

MODEL  
ELECTRONIC DATA INTERCHANGE  
TRADING PARTNER  
AGREEMENT  
AND  
COMMENTARY

Prepared by  
the  
Electronic Messaging Services Task Force  
  
Subcommittee on  
Electronic Commercial Practices  
Uniform Commercial Code Committee  
Section of Business Law  
  
American Bar Association

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## FOREWORD

This Model Electronic Data Interchange Trading Partner Agreement and Commentary were prepared by the Electronic Messaging Services Task Force under the auspices of the Subcommittee on Electronic Commercial Practices of the Uniform Commercial Code Committee, Section of Business Law, of the American Bar Association.

The Model Agreement and Commentary are to be used by attorneys in advising clients who are establishing commercial trading practices which implement electronic data interchange ("EDI"). The format of the Model Agreement and Commentary is considered an appropriate manner in which to identify the issues arising in EDI and to suggest uniform approaches in response. However, it is not intended that the Model Agreement represent the only form in which those issues may be addressed by counsel considering the underlying business relationships. Those reviewing the Model Agreement and Commentary are strongly encouraged to consider and study their provisions and to use independent judgment as to the effectiveness of the provisions of the Model Agreement and the advisability of their use in particular transactions.

The Model Agreement and Commentary reflect the views of those involved in their preparation; neither the contents of the Model Agreement and Commentary, nor the opinions expressed therein, represent the views, in whole or in part, of the American Bar Association or any part thereof.

## Background

Beginning in the early 1970's, EDI was introduced as a method by which business data could be communicated electronically between computers in standardized formats in substitution for conventional paper-based documents. The commercial implementation of EDI to effect the purchase and sale of goods has experienced exponential growth, and has begun to change the manner in which contracts are negotiated and created.

In April 1987, the Subcommittee on the Scope of the Uniform Commercial Code, of the Uniform Commercial Code Committee, Section of Business Law, of the American Bar Association, through the Electronic Messaging Services Task Force, initiated a study to examine the effects of electronic commerce upon fundamental principles of contract law and related legal issues. In 1988, that Subcommittee issued a responsive report, entitled *Electronic Messaging* (ABA Publication No. 507-0210, 1988) and authorized a further examination of EDI and other electronic messaging systems (a) to determine how contract formation and related issues were being addressed by existing agreements, (b) to identify possible uniform approaches to those issues, and (c) to develop a means of communicating to practicing attorneys the issues which should be considered when drafting agreements for parties conducting business through the use of EDI.

In July 1989, in recognition of the continued expansion of electronic commerce and the legal issues which arise as a result, a new Subcommittee on Electronic Commercial Practices was organized. In October 1989, the Electronic Messaging Services Task Force issued to the Subcommittee on Electric Commercial Practices and to the Subcommittee on the Scope of the Uniform Commercial Code a report entitled *The Commercial Use of Electronic Data Interchange - A Report and Model Trading Partner Agreement*, 44 Bus. Law. \_\_ [May, 1990],

which includes the Model Agreement and Commentary. Counsel is encouraged to review that report in connection with the use of the Model Agreement.

Members of the Task Force responsible for the preparation of the Model Agreement and Commentary were: Michael S. Baum (Cambridge, Massachusetts), Philip V. Otero (Rockville, Maryland), Jeffrey B. Ritter (Columbus, Ohio), Thomas J. McCarthy (Wilmington, Delaware) and Amelia H. Boss (Philadelphia, Pennsylvania). The Task Force also wishes to recognize the invaluable comments and support provided by Patricia B. Fry (Grand Forks, North Dakota), Chair of the Subcommittee on Electronic Commercial Practices.

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## USE OF THE MODEL AGREEMENT AND COMMENTARY

The following should be considered by counsel in reviewing and implementing the Model Agreement and Commentary:

1. Provisions of the Model Agreement contained in brackets ([]) identify options for counsel to consider; in several cases, the bracketed language represents alternatives presented within the Model Agreement, while in other instances the provisions are themselves presented as optional.
2. The Commentary has the following purposes:
  - To explain how the Model Agreement works, the purposes of each section and the intended effect of certain provisions in the context of existing commercial law.
  - To provide background technical information relating to certain aspects of EDI and prevailing general industry practices.
  - To provide specific drafting considerations on the manner in which provisions of the Model Agreement may be utilized or modified in preparing a definitive agreement.
3. The Appendix is an essential component of the Model Agreement. The parties should use the Appendix to set forth information essential to the proposed trading relationship as well as additional terms and conditions. Counsel should not consider the Appendix merely a "technical" item; rather, it is the field upon which mutual business decisions which affect the substance of the relationship of the parties, as well as the validity and enforceability of the underlying transactions, are to be specified. For that reason, the format of the Appendix is a suggested format, but does not represent a required structure. Counsel is encouraged to adapt the form and content of the Appendix to meet the requirements of any particular business relationship.

## MODEL ELECTRONIC DATA INTERCHANGE TRADING PARTNER AGREEMENT

THIS ELECTRONIC DATA INTERCHANGE TRADING PARTNER AGREEMENT (the "Agreement") is made as of \_\_\_\_\_, 19\_\_\_\_, by and between \_\_\_\_\_ ("ABC"), a \_\_\_\_\_ corporation, with offices at \_\_\_\_\_ and \_\_\_\_\_ ("XYZ"), a \_\_\_\_\_ corporation, with offices at \_\_\_\_\_.

### RECITALS

ABC and XYZ desire to facilitate purchase and sale transactions ("Transactions") by electronically transmitting and receiving data in agreed formats in substitution for conventional paper-based documents and to assure that such Transactions are not legally invalid or unenforceable as a result of the use of available electronic technologies for the mutual benefit of the parties.

NOW THEREFORE, the parties, intending to be legally bound, agree as follows:

#### Comment

1. The scope and purposes of the Agreement are as follows:
    - The Agreement is to be used between commercial trading partners; the Agreement is not intended for use in consumer transactions.
    - The Agreement is to be used only in connection with domestic purchase and sale transactions involving goods, as contemplated by Article 2 of the Uniform Commercial Code (the "Code"). Counsel may wish to consider the Agreement in developing suitable provisions for use in other types of EDI relationships, such as those which are international in scope, or which involve the performance of services (including transportation and shipping activities).
    - The Agreement is intended to facilitate the commercial relationship of the trading parties. The Agreement does not generally advocate particular solutions to what are essentially business is-
- sues; freedom of contract is encouraged.
- The Agreement does not attempt to resolve all aspects of commercial trading relationships which are within the scope of Article 2 of the Code. Counsel is cautioned to consider the additional issues which arise from the underlying Transactions (issues which are not unique to the use of EDI) and to develop appropriate responses.
2. Certain provisions of the Agreement have the effect of varying the application of provisions of Article 2. In this respect, the Agreement implements two of the fundamental purposes of the Code, namely (a) to simplify, clarify and modernize the law governing commercial transactions, and (b) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties. See UCC Section 1-102(2). In order to accomplish these purposes, the Code is to be liberally construed

and applied. See UCC Section 1-102(1). This flexibility is intended to allow the underlying principles to be developed in light of unforeseen and new circumstances and practices. See UCC Section 1-102, comment 1. Freedom of contract is also an important principle of the Code. See UCC Section 1-102(3) and 1-102, comment 2. Thus, parties are free to vary by agreement the effect of all provisions of the Code, except to the extent the general obligations of good faith, diligence, reasonableness and care may not be displaced. See UCC Section 1-102(3) and 1-102, comment 3.

