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October 16, 2014

Mr. Benjamin M. Lawsky
Superintendent of Financial Services
New York Department of Financial Services
One State Street, New York, NY 10004-1511

Mr. Dana V. Syracuse
Office of General Counsel
New York State Department of Financial Services
One State Street, New York, NY 10004
[REDACTED]

Email: dana.syracuse@dfs.ny.gov

Re: Regulation of Conduct of Virtual Currency Business-Addition of part 200 to title 23 NYCRR

Dear Mr. Lawsky and Mr. Syracuse:

We respectfully submit this commentary on behalf the National Commerce Exchange of Long Island, Inc. ("NCE") (webpage: www.ncetrade.com), and in conjunction with the International Reciprocal Trade Association ("IRTA") (webpage: www.irta.com). NCE is a local Long Island based barter company/trade exchange established in 1980; IRTA is a non-profit association, founded in 1979, that promotes equitable standards of practice within the commercial trade exchange industry (sometimes known as the commercial barter industry) worldwide. For the reasons set forth herein, we request that the Proposed Regulation contain a narrower definition of "Virtual Currency" which either excludes the business of a Barter Exchange by name at proposed 23 NYCRR 200.1(m), or specifically adds "barter exchanges" next to the provision that specifically excludes customer affinity or reward programs. Id.

The foregoing request is based on the following: i) the purpose and intent of the proposed regulations are not to impose additional regulation on a barter company, commonly called a trade or barter exchange ("Barter Exchange"); ii) the barter industry does not utilize virtual currency and/or digital units ("digital currency"); iii) pursuant to the Tax Equity and Fiscal Responsibility Act of 1982 ("TEFRA"), Barter Exchanges are categorized as third-party record keepers by the IRS and Barter Exchange trade dollars ("Trade Credits") are considered taxable income that must be reported via a 1099B; and iv) Barter Exchanges do not provide insurance, banking and other financial services to general consumers that would be under the auspices of the New York State Department of Financial Services ("NYDFS").

A BARTER EXCHANGE IS A THIRD PARTY RECORD KEEPER

In order to understand our request to exclude the barter industry, it is important to understand the nature and business of a Barter Exchange.

The IRS is well aware of Barter Exchanges and regulates them accordingly. As set forth above, and pursuant to the Tax Equity and Fiscal Responsibility Act of 1982 (TERFA), Barter Exchanges are defined as third party record keepers and as such are required to file Internal Revenue Service (IRS) Form 1099-B reporting for

annual gross barter sales of each of the Barter Exchanges' members. Barter Exchanges are thus subject to IRS civil penalties in the event they fail to comply. *Id.*

Bartering occurs when you exchange goods or services without exchanging money. See IRS Topic 420 (attached at Exhibit "A") and IRS Publication 525 at Bartering Income. Furthermore, a Barter Exchange is an "organization with members who contract with each other ... to exchange property or services." See IRS website page at "Barter Exchanges," a copy of which is attached hereto at Exhibit "B." The Barter Exchange keeps track of the exchange members' trade activity through the use of "Trade Credits:" the exchange credits units from [a Barter Exchange member's] account for goods and services provided to other members, which [the providing member] can use to purchase goods and services offered by other members. In short, these Trade Credits are accounting mechanisms that exist solely to either denote a right or obligation of a Barter Exchange member to either receive or provide to or from other members of the barter network. Transactions occurring between a trade clearing house and the network member are de minimus; virtually all transactions are between members, with the trade exchange serving as an arms' length third party record keeper, not as a guarantor or a holder of collateral to guarantee a trade. The sole guarantee of a trade credit is a network member's contractual obligation to supply goods and services and accept payment in accordance with their terms of their agreement with the barter exchange. Trade Credits are not redeemable either for cash or currency under any circumstances. See IRTA's (attached at Exhibit "C") April 25, 2014 letter to of State of California Department of Business Oversight ("CDBO") and CDBO's (attached at Exhibit "D") June 26, 2014 reply letter to IRTA, which concludes that (x) Barter Exchange Trade Credits have no stored value and (y) Barter Exchanges are not subject to being licensed under the California Money Transmitter Act.

A TRADE CREDIT IS NOT A DIGITAL UNIT AND/OR VIRTUAL CURRENCY

As explained above, a Barter Exchange does not create a Trade Credit, but merely acts as a third party record keeper. A Trade Credit is not a "digital unit," but instead a measure for record keeping. Barter Exchanges have been accounting for Trade Credits of their members long before the advent of the computer. "Since barter exchanges act as third party record keepers, they do not "receive money for transmission and are not an "issuer of stored value." See CDBO Letter, attached. It stands to follow that a Barter Exchange's record keeping of a Trade Credit does not constitute a digitally stored value. As such, a Barter Exchange's business, the keeping track of Trade Credits, falls outside the proposed definition of Virtual Currency, which "means any type of digital unit that is used as a medium of exchange or a form of a digitally stored value ... incorporated into a payment system technology." Proposed 23 NYDFS 200.1 (m).

