**Joint Comments of the American Bar Association's
Section of Antitrust Law
and Section of International Law and Practice
on Merger Enforcement Guidelines (Draft for Consultation March 2004)
of the Competition Bureau of Canada[*]**

The Section of Antitrust Law and the Section of International Law and Practice (collectively, the "Sections") of the American Bar Association welcome the opportunity to respond to the request of the Competition Bureau of Canada (the "Bureau") for comments on the Merger Enforcement Guidelines (Draft for Consultation March 2004) (the "Draft MEGS"). The views expressed herein are being presented jointly on behalf of the Sections. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association.

The membership of the Sections includes approximately 23,500 lawyers, most of whom are based in the United States. Given the increasingly global nature of business and, in particular, the growing importance of cross-border transactions involving firms in the United States, the Sections have a strong interest in the Draft MEGS. The Sections also have substantial familiarity with the legal and economic analyses of the potential competitive effects of transactions. These comments ("Comments") offer a perspective based upon the experience of our members in the United States and in cross-border transactions with other nations, including Canada. The Sections hope that our Comments will assist the Bureau in finalizing the Merger Enforcement Guidelines.

We do not intend for these Comments to represent a comprehensive analysis or discussion of merger guidelines in general. Nor are the Comments intended to reflect a considered, affirmative endorsement of all of the provisions of the Draft MEGS (or, to the extent they are referred to, the U.S. Merger Guidelines), including in areas where there is additional convergence between the Draft MEGS and the U.S. Merger Guidelines. Instead, we have used the U.S. Merger Guidelines as an analytical backdrop and reference point in assessing the Draft MEGS. It is important to note that the U.S. antitrust agencies are currently re-evaluating the 1992 Merger Guidelines and whether those need to be updated.[1] The Sections believe that re-evaluation of guidelines from time to time is beneficial to ensure that the enforcement agencies are incorporating the most current analytical framework in their merger review.

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[1] The FTC and the DOJ hosted joint workshops in February of this year to discuss the 1992 Merger Guidelines and whether additional refinement of those guidelines is warranted. *See* FTC/DOJ to host joint workshop on Merger Enforcement (Feb. 11, 2004) *at* http://www.ftc.gov//opa/2004/02/mergerworkshop.htm.

I. Overview

The Draft MEGS continue the trend in the current Merger Enforcement Guidelines towards convergence and consistency in the analysis of mergers. We support and promote greater substantive convergence among competition regimes based on analytically sound antitrust principles. The Draft MEGS represent a significant step towards greater substantive convergence between the Canadian Merger Enforcement Guidelines and the 1992 U.S. Merger Guidelines. We support the Draft MEGS in most of these areas of convergence, identify areas where further convergence may be desirable and also note areas where we believe the Draft MEGS reflect more current legal and economic theory than the U.S. Guidelines. In addition, these Comments suggest some additional issues for the consideration of the Competition Bureau and identify areas where we have reservations.

The Draft MEGS provide helpful additional guidance, particularly in the definition of mergers, the analysis of market share and concentration, and anti-competitive effects. We agree that only mergers likely to create or enhance market power should raise issues under Section 92 of the Competition Act and that countervailing power should be considered in merger analysis.

Nonetheless, we are concerned about possible confusion arising from the adoption of concepts such as *de facto* control without full discussion, and certain ambiguities regarding the treatment of "significant interests." Similarly, we suggest that the Bureau consider clarifying its intentions in the omission from the Draft MEGS of certain language in the current MEGS in the areas of anti-competitive threshold, anti-competitive effects, merger-specific efficiencies and failing firms. Additional guidance regarding the parameters of safe harbors, the use of market shares as reflective of market position, the treatment of acquisitions of innovative firms and the assessment of conglomerate mergers would also be helpful.

The Draft MEGS may not fully reflect actual current enforcement practice and therefore may not provide accurate guidance in certain areas, such as market definition and vertical mergers. The market share and concentration analysis would be enhanced by consideration of foreign capacity that may be made available to the domestic market and by full adoption of the Herfindahl-Hirschman Index as the measure of market concentration.