3. The Recitals set forth the mutual intention of the parties for valid and enforceable obligations to result from the electronic communication of data in substitution for conventional paper-based documents. See also Sections 1.1, 2.1 and 3.3, and the Comments thereto. The execution and delivery of the Agreement and the performance of Transactions, together with the conduct of the parties in accordance with its terms, should be considered suf-

ficient to show the existence of contracts for the sale of goods. See UCC Section 2-204.

#### Drafting Considerations

1. The Agreement does not designate either party as buyer or seller. Either party may, therefore, purchase or sell goods in accordance with its provisions, unless appropriate modifications are made. For example, counsel may wish to add to the Appendix, as to each Document (as defined in Section 1.1), which party may be the "Sender" of that Document. See Sections 1.1 and 3.1, and the Comments and Drafting Considerations thereto.
2. Consider whether either or both of the parties are merchants, and the implications under the Code of that classification on the underlying commercial relationship and the rules of conduct which are defined by the Agreement. See UCC Sections 2-104(1) and 2-104(3). Note that if the parties are not corporations, appropriate changes should be made.

## Section 1. Prerequisites.

**1.1. Documents: Standards.** Each party may electronically transmit to or receive from the other party any of the transaction sets listed in the Appendix, [transaction sets which the parties regularly transmit] and transaction sets which the parties by written agreement add to the Appendix (collectively "Documents"). Any transmission of data which is not a Document shall have no force or effect between the parties unless justifiably relied upon by the receiving party. All Documents shall be transmitted in accordance with the standards [and the published industry guidelines] set forth in the Appendix.

### Comment

#### General:

1. Establishing an EDI trading relationship, by necessity, involves a series of decisions, primarily technical in nature, by both parties regarding: (a) the formats in which the data will be transmitted, and the standards and possible implementation guidelines to be adopted in connection with such formats; (b) the possible selection of third-party service providers (as well as the various business decisions required in connection with establishing such relationship); and (c) the development and maintenance of appropriate computer and communication systems and security procedures. Section 1 and the Appendix provide a framework for the parties to mutually structure these decisions. Compliance with the provisions of Section 1 will confirm their intent to give legal significance to the transmissions. See Sections 2.1, 2.3 and 3.3.3, and the Comments thereto.
2. Implementing EDI should also involve careful evaluation of existing internal business procedures and controls of the parties relating to paper-based commercial practices, and consideration of the extent to which such proce-

dures and controls should be strengthened and/or modified in connection with the establishment of an electronic communication and trading environment. For example, authorizations to release purchase orders or approve payments, as well as rules regarding security and confidentiality, should be reviewed. See also Sections 2.1 and 3, and the Comments thereto.

3. This section contains the first use of "by written agreement" or "in writing" in the Agreement. The Agreement provides the flexibility to allow notices, modifications, amendments or other communications required or permitted by the Agreement to be "in writing" to consist of electronic transmissions, but only if the transmissions satisfy the criteria of the Agreement for "Signed Documents" (as defined in Section 3.3.2). Alternatively, the Agreement could specify paper-based writings are required, if the parties consider it appropriate.

#### Documents:

4. "Transaction sets" define the types of data which the specified

transmission must contain and the format in which the data must appear. Transaction sets function like conventional paper document forms, and include purchase orders, requests for quotation, purchase order acknowledgements, invoices, remittance advices and purchase order change requests. In addition, transaction sets exist in which "free text" may be communicated as a segment; this type of transaction set would be appropriate for notices, modifications or amendments (such as those described in Comment 3 above).

5. The Agreement generally applies only to those transmissions of data classified as "Documents" under Section 1.1. At a minimum, transaction sets listed in the Appendix (including subsequent additions) are Documents.
6. The Agreement provides, as an option, for transaction sets which are not listed in the Appendix but which are regularly transmitted to be considered as Documents. No attempt to define "regularly transmit" has been made. However, see Section 3.3.3 (and UCC Section 2-208).
7. The "regularly transmit" option should be considered when both parties wish to give effect to new transaction sets without express prior agreement. Parties who wish to retain tight control over which transmissions qualify as Documents under Section 1.1 will eliminate the "regularly transmit" option from the Agreement. Note that, if the "regularly transmit" option is not included, regularly transmitted transaction sets may still be given effect, though inconsistent with the terms of this Agreement. See

UCC Sections 1-103, 2-208 and 2-209. In addition, such parties may wish to eliminate from the second sentence of Section 1.1 the phrase "... unless justifiably relied upon by the receiving party" or make other modifications to, or entirely delete, that sentence. Note, however, that such changes may not effectively prevent a transmission which is not a Document from having legal effect, where the receiving party has under the circumstances, including the language in the Agreement, justifiably relied on that transmission. See Comment 6 above and Comment 8 below.

8. The second sentence of Section 1.1 is not intended to alter the law of reliance; the provision simply prevents a party which has transmitted data from avoiding the legal effect of the receiving party's justifiable reliance merely because the format had not been previously classified as a Document. However, note that the remaining provisions of the Agreement relating to Documents are not applicable in those circumstances. See, for example, Sections 1.2.3, 2.1, 3.3, and 4.6.

#### Standards:

9. "Standards" are the uniform specifications for the electronic interchange of business data and include provisions of the structure and format of data as well as the transmission of the formatted data. There are also standards, among other things, for certain security and communication procedures.
10. The selection of applicable standards is a matter of some flexibility. The parties may

- mutually select and utilize one or more sets of recognized standards, or, within certain technical limits, customize those standards to their mutual benefit. Existing technology also permits each party to adopt a different standard for transmission of a Document, with Providers (as defined in Section 1.2.1) subsequently conforming the different formats to each party's adopted standard.
11. Virtually all standards for EDI include detailed technical requirements to facilitate EDI, including transaction sets, data dictionaries, segment dictionaries and other uniform controls. Pursuant to the provisions of the Appendix, the selection by the parties of applicable standards acts to incorporate by reference these additional requirements. Should the parties desire to exclude or modify any of such requirements, such changes may be made in the Appendix.

**Guidelines:**

12. "Published industry guidelines" contain recommended procedures and implementation guidelines for the use of EDI within particular industry groups (recent examples include guidelines of the automotive, chemical and pharmaceutical industries). In contrast to standards, which require compliance for the effective interchange of data, guidelines generally are intended to aid implementation among trading partners. The Agreement, as an option, provides the parties the ability to require compliance with any guidelines which they mutually adopt and specify.

