELINES, *supra* note 23, at 10.

the level of competition under the agreement with the competition level that would occur without the agreement.[32] A harm to competition is established if an agreement would likely raise prices or reduce output, quality, service, or innovation below what would likely occur without the agreement taking place.[33]

If it is determined that an agreement evidences by its very nature a likely competitive harm,[34] or if anticompetitive harm has already occurred,[35] the FTC or DOJ will challenge the agreement without further analysis unless other benefits exist which could offset the harm to competition.[36] If, however, it is found that a potential anticompetitive effect exists, yet such harm either has not yet occurred or is not evident by the nature of the agreement, a detailed market analysis of the agreement is commenced.[37] Such an analysis entails studying any factor which may increase or decrease competitive harms, including the market shares held by the collaborators, the ability and incentive of the collaborators to compete independently from each other,[38] and whether barriers to entry exist which would deter new competitors from entering the market.[39] Clauses in a collaborative agreement which may lead to a conclusion that an anticompetitive effect exists include those which limit the ability of a collaborator to make independent decisions,[40]

32. *See id*.

33. *See id*.

34. *See California Dental Ass'n* at 1612-13, 1617.

35. *See* F.T.C. v. Indiana Fed'n of Dentists, 476 U.S. 447, 459 (declaring that "proof of actual detrimental effects" makes an inquiry into market power unnecessary).

36. *See id*. at 460-61.

37. *See* ANTITRUST GUIDELINES, *supra* note 23, at 11.

38. *See id.*

39. A collaboration will not be challenged if the barrier to entry for potential competitors is small enough such that their entry into the market would be timely, likely and sufficient to deter the anticompetitive harm. *See id*. at 22. The likelihood of entry is determined based upon whether potential competitors possess the competency and incentives necessary to enter the field. *See id.*

40. Such collaborations may take a variety of different forms. Production collaborations involve an agreement to jointly produce a product for sale in order to produce a good more efficiently. *See id.* at 13. Though production collaborations may be procompetitive in the sense that consumers may obtain the good at a lower price, they may also have anticompetitive effects if they involve an agreement on the amount of product produced, or the price at which it is sold. *See id.* Marketing collaborations are those in which the participants agree to jointly "sell, distribute, or promote goods or services that are either jointly or individually produced." *Id*. at 14. A production

combine control over production, key assets, or decisions on price, output, or other factors sensitive to competition, or may cause an increase in market power.[41]

If the detailed market analysis does not reveal potentially anticompetitive effects, the investigation is ended.[42] If anticompetitive effects are found, however, an analysis is undertaken to determine whether the agreement is "necessary to achieve procompetitive benefits that likely would offset anticompetitive harms."[43]

Of particular interest to an antitrust analysis of B2B exchanges are agreements which involve the exchange of sensitive information among the parties, since the sharing of information may lead to collusions on price or output.[44] Of

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agreement may be procompetitive if it results in a faster and more efficient distribution of the product to the marketplace. *See id*. It may be anticompetitive, however, if it results in the fixing of a competitively significant variable, such as an agreement to jointly promote a product by eliminating comparative advertising in a manner which would restrict the information consumers receive concerning the product. *See id*. A buying collaboration involves an agreement to jointly purchase inputs. *See id*. Such a collaboration may be procompetitive by reducing costs through centralization of ordering or combining warehouse functions. *See id*. An anticompetitive effect may prevail, however, if the agreement enables the buyers to purchase the input at a price below that which would prevail without the agreement. *See id*. A collaboration may also take the form of an agreement to practice joint research and development (R&D). Such an agreement is procompetitive in that it can enable more efficient development of new goods or services. *See id.* It may be anticompetitive, however, if it reduces the amount of innovation that would have occurred if each participant in the agreement had conducted R&D separately. *See id.*

41. Market power is defined as a seller's ability to profitably keep prices above competitive levels for a significant time, or alternatively, as a buyer's ability to profitably reduce the price of a product below the competitive level for a significant time. *See* ANTITRUST GUIDELINES, *supra* note 23, at n. 30.

42. *See id.*

43. *See id.* at 12.

44. *See id.* at 15. A recent example of alleged online collusion between competitors over price involved the nation's airlines. In U.S. v. Airline Tariff Publishing Co., Proposed Final Judgment and Competitive Impact Statement, 58 FR 3971 (1993), the defendant Airline Tariff Publishing Co. ("ATP"), was owned by seven of the nation's major airlines and served as the "central source for the collection, organization, and dissemination of fare information for virtually every domestic airline." *Id.* at 3975. ATP operated a computerized fare system which disseminated to each airline information on the fares charged on every route served by every other airline. *See id*. Each weekday, airlines submitted a list of proposed changes which it wished to make to its fares. *See id*. Attached to each proposed fare change was a "first ticket date" representing the date on which the fare change was scheduled to become effective. *See id*. Also, attached to each fare currently offered for sale was a "second ticket date" which indicated the date at which the listed price was

special concern is the sharing of information concerning prices, output, costs, strategic planning, current and future business plans, or the sharing of the individual, as opposed to aggregated, information of the parties to the agreement.[45]

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scheduled to expire. *See id.* Both the first and second ticket dates were tentative and could be changed or eliminated at any time; thus, a proposed fare change may be repeatedly delayed by changing the first ticket date to a time further and further in the future, or may never take place at all if withdrawn by the airline. *See id.* Hence, by accessing the ATP system, the airlines could monitor each other's proposed fare changes and analyze them to discern any patterns. *See id.* The U.S. Department of Justice ("DOJ") sued ATP and the participating airlines, alleging that the ATP system was a *per se* illegal price fixing agreement in that the airlines used the ATP system to illegally form agreements to fix prices, eliminate discounted fares, and set fare restrictions. *See id*. In particular, DOJ charged that the use of "first ticket dates" amounted to a communication of a desire to increase fares on a selected route to which competing airlines could agree to or, alternatively, to submit an alternative plan. *See id*. For example, Carrier A could propose to increase a given fare by filing the change with ATP with a first ticket date two weeks in the future. *See id*. at 3976. Carrier B could then signal its approval of the price hike by filing a similar fare change on the same route, with a first ticket date matching that of the change proposed by Carrier A. *See id*. Alternatively, a process of negotiation could ensue in which Carrier A would agree only to a smaller increase than proposed by Carrier A. *See id.* The negotiating process ended only after all airlines filed the same fare in the same market with the same first ticket, thus indicating their commitment to the fare hike. *See id.* Until all airlines agreed to the higher price, Carrier A could repeatedly postpone the first ticket date on the targeted flight to prevent the fare from taking effect until all competing airlines were onboard. *See id*. The process serves as a way, therefore, for Carrier A to test out a proposed fare change without it actually taking effect until it knows that other airlines will agree to match it. *See id.*

