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June 21, 2000

Secretary
Federal Trade Commission
Room H-159
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: Alternative Dispute Resolution for Consumer Transactions in the Borderless Online Marketplace

Dear Mr. Secretary:

The Council of Better Business Bureaus, Inc. (CBBB) and BBBOnLine, Inc. (BBBOnLine®), are pleased to have been able to participate in the workshop, Alternative Dispute Resolution in the Borderless Online Marketplace, cosponsored and conducted by the Commission and the Department of Commerce.

It is our understanding that the comment period has been extended to allow conference participants and other interested parties additional opportunity to submit further comments and reflections on the substance of the very full, two-day agenda. This submission will supplement our original submission of March 21, 2000.¹

GENERAL

As CBBB and BBBOnLine have repeatedly advocated, a three-phased approach is essential to adequately protect consumers in the borderless, online marketplace. The three legs of this consumer protection "stool" are:

¹ See: <http://www.ftc.gov/bcp/altdisresolution/comments/underhillbbb.pdf>

- **Comprehensive, meaningful standards for online business performance.** These standards serve several important, interrelated purposes.
 - 1) They educate businesses. Many of these are new "startups" whose management teams are steeped in technology, but new to the legal requirements of consumer protection found in the traditional "bricks and mortar" world.
 - 2) They provide general benchmarks against which both businesses and consumers can measure the specifics of a particular marketplace transaction.
 - 3) They give third-party dispute resolvers guidance in measuring consumer and business performance in any single transaction.

The Better Business Bureau system is in the final stages of approving its Code of Online Business Practices. Development of the Code began in June 1999². The initial draft of the Code was completed and posted online in November 1999³; revisions were made, and a second draft was posted in April 2000. More than 1,000 online comments on the Code were received from businesses, consumer groups and government representatives from North America and Europe. These comments were augmented with feedback received during three major public workshops in Denver, Colorado; Palo Alto, California; and Washington, D.C.

A final version of the Code⁴ was approved by the CBBB Executive Committee on June 5th and by the BBBOnLine Board of Directors on June 6th. The Code is now pending approval by the 132 member Better Business Bureaus across the U.S.

- **Fast, fair, flexible consumer dispute resolution procedures.** These procedures provide a safety net for consumers in the borderless marketplace, and the standards (rather than a set of conflicting laws) provide a basic "fairness" benchmark against which dispute resolvers can measure how well (or poorly) consumers and merchants have upheld their respective responsibilities in individual transactions.
- **A method through which consumers can identify those merchants that have committed to high standards and that use fair dispute resolution processes.** The BBB believes that "trustmark" programs, such as the BBBOnLine privacy and reliability seals, can serve as models for such programs.

During the workshop, we were particularly pleased to note that many presenters -- from Dean Perritt to Commissioner Bhojani -- echoed variations of this basic approach. We

² See: <http://www.bbbonline.org/about/press/6-8-99.html>

³ See: <http://www.bbbonline.org/about/press/11-22-99.html>

⁴ See: <http://www.bbbonline.org/businesses/code/draft/index.htm>

believe these principles provide a solid framework within which to quickly construct a new paradigm in consumer protection across national boundaries.

"OFF LINE" LOCAL TO ONLINE GLOBAL -- ISSUES FOR FURTHER DISCUSSION

We are pleased to note that there have been a number of recent experiments with online dispute resolution, and there are new online mechanisms, largely for-profit, offering to put the latest Internet technologies at the service of disputing parties. Many of these have a business model focused on more complex commercial transactions and disputes where the "cost/benefit" of using these technologies is obvious. As we noted during the workshop, there are also some new initiatives to experiment with Internet technology for smaller disputes. However, a great deal more must be done before any but the most tentative conclusions can be drawn. In truth, we believe there are simply no truly representative models of successful cross-border, online consumer dispute resolution programs.