13. Counsel should carefully evaluate any available guidelines to assure that any conflicts between the guidelines and the standards, or between different guidelines, are understood and resolved. The adoption of certain guidelines, for example, may affect the process of contract formation in an unintended manner, since several current guidelines suggest certain procedures (e.g., which Documents are acceptable responses to other specified Documents) which may be in conflict with what the parties mutually negotiate and specify in the Appendix. Language in the Appendix has been included to avoid this result by subordinating the content of any selected guidelines to the provisions of the Agreement.
14. Counsel should evaluate whether any existing guidelines, whether or not adopted, may be considered, in any interpretation of the Agreement, as a usage of trade to be considered with respect to any Transaction. See UCC Section 1-205(2).

**Drafting Considerations**

1. The parties should identify and list the transaction sets which may be transmitted between them as Documents. The Appendix is structured in accordance with most common methods of identifying Documents. However, proprietary Documents, not based upon any particular standard, may also be utilized and listed.
2. In specifying Documents in the Appendix, it is recommended that the parties agree that any selected Document be communicated only in the then current release version or the release

- version immediately preceding the then current release version. Consistent with the provisions of Section 1.3, this will require the parties to periodically install new release versions of software corresponding to new revisions of the applicable standards. See Section 1.3, and the Comments thereto. Counsel may wish to consider establishing a time frame in which any such releases must be installed.
3. In completing the Appendix, any transaction set listed as an Acceptance Document (pursuant to Section 2.3) should also be listed

**1.2. Third Party Service Providers.**

- 1.2.1. Documents will be transmitted electronically to each party either, as specified in the Appendix, directly or through any third party service provider ("Provider") with which either party may contract. Either party may modify its election to use, not use or change a Provider upon 30 days prior written notice.

**Comment**

1. Section 1.2 provides the structure to specify the channel(s) of communication to be used in transmitting Documents between the parties. Transmissions may be made directly between the parties or through Providers. To the extent Providers are selected, Section 1.2 provides a framework for considering those aspects of the trading partners' relationship under the Agreement which are related to the use of Providers.
2. Among other things, Providers function as electronic mail processing systems and may (a) maintain electronic "mailboxes" into which communications can be placed for trading partners, and (b) interconnect with other Providers to permit communication between their respective cus-

- as a Document. See Section 2.3, and the Comments thereto.
4. The Agreement permits any Document specified in the Appendix to be transmitted by either party. If this result is not desired, appropriate restrictions should be specified in the Appendix. See Recitals, Drafting Consideration 1.
5. If the parties do not wish transmissions which are not Documents to be given any force or effect, appropriate changes may be made. See Comments 7 and 8 above.

- tomers. Providers have become an important aspect of general industry practice relating to EDI.
3. Section 1.2.1 provides maximum flexibility for each party to choose and maintain the desired channel of communication. Decisions to communicate directly or through Providers will be affected by factors such as cost, the nature of available services, the volume of transmissions, the bargaining power of the respective parties and continued evolutions in technology.
4. Counsel should note that Section 1.2.1 requires the parties to have contracted with any Provider specified for them in the Appendix. This assures that each party has obtained the availability of each such Provider.

5. Notice of any modification of a party's election provides a reasonable opportunity for the other party to make corresponding adjustments in operations. Generally, 30 days is considered, consistent with general industry practice, as a reasonable notice period; however, that period may be adjusted, based on what may be reasonable for a particular relationship.

**Drafting Considerations**

1. If the parties elect to communicate directly, counsel may wish to consider specifying in the Appendix appropriate technical information.
2. If either party uses one or more Providers, the names and related information of such Providers are to be set forth in the Appendix. If Providers are to be used for particular services or transactions, such indications would be appropriate in the Appendix.

1.2.2. Each party shall be responsible for the costs of any Provider with which it contracts, unless otherwise set forth in the Appendix.

**Comment**

1. Section 1.2.2 permits the parties to allocate between them the various expenses incurred in the use of Providers. Such expenses relate to the basic services of transmission, receipt, data storage, and data translation as well as additional services which may be offered. Counsel should consider the effect of this Section 1.2.2 when Providers offer a service permitting the parties to automatically agree on-line as to the allocation of these types of expenses.

2. The Agreement is consistent with the general industry practice within a paper-based environment that each party absorb its respective communication costs (i.e., postage, courier costs, and printing expenses).

**Drafting Considerations**

To the extent the parties allocate costs in a manner other than as provided in Section 1.2.2, such allocation may be added in the Appendix; no change in the Agreement is required.

[1.2.3. Each party shall be liable for the acts or omissions of its Provider while transmitting, receiving, storing or handling Documents, or performing related activities, for such party; provided, that if both the parties use the same Provider to effect the transmission and receipt of a Document, the originating party shall be liable for the acts or omissions of such Provider as to such Document.]

**Comment**

1. This optional Section permits the parties to establish contractual responsibility between them for the conduct of their respective

Providers. This Section, if used, has the effect of providing a clear rule within the Agreement for allocating the risk of loss be-

tween the parties arising from the Provider's conduct. If this Section is omitted, the parties will have no contractual liability to each other under the Agreement for the conduct of their respective Providers, except where such conduct is attributable to either party and causes such party to breach the provisions of the Agreement.

2. The originating party is responsible for the acts of a shared Provider on the basis that such party initiates the final action, with respect to any Document, to use the Provider.
3. The Agreement does not address the respective right of either party to assert claims against any Provider under any applicable service contract, nor does the Agreement alter the liability of the parties to each

**1.3. System Operations.** Each party, at its own expense, shall provide and maintain the equipment, software, services and testing necessary to effectively and reliably transmit and receive Documents.

**Comment**

1. This Section imposes a reciprocal obligation upon the parties to support effective and reliable communications, and allocates the related costs.
2. Consistent with general industry practice, the obligation to "maintain" is intended to require the parties to update the specified items as necessary to assure that effective and reliable communications are maintained in accordance with prevailing commercial practices and technology. See Section 1.1, and the Comments thereto. Section 1.3 may require, therefore, additional hardware or software ac-

other, if any, pursuant to any applicable legal principles.

**Drafting Considerations**

1. Liability arising under Section 1.2.3 is subject to the exclusion of damages contained in Section 4.6; counsel should consider whether this result is appropriate. The possible effect of Section 4.5 (*Force Majeure*) to relieve a party of liability under Section 1.2.3 should also be evaluated.
2. Note that Section 1.2.3 does not act to allocate liability between the parties where a Provider is not used. See Section 1.2.1.
3. This Section, if used, may be modified to allocate liability in any other manner upon which the parties agree.

quisitions by the parties as well as the possible adoption of new security procedures satisfying the requirements of Section 1.4.

3. The conduct of the parties in establishing and maintaining effective and reliable communication enhances the reliability of Documents (including their content). See Sections 2.1, 3.3, and the Comments thereto.