A second example of alleged price collusion involving electronic interactions between competitors concerns the NASDAQ computerized stock quotation system. The Department of Justice ("DOJ") sued major NASDAQ securities firms which acted as "marketmakers" by trading in particular NASDAQ stocks. *See* Second Amended Refiled Consolidated Complaint of the DOJ v. NASDAQ Marketmakers, (S.D.N.Y). The DOJ charged that the marketmakers conspired to maintain the spreads (the difference between the "bid" price and the "ask" price) paid by securities buyers and sellers at supra-competitive prices by refusing to quote bid and ask prices in odd-eighths (e.g., 1/8, 3/8, 5/8) and instead widening the spread to even eighths (e.g., 2/8, 4/8, 6/8). *See id.* at 14. Marketmakers allegedly punished those firms that refused to participate and "broke the spread" by refusing to conduct business with those firms in other contexts, trading around a marketmaker who broke the spread, and making threatening phone calls to them demanding that they fall into line. *See id.* at 14-15.

B. SAFETY ZONES

The FTC and DOJ have established "safety zones" which describe situations in which a collaboration agreement will be presumed lawful.[46] First, a collaboration will generally not be challenged when the market shares of the collaboration and its members equal no more than twenty percent of the market in which competition may be affected.[47] Second, a collaboration is presumed lawful if at least three other independently controlled research efforts have the assets, incentive, and other traits necessary to engage in R&D very similar to that of the collaboration.[48]

C. THE POTENTIAL ANTITRUST DANGERS INHERENT IN B2B EXCHANGES

1. Monopsony

B2B exchanges hold the potential to create a "once in a lifetime shift" in power from suppliers to buyers.[49] One way in which buyers in an exchange may seek to reduce their costs is by pooling their purchase orders for a given good together, and using the resulting size of the order to negotiate a volume discount with a seller.[50] The danger, however, is that the purchasers may be able to exercise monopsony power by ganging up on the seller and forcing it to sell the product at a price that is below that which would normally prevail in a competitive market.[51]

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46. *See* ANTITRUST GUIDELINES, *supra* note 23, at 26.

47. *See id*. This safety zone does not apply to agreements which are *per se* illegal, or that would be challenged even without the undertaking of a detailed market analysis. *See id.*

48. *See id.* at 26-27. This safety zone also does not apply to *per se* illegal agreements, or those challenged without a detailed market analysis. *See id.*

49. *See* Comments by Rick Warren-Boulton, TRANSCRIPTS OF THE FEDERAL TRADE COMMISSION PUBLIC WORKSHOP: COMPETITION POLICY IN THE WORLD OF B2B ELECTRONIC MARKETPLACES (visited April 9, 2001) <http://www.ftc.gov>.

50. *See id.*

51. It is important to distinguish illegal monopsony power from regular bargaining power. Both types of behavior result in the purchaser paying a lower price for goods. A monopsonist, however, achieves that result by reducing demand for the goods by restricting its level of purchases to an extent sufficient to force the seller to reduce the price in order to unload the goods. The reduction in demand then typically leads the seller to curtail production of

The danger of monopsony is most present in B2B exchanges where there is a small group of purchasers who account for a large portion of the market for a specialized good.[52] In such a case, the seller will feel compelled to deal with the buyers on their terms; if, however, the market for the good is large and fragmented, the seller has the negotiating leverage to "walk away" from the table and instead deal with other groups of buyers outside of the exchange.

2. Price Fixing Through Information Exchange

A second antitrust risk associated with B2B exchanges stems from the fact that the Internet allows for the aggregation and analysis of copious information concerning the exchange's participants. For example, in some B2B exchanges, participants may be allowed to track the identities of each buyer and seller, as well as the amount of a good purchased and the date and time, and price of the transaction.[53] In a model of perfect competition, where there is complete transparency of all information to all participants in the market, the availability of such information enhances buyer choices and leads to increased competition between buyers and sellers.[54] In some circumstances, however, greater exchange of information can actually result in reduced competition and higher prices to consumers.[55] Specifically, one danger in a B2B exchange is that if all of the buyers know the prices that their competitors are paying for their production inputs, they may be able to predict the prices the competitors will charge to consumers.[56] Such knowledge may create conditions in which

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the goods, thereby reducing overall output. In turn, the reduction in the final output of goods available for purchase by consumers tends to *increase* the retail price of the goods. Regular buying power, in contrast, involves a buyer utilizing the particular strengths in its bargaining position to negotiate a better price with the seller. Usually, the resulting lower price encourages the buyer to purchase the goods in greater quantity, thus increasing the total amount of goods available for purchase by the consumer, and therefore *lowering* the retail price.

52. *See id.*

53. *See* Charles F. Rule, *B2B or Collusion*, 36 LEGAL TIMES (April 3, 2000).

54. *See* Jonathan B. Baker, *Identifying Horizontal Price Fixing in the Electronic Marketplace*, 65 ANTITRUST L.J. 41 (1996).

55. *See id* at 42.

56. *See* Peter L. de la Cruz & Sheila A. Millar, *Comments Regarding B2B Electronic Marketplaces* (June 28, 2000) <http://www.ftc.gov/bc/b2b/comments

the participants could tacitly collude on prices charged at retail.[57] Furthermore, this same transparency of information could lead to tacit allocation of markets.[58] If a company can discern through the price inputs of its competitor that it is less competitive in a given market, it may shift its resources out of that market and into one in which it is more competitive.[59]

3. Exclusion

A third antitrust danger lies in the possibility of excluding certain buyers and/or sellers from participating in an exchange or holding equity in it. For example, a B2B exchange might require all buyer participants to purchase a certain percentage of their goods through the exchange, or even prohibit them entirely from making purchases through any other exchange. Alternatively, a supplier-owned exchange could implement rules making it difficult for any additional suppliers to join the

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/kellerandheckman.pdf>.