INTENT OF PROPOSED REGULATIONS DOES NOT INCLUDE BARTER EXCHANGES

As can be seen from the above, a Barter Exchange deals with record keeping for a very old and traditional form of commerce – trade. Contrary to what Superintendent Lawsky was referring to in his February 11, 2014 remarks about virtual currencies, trade does not represent a "new financial technology." As the Superintendent also pointed out, "crypto-currencies are unlike pretty much anything an average consumer has ever used before." (*Id.*; see also, January 28, 2014 Opening Statement of Superintendent Lawsky, Hearings on the Regulation of Virtual Currency: "regulators are in new and uncharted waters," "this new and constantly evolving industry," "don't clip the wings of a fledgling technology before it gets off the ground"). The concerns associated with the new virtual type of currencies simply do not exist with a Barter Exchange. Organized third-party trading, conducted through barter exchanges, has been a legal and accepted alternative form of commerce by the IRS since 1982.

Trade Credits have no market application outside of the contained network of barter members. Unlike Bitcoin, there is no speculation in Trade Credits. For example, in January 2013 a single Bitcoin was valued at approximately \$13, but in December 2013 that same coin was valued at \$1,100. See "Bitcoin and Virtual Currency Regulation," Steven Witzel, *New York Law Journal*, September 4, 2014. Also, unlike Bitcoin, Trade Credits cannot be converted into or redeemed for, conventional fiat currencies.

Barter Exchanges are not banks, insurance companies or money transmitters that are the regulatory focus of the Department of Financial Services. Barter Exchanges do not sell or issue payment instruments. Indeed with trade, unlike with "Bitcoin," no crypto, digital or virtual currency is being created: Trade Credits are merely an accounting unit, recorded on a ledger, computerized or otherwise. With Trade Credits, there are

no opportunities to “mine” for dollars with highly sophisticated computer programs and algorithms. Such Trade Credits cannot be created or obtained by computing or manufacturing effort: only the true value of a merchant’s goods and services are valued and accounted for in US dollars. Unlike Bitcoin, barter does not require online wallets and encrypted keys.

In conclusion, we respectfully submit that the intent of the proposed regulations to provide financial clarity and reasonable restraints to the new and growing industry of true digital currencies has merit. However, any overly broad sweeping definition and application of “Virtual Currency” runs the danger of unintentionally, yet adversely, affecting the long-standing, government recognized barter industry, and the third party record keeping functions they provide. We respectfully request that the regulations be honed to prevent the inadvertent targeting of companies that are not in the digital currency businesses. We request amending the Proposed Regulation to provide a narrower definition of “Virtual Currency” which either excludes the business of a Barter Exchange by name at proposed 23 NYCRR 200.1(m), or specifically adds “barter exchanges” next to the provision that specifically excludes customer affinity or reward programs. Id.

We stand ready, willing and able to answer any further questions you might have regarding this matter. We can be reached at the emails and phone numbers posted below.

Thank you for your time and attention and consideration.

Tracey Paer
Legal Counsel, NCE

[REDACTED]

Ron Whitney
Executive Director, IRTA

[REDACTED]



Topic 420 - Bartering Income

Bartering occurs when you exchange goods or services without exchanging money. An example of bartering is a plumber exchanging plumbing services for the dental services of a dentist. You must include in gross income in the year of receipt the fair market value of goods or services received from bartering.

Generally, you report this income on [Form 1040, Schedule C](#) (PDF), *Profit or Loss from Business* or [Form 1040, Schedule C-EZ](#) (PDF), *Net Profit from Business*. If you failed to report this income, correct your return by filing a [Form 1040X](#) (PDF). Refer to [Topic 308](#) for information on filing an amended return.

A barter exchange is an organization with members who contract with each other (or with the barter exchange) to exchange property or services. The term does not include arrangements that provide solely for the informal exchange of similar services on a noncommercial basis.