**Drafting Considerations**

To the extent the parties agree upon a different allocation of expenses, appropriate changes may be made.

**1.4. Security Procedures.** Each party shall properly use those security procedures, including those specified in the Appendix, if any, which are reasonably sufficient to ensure that all transmissions of Documents are authorized and to protect its business records and data from improper access.

**Comment**

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| <p>1. Adequate security procedures are recognized by general industry practice as critical to the efficacy of electronic communication. This Section imposes affirmative duties to use security procedures to ensure the reliability of the communication systems and resulting business records. The use of adequate security enhances the reliability of those records and enhances the ability to prove the substantive terms of any underlying commercial transaction. See Section 3.3.4, and the Comments thereto.</p> <p>2. This Section imposes two obligations. First, each party must use security procedures sufficient to "reasonably" ensure proper authorization of transmissions. If a party fails to adequately secure its transmission activities, it may be liable for any unauthorized transmissions, and the consequences thereof. Second, each party must use security procedures sufficient to "reasonably" protect business records and data from improper access. In this case a failure to comply may again result in liability. This second obligation, when properly performed, also gives one party some measure of assurance that its own operations will not be subject to improper access through the systems and operations of the other party. A party failing to meet this second duty would, in addition, likely be stopped from submitting its records as superior to those of the other party, where the other</p> | <p>party has properly met its own duty under Section 1.4.</p> <p>3. Security procedures may be far-ranging in both sophistication and detail. Examples include the confidential exchange of Signatures (see Section 1.5) to authenticate the parties and the content of Documents which are transmitted or received, the exchange of encryption keys (by which the content of communications may be scrambled and unscrambled only pursuant to the exchanged keys), physical control of access to equipment and facilities, and the exchange of identifying information regarding the terminals from which authorized EDI transmissions may originate (which identifying information may be contained as part of the electronic "envelope" in which transmissions are exchanged).</p> <p>4. Whether in any circumstance procedures which have been adopted or implemented will be considered as "reasonable" will vary based on the sized and relative sophistication of the parties, the complexity of the operations of the parties, the nature of the communications and the underlying commercial transactions and additional factors. This Section provides an objective but flexible test by which to measure the conduct of the parties. See UCC Section 1-204(2).</p> <p>5. Under this Section, the parties may specify in the Appendix additional security procedures in connection with either or both of the requirements described in the</p> |
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above comments. This provision provides flexibility; as EDI and related technologies continue to advance, increasingly sophisticated security procedures will likely emerge which may be appropriate for one or both parties to implement. Parties should consider specifying in the Appendix any existing, generally accepted security procedures, special industry standards and any proprietary or unique security procedures required by the underlying commercial relationship.

6. This Section encourages the parties to negotiate the level of security required to induce them to enter Transactions. See Section 3.3, Comment 5. However, to the extent any duty of care may

**1.5. Signatures.** Each party shall adopt as its signature an electronic identification consisting of symbol(s) or code(s) which are to be affixed to or contained in each Document transmitted by such party ("Signatures"). Each party agrees that any Signature of such party affixed to or contained in any transmitted Document shall be sufficient to verify such party originated such Document. Neither party shall disclose to any unauthorized person the Signatures of the other party.

**Comment**

1. This Section establishes a mechanism for the adoption by each party of an electronic signature by which each Document may be signed. UCC Section 1-201(39) defines "signed" to include "... any symbol executed or adopted by a party with present intention to authenticate a writing (emphasis added)." Use of a Signature is important to establishing the validity of any EDI communication. See Section 3.3, and the Comments thereto.
2. This Section requires each party to adopt a Signature, but retains considerable flexibility as to what symbols or codes shall be

exist between the parties, liability may also arise at common law. See UCC Section 1-103.

7. This Section relates to obtaining access to business records and data; the use of such records and data is covered by Section 3.2. Counsel should consider the relationship between security procedures required by Section 1.4 and the treatment of confidentiality in Section 3.2.

**Drafting Considerations**

Counsel should note that the provisions of Section 4.6 (*Exclusion of Damages*) do not apply to any breach of the obligations arising under Section 1.4.

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adopted. The decision of each party will be made in light of existing technology, the relative sophistication of the parties, the requirements of applicable standards and any security procedures which are in use. A party may select as its Signature the use of its name on a Document (similar to a form of purchase order imprinted with the buyer's name and containing no other authorized signature). What is important is that the use of the adopted symbol or code reflect the intent to authenticate required by the Code. Regulating the use of any Signature may

- also be part of security procedures required by the Agreement; counsel should evaluate any such procedures to assure that the required intent to authenticate is preserved.
3. The electronic signature of any party may change from time to time, in order to protect its confidential character. Accordingly, the Appendix does not provide for disclosure of any Signature, but relies on general industry practice for the exchange of Signatures by other means of communication. If any Signature is used by a party as part of
  4. The last sentence of Section 1.5 prohibits only disclosure of the Signatures of the other party. If security procedures required by the Agreement relate to non-disclosure of Signatures, a party which discloses its own Signature to an unauthorized person may breach the provisions of Section 1.4.

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## Section 2. Transmissions.

**2.1. Proper Receipt.** Documents shall not be deemed to have been properly received, and no Document shall give rise to any obligation, until accessible to the receiving party at such party's Receipt Computer designated in the Appendix.

### Comment

1. The increased speed and accuracy of electronic commerce fundamentally differ when compared to contract formation practices in a paper-based environment. Parties engaging in electronic commerce have the ability to efficiently determine whether a particular transmission has been received by the other party, whether any transmission is inconsistent with prior business arrangements, or whether any transmission may be outside negotiated contractual limits. Consequently, the procedures of electronic commerce, when effectively implemented, offer the opportunity to achieve greater certainty in the contracting process. Section 2 provides a framework for the effective implementation of those procedures for the mutual benefit of both parties. The provisions set forth rules pertaining to the timing of receipt (Section 2.1), the obligation of the receiving party to verify receipt (Section 2.2), the manner in which acceptance occurs within an EDI environment (Section 2.3), and the disposition of unintelligible or garbled transmissions (Section 2.4).
2. Section 2.1 provides that no Document may create any legal obligation until properly received. This Section, therefore, represents a departure from the "mailbox rule" and parallel legal doctrines. Since the technology exists by which the party originating the transmission of any Document can effectively confirm receipt has occurred, it is inappropriate that the mere dispatch of any Document should be sufficient for any legal purpose.
3. "Properly received" requires that the transmitted Document be accessible at a computer designated by the receiving party. This permits each party to determine the appropriate system location. A Receipt Computer may be the computer of the third party service provider, the computer of either party or a specific terminal within a party's internal network (for example, a billing supervisor's desk). The Receipt Computer should be situated to enable the receiving party to promptly and properly transmit a functional acknowledgement upon proper receipt of any Document, as required by Section 2.2. Such acknowledgement may be sent by the Receipt Computer or by a computer with which the Receipt Computer communicates. Counsel should review the applicable operations to ensure that a functional acknowledgement cannot be transmitted before a Document reaches the Receipt Computer. Counsel should carefully consider the effects under remaining provisions of the Agreement of selecting as the Receipt Computer a computer which is not under the respective control of each party. Note that receipt does not require that any

- Document actually be examined, only that the Document be accessible. In a paper-based environment, this is similar to when a letter is delivered, but the envelope remains unopened. Each party thereby defers "receipt" until the "right" person or machine has an opportunity to have access to the transmitted data.
4. Note that Section 2.1 operates to relieve both parties from any obligation until the Document has been properly received.
  5. Except as described in Comment 2 above, the provisions of Section 2 are not intended to displace other applicable laws relating to contract formation or the underlying commercial relationship of the parties.
  6. Several examples which illustrate the operation of the provisions of Section 2 appear at Section 2.4, Comment 6.