57. Imagine, for example, that Company A is a manufacturer of a new consumer video game system. As a member of a B2B purchasing exchange, company A purchases on a certain date a quantity of memory chips which are essential components of its product. Shortly thereafter, an earthquake severely damages several South Korean factories which produce the memory chips, causing the price of such chips to skyrocket. Company B, Company A's main competitor, is finalizing the production of a new video game system just in time for the holiday shopping season to compete with Company A's product. Company B is forced to purchase its memory chips on the exchange at the higher post-earthquake price. Company A, as a participant on the exchange, notes Company B's purchase and infers that Company B will be forced to price its new product at a higher level due to the increased cost of the chip. Company A then raises the price of its product over that which it would have priced it without knowledge of the price of Company B's production inputs.

58. *See* The Original Equipment Suppliers Association, *Comments Prepared for the Federal Trade Commission In Connection With Its Workshop on Competition Policy in the World of B2B Electronic Marketplaces* at 3 (June 29, 2000) <http://www.ftc.gov/bc/b2b/comments/oesa.pdf>.

59. *See id*. Generally, this process is not harmful, and in fact is the heart of the competitive process. *See id.* However, outside of a transparent marketplace, a company can never know for sure where its competitor's strengths and weaknesses are. *See id.* Therefore, the company will be forced to make its choices on what is competitively optimal, and not based on what its competitor's position is. *See id*. In a B2B online exchange that is transparent concerning the identities of buyers and sellers, however, no uncertainty remains, since each competitor knows the quantity of goods purchased and at what price by each competitor. *See id.* Thus, the competitors will allocate their resources based on the actions of their competitors, instead of responding to the demands of the market. *See id.* This allocation results in a collusive situation in which the well-being of the participants is enhanced at the expense of that of the end consumer. *See id.*

exchange.[60] If most of the buyers in that industry purchase exclusively through the B2B exchange, the suppliers not allowed to join would find themselves completely shut out of the market.[61]

Furthermore, if a B2B exchange is run as a for-profit entity which charges participants for each transaction carried out on the exchange, those buyers (or sellers) which are equity owners in the exchange would receive their respective shares of any profits, wherein the profits would essentially serve as a rebate on the fees which were charged to the equity owners on their own transactions.[62] Thus, their transaction costs would be effectively lowered relative to that of any non-equity competitors who participate in the exchange, giving them a competitive advantage.[63]

III. CRITIQUING THE FTC'S RESPONSE TO THE PUBLIC WORKSHOP ON B2B ELECTRONIC MARKETPLACES

At issue in this Note is whether the guidelines for joint venture agreements described above are adequate to police the emerging sector of business-to-business online marketplaces. An analysis of this issue may lead to several different conclusions, including that: B2B marketplaces should be regulated as joint ventures under already existent joint venture antitrust guidelines; new regulations are required which specifically address the unique issues which are generated by

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60. If the owners of the exchange are larger companies, an easy way to increase the barrier of entry into the exchange is to set the transaction fees high enough to make it unfeasible for smaller firms to participate. Thus, even if the exchange owners maintain ostensibly objective criteria for joining the exchange, the rules in fact may be designed to keep out potential competitors. A second way to keep out competitors lies in the software technologies necessary to interact with participants in the exchange. Typically, the exchange establishes a uniform set of variables and Internet locations which the computerized systems of each participant must be able to read and write. *See id*. An exchange may deny access to this information to an unwanted potential participant, thus depriving it of the ability to fully make use of the exchange. *See id.*

61. Fears about exclusion may no longer be merely theoretical. Already some complaints about exclusionary practices have arisen. *See* Julia King, *Some Dispute FTC Finding In B2B Antitrust Report*, COMPUTER WORLD (Nov. 6, 2000).

62. *See* Albert A. Foer, *High Tech Needs Antitrust,* FTC WATCH No. 546 (June 5, 2000). This technique is known as "raising rival's costs." *See id.*

63. *See id.*

B2B marketplaces; or that no regulation of B2B exchanges by the FTC or DOJ should take place at this early stage in their development.[64]

On June 29, 2000, the FTC held a public workshop on B2B exchanges, bringing together designers, owners, operators, and members of these entities to discuss their benefits as well as the possible antitrust dangers which could arise.[65] On October 26, 2000, this workshop culminated in the release by the FTC of a report setting forth guideposts to use in evaluating antitrust concerns in the context of B2B exchanges.[66]

There is some evidence that a general consensus is forming that the FTC's present guidelines governing collaborations among competitors provide a sufficient framework to address the antitrust issues arising out of Internet B2B exchanges.[67] After all, the potential risks inherent to B2B's such as price fixing, exclusion, and monopsony are the same which crop up in other traditional antitrust cases. Nevertheless, controversy exists as to how (and when) the FTC's collaboration guidelines

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64. A hands-off, laissez-faire approach to B2B's is grounded in the belief that proper market incentives already exist to ensure that B2B's do not operate in an anticompetitive manner. *See supra* note 117 and accompanying text. Easterbrook and Fischel provide a classic example of an argument that government regulations are not necessary to ensure the proper functioning of markets in a different context. *See* Frank H. Easterbrook & Daniel R. Fischel, *Mandatory Disclosure & the Protection of Investors*, 70 VA. L. REV. 669 (1984) (arguing that mandatory securities disclosure laws are superfluous).

65. *See* Federal Trade Commission, *FTC to Hold Public Workshop to Examine Competition Issues in Business-to-Business Electronic Marketplaces* (May 4, 2000) <http://www.ftc.gov/opa/2000/05/b2bworkshoop.htm>.

66. *See Entering the 21st Century*, *supra* note 9. This report, however, merely represents the views of the FTC staff, and are not necessarily those of the Commission as a whole. *See id*. at n.1.