As we noted during our presentation at the workshop, the Better Business Bureaus in the United States and Canada have had online consumer complaint forms -- one uniquely designed for the BBB AUTO LINE program and one for generic consumer complaints -- since 1995. We estimate that by the end of the year 2000, forty percent of the basic BBB consumer complaint activity (or roughly 160,000 complaints) will come through the BBB's website, a dramatic shift in a very short period of time. A closer analysis of these statistics illustrates just how fast change happens. On an average month during 1999, roughly 24% of all BBB complaints arrived online. However, in November 1999, that figure was 27% and in December 1999, it had increased to 34%. In January 2000, the percentage had again increased again.

This presents a number of unique issues that will ultimately need to be addressed. However, from our experience, coupled with our growing understanding of a number of related issues, we believe the following issues -- many of which are strongly linked -- will need to be addressed immediately:

- **Volume.** Most dispute resolution mechanisms, including the courts, rely on a system of barriers (however benign) to retard entry and encourage resolution at lower levels. If one assumes that an online, global consumer dispute resolution mechanism exists, that it meets the requirements for accessibility and visibility, that it is fair, impartial and trusted by consumers and that online merchants have pre-agreed to use such a mechanism, then the Internet eliminates most traditional barriers. It may be difficult and time consuming for a consumer to go down to a small claims court, pay a filing fee and receive a date upon which to return and argue a case. However, for the investment of a few minutes of time online, a consumer can initiate a dispute resolution process without ever leaving home. Given the explosive growth of online commerce, the potential consumer complaint volume will be a major factor with which dispute resolution mechanisms must deal effectively.

- **Speed.** A 40-calendar-day time frame (from complaint filing through decision) may be considered quite fast in the "brick and mortar" world, but it may be considered extraordinarily slow in a world where "excellent customer service" may mean responding to a consumer request in minutes or hours, rather than days or weeks. Dispute resolution mechanisms will need to adapt to Internet time frames or consumers and merchants will find them unsatisfactory.
- **Technology.** The major solution to both concerns about volume and speed lies in adapting Internet technologies to consumer dispute resolution. Unfortunately, the low dollar value of consumer disputes, coupled with the desire to provide dispute services at low or no cost, gives little incentive for a "fee based" entrepreneurial investment. At the same time, the potential volume of consumer cases will require a larger investment in robust technology that can be rapidly scaled up to meet demand. We believe that partnerships among governments, non-profit foundations, academic institutions and the private sector may be necessary to ensure that the technological infrastructure will be in place.
- **Language and Cultural Issues.** As online commerce transcends national borders, it crosses major language and cultural barriers as well. Without speaking another language well (or perhaps at all), a consumer from one country may be able to navigate through a well-constructed web site in another country well enough to place an online order. It is quite another matter for that customer to try and explain the complexities of his or her dissatisfaction to the company or a third party speaking his or her native language. Similarly, it may be difficult for a company or third party to understand a specific cultural context within which lies a customer's dissatisfaction with a product or service. Treating these cross-lingual and cultural issues in the consumer dispute context will be an early challenge for the construction of effective dispute resolution programs. This problem was well identified by Dr. Nora Femenia, President of Inter-Mediacion, Inc., during one session of the workshop.
- **Credibility Issues.** The classic fact-finder often relies on ascertaining the veracity of witnesses by the appearance and demeanor of the parties and their witnesses -- "looking them in the eye". Such visual cues may be absent from a dispute resolution process where the parties and the neutral may be separated by several thousand miles. In any event, such cues might actually be quite misleading, since they are set in a cultural context. For example, a witness who looks another person in the eye may be considered to be truthful in one culture and may give great offense in another. Dispute resolution processes will certainly need to take these issues into account and may need to modify procedures or find new and different methods to deal with these issues.
- **Production of Evidence.** In the "brick and mortar" world, the parties produce evidence or witnesses by bringing the documents or the witnesses with them to a

hearing. In the electronic world, where documents cross continents in a nanosecond via email, it is simple to believe that evidence will be produced the same way. While that may be valid in major commercial disputes, it is unreasonable to assume that every consumer with Internet access is also a document-imaging specialist. Accordingly, thought needs to be given to the means through which the average consumer may submit evidence to the mechanism (certainly not ruling out ordinary mail) and how a mechanism may obtain credible testimony from witnesses (including how and when electronic "witnesses" may be questioned).