**2.2. Verification.** Upon proper receipt of any Document, the receiving party shall promptly and properly transmit a functional acknowledgement in return, unless otherwise specified in the Appendix. A functional acknowledgement shall constitute conclusive evidence a Document has been properly received.

**Comment**

1. In light of the capability of technology to facilitate nearly immediate verification of receipt, and also to verify that no defect in receipt has occurred, Section 2.2 imposes an affirmative obligation to provide verification of receipt. Effective verification practices increase the opportunity for the early detection and resolution of transmission errors, thereby reducing the exposure of both

**Drafting Considerations**

1. In identifying the proper Receipt Computer, counsel may wish to consider, by example, current internal practices of the parties for giving notice under existing agreements and identify the person designated for such purposes (see Section 1.1, Comment 2). Since virtually any Document may be sent without direct human involvement, care should be taken that adequate controls have been established regulating the level of approval (and human authorization) required to properly receive any Document.
2. Counsel should consider whether any modification by either party under Section 1.2.1 will require conforming changes in the designation of the Receipt Computer for such party.

- parties to possibly significant damages.
2. A "functional acknowledgement" is a transaction set which confirms that receipt of a Document (in the format specified by such functional acknowledgement) has occurred and that all required portions of the Document have been received and are syntactically correct, but otherwise does not confirm the substantive

- content of the related Document. A functional acknowledgement can verify receipt, but is also designed to identify whether, in fact, omissions or errors in format or syntax have occurred. To the extent a party transmitting a functional acknowledgement identifies any errors or omissions, such notice would satisfy the notice requirements of Section 2.4. See Section 2.4, and the Comments thereto.
3. A party will "properly transmit" a functional acknowledgement or Document if it has been transmitted in a manner which complies with the provisions of Section 1.
  4. Whether or not verification is provided will not alter the legal significance of the initial Document; Section 2.1 controls in that respect.
  5. Counsel may wish to evaluate whether any circumstances exist

**2.3. Acceptance.** If acceptance of a Document is required by the Appendix, any such Document which has been properly received shall not give rise to any obligation unless and until the party initially transmitting such Document has properly received in return an Acceptance Document (as specified in the Appendix).

**Comment**

- Section 2.3 unambiguously indicates, with respect to the offer and acceptance of any contract, that no obligation will arise except upon satisfaction of the provisions of the Agreement. See UCC Section 2-206(1). The parties, by designating appropriate Acceptance Documents, have the opportunity to define what will constitute acceptance and can assure that no contract arises from any Document until there has been mutual and certain agreement upon the terms contained in such Document.
2. This Section permits the parties to designate Acceptance Documents for Documents not specifi-

- where the affirmative obligation to verify receipt should not be imposed and make appropriate exceptions in the Appendix. For example, a party's system may not include functional acknowledgements or the parties may elect to verify in another manner, such as transaction sequence checking.
6. A party initially transmitting a Document may have an obligation to make reasonable inquiries or take other actions to discharge any duty which may exist to mitigate damages arising from a breach of the provisions of Section 2.2 by the receiving party.
  7. The conclusive quality of a functional acknowledgement established by this Section assures that subsequent reliance thereon is reasonable.

3. An Acceptance Document might be a computer generated response or a more significant communication, possibly requiring human evaluation at the receiving end. Selection of the appropriate Acceptance Document in a particular context may also be influenced by the manner in which either party interacts with its Provider and by the commercial relationship of the parties. Note that Section 2.3 operates to relieve both parties

- from any obligation until an Acceptance Document has been properly received in return.
4. Note that the party receiving a Document also controls whether the Acceptance Document is to be sent. If the proposed terms or content of an initial Document is objectionable, neither party has any obligation if the Acceptance Document is not properly received in return.

**Drafting Considerations**

1. In identifying possible Acceptance Documents, counsel may wish to consider, by example, current internal practices of the parties for giving notice under existing agreements and identify the person designated for such purposes (see Section 1.1, Comment 2). Since virtually any Document may be sent without direct human involvement, care should be taken that adequate controls have been established regulating the level of approval (and human authorization) required to transmit any Document.
2. Counsel is strongly encouraged to review the substantive content of possible Acceptance Documents in selecting the appropriate confirmation of any Document. For example, in response to a purchase order, the Acceptance Document may be:
  - a purchase order acknowledgement (which substantively confirms the terms of the purchase order); or
  - a shipping notice (specifying that the goods have been or will be shipped; see UCC Section 2-206(1)(b)).
3. For certain Documents (for example, a notice of rejection of goods

from the buyer), no Acceptance Document will be appropriate. Note, however, if the buyer, having sent such notice does not receive a functional acknowledgement in return, the buyer is on notice that its notice of rejection may not have been received, and should consider either re-sending the notice, or providing such notice by means other than EDI. See UCC Section 1-201(26).

4. Counsel may wish to consider applicable industry implementation guidelines in selecting appropriate Acceptance Documents. See Section 1.1, Comments 2 and 13.
5. Counsel should also consider what effects, if any, the selection and use of Acceptance Documents may have upon the additional terms and conditions of the underlying commercial relationship, which may more specifically address contract formation issues (such as the time period in which offers must be accepted or rejected, and the manner of communicating rejection, if at all), rights of rejection and other matters. In addition, notwithstanding the last sentence of Section 3.1, counsel should endeavor to assure that the contract formation practices developed under the Agreement are consistent with any commercial relationship established by any other agreement described in Section 3.1. See Section 3.1, and the Comments thereto.

**Garbled Transmissions.** If any transmitted Document is received in an unintelligible or garbled form, the receiving party shall promptly notify the originating party (if identifiable from the received Document) in a reasonable manner. In the absence of such a notice, the originating party's records of the contents of such Document shall control.