67. *See, e.g*. Jasinowski *supra* note 13 (arguing that there is no need at the present time "for specific rules concerning this sector"); Philip A. Proger, *Testimony to the Federal Trade Commission Workshop on Electronic Marketplaces* (2000) <http://www.ftc.gov> (visited April 9, 2001) (stating that "[I]'m sort of skeptical that there is anything highly unusual about B2B's, . . . they may be very, very pro competitive, but in the end we're going to have to do traditional antitrust analysis, and I think the joint venture analysis and the Collaboration Guidelines are appropriate in this framework."); Laura A. Wilkinson, *Testimony to the Federal Trade Commission Workshop on Electronic Marketplaces* (2000) <http://www.ftc.gov> (visited April 9, 2001)(arguing that "the antitrust laws and guidelines that we have in place in terms of mergers and joint ventures or collaborations among competitors all take in to effect [B2B's] as well so I think that as the dust settles, you'll find that the analysis remains the same, and the issues remain the same in terms of monopoly, monopsony, collusion and information exchange kinds of issues.").

should be applied to B2B's. An analysis of these issues suggests that while the FTC should exercise great caution in promulgating new regulations which could have a chilling effect on the nascent B2B industry, some steps must be taken to specifically address the potential problems arising from information sharing between competitors on a B2B electronic marketplace.

A. PREVENTING MONOPSONY

One way in which buyers may engage in monopsonistic behavior is by limiting the number of suppliers allowed onto the exchange. This danger is most apparent in the minority of industries which are non-fragmented; that is, those which are dominated by a small number of larger purchasers.[68] Monopsony can also occur where the buyers, acting in concert, restrict their purchases to force the sellers to reduce prices to make a sale.

A telltale sign of monopsonistic behavior of the second type is a requirement by the exchange that each member must deal exclusively with the exchange.[69] This telltale behavior occurs because by restricting purchases to drive down the price, each purchaser will find itself unable to obtain as many goods as in a non-monopsonistic situation.[70] The purchasers will therefore have an incentive to buy additional goods outside of the exchange, thereby providing an incentive for the exchange to restrict a buyer's purchases outside of the exchange.[71]

The Competition Policy Report does not provide any framework specifically tailored to B2B's for determining if monopsonistic practices exist. The Report notes, however, that under the Competitor Collaboration Guidelines, whether or not the exercise of monopsonistic power would induce the entry of

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68. The danger of monopsony is generally only present in B2B exchanges featuring dynamic pricing, such as a "reverse auction" where the sellers bid to provide for the buyer's requirement, or some other mechanism wherein the price between buyer and seller is negotiated. Most exchanges to date, however, involve "static pricing," where each seller's catalog is online with a fixed price for each item. There is therefore no opportunity for the buyers to "gang up" on the sellers to force them to reduce prices.

69. *See Entering the 21st Century, supra* note 9, at Part 3, 14 (noting that "[e]xclusivity policies that require that the group's members purchase through the group may make the exercise of monopsony power easier").

70. *See id.*

71. *See id.*

new buyers onto the exchange to mitigate the monopsonistic effects is a relevant consideration in determining if a B2B is in violation of antitrust laws.[72]

Additionally, participants at the Public Workshop put forward various regulations whose enactment could help prevent the development of monopsonistic practices. For example, the FTC could prohibit B2B's from requiring their members to refrain from making purchases outside of the exchange.[73] Such a rule, however, could backfire by preventing many legitimate B2B's from generating the profits necessary for their survival.[74] Many of the B2B's formed thus far have been created by a small number of major industry players,[75] suggesting that B2B exchanges require a certain minimum volume of purchases through the exchange in order to generate sufficient revenue to run the exchange, as well as to provide enough business on the exchange to encourage a sufficient number of sellers to participate.[76]

Prohibiting a B2B from enacting restrictions on its members could discourage the formation of B2B exchanges. In sum, the imposition of new regulations on B2B exchanges designed to prevent monopsonistic practices may end up causing more harm than they prevent, and therefore the FTC should refrain from promulgating new regulations addressing these dangers until the B2B industry reaches the level of maturity necessary to establish what regulations may be needed to reasonably address these concerns, while not unduly harming the ability of B2B's to operate.

In the future, the Competition Policy Report's emphasis on the ability of monopsonistic practices to induce new buyers onto the exchange[77] may prove useful as a starting point for enforcing antitrust laws with respect to B2B's and monopsony. The lack of such inducement can serve as a signal that any benefits derived from limiting participants' abilities to transact outside of the B2B exchange are outweighed by considerations of preventing the occurrence of anti-competitive practices.

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72. *See id.* at Part 3, 15.

73. *See* Robert E. Bloch & Scott P. Perlman, *Analysis of Antitrust Issues Raised By B2B Exchanges* (visited June 16, 2000) <http://www.ftc.gov/bc/b2b/comments/blockarticle.pdf>. This proposal is also relevant to the discussion on exclusion in Part II B of this Note.

74. *See id.*

75. *See id.*

76. *See id.*

77. *See supra* note 72 and accompanying text.

Additionally, the FTC should strongly encourage B2B's to form an independent, third party body to ensure that fair, objective standards are employed in determining which entities are allowed onto the B2B. This can be accomplished by making it clear that the existence of such an independent body, especially in the case of B2B's in highly fragmented industries, will be considered as relevant evidence of compliance with the antitrust laws in any investigation of possible monopsonistic practices.

B. PREVENTING UNLAWFUL EXCLUSION

In tackling the issue of anticompetitive exclusions of participants from a B2B exchange, the Competition Policy Report again relies on the standard rule of reason analysis. Hence, the Report asks if the exclusion of a given firm from a B2B exchange is likely to result in anticompetitive harm.[78] Next, it is determined whether the denial of access is reasonably necessary to achieve procompetitive benefits that likely offset the anticompetitive harm.[79] The report notes that key factors may shape the analysis, including considerations of whether the B2B is the only way the product can be bought or sold at reasonable prices, whether the barrier of entry to the creation of a new B2B to compete with the exclusionary one is sufficiently low, and whether the denial of access to a new member gives the existing members of a B2B the power to maintain prices of products above that which would otherwise prevail.[80]

Rather than relying on this traditional antitrust analysis, some have promoted further steps to ensure fairness and inclusionary practices on B2B exchanges. It has been suggested that each B2B exchange should develop objective criteria by which a new buyer or seller will be admitted.[81] It is argued that the absence of an independent body to establish standards for the exchange and evaluate admission to the exchange should be treated as a potentially anticompetitive behavior under an antitrust analysis.[82]

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78. *See Entering the 21st Century, supra* note 9, at Part 3, 20.
79. *See id.*
80. *See id.* at 20-22.
81. *See, e.g.,* The Original Equipment Suppliers' Association, *supra* note 58, at 7.
82. *See id.*