II. Purpose

The language in the Purpose section of the Draft MEGS is somewhat less definitive than the Purpose section in the current MEGS regarding the extent to which the document reflects the Bureau's general approach to merger review. The current MEGS state: "[t]he particular facts will determine how the Bureau assesses any proposed transaction." The Draft MEGS add a qualifier to this sentence and the new sentence reads: "[t]he particular facts of a case will determine how the Competition Bureau assesses a proposed transaction *and may sometimes require different methodologies*" [emphasis added]. While the guidelines should not be binding on the Bureau and the Bureau must have sufficient flexibility to deal with exceptional cases, the value of guidelines is a function of the degree to which they are perceived to reflect general policy and practice. For example, the U.S. Merger Guidelines (§O) note that the Guidelines "describe the analytical framework and specific standards *normally* used by the Agency in analyzing mergers" [emphasis added]. We suggest that similar language be added to the Draft MEGS or that the Bureau delete the qualifier added in the Draft MEGS. Alternatively, the Bureau should explain more clearly the conditions that present the exceptional case, or identify the "different methodologies" that may be used.

III. Definition of Merger

While additional guidance in the Draft MEGS regarding the types of transactions or arrangements that fall within the definition of "merger" is helpful, the Bureau might consider clarifying some points.

For instance, the Draft MEGS propose to expand the concept of "control" to include *de facto* control, a somewhat ambiguous legal concept. This change may not be necessary or desirable, given that the concept of "significant interest" that is included in the Competition Act and addressed in the Draft MEGS (¶¶ 1.5-1.9) is sufficiently broad to capture those situations in which *de facto* control is acquired. If the concept of *de facto* control is retained, we suggest that the Bureau clearly set out the factors, apart from "significant interest," that will lead the Bureau to conclude whether *de facto* control has been acquired.

As to the concept of "significant interest," the Bureau may wish to further consider the 10 percent threshold for an acquisition of voting interests (¶1.9) as that of a "significant interest" in light of the 20 percent (public company) and 35 percent (private company) thresholds for pre-merger notification. If it is not the intent of the Bureau to indicate a threshold for potential challenges, then it would be helpful to clarify this aspect of the concept of "significant interest." In light of the above considerations, we suggest that the Draft MEGS be clarified to indicate that the Bureau does not intend to consider holdings of less than 50 percent generally to be equivalent to that of 100 percent and to provide guidance as to when the acquisition of a "significant interest" may be challenged.[2] Moreover, to the extent that ¶¶ 1.14, and 1.15 indicate that a "significant interest" subject to merger enforcement can arise without an acquisition, we note that this is significantly divergent from U.S. merger law. We believe that situations that do not involve acquisitions are better addressed by non-merger provisions of competition law.

With respect to interlocking directorships (¶1.12), the Bureau may wish to consider clarifying what would constitute a "sufficient number of directors" to materially influence the board of directors, and whether it would not also first be necessary to hold a significant voting share interest in the target to be a "merger" within section 91 of the Competition Act.

[2] In particular, it would be useful if the MEGS provided guidance on how the Bureau distinguishes between transactions or arrangements that give rise to a "significant interest" and are potentially reviewable under the merger provisions and those that may raise issues under the conspiracy provisions of the Competition Act.

IV. Anti-Competitive Threshold

We agree with the test in ¶2.1 that only those "mergers that are likely to create or enhance" market power raise issues under Section 92 of the Competition Act. The Bureau may want to consider clarifying in this introductory paragraph that its focus will be upon whether a merger will create, maintain or enhance the ability of the merged entity, alone or together with other firms, to exercise greater market power than in the absence of the merger.

The Draft MEGS (Part 2) incorporate non-price effects into the more general discussion of price effects. The Bureau may want to consider including some guidance on the circumstances in which non-price effects would be considered to be substantial.

We suggest the Bureau consider retaining from the existing MEGS the statement that "where a merger is not found to have adverse market power effects, it generally cannot be demonstrated that competition is likely to be adversely affected, notwithstanding that the merger might have additional implications for other industrial policy objectives." Economics-based standards provide a sound foundation for competition policy, and we do not understand the Bureau to be departing from this approach and introducing non-economic factors under Section 92. Canada, like the U.S. and the E.U., has previously stated that it eschews industrial policy objectives in merger control. However, retention of the language from the current MEGS omitted in the Draft MEGS would make that clear.