**Comment**

1. Section 2.4 is intended to apply only to unintelligible or garbled messages, incapable of having effective meaning or missing material data components, for which the originating party may be identified within the context of the relevant Document. In those cases, the originating party's records control unless the receiving party gives prompt notification in a reasonable manner. See UCC Section 1-204. Such notice may be given by other than electronic means. The obligation to provide notice under this Section is not burdensome in an electronic environment, and has the advantage of assisting the transmitting party to correct promptly a miscommunication.
2. The phrase "unintelligible or garbled" is not intended to include Documents which are, in human readable form, capable of being read but which contain information which the receiving party knows, or has reason to know, may be incorrect. For example, if ABC has always ordered no more than 200 pencils, its purchase order for 200,000 pencils should not be considered unintelligible or garbled, since pursuant to Section 2.1, the parties can adopt a procedure where XYZ can always review, confirm or reject the substantive terms contained in any Document.
3. Section 2.4 is not intended to displace the applicable principles of

the law of mistake. See UCC Section 1-103.

4. If, pursuant to Section 2.3, no obligation arises with respect to a Document otherwise subject to this Section because the required Acceptance Document has not been properly received in return, then the fact that such Document is unintelligible or garbled should have no consequences under this Section.
5. Section 4.6 (Exclusion of Damages) clearly applies to liabilities which may arise in connection with any unintelligible or garbled transmission; if the parties wish a different result, appropriate changes may be made.
6. The following examples illustrate the operation of the provisions of Section 2, taken as a whole:

**Example 1.**

XYZ has specified its mainframe computer as its Receipt Computer. ABC sends a Document to XYZ's Provider, but the Document is never made accessible to XYZ's Receipt Computer. ABC's transmission of the Document has no legal effect.

**Example 2.**

XYZ properly receives a purchase order from ABC but never transmits in return either a functional acknowledgement or an Acceptance Document. No contract has been formed but XYZ is liable for any damages suffered by ABC, if any, from XYZ's

failure to provide verification as required.

**Example 3.**

XYZ properly receives a purchase order from ABC which by its terms is open for 10 days. XYZ properly transmits an Acceptance Document within the 10 day period, but the Acceptance Document is not "properly received" until the 11th day. No contract is formed.

**Example 4.**

The Appendix requires, as to a purchase order, that a purchase order acknowledgement be sent as an Acceptance Document. ABC, as buyer, sends a purchase order, receipt of which is verified by XYZ, as seller, by sending a functional acknowledgement. However, XYZ never sends an Acceptance Document. No contract for sale has been formed.

**Example 5.**

XYZ properly transmits an Acceptance Document, which is received by XYZ's

Provider and stored. Meanwhile, ABC properly transmits a revocation of its offer, which revocation is properly received by XYZ's Receipt Computer before the Acceptance Document is forwarded to ABC's Receipt Computer by XYZ's Provider. No contract is formed; the revocation is effective.

**Example 6.**

The Appendix requires, as to a purchase order, that a purchase order acknowledgement be sent as an Acceptance Document. XYZ, as seller, properly receives a purchase order from ABC, as buyer, but the price data is missing. XYZ sends a functional acknowledgement which identifies the omitted data. Under Section 2.4, XYZ has met its obligations. If XYZ, without the price data, then sends an Acceptance Document, a contract is formed, with the price to be determined pursuant to applicable law. See UCC Section 2-305.

### Section 3. Transaction Terms.

**3.1 Terms and Conditions.** This Agreement is to be considered part of any other written agreement referencing it or referenced in the Appendix. In the absence of any other written agreement applicable to any Transaction made pursuant to this Agreement, such Transaction (and any related communication) also shall be subject to [CHOOSE ONE]:

- [A] those terms and conditions, including any terms for payment, included in the Appendix.
- [B] the terms and conditions included on each party's standard printed applicable forms attached to or identified in the Appendix [as the same may be amended from time to time by either party upon written notice to the other]. The parties acknowledge that the terms and conditions set forth on such forms may be inconsistent, or in conflict, but agree that any conflict or dispute that arises between the parties in connection with any such Transaction will be resolved as if such Transaction had been effected through the use of such forms.
- [C] such additional terms and conditions as may be determined in accordance with applicable law.

The terms of this Agreement shall prevail in the event of any conflict with any other terms and conditions applicable to any Transaction.

**Comment**

- 1. Section 3 recognizes that the exchange of Documents furthers the commercial relationship of the parties, and that the use of available technology pursuant to its terms should not create any conflict with other written agreements between the parties, or fail to properly accommodate the terms and conditions which define the dimensions of the commercial transactions.
  - 2. Section 3.1 responds to three situations:
    - The parties have previously or concurrently executed a separate contract for the sale of goods, which may, by example, be in the form of a master purchase, requirements or outputs agreement. See UCC Section 2-306.
    - The parties execute such an agreement after the Agreement is signed.
    - The parties conduct business in the absence of, or outside the scope of, any such agreements, relying solely upon the Documents and the conduct of the parties pursuant to the Agreement to establish any contract.
- In either the first or second case, the other agreement is assumed to be the instrument by which the parties have had the opportunity to negotiate and agree upon terms and conditions applicable to any Transaction which are not defined by the content of any Document. However, in the final case, Section 3.1 requires the parties to elect from among three alternatives the manner for

- providing the additional terms and conditions not anticipated by the standard formats of applicable transaction sets.
3. Option [A] requires negotiation and agreement upon the additional terms and conditions. Such option, as compared to the remaining options, achieves the highest level of certainty in establishing the terms of any contract of sale. Essential terms and conditions to be negotiated, by way of example, may include warranty, delivery, rejection, liability for non-conforming goods and attorney's fees. The negotiated terms would be included in the Appendix.
  4. Option [B] permits incorporation into the electronic environment of existing paper-based methods of conducting business. Option [B] has the objective of clearly defining, for each party, the terms and conditions upon which it wishes to conduct business, and, to the extent amendments may be accommodated, the terms and conditions applicable at any time during the commercial relationship. If selected, however, Option [B], in anticipating, but not resolving, inconsistencies or conflicts in the respective forms of the parties, will not achieve the highest level of certainty as to the terms of any contract of sale.
  5. Option [B] requires each party's standard printed forms to be incorporated as a part of the Agreement. The parties may attach such forms to the Appendix or may identify the appropriate forms which are to be incorporated by reference. Any identification provided should be sufficiently specific to identify only one form. However, selecting the option of attaching such forms to the Appendix assures that the terms and conditions of such forms are explicitly known and disclosed.
  6. In response to general industry practice, Option [B] includes, as a further option, language permitting the terms and conditions of any form attached to or identified in the Appendix to be amended by subsequent written notice (which notice must be sufficient to adequately identify the new form or changes). If this option is elected, either party may incorporate into EDI trading the changes in terms and conditions which may occur in its paper-based trading practices. Parties wishing to retain greater control over subsequent amendments would not elect the optional language. In that case, subsequent forms would require mutual agreement for subsequent attachment or identification.
  7. In the event of any inconsistency or conflict between the respective forms of the parties, Option [B] incorporates the method of resolution set forth in UCC 2-207 and other applicable law. Since the attached or identified forms will correspond to Documents which have been transmitted, the terms and conditions contained in such forms should be considered in the same sequence in which the related Documents are transmitted and received between the parties.
  8. Option [C], if elected, incorporates into each contract for sale of goods the manner by which applicable law determines additional terms and conditions (other than quantity) which have not been agreed upon by the parties. See *e.g.*, UCC Sections 2-305 (Open Price Term), 2-307 (Delivery and Single Lot), 2-308