The Internet has provided a medium for new growth in the bartering industry. This growth prompts the following reminder: Barter exchanges are required to file [Form 1099-B](#) (PDF), *Proceeds From Broker and Barter Exchange Transactions*, for all transactions unless an exception applies. Refer to *Bartering* in [Publication 525, Taxable and Nontaxable Income](#), and the [Form 1099-B Instructions](#), for additional information on this subject. Persons who do not contract with a barter exchange or who do not barter through a barter exchange, but who trade services, are not required to file Form 1099-B. However, they may be required to file [Form 1099-MISC](#) (PDF). If you exchange property or services through a barter exchange, you should receive a Form 1099-B. The IRS also will receive the same information. If you receive income from bartering, you may be required to make estimated tax payments. Refer to [Form 1040-ES](#) (PDF), *Estimated Tax for Individuals*, for more information.

If you are in a trade or business, you may be able to deduct certain costs you incur to perform services that you barter.

Refer to [Publication 525, Taxable and Nontaxable Income](#), for additional information about bartering. Please refer to our [Bartering Tax Center](#) page for more information on bartering income and barter exchanges.

[More Tax Topic Categories](#)

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Barter Exchanges

Bartering is the trading of one product or service for another. Usually there is no exchange of cash. Barter may take place on an informal one-on-one basis between individuals and businesses, or it can take place on a third party basis through a barter exchange company. A barter exchange is any person or organization with members or clients that contract with each other (or with the barter exchange) to jointly trade or barter property or services. The term does not include arrangements that provide solely for the informal exchange of similar services on a noncommercial basis.

Unlike one-on-one bartering, members of exchanges are not obligated to barter or purchase directly from a seller. Instead, when a barter exchange member sells a product or a service to another member, their barter account is credited for the fair market value of the sale. When a barter exchange member buys, the account is debited for the fair market value of the purchase.

Internet-based Barter

The Internet provides a new medium for the barter exchange industry. Pure Internet-based barter companies differ from traditional, organized trade exchanges in that they do not have a physical office. In modern Internet barter exchanges, there is an agreement or process in place to value goods and services exchanged, which is facilitated by the barter exchange for a fee. A barter exchange functions primarily as the organizer of a marketplace where members buy and sell products and services among themselves.

Trade Dollars

Barter exchanges have their own unit of exchange, usually known as barter or trade dollars. Trade dollars or barter dollars are valued in U.S. currency for the purposes of information returns. Trade dollars allow barter to take place between parties when one party may not have a simultaneous need or desire for the goods or services of the other members. Barter exchanges act as the bookkeeper for keeping track of trade dollars that participants accumulate. Earning trade or barter dollars through a barter exchange is considered taxable income, just as if your product or service was sold for cash.

Requirement for Barter Exchanges to File Information Returns

Barter exchanges are required to issue [Form 1099-B](#) (PDF) Proceeds from Broker and Barter Exchange Transactions, annually to their clients or members and to the Internal Revenue Service.

[Rate the Small Business and Self-Employed Website](#)

Page Last Reviewed or Updated: 19-Sep-2014



Raising the Standard of the Trade and Barter Industry Since 1979

International Reciprocal Trade Association
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PH: 757-393-2292 FAX: 757-257-4014

April 25, 2014

Jennifer Rumberger, Esq.
Senior Counsel
Department of Business Oversight - Legal Division
State of California
1515 K Street, Suite 200
Sacramento, CA 95814-4052

Dear Ms. Rumberger:

The International Reciprocal Trade Association (IRTA) is a non-profit association founded in 1979 to promoting equitable standards of practice within the the commercial trade exchange industry (sometimes known as the commercial barter industry) worldwide. www.irta.com

IRTA secured the passage of the "Tax Equity and Fiscal Responsibility Act of 1982" (TEFRA) in the U.S. which recognized barter exchanges as third party record keepers and mandated that barter exchanges report the barter sales of their members via an IRS 1099B form.

We are writing you in response to your March 26, 2014 letter, "Invitation For Comments On Proposed Rulemaking Under The California Money Transmission Act." Our purpose is to advise you about the fundamentals of the lawful U.S. barter industry and to clarify that barter transactions conducted through organized barter exchanges that comply with TEFRA are not considered "money transmissions" under the current or proposed revised California Money Transmission Act, nor restricted in anyway under the California Financial Code.

Barter exchanges act as a clearinghouse for barter transactions between their members. The recorded unit of account for the barter transactions are known as "trade credits." Such credits have value and are accepted as final means of payment within the barter network, nevertheless such credits exist solely to denote the right of a network member to receive, or the obligation of a network member to pay, a certain value in goods and services. Transactions occurring between a trade clearinghouse and the network members are de minimus; virtually all transactions are between members, with the trade exchange serving as an arms-length third-party

EXHIBIT C

record keeper and not as guarantor of a trade or holder of collateral to guarantee a trade. The sole guarantee of a trade credit is a network member's contractual obligation to supply goods and services and accept payment in accordance with terms of the agreement. Trade credits ARE NOT REDEEMABLE FOR CASH, under any circumstances.