- **Inspections.** In the BBB's consumer programs, arbitrators often conduct "on site" inspections of a product or service that is the subject of a dispute. Such inspections might prove pivotal in determining whether a fault exists and, if so, where that fault lies. What types of provisions might an online mechanism make for the equivalent of such inspections?

CHARGEBACKS AS A MODEL OF ADR

Although it is easy to view dispute resolution mechanisms as being somehow synonymous with consumer protection programs, they are not. If ADR is to be trusted and used by both businesses and consumers, it must in fact present a neutral forum for resolving individual disputes between businesses and consumers.

If either the consumer or the merchant is left in the position where the only way to obtain recourse is to travel to the legal jurisdiction of the other and use the other's court system (and legal counsel), a major goal of facilitating electronic commerce across borders will be dealt a serious blow.

The credit card "chargeback" is a quick and effective way of shifting the burden of power in a dispute from the merchant to the consumer. It has certainly protected many U.S. consumers from being the victims of a host of frauds and schemes. It does not follow, however, that the chargeback resolves disputes. If a consumer in the U.S. alleges that he did not receive the \$250 (ED) Black Forest clock he ordered from a German small business, a chargeback may remove that charge from the U.S. consumer's account. The German clockmaker, who now has neither merchandise nor money, will hardly consider this a fair and effective dispute resolution process if he has delivered the clock in good faith to the U.S. consumer.

As was discussed during the workshop, consumer rights in a "chargeback" situation are governed in the U.S. by the Fair Credit Billing Act⁵. The distinctions in the Act between "billing errors" and issues involving the "quality of goods and services" are important. Within the "quality" issues are limitations requiring that the purchase must have been made within the consumer's home state or within 100 miles of the consumer's home.

⁵ The Federal Trade Commission provides an excellent consumer summary of the Act at the following URL: <http://www.ftc.gov/bcp/online/pubs/credit/fcb.htm>

This factor, if literally interpreted, rules the "chargeback" out in nearly all cross-border consumer transactions.

We believe that credit card companies are -- in this situation -- in a truly unenviable position. If they routinely (and indiscriminately) charge transactions back to small and medium sized enterprises (SME) -- without performing a reasonable investigative process -- they may ultimately generate a reservoir of ill will that will send these SME's searching for alternate payment methods online.

However, credit card companies that do not act upon customer complaints also risk the same fate.

We believe the emerging global e-commerce marketplace will provide significant incentives for credit card companies and bank issuers to partner with "trustmark" programs and dispute resolution mechanisms. These will help ensure that consumers deal with merchants that have agreed to meet important standards of business conduct (thus minimizing disputes) and participate in fair ADR mechanisms.

INCENTIVES FOR PARTICIPATION IN ADR

Based on our 85 years of experience in consumer complaint handling and dispute resolution, we believe that availability, visibility and quick access to dispute resolution are all the incentives needed to attract consumer participation in ADR. To keep consumer participation will require that the mechanisms meet high standards (see: "What Issues Need To Be Addressed in Developing ADR Mechanisms").

Attracting merchant participation requires added thought. If the mechanisms are to be free or low-cost to consumers, it is likely that merchants will have to provide some funding for the ongoing maintenance and operation of online ADR programs. This will likely mean that the more consumers use the mechanism, the more the mechanism will cost individual merchants -- in dollars and in internal staff time. Accordingly, finding ways to create incentives for participation in ADR will be important.

We believe "trustmark" programs offer one incentive. If the program is credible to consumers, then there will be a marketing advantage for merchants (particularly SME's whose brand recognition is not high) to earn and display the "trustmark". If a condition of displaying the "trustmark" is participation in an ADR mechanism, then the incentive to participate in the ADR program is the value of the "trustmark" as a marketing tool.

A second incentive to business may well prove to be a requirement that consumers use a "non-binding" form of ADR before they can call upon any remedies provided in individual nation's laws (referred to as "exhaustion of remedies"). As mentioned earlier, we are absolutely convinced that consumer participation in ADR can be readily obtained without such requirements (provided the mechanism is fast, fair and effective). However, we believe business participation will be significantly encouraged if some form of "safe harbor" is created. We do not believe this will cause any harm to consumers if the ADR

mechanisms are non-binding, thereby affording unhappy consumer users of ADR access to whatever legal remedies may be available to them at the conclusion of their case.