Another possible rule would require B2B's to have an open exchange wherein any entity which could meet reasonable, objective criteria would be admitted. Such a rule is unwise, however, because valid reasons may exist for a B2B to exclude additional members. For example, to be profitable and effective, a B2B must be able to assure buyers, who may be purchasing items in a blind auction without knowing the identities of the suppliers, that the suppliers are trustworthy and capable of delivering goods to the buyer's specifications.[83] Thus, some buyers may wish to form a B2B exchange whose membership is limited to those suppliers it has worked with in the past and found trustworthy.[84] At this early stage in B2B development, it is difficult to see how the FTC could have a firm enough grasp of when exclusion is or is not necessary to the successful functioning of a B2B. In fact, the current relative dearth of B2B's which practice exclusionary tactics suggests that little incentive to exclude may exist except in situations when such practices may be legitimate.[85] Actions taken against B2B's for alleged exclusionary tactics in violation of the Collaboration Guidelines risk stifling the innovation and experimentation necessary to develop successful B2B business models.[86] In light of the current scarcity of exclusionary practices, the possible benefits of such practices in certain

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83. *See* Steven J. Kafka, *Testimony to the FTC Workshop* (declaring that "for buyers, the credibility of the offer is absolutely an issue in who's making the offer . . . is the product that they're offering what they say it is, are they going to deliver it when they say they will, et cetera.").

84. Such arrangements are already becoming commonplace. *See* Seminerio, *supra* note 13. Additional reasons for forming such exchanges are that dealing with and analyzing a large number of bids can be costly and time-consuming. *See id.* Some firms also fear the possibility of data security problems in posting information on a public exchange. *See id.*

85. *See* Hal Loevy, *Testimony to the FTC Workshop* 304 (visited April 9, 2001) <http://www.ftc.gov>. Mr. Loevy stated that:

> If there are 700 [B2B] marketplaces in the world today, we've talked to some 200, 250 of them, and I can only recall two or three cases where those marketplaces were requiring exclusivity. And I know of two of them at least that don't exist anymore. So, I couldn't agree more that the exclusivity—the exclusivity is something which won't exist, which will not allow a marketplace to carry forward. *See id.*

86. Evidence has already accrued indicating that the mere possibility of FTC investigations of B2B exchanges has a chilling effect on their formation. Recently, the FTC investigation into an exchange created by major automakers caused parts suppliers interested in joining the exchange to put their plans on hold. *See* Erich Luening, *Investigation of Auto Marketplaces Scares Off Some Players* (May 4, 2000).

circumstances, and the danger of over-regulating a fragile, developing business model, the FTC's adherence to already-existing antitrust guidelines, as opposed to the promulgation of additional regulations aimed at B2B exchanges, represents the proper approach to the exclusionary practice issue.

Nevertheless, even if B2B's show little evidence of practicing exclusionary tactics in terms of admission of members, there are indications that some B2B's owned by large players in a given industry are practicing a different type of exclusion: exercising their power to drive competitors out of business by restricting the ability of their participants to transact with competing exchanges.[87] It is imperative that the FTC monitors such developments to ensure that such activities do not run afoul of the antitrust laws.

At the present time, however, it appears that the current regulatory framework is sufficient to address this type of exclusion problem. Under the last step of the rule of reason approach, taken only after it is determined that anticompetitive effects are existent, it is determined whether the agreement or requirement in question is "necessary to achieve procompetitive benefits that likely would offset anticompetitive harm."[88] Under this step, the FTC must find that the limitations on participants' abilities to transact outside of the exchange produce sufficiently procompetitive results. The B2B could satisfy this requirement, for example, by showing that due to the economics of the market, it needs the restrictions to ensure that it obtains sufficient revenue to operate. The FTC should make it clear that if this final step of the rule of reason analysis is reached, the B2B will bear the burden of making such a showing.

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87. *See supra* notes Julia King, *Some Dispute FTC Finding In B2B Antitrust Report*, COMPUTER WORLD, Nov. 6, 2000 <http://www.computerworld.com/cwi/story/0,1199,NAV65-665_STO53357,00.html> (quoting Ravi Kalakota, chairman of Hsupply.com, an independent exchange serving the hospitality industry, as saying, "I don't know what the FTC was smoking, but they're not looking at the evidence" and claiming that he knows multiple hotel operators who are barred from dealing with his exchange under franchise agreements with large hotel companies such as Hyatt Corporation and Marriott International, Incorporated, both of whom are partners in a competing exchange, Avendra). Hsupply.com is now defunct, yet another victim of the dearth of investor interest in providing further capital to Internet firms. *See* Mark Haley, *The Rise and Fall of Hsupply.com,* HOSPITALITY UPGRADE (Spring 2001) <http://www.hotel-online.com/Neo?News?PR2001_2nd?Apr01_hsupplyFall.html>.

88. *See supra* note 43 and accompanying text.

C. PREVENTING PRICE FIXING

In the face of concerns about price fixing on B2B exchanges caused by the free flow of information among buyers and sellers, the Competition Policy Report cautions that whether an information-sharing agreement is likely to harm competition depends on facts unique to each situation.[89] The Report then proceeds to put forth an analysis of such agreements which adheres closely to principles previously stated in the Collaboration Guidelines.[90] The Report states five factors for consideration in evaluating the flow of information on B2B exchanges to determine the likelihood of anticompetitive effects.

First, the Report inquires about the structure of the market the B2B serves, noting that the more concentration present in the market, the greater chance for an adverse impact on competition.[91] Second, the Report states that information shared among competitors may cause greater concern than information shared with non-competitors.[92] Third, the Report quotes from the Collaboration Guidelines in stating that "[o]ther things being equal, the sharing of information relating to price, output, costs, or strategic planning is more likely to raise competitive concern than the sharing of information relating to less competitively sensitive variables."[93] Fourth, the Report states that the sharing of future pricing information is greater cause for concern than sharing data about old transactions.[94] Finally, the Report declares that if the shared information is available elsewhere besides on the B2B exchange, less concern exists about antitrust violations.[95]

Proceeding again under traditional rule of reason analysis, the Report states that if likely anticompetitive effects are found, the investigation should then shift to an examination of the efficiencies which would result from the information sharing practice, and, finally, whether or not practical,

89. *See Entering the 21st Century, supra* note 9, at § 3, at 7.
90. *See supra* note 9, at 7-13.
91. *See supra* note 9, at 7.
92. *See supra* note 9, at 8.
93. *See id*.
94. *See supra* note 9, at 8-9.
95. *See supra* note 9, at 5-6.