- (Place for Delivery) and 2-309 (Time for Shipment or Delivery). Under the circumstances contemplated by the Agreement, any contract for sale should not fail for indefiniteness. See UCC Section 2-204(3).
9. The last sentence of Section 3.1 confirms that the intent of the parties to give effect to the provisions of the Agreement is not contradicted by other terms and conditions applicable to any Transaction, whether set forth in any agreement described in Section 3.1 or by applicable law. For example, a separate contract for the sale of goods may provide for acceptance, in a paper-based environment, to occur upon the receipt of a signed purchase order acknowledgement at the offices of buyer by certified mail. The last sentence of Section 3.1 provides for the acceptance mechanism established pursuant to the Agreement to control with respect to EDI transmissions. Thus, the commercial intent of the parties, taken as a whole, is given effect.
- 3.2. Confidentiality.** No information contained in any Document or otherwise exchanged between the parties shall be considered confidential, except to the extent provided in Section 1.5, by written agreement between the parties, or by applicable law.
- Comment**
1. Section 3.2 focuses on whether the information transmitted in any Document requires confidential treatment by the parties. This Section provides for no confidential treatment except for Signatures (as provided in Section 1.5), and as required by other written agreements (see Section 1.1, Comment 3) or by applicable law. Examples of applicable law would include common law relating to trade secrets, any court order imposing confidentiality obligations as
- Drafting Considerations**
1. If the parties clearly intend that the Agreement is to be used solely and exclusively in connection with other written agreements, and that no other EDI transactions should be authorized, the second sentence of this Section may be deleted. However, such sentence serves as a "safety basket" for future transactions not otherwise contemplated and should be deleted only after careful analysis.
  2. If the parties elect Option [A], counsel is encouraged to carefully consider whether additional terms and conditions should be included to fully implement the commercial intentions of the parties expressed in other provisions of the Agreement. See Section 1.1, Comment 2, and Section 2.3, Drafting Consideration 5.
  3. If the parties elect Option [B], counsel may wish to consider specifying the method of providing notice of any amendments to the printed forms adopted by either party, as well as any minimum period before such notices take effect.

- to any relevant information or 47 USC 605.
2. If confidential treatment is to be provided, counsel, in substitution for the provisions of Section 3.2, should prepare appropriate provisions as to the scope and duration of any obligations, as well as appropriate remedies. Counsel may wish to give special emphasis, if only certain information is to be considered as confidential, on the manner in which, in an electronic environment, information is to be designated as confidential by the parties. Information may be designated as confidential on a transaction-by-transaction basis by including an appropriate designation (by the use of special codes) within the related electronic transmissions. Such a technique would satisfy the requirement of this Section 3.2 for "written agreement" if the parties intend for that effect. See Section 1.2, Comment 3.
- 3.3. Validity: enforceability.**
- 3.3.1. This Agreement has been executed by the parties to evidence their mutual intent to create binding purchase and sale obligations pursuant to the electronic transmission and receipt of Documents specifying certain of the applicable terms.
  - 3.3.2. Any Document properly transmitted pursuant to this Agreement shall be considered, in connection with any Transaction, any other written agreement described in Section 3.1, or this Agreement, to be a "writing" or "in writing"; and any such Document when containing, or to which there is affixed, a Signature ("Signed Documents") shall be deemed for all purposes (a) to have been "signed" and (b) to constitute an "original" when printed from electronic files or records established and maintained in the normal course of business.
  - 3.3.3. The conduct of the parties pursuant to this Agreement, including the use of Signed Documents properly transmitted pursuant to this Agreement, shall, for all legal purposes, evidence a course of dealing and a course of performance accepted by the parties in furtherance of this Agreement, any Transaction and any other written agreement described in Section 3.1.
  - 3.3.4. The parties agree not to contest the validity or enforceability of Signed Documents under the provisions of any applicable law relating to whether certain agreements are to be in writing or signed by the party to be bound thereby. Signed Documents, if introduced as evidence on paper in any judicial, arbitration, mediation or administrative proceedings, will be admissible as between the parties to the same extent and under the same conditions as other business records originated and maintained in documentary form. Neither party shall contest the admissibility of copies of Signed Documents under either the business records exception to the hearsay rule or the best evidence rule on the basis that the Signed Documents were not originated or maintained in documentary form.

- |  |  | Comment |
|--|--|---------|
| <ol style="list-style-type: none"> <li>1. This Section confirms the validity and enforceability of the underlying contracts formed by the electronic transmission and receipt of Documents. See Recitals, Comment 3.</li> <li>2. The intent of any party to a contract that the contract be legally binding is an essential predicate for the underlying transaction. The Recitals of the Agreement initially stated the parties' intentions that Transactions arising under the Agreement be legally valid and enforceable; Section 3.3.1 implements such intent.</li> <li>3. Section 3.3.2 establishes any properly transmitted Document as a "writing". This provision expands upon the existing definition contained in UCC Section 1-201(46) (defining "writing" to include "printing, typewriting or any other intentional reduction to tangible form."). This modification is of the type contemplated by the Code. See UCC Section 1-102(3) and Recitals, Comment 2.</li> <li>4. Section 3.3.2 (taken with the provisions of Section 1.5) also establishes Signed Documents as sufficient to satisfy the formal requirements of UCC Section 2-201 (the Statute of Frauds) when the Documents relate to the formation of any contract for the sale of goods for the price of \$500 or more. See UCC Section 2-201 and comments thereto. Finally, Section 3.3.2 also establishes that Signed Documents shall be deemed to constitute "original" business records under certain circumstances. See Comment 7 below; see also Section 1.4, Comment 1.</li> </ol> | <ol style="list-style-type: none"> <li>5. Under Section 3.3.3, the conduct of the parties pursuant to the Agreement constitutes a course of dealing and a course of performance upon which they may rely in structuring their business relationship. This conduct includes the identification of the Documents to be transmitted, the establishment of channels of communication and the adoption of mutually acceptable security procedures, all pursuant to the provisions of Section 1. UCC Section 2-208 contemplates that such conduct be considered in determining the meaning of this Agreement and any underlying contract for the sale of goods. See UCC Sections 1-205 and 2-208. This conduct, either as a course of performance, should be given effect with respect to both the Agreement and other applicable purchase contracts, independent of the status of Signed Documents as signed writings under applicable law. See also UCC Sections 2-202(a) and 2-207(3).</li> <li>6. Nothing in the Agreement, other than the prohibition on oral waivers contained in Section 4.3, operates to prevent either party from contending that the terms and conditions applicable to any Transaction, or those set forth in the Agreement, may be modified or waived as contemplated by UCC Section 2-209.</li> <li>7. Section 3.3.4 establishes rules of conduct for the parties in connection with the use of Signed Documents as evidence in any proceeding between the parties. By way of example, see Federal Rules of Evidence 802, 803(6) and 1002. However, Section 3.3.4 (together with Section</li> </ol> |         |

3.3.2) does not waive the need for a proper foundation to be established for the admissibility of the evidence. In this regard, the effectiveness and reliability of each party's security procedures, record retention policies, confidentiality obligations and their

conduct under the provisions of the Agreement may be relevant in individual cases to the ultimate admissibility of any Signed Documents.