Government and law enforcement interests in ADR are several. Successful ADR programs in the borderless marketplace will relieve governments of either a huge potential financial burden of effectively handling a mass of small consumer disputes or a huge political burden of having these disputes go unresolved. Effective ADR programs will allow governments and law enforcement agencies to focus their limited financial and personnel resources on outright fraud and deception.

ISSUES NEEDING TO BE ADDRESSED IN DEVELOPING AND CONDUCTING ADR

There are a number of key issues that should be addressed in any cross-border consumer dispute resolution mechanism. We consider six to be essential. These are:

- **Fairness.** Consumer dispute mechanisms must have structure, rules and procedures that ensure that all parties' rights are protected and that all aspects of the mechanism operates with regard to the parties' rights to due process.
- **Visibility.** Consumers must be fully knowledgeable of the existence of any mechanism. While it is desirable that consumers have this knowledge prior to purchase, it is critical that this information be available at the time a dispute arises.
- **Accessibility.** The mechanism must be readily accessible by consumers when a dispute arises. Accessibility not only means that the mechanism can be called upon when needed, but that there are no unreasonable barriers to access (including unreasonable costs).
- **Timeliness.** There is an old adage that "justice delayed is justice denied"; it applies particularly to consumer dispute resolution. Disputes should be resolved as quickly as possible, taking into account the need for the parties to provide (or the mechanism to collect) sufficient information upon which to base a resolution.
- **Finality.** The mechanism should, to the greatest extent possible, ensure that decisions fully and finally resolve individual consumer disputes. The BBB offers a number of models that achieve this end including binding arbitration, conditionally binding dispute resolution, non-binding informal dispute settlement and non-binding measurements against performance standards.
- **Enforceability.** The mechanism should ensure that decisions it renders are quickly and completely honored.

Each of these guidelines interconnects with the others; together, they form an excellent framework under which to discuss cross-border, online dispute resolution. Our March comments (<http://www.ftc.gov/bcp/altdisresolution/comments/underhillbbb.pdf>) expand on these key issues and, accordingly, are not repeated here.

BINDING CONSUMERS/COMPANIES TO DISPUTE RESOLUTION

The workshop discussion on this issue intertwined three separate themes: 1) Whether (and under what conditions) companies may seek (in advance of a dispute) to contractually commit their customers to use binding arbitration and surrender their right to access the courts; 2) Whether a dispute resolution process should be binding on the consumer and/or the merchant under any circumstances; and, 3) Whether consumers and businesses should have to exhaust available ADR remedies before going to court.

- 1) The first issue (pre-dispute, binding arbitration clauses in consumer contracts) is an issue ultimately headed for the U.S. Supreme Court. The workshop gave an excellent preview of the arguments likely to be heard by the court.

We do not believe this issue should become a major roadblock to the successful conclusion of agreements on consumer ADR in cross-border disputes for several reasons:

- First, European principles (under its category of "liberty" within a binding dispute resolution process) address the issue of the voluntary nature of arbitration, attempting to ensure that the consumer has knowingly and freely chosen to elect to bind him/herself to a mechanism's decision. Under the European Principle, a consumer's election to arbitrate may not be the result of a commitment prior to the actual disputing arising.
- Second, the Better Business Bureau system has established a *Policy for Voluntary Consumer/Business Arbitration in Contractual Commitments*⁶. Recognizing that courts in the U.S. have generally upheld these clauses, with restrictions, the BBB policy sets protocols under which a business may name the BBB in one of these clauses. The policy is consistent with the BBB's long-standing positions on the importance of clear, conspicuous, pre-sale disclosures of important consumer information, the importance of consumers' informed choices to a free marketplace and the right of consumers to have a fast, fair redress of grievances.
- Finally, we believe this may ultimately be an issue of little real significance, since we believe the use of these clauses may prove impractical in the global, cross-border context. The generally small dollar value of consumer transactions, coupled with the difficulty and cost of

⁶ Council of Better Business Bureaus, Inc., *Policy for Voluntary Consumer/Business Arbitration in Contractual Commitments*, March 25, 1998.

attempting to enforce a pre-dispute clause in some international forum(s), will likely make the practice moot.