significantly less restrictive alternatives exist which would achieve the same efficiencies.[96]

The Competition Policy Report's recitation of these factors, however, raises troubling questions about the relevancy of these existing antitrust policies to electronic transactions, particularly those taking place on B2B exchanges. In particular, the five-factor analysis appears to be of limited usefulness in analyzing certain types of B2B exchanges. By the very nature of a transparent B2B exchange, current, and perhaps even real time information, concerning sensitive variables such as prices and costs will be shared among competitors.[97] Thus, the second, third, and fourth factors may be present in any B2B exchange in which participants can view each other's current prices and offers to buy. Moreover, the first factor, which looks unfavorably upon a high degree of market concentration in a given exchange, could have a chilling effect on the industry, since such concentration may be essential to achieve the critical mass necessary to operate a B2B exchange,[98] as discussed in Part III, Section A of this Note. The five-factor analysis, therefore, may be of little help in distinguishing which transparent B2B's are engaging in anticompetitive practices.

Just as importantly, the FTC's Rule of Reason approach is applied to *collaboration*s between competitors which may have anticompetitive effects.[99] A B2B exchange in which buyers and sellers have immediate, transparent access to bids, sales, and prices, however, represents a state of "rapid information exchange" under which tacit collusion on pricing can take place without any evidence left behind of an actual collaboration.[100] For example, under conditions of rapid information exchange, a seller's incentive to deviate from a price may be significantly reduced.[101] A seller's intent in cutting prices is the desire to

96. *See id*.

97. *See supra* notes 53-59 and accompanying text.

98. *See supra* note 72 and accompanying text.

99. *See supra* notes 26-43 and accompanying text.

100. The rapidity with which information can be exchanged on a B2B marketplace makes it much easier for sellers to monitor each other's prices. As an analogy, consider the ease with which online retailers today can monitor the prices of their competitors. It has been noted that online merchants are closely monitoring each other's prices since the best prices of popular items, such as books, are usually within a few cents of each other. *See* Hal R. Varian, *Online Commerce Creates Strange Competition,* N.Y. TIMES, August 24, 2000.

101. *See* Jonathan B. Baker, *Identifying Horizontal Price Fixing in the Electronic Marketplace,* 65 ANTITRUST L.J. 41 (1996).

reap increased sales from the lower price.[102] If competitors on the B2B exchange can immediately detect and match the reduction in price, however, the seller who first cuts prices will gain only a fraction of any increase in purchases caused by the lower selling price.[103] Thus, a seller may have little incentive to cut prices in the first place.[104] Therefore, market transparency can actually facilitate above-market pricing. [105] In the absence of rapid information exchange, maintaining coordinated pricing is more difficult, because a seller can never be certain that a competitor is not breaking the price-fixing agreement by engaging in secret price cuts.[106]

The current collaboration antitrust guidelines which the FTC intends to apply to B2B exchanges do not adequately address this phenomenon. Mere "follow the leader" behavior, in which no seller is willing to cut prices unless another seller does so first, is not illegal as long as there is no actual agreement, tacit or otherwise, to fix prices, even if the result is supracompetitive pricing.[107] In employing the rule of reason analysis, courts and the FTC do not assume that mere price matching constitutes an agreement to fix prices. Rather, they look for additional factors which would support an inference that an agreement to fix prices exists among competitors.[108] To do otherwise could subject a competitor to the rule of reason analysis any time it attempted to compete with another

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102. *See id.*

103. *See id.*

104. *See id.*

105. *See id.*

106. In *Clamp-All Corp. v. Cast-Iron Soil Pipe Inst.*, the First Circuit Court of Appeals stated that:

> The problem [for a firm participating in a price-fixing agreement] is that each also knows that for it alone the best of all possible worlds is to attract customers through a small price cut not matched by others. Since they all know this, how can they keep each other from cutting prices? How can they prevent the forces of competition from breaking out, with one or another firm yielding to the temptation to cut its own prices while hoping the others will not match the low price? . . . [e]ach fears that . . . its competitors will "chisel" on the tacit pricing arrangement, perhaps through secret or selective price cut.

Clamp-All Corp v. Cast-Iron Soil Pipe Inst., 851 F.2d 478, 484-85 (1st Cir. 1988).

107. *See* Baker, *supra* note 97.

108. *See id.*

competitor by matching a reduction in price.[109]

In the airlines-price fixing case,[110] the government was able to detect evidence of an agreement to fix the prices of air fares because the data attached to those fares on the computer reservation system allowed airlines to test in advance whether or not other airlines would go along with a proposed fare hike.[111] The complex behavior that resulted from this practice produced a strong inference that tacit price-fixing agreements were taking place.[112]

Most B2B exchanges, however, do not provide mechanisms through which buyers and sellers can signal each other about future proposed price changes.[113] While this may make it more difficult for price coordination to occur, it can also make it far more difficult for the government to produce an inference that such price coordination is occurring, since there is no explicit signaling mechanism for the FTC to detect. Therefore, the current rule of reason analysis, which requires at least enough evidence to produce an inference of an agreement between buyers or sellers to raise prices in order to suggest unlawful activity is occurring,[114] may be wholly inadequate at policing those B2B exchanges which provide transparent market information to its participants.

The primary difficulty in policing potential price-fixing agreements in the B2B industry, as elsewhere, will likely involve cases lacking an express agreement. It can be very difficult to distinguish between an implicit price-fixing agreement and simple competitive behavior.[115] The highest potential for abuse occurs in those B2B exchanges in which participants have real-time access to each other's bids and prices.[116]

Some proponents of B2B exchanges assert that these marketplaces already have strong incentives to organize their operations in such a way as to avoid anticompetitive

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109. *See id.*

110. *See supra* note 44 and accompanying text.

111. *See id.*

112. *See Comments of the American Antitrust Institute Relating to Orbitz and the D.O.T.'s C.R.S. Rulemaking*, 14 (Sept. 18, 2000) <http://www.antitrustinstitute.org>.

113. *See* Charles F. Rule, et al., *B2B or Collusion*, LEGAL TIMES 36 (April 3, 2000).

114. *See supra* notes 108-109 and accompanying text.

115. *See supra* notes 107-109 and accompanying text.