Parts 2 (The Anti-Competitive Threshold) and 5 (Anti-Competitive Effects) and the Anti-Competitive Effects section of Part 8 (The Efficiency Exception) all address the competitive impact of a transaction. We suggest that the Bureau consider whether it would be clearer and facilitate the analysis to consolidate these three sections into one, devoted to anti-competitive implications generally.[3]

V. Market Definition

The Bureau's Draft MEGS (¶3.1) and the U.S. Merger Guidelines (§1.1) state that the government will begin assessing a merger by first defining the relevant product market. We do not understand these statements to suggest a stepwise, formalistic approach to merger analysis, which would not fully reflect the actual methods of antitrust analysis that are applied. The analysis of market definition, market shares and competitive effects have always been inter-related, have become even more intertwined in modern competition analysis, and are commonly more fluid than suggested by the Draft MEGS (and the U.S. Merger Guidelines). We suggest that the Bureau add a statement to that effect.

3 For example, unless price effects and non-price effects (discussed in Part 8) are never part of the consideration of unilateral or coordinated effects or of the prevention or lessening of competition (which is not the case; *see*, *e.g.*, ¶2.4), it would seem that the anti-competitive effects analysis that would be made under Part 8 should also be discussed in Parts 2 and 5. We do not suggest, however, that all aspects of the anti-competitive effects analysis set forth in Part 8 are appropriate under Section 92 of the Competition Act.

VI. Market Share and Concentration

Part 4 of the Draft MEGS generally provides clear guidance on how market participants and shares for those participants will be assessed. In addition, this guidance is largely consistent with well-established legal and economic principles used in assessing mergers and with the U.S. Merger Guidelines. The Bureau may want to consider addressing the following five points.

First, the Draft MEGS state (¶4.2) that "the Bureau determines whether sellers that are not currently supplying the relevant market are able to profitably divert sales from their existing buyers to those in the relevant market." We suggest that the Bureau consider whether it wishes to clarify in this section that firms may also be identified as being in the relevant market if they can expand existing assets or easily put new production facilities in place to begin producing the product. For example, the U.S. Merger Guidelines state that the Agency will treat firms as market participants if "new firms, or existing firms without closely related products or productive assets, likely would enter into production or sale in the relevant market within one year without the expenditure of significant sunk costs of entry and exit…." (*See* §1.322).

Second, the Draft MEGS state (¶4.10) that "when distant sellers supply the relevant market from locations outside of the market boundaries, market shares attributable to their products are typically calculated on the basis of actual sales in the relevant market." Present sales into the relevant market may understate the competitive significance of a distant seller that is ready, willing and able to divert shipments from other areas in the event of an anti-competitive price increase in the relevant market. While we recognize that it may be difficult to assess the extent to which distant sellers will divert shipments into the relevant market, we believe these difficulties are no greater than many of the other determinations that are contemplated in the Draft MEGS. Notably, the Draft MEGS indicate in ¶4.11 that the Bureau will estimate the output or capacity that is likely to be available to the relevant market as the result of a supply response. Moreover, the U.S. Merger Guidelines expressly consider the market shares of foreign competitors, providing (§1.43) that "market shares will be assigned to foreign competitors in the same way in which they are assigned to domestic competitors," taking into account limits on imports. Consequently, the U.S. and Canadian authorities analyzing a merger could calculate very different market shares – based on exactly the same information – simply as a result of the different treatment of foreign firms. Since the Bureau can attempt to estimate the amount of foreign capacity that would be available to the domestic market in the event of a price increase, we suggest it consider adjusting the basis on which it calculates domestic and foreign shares.

Third, the Draft MEGS incorporate the concept of a change in the Herfindahl-Hirschman Index ("HHI") (footnote 53) while retaining the four-firm concentration ratio ("CR4") as a measure of market concentration (¶4.14). The HHI is recognized by many economists as more indicative of general industry concentration and structure than the

CR4, and has been adopted by many other jurisdictions in their merger enforcement.[4] Moreover, the Draft MEGS appear to recognize that the CR4 alone may not provide an accurate picture of industry concentration, explaining (¶4.18) that the Bureau examines "the distribution of market