- 2) If consumers are given the informed choice to freely elect a binding arbitration process after a dispute has arisen, and if the merchant concurs, we do not believe regulations that prohibit such agreements. However, as a practical matter in cross-border transactions, this, too, may prove moot. If "binding" ultimately means "legally binding", we seriously doubt that parties will want to engage in court proceedings in other countries to "confirm" small-dollar-value consumer/business decisions. As we've mentioned earlier, we believe "trustmark" programs will have a variety of extra-legal procedures that can be used to ensure business compliance with ADR findings.
- 3) We have already commented on the "exhaustion of remedies" issue (See: Incentives for participation in ADR).

HOW GOVERNMENTS CAN PROMOTE PRIVATE SECTOR-LED SEAL PROGRAMS AND SIMILAR SELF-REGULATORY INITIATIVES

Governments can encourage and support effective self-regulatory efforts in four ways:

- Encourage discussion on dispute resolution in forums such as the June 6th-7th workshop and the similar program sponsored by the European Commission in March of this year. These programs bring together significant expertise and expand the options being considered to enhance consumer protection in the borderless marketplace.
- Help promote and educate consumers and businesses on the benefits of ADR.
- Treat company promises to adhere to standards and participate fully and fairly in third party dispute resolution programs as "warranties" and treat alleged breaches of those promises as deceptive business practices;
- Rigorously monitor "trustmark" programs and take action against deceptive trustmarks that do not adequately inform consumers what they stand for and do not deliver on claims being made. Governments should cooperate in international law enforcement against deceptive trustmarks and unfair ADR.

If governments encourage the development of effective trustmark program standards and dispute resolution processes, we have no doubt that consumers will use those programs to seek out participating merchants. And educated, informed consumers -- seeking out companies that participate in these programs -- will become a major force to drive companies to seek out and participate in the best of these "trustmark" programs.

To that end, however, we must express some serious reservations with respect to government sponsorships of processes that bring various private groups together in an "unofficial" effort to "negotiate" a regulatory "floor" of some sort for trustmarks, codes of conduct and alternative dispute resolution mechanisms. Unquestionably, we applaud government-sponsored efforts in the U.S. and Europe to bring interested groups together to fully explore -- and learn from -- the various available models. We would be extremely concerned, however, if the effect of some quasi-regulatory "negotiation" among various private providers and e-commerce merchants resulted in a compromise, the effect of which was to create a lower overall "floor" than certain codes of conduct, trustmarks and ADR mechanisms currently provide.

We share the European Commission's belief, expressed in its post-workshop comment, that "competition between them (editor's note: "them" refers to ADR schemes, Codes of conduct and trustmarks) should ultimately produce ADR's and Codes of Conduct that best satisfy both consumers and business." We believe this competition should be allowed to flower. We fear that in a situation where all programs, regardless of their comparative quality, are "certified" by governments as meeting the compromise regulatory floor, competition among programs will be impaired. In such a situation (where a high quality and a marginal quality program are both "certified" as meeting the "floor"), we believe that competition among private programs will ultimately mean that the regulatory "floor" could quickly become the de facto standard for all programs. Put another way, the European Commission's express desire to rely on the marketplace could easily be subverted if an extra-marketplace imprimatur were to be placed on programs that, by themselves, would not have risen to the top. Consumers might easily perceive a formal recognition (in the form of a government "accreditation" mark) as the symbol or expression of value. That, in turn, might well undercut marketplace-responsive efforts to bring greater value -- a value that would be difficult to distinguish from other programs sharing the government-sponsored imprimatur.

We believe a set of minimum standards may be necessary to create some "bright lines" below which regulatory action is likely. However, we also believe the role of governments should be to require the submission of independent audits of mechanisms and to ensure -- through a variety of channels -- that comparative information on trustmarks, codes and ADR mechanisms is readily available to government, consumer groups and the general public.

The Better Business Bureau believes that consumers and business of all sizes -- whatever their countries of origin -- will be the ultimate beneficiaries.

Sincerely,

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