Trade credits are not "money" or considered legal tender and therefore do not constitute "monetary value" as defined in the California Financial Code. They are not a standard of value because prices are set in local currency, and they are neither intended as a store of value nor effective as such, because they do not earn interest. They have transaction value only. Moreover, trade credits are not "securities" in the sense of transfers of debt and equity capital. Barter exchanges do not "take possession of money for transmission" as is required in Section 80.129 of the proposed changes to the CA Money Transmission Act. For all of the above reasons, it is clear that lawful barter exchange transactions do not meet definitional criteria to be considered money transmitters under the current or proposed revised CA Money Transmitter Act.

Thank you for the opportunity to bring these matters to your attention. We ask for your assurance that commercial trade exchanges which facilitate sales of goods and services are not intended to be covered by the proposed changes to Subchapter 80 of the California Money Transmission Act, and that commercial barter exchanges are not considered money transmitters under the California Financial Code.

Should you have any questions, we shall be pleased to assist you in any way.

Sincerely,

A handwritten signature in black ink, appearing to read "Ron Whitney". The signature is written in a cursive, flowing style with a large, sweeping flourish at the end.

Ron D. Whitney
Executive Director

DEPARTMENT OF BUSINESS OVERSIGHT*Ensuring a Fair and Secure Financial Services Marketplace for all Californians*

Jan Lynn Owen
Commissioner of Business Oversight

June 26, 2014

Ron D. Whitney
Executive Director
International Reciprocal Trade Association
524 Middle Street
Portsmouth, VA 23704

Re: Opinion Request

Dear Mr. Whitney:

This is in response to your letter on behalf of the International Reciprocal Trade Association ("IRTA") to the Department of Business Oversight ("Department"), dated April 25, 2014. You have requested a determination of whether commercial barter exchanges are engaged in activities which are regulated by California Money Transmission Act, Financial Code Section 2000, et seq. (MTA).

According to your correspondence, barter exchanges act as a clearinghouse for barter transactions between their members. The recorded unit of account for the barter transactions is known as a "trade credit." While a trade credit has value, such credits exist solely to denote the right of a network member to receive, or the obligation of a network member to pay, a certain value in goods and services. Virtually all transactions are between members with a de minimus number of transactions occurring between a barter exchange and the network members. The barter exchange serves as an arms-length third party record keeper, not as a guarantor of a trade or holder of collateral to guarantee the trade. Trade credits are not redeemable for cash, or fiat currency, under any circumstances.

The role of a commercial barter exchange as a record keeper of trade credits does not constitute "receiving money for transmission," as defined in Financial Code Section 2003(s). Without making a determination of whether a trade credit is money or monetary value, the salient point is that a barter exchange does not "receive" any trade credits; it merely acts as the bookkeeper for keeping track of trade credits that members accumulate.

EXHIBIT D

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Ron D. Whitney
International Reciprocal Trade Association
June 26, 2014
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A commercial barter exchange also does not meet the definition of an "issuer" of stored value, as defined in Financial Code Section 2003(k). "Issuer" with regard to stored value means "the entity that is liable to the holder of the stored value and has undertaken or is obligated to pay the stored value." Because a barter exchange is not liable to the members for the value of their trade credits, and it has not undertaken nor is it obligated to pay the trade credits; a barter exchange is therefore not an "issuer" of stored value. Financial Code Section 2003(v) defines "stored value" to mean monetary value representing a claim against the issuer that is stored on an electronic or digital medium, and that is a means of redemption for money or monetary value or payment for goods or services. Because a barter exchange is not an issuer of the trade credits, the trade credits do not represent a claim against the barter exchange. Thus, trade credits do not meet the definition of "stored value."

Based on all of the foregoing reasons, it is the Department's view that commercial barter exchanges, by acting as third party record keepers, are not engaged in: (1) "receiving money for transmission" as defined in Financial Code Section 2003(s); or (2) "issuing or selling stored value" as defined in Financial Code Section 2003(v). Therefore, commercial barter exchanges do not need to be licensed under the MTA.

This opinion is based solely on the facts presented in your correspondence and may change if any of the conditions or circumstances under which commercial barter exchanges provide services are altered in the future. If you have any questions or comments, please contact me at (415) 263-8528.

Sincerely,

Jan Lynn Owen
Commissioner of Business Oversight

By 

Jennifer L.W. Rumberger
Senior Counsel

JLWR:acp

cc: Robert Venchiarutti, Department of Business Oversight, San Francisco