116. *See supra* note 100 and accompanying text.

information-sharing practices.[117] However true that may be, the facts of the airline price-fixing case demonstrate that, given the ability to engage in subtle price signaling measures, unlawful anticompetitive behavior will sometimes occur.[118] Therefore, while a hands-off approach to regulation of B2B's may produce adequate results in most cases due to market forces that require B2B's to engage in fair practices in order to attract members, it is likely that some abuses will occur. [119] Furthermore, the alleged case of spread-fixing on NASDAQ provides evidence that price collusion may occur even in real-time markets where no information on future pricing can be exchanged.[120] It is paramount, therefore, that the FTC consider new approaches to regulate information exchange on B2B marketplaces.

The most commonly suggested solution to the problem of price collusion consists of restrictions on the amount of information that buyers and sellers are allowed to share on the exchange.[121] Generally, these restrictions involve creating a "vertical path" within the exchange, protected by firewalls within the software driving the exchange.[122] Vertical paths only allow a purchaser to see the bids which it has made, and not the bids of other buyers.[123] Likewise, a seller only sees the prices that a buyer is willing to pay for its goods, and not the

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117. *See, e.g.,* Jasinowski, *supra* note 13 (asserting that B2B exchanges will enhance rather than restrict competition, even without government regulation); Edward Correia, *Testimony to the FTC Workshop* 502 (visited April 9, 2001) <http://www.ftc.gov> (stating that "[w]hen rivals are putting prices out for basically instantaneous transactions, I think it might be very hard to imagine a very effective way to collude" because with real-time transactions, there is no opportunity to signal future contingent prices to competitors).

118. *See* Baker, *supra* note 97. Baker argues that additional evidence shows that given the opportunity, price fixing will occur. *See id*. Baker cites contemporary economic "game" theory which shows the plausibility of price coordination among competitors, even in the absence of an agreement which would render it unlawful under current antitrust laws. *See id.*

119. Likewise, while voluntary disclosure laws in the securities industry may produce optimal results in many cases the well established evidence of fraud in the securities markets prior to the enactment of disclosure laws demonstrates that given the opportunity for abuse, some abuse will likely occur. *See supra* note 64. *See also* Seligman, *The Historical Need for a Mandatory Corporate Disclosure System*, 9 J. CORP. L. 1 (1983).

120. *See supra* note 44 and accompanying text.

121. *See, e.g.,* The Original Equipment Suppliers Association, *supra* note 58.

122. *See id.* at 5.

123. *See id.*

prices at which other sellers are willing to sell.[124]

In many cases, the buyers and sellers on a B2B exchange already demand a certain degree of data confidentiality to protect their proprietary information.[125] Such restrictions on information sharing, however, tend to negate some of the possible benefits of participation in a B2B exchange. Having access to the identity of other buyers and sellers, as well as the prices of purchased goods and their quantities, allows a participant to get an idea of overall trends within the market. The discernment of such trends can help an exchange participant manage its inventory levels, reducing the chance of it being caught with too much inventory or too little input supplies, therefore smoothing out the overall business cycle in the industry.[126] Some exchange participants, therefore, are likely to desire access to some degree of information about other participants on the exchange.[127] Even in those cases where B2B participants do not desire information-sharing to occur, a situation could arise in which a large B2B dominates a given industry, and entities in the field may have no choice but to join the exchange and play by its rules.

A first possible solution to protect against price collusion while maintaining the ability to share a limited amount of information is to require the anonymization of the data.[128] As

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124. *See id.*

125. *See* Charles Phillips, *Statements to the FTC Workshop* stating that

> my experience has been that the buyers and the suppliers are definitely afraid of anybody seeing anything else. They want these relationships to remain private with a portion of the marketplace public for people who want to do that, for suppliers who want to discover new buyers, and they want to publish a generic price for everyone to see. That may be a different price than they've negotiated for a supplier . . .

Id. Phillips also points out that the potential for price fixing through exchange of information only exists in those B2B exchanges which utilize a real-time pricing format. *See id.* at 300. In fact, however, many B2B exchanges only offer a static pricing format in which buyers select items from posted catalogs. *See id.* The catalogs may even be segmented such that a seller only allows portions of the catalog to be available to purchasers who satisfy certain criteria. *See id.*

126. *See supra* note 18 and accompanying text.

127. *See e.g.*, *Comments of energyLeader.com to the FTC Workshop* 11, 14 (June 2000) (stating that exchanges set up by energyLeader.com typically do not allow buyers to learn about each others' purchases, but may let sellers have access to competitors' prices).

128. *See* The Original Equipment Suppliers Association, *supra* note 58.

long as the number of participants is large enough, information concerning each bid for a good can be distributed to each participant while making it difficult for any participant to accurately attribute any specific transaction data to any specific participant.[129] Alternatively, the bid information can be provided only in the aggregate. The total quantity of goods purchased and the average price for a good over a given period of time can be distributed, but not information pertaining to any specific transaction.[130]

The potential anticompetitive risks of information sharing are enhanced when there is an asymmetry of information among the participants on an exchange.[131] A B2B exchange owned only by sellers or solely by buyers creates a situation in which the owners, who necessarily have access to all information being transferred on its exchange, have an incentive to utilize their privileged position to the detriment of non-owners.[132]

Some B2B participants suggest that exchanges owned by firms on the seller level rather than the buyer level are less likely to raise antitrust concerns; a buyer-owned exchange may feel more pressure to take advantage of inside information on competitors, because one of the buyers' primary aims is to reduce the price at which it purchases goods from sellers.[133] From the perspective of the seller's side, however, the primary motivation in joining a B2B exchange is to develop a channel of distributors and buyers to purchase its goods.[134] Thus, some argue that a seller-led exchange would be "more in favor of supporting an entire value chain"[135] as opposed to favoring sellers over buyers.

Buyer participants in B2B exchanges, however, often argue that seller-owned exchanges pose the greatest risk of price fixing activities. A seller-owned exchange could use its access to exchange data to discover the purchasing needs of buyers in advance and raise prices accordingly.[136] A second solution,

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129. *See id.*

130. *See supra* note 119.

131. *See* The Original Equipment Suppliers Association, *supra* note 58.

132. *See id.* at 5.

133. *See* Dwayne Spradlin, *Testimony to the FTC Workshop* (June 29, 2000).