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## Section 4. Miscellaneous.

**4.1. Termination.** This Agreement shall remain in effect until terminated by either party with not less than 30 days prior written notice, which notice shall specify the effective date of termination; provided, however, that any termination shall not affect the respective obligations or rights of the parties arising under any Documents or otherwise under this Agreement prior to the effective date of termination.

### Comment

1. The provisions of Section 4 include provisions often found in many types of agreements. These provisions are not exclusive, and counsel may wish to consider other similar customary provisions which, for the most part, are not effected by the use of electronic communications. However, as discussed in these Comments, these provisions focus upon some significant legal factors relating to the use of electronic communication under the Agreement.
2. Section 4.1 assures freedom of contract, but also assures the non-terminating party an appropriate opportunity to establish
3. A 30-day notice period is considered reasonable by general industry practice. However, see Section 1.2.1, Comment 5.
4. Any notice of termination under Section 4.1 does not affect obligations under the underlying commercial relationship; any notices relating to such obligations would be separately required.
5. With respect to the requirement that notice under this Section be "written", see Section 1.1, Comment 3.

**4.2. Severability.** Any provision of this Agreement which is determined to be invalid or unenforceable will be ineffective to the extent of such determination without invalidating the remaining provisions of this Agreement or affecting the validity or enforceability of such remaining provisions.

### Comment

The Agreement has been prepared for implementation in a variety of situations; Section 4.2 has been included to assure that the entire contract does not fail in the event any specific provision is determined to be unenforceable under any particular circumstances.

**4.3. Entire Agreement.** This Agreement and the Appendix constitutes the complete agreement of the parties relating to the matter specified in this Agreement and supersede all prior representations or agreements, whether oral or written, with respect to such matters. No oral modification or waiver of any of the provisions' of this Agreement shall be binding on either party. No obligation to enter into any Transaction is to be implied from the execution or delivery of this Agreement. This Agreement is for the benefit of, and shall be binding upon, the parties and their respective successors and assigns.

**Comment**

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| <ol style="list-style-type: none"> <li>1. Section 4.3 integrates the Appendix with the Agreement into a complete agreement. The provisions of Section 3.1 are effective to integrate the Agreement (with the Appendix) into any other specified purchasing contract.</li> <li>2. Section 4.3 permits modifications and waivers of the Agreement by Signed Documents (but the parties must include "free-text" Documents to have this result). See Section 1.1, Comments 3</li> </ol> | <ol style="list-style-type: none"> <li>and 4. If the parties wish to require paper-based writing for modifications or waivers, appropriate changes should be made.</li> <li>3. This Section confirms that the Agreement itself creates no obligations relating to the purchase and sale of goods; such obligations arise only from the Documents and the conduct of the parties.</li> </ol> |
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**4.4. Governing Law.** This Agreement shall be governed by and interpreted in accordance with the laws of the State of \_\_\_\_\_.

**Comment**

In addition to customary factors considered in selecting applicable law, counsel may wish to evaluate various state laws which may be in effect relating to criminal use of computers, computer privacy and similar issues relating to technology.

**4.5 Force Majeure.** No party shall be liable for any failure to perform its obligations in connection with any Transaction or any Document, where such failure results from any act of God or other cause beyond such party's reasonable control (including, without limitation, any mechanical, electronic or communications failure) which prevents such party from transmitting or receiving any Documents.

**Comment**

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|---|---|
| <ol style="list-style-type: none"> <li>1. The scope of this Section is limited to events which prevent the transmission or receipt of Documents and does not extend to the impact of those events on</li> </ol> | <ol style="list-style-type: none"> <li>any other obligations of the parties, whether under the Agreement or in connection with any underlying Transaction.</li> </ol> |
|---|---|

2. Among other things, this Section is specifically intended to excuse performance resulting from such events as a general power outage in the community or unscheduled "down-time", events outside the reasonable control of one of the parties.
3. Counsel should carefully consider the effect of this Section

upon the obligations arising under Section 1.2.3, if such Section is included. To the extent Section 1.2.3, imposes liability, counsel should evaluate whether Section 4.5 reduces or eliminates liability to the extent the actions of a Provider may be considered beyond the reasonable control of either party.

**4.6 Limitation of Damages.** Neither party shall be liable to the other for any special, incidental, exemplary or consequential damages arising from or as a result of any delay, omission or error in the electronic transmission or receipt of any Documents pursuant to this Agreement, even if either party has been advised of the possibility of such damages.

**Comment**

Since the benefits of conducting electronic commerce are substantial and far-reaching, an exclusion of damages is appropriate and consistent with general industry practice to encourage recognition of those benefits. However, the scope of this Section is also limited, as provided in Section 4.5, solely to damages arising from or as a result of any delay, omission or error in the transmission or receipt of Documents pursuant to the Agreement. See Section 2.4, Comment 5. Section 4.6 does not limit any damages resulting from a breach of Section 1.4 (*Security Procedures*) or Section 1.5 (*Confidentiality*) and does not apply to damages resulting from a breach of any related Transaction. If different results are desired, appropriate changes should be made.

**[4.7. Arbitration.** Any controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be settled in accordance with the Commercial Arbitration Rules of the American Arbitration Association, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.]

**Comment**

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| <ol style="list-style-type: none"> <li>1. Section 4.7 sets forth, as an option, the recommended arbitration clause of the American Arbitration Association.</li> <li>2. Counsel is encouraged to consider the advisability of arbitration and other forms of alternative dispute resolution in</li> </ol> | <ol style="list-style-type: none"> <li>connection with the Agreement and Transactions conducted pursuant to the Agreement. Of course, to the extent arbitration or other similar methods are considered appropriate, the parties may modify or amend the suggested language.</li> </ol> |
|---|---|



**SECURITY PROCEDURES**

(If no security procedures have been agreed upon, enter "NONE"): \_\_\_\_\_  
\_\_\_\_\_

**EXISTING AGREEMENTS**

(If the Agreement is not to be considered a part of any existing written agree-  
ment, enter "NONE"): \_\_\_\_\_  
\_\_\_\_\_

**[TERMS AND CONDITIONS**

If the parties select Section 3.1[A], specify terms and conditions: \_\_\_\_\_  
\_\_\_\_\_

If the parties select Section 3.1[B], attach applicable forms or provide sufficient  
identification of each form being incorporated: \_\_\_\_\_ ]

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