

**It's 10:00 PM –  
Do You Know Where Your Company's Electronic Data Is?  
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**The Growing Use of XML:** As B2B e-commerce grows, your company will send more and more commercial documents, like purchase orders and invoices, in XML format. XML format documents contain “tags” to allow computer systems to read and identify certain terms (known as “fields”), such as prices, quantity, location, name of purchaser and seller, or specifications of the products being bought or sold. It is very convenient for the sender's and recipient's computer systems to use the “tags” to read the “fields” automatically and without human intervention.

**An XML Document Might Contain Tags and Fields that Look Like This:**

```
<pidx:Pricing>  
<<pidx:UnitPrice>  
<<pidx:MonetaryAmount>9.35</pidx:MonetaryAmount>  
<<pidx:UnitOfMeasureCode>EA</pidx:UnitOfMeasureCode>  
<<pidx:CurrencyCode>USD</pidx:CurrencyCode>  
</pidx:UnitPrice>  
</pidx:Pricing>
```

**What's the Issue?** Other computer systems can also read these fields. This opens the door to service companies who handle or transmit electronic documents to “data mine” all of the documents they read and to publish reports on price trends, cost data or other market information. This information could be published almost instantly and could be sorted by geographic area or product types in ways that are impossible in the paper world. The use of that data by those service companies is not regulated by law.

**Who Aggregates Data?** Often it is electronic marketplaces or electronic networks that route electronic documents from the sender to the recipient as well as others performing e-commerce related services.

**A River of Data:** The business plans of many marketplaces and networks include harvesting value from the “**river of data**” that passes through their systems by selling access to that data.

**Doesn't a Confidentiality Agreement Prevent This?** Often the answer is no. Many confidentiality agreements allow disclosure of aggregated data so long as it does not disclose information specifically identifiable to your company.

## What are Some Examples of Terms and Conditions Allowing Data Aggregation?

All of these were found on website Terms and Conditions of electronic marketplaces.

“Network also retains the right to analyse, aggregate and report statistically sound summaries of the transactions flowing through the Marketplace.”

“Network may also use aggregated Confidential Information, as provided or agreed by our Customers, for certain general business purposes including publication of certain information provided that such publication does not directly or indirectly identify Supplier by name or in any manner provide sufficient information to allow a third party to identify Supplier.”

“Network may use the bidding information submitted by Suppliers in the course of Sourcing Services projects, to determine general price trends in various supply industries, to create predictive analyses useful for estimating likely market prices, and to determine suppliers appropriate for inclusion in future spend management projects in similar markets.”

**Are There Sarbanes Oxley Implications?** Possibly. If a vendor handles a “significant class” of your company’s transactions and you do not have adequate means to control what the vendor does with your data. One requirement of “internal controls” under Sarbanes Oxley is having measures in place that prevent and detect in a timely fashion unauthorized acquisition, use and disposition of company assets that could have a “material adverse effect on financial statements.” Your data is one of those assets.

**What does the Federal Trade Commission Say?** The Federal Trade Commission established a “safe harbor” for electronic information exchanges in the health care industry that comply with the following conditions: (1) the collection is managed by an **independent third party** (i.e. the exchange is not owned by one or more parties to the transactions being studied); (2) any information that is shared among or is available to the competing providers furnishing the data must be more than **three months old**; and (3) there are at least **five providers** reporting data upon which each disseminated statistic is based, no individual provider's data may represent more than **25 percent** on a weighted basis of that statistic.

**Why Does the Federal Trade Commission Care?** The FTC said that safe harbor requirements are intended “to ensure that an exchange of price or cost data is not used by competing providers for discussion or coordination of provider prices or costs.”

## **Ten Things to Look For in an Electronic Data Agreement**

**1. Terms Clearly Stating Who Owns the Data.** In the B2B context, suppliers generally seek to protect ownership of their catalogue data and any confidential pricing. As to invoices and purchase orders, it is typical that the buyer and supplier often agree that each is a co-owner of the transaction data, subject to a royalty-free cross license.

**2. Terms Clearly Stating How the Supplier and Customer May Use the Data?** Each co-owner of the transaction data may use the data for its own business purposes. Both parties should be allowed to “data mine” or aggregate the data with other data from transactions to which it is a party, but may not mix the data with other data derived from transactions to which it is not a party.

**3. Terms Clearly Stating How the Third Party “Marketplace” or “Network” May Use the Data.** The electronic marketplace should not allow any party to use, view or analyze prices, trends or aggregated data based on transactions to which it was not a party. No commercial use of data without consent of parties to the transaction.

**4. Who Pays for the Cost of Integration.** Even if the initial costs are agreed upon, the parties need to address costs caused by future changes in computer systems or document requirements.

**5. What About Transaction Fees.** What fees, if any, are appropriate for the marketplace to charge and who should bear them. Should suppliers who did not select the marketplace be required to pay it fees?

**6. Standards.** The parties should agree on a neutral and non-proprietary standard for their electronic business documents.

**7. What constitutes Receipt and Acknowledgements.** Does receipt by the electronic marketplace constitute receipt of the document? Will there be acknowledgements of receipt delivered?

**8. Security and Transmission Protocols.** The parties should agree on a level of security for the transmissions and a protocol for the transmission and what happens if one party later wants to change them.

**9. Address Competing Terms of Web Sites.** The Electronic Data Agreement should supercede any terms and conditions posted on the marketplace’s website and prohibit unilateral amendments.

**10. Sarbanes Oxley and U.S./EU Privacy Laws.** The cost of Sarbanes Oxley required audits or compliance (which may be expensive) should be allocated up front. If data subject to U.S. or EU privacy laws are to be transmitted, the means for doing so and compliance costs should be addressed.

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**Recent E-Commerce Articles by Phillip Schmandt:**

*Is Your Electronic Data Agreement Your Supply Chain's Weakest Link?*, E-Commerce Times (February 4, 2008)

*Move to Electronic Transactions Easier with Data Agreement*, Austin Business Journal (July 13, 2006)

*E-commerce meets Sarbanes-Oxley*, Business Edge (February 24, 2006)

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