134. *See id.*

135. *Id.*

136. *See* Kaushik Shridharani, *Statement to the FTC Workshop* 185 (June 29, 2000); Lori Mirek, *Statement to the FTC Workshop* 188-89, 200 (June 29,

therefore, would be a regulation requiring an independent third party to own B2B exchanges, which would minimize the danger of owner favoritism.[137]

Both of these solutions, however, may compromise the formation of B2B exchanges and the level of efficiencies needed to operate them. Numerous situations may exist in which a seller-owned exchange or an independently owned exchange is the most plausible or efficient way to organize a given B2B. Consider, for example, that B2B's require an enormous amount of money and resources to commence operation.[138] Having a B2B started and supported by players in the industry can provide these resources, while an independent, third-party B2B exchange may have to seek outside financing to operate.[139] Furthermore, in the recent market climate, in which Internet start-ups are having serious difficulties obtaining venture capital financing or completing initial public offerings (IPOs),[140] any regulation restricting who may have equity stakes in B2B exchanges may prevent an exchange from being created. Such a regulation would be especially inappropriate in the context of a new and hyper-innovative industry such as B2B exchanges, which are attempting to develop never before seen platforms, and consequently require flexibility to determine which type of business model is most efficient and effective. It would be extremely difficult at this time for the FTC to interfere with an industry for which the rules are still being written, and effectively weigh the pros and cons of various B2B ownership

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2000) (arguing that in supplier-owned exchanges,

traditional firewall mechanisms are likely to be particularly ineffective because of the necessary integration between the supplier's computer information systems and that, of course, of the supplier-owned exchange's information systems. . . when suppliers run an exchange, they know each other's bids and prices on every trade instantly . . . one could, candidly, hardly imagine a better mechanism . . . to affect . . . horizontal pricing agreements.).

137. *See Comments of Currenex to the FTC Workshop* 2 (June 2000) (stating that "the independent, third-party exchange is the model that is most likely to realize the efficiency-enhancing and pro-competitive potential of B2B exchanges for consumers with the lowest likelihood of anti-competitive effects such as collusion on fees or price.").

138. *See id.*

139. *See id.*

140. *See* Jim Hopkins, *Flow of Venture Capital Funds Slows to Trickle*, USA TODAY, (March 16, 2001) <http://www.usatoday.com/life/cyber/invest/2001-03-16-venture.htm> (quoting the research firm Venture Economics as stating that "the amount of money flowing into venture capital funds fell 33% in the fourth quarter of 2000 compared with the third quarter.").

structures.[141]

Nevertheless, the traditional antitrust analysis which the FTC is currently employing in relation to B2B exchanges does not adequately address the potential anticompetitive risks involved in the sharing of information on these exchanges, particularly those exchanges involving real-time pricing and owned by a small group on the seller side. In light of the dangers of placing restrictions on who may own and operate B2B exchanges, a nuanced approach is called for which balances the benefits of market transparency with its associated antitrust concerns.

The FTC, therefore, should move to enact regulations requiring the identity of all buyers and sellers in a B2B employing real-time pricing to remain anonymous. In both the airline price-fixing case and the NASDAQ spread-fixing case, the defendants could determine the identities of all other participants in the electronic market and so were allegedly able to punish those who deviated from the implicit collusive agreement. Requiring such anonymity, therefore, would make it significantly more difficult for a price-fixing agreement to be enforced.

Second, the FTC should enact a regulation prohibiting owners of non-independent exchanges from utilizing confidential information which it receives in their capacity as owners in a way that is detrimental to other participants on the exchange. A B2B could meet this requirement, for example, by establishing firewalls between the owner's computer systems and those of the exchange. While responsible B2B's will likely already implement such procedures, this regulation will ensure protection in any case in which a B2B is controlled by entities which dominate in a given market, and could otherwise impose anticompetitive information-sharing practices to the detriment of other B2B participants.

These proposed regulations simply represent good faith practices that should be relatively unburdensome to implement, and help to provide needed protection without imposing more substantive regulations which could cripple the development of this already fragile industry.

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141. *See* Arthur B. Scullery & W. William A. Woods, *Comments to the FTC Workshop* 3 (visited April 9, 2001) <http://www.ftc.gov> (stating that "[i]n our opinion, neither trade associations nor governmental bodies are sufficiently flexible to cope with the rapid development of the B2B marketspace").

CONCLUSION

In light of the need for B2B's to have flexibility in designing the most efficient and effective marketplaces, it would be unwise for the FTC to rush in and begin regulation of the ownership structures of B2B's at this time. This is especially so since the FTC has little precedent to rely on in establishing what is and is not anti-competitive behavior in the B2B world. Since the types of risks found in the B2B world are similar to those that are found in other joint collaborations between competitors, the FTC's Collaborator Guidelines may ultimately serve as an effective starting point for dealing with B2B's. Evidence suggests, however, that current antitrust laws cannot adequately address the anticompetitive risks which may arise from the sharing of real-time pricing information between buyers and sellers on a B2B exchange. Hence, the FTC should encourage B2B exchanges to consider such approaches as establishing independent boards to establish admission standards to the exchange, and anonymizing all customer identity data in exchanges involving real-time pricing of goods, to reduce the risks of tacit price coordination which may be nearly impossible to prove otherwise. It is important in any case, however, that the FTC wait for the "dust to settle," so to speak, before embarking on any major, additional regulation of the B2B's which could discourage innovation and eliminate the promised benefits of these exchanges before they even have the opportunity to be recognized. Fortunately, the FTC seems to be aware of its present limitations, and is proceeding cautiously.[142] Hopefully, the FTC will be able to develop an approach in due time which appropriately balances the risks and opportunities of these remarkable entities.

142. *See, e.g.,* FTC Commissioner Orson Swindle, Remarks on "Antitrust in the Emerging B2B Marketplace," delivered to the Forum for Trust in Online Trade, Princeton Club, (July 19, 2000) (stating that "we must be certain that any actions the FTC takes in the B2B and E-commerce world are necessary and rational. We must get this right; otherwise we could do terrible harm . . . the government is not knowledgeable enough to begin regulating. We must look before we leap and consider the potential unintended consequences . . ."); *FTC Public Notice* (Sept. 11, 2000) (stating that the FTC had closed its investigation of potential antitrust violations on the part of the Covisint B2B exchange, stating that, "because Covisint is in the early stages of its development . . . it is not yet operational . . ." The FTC could not say whether implementation of the B2B would cause competitive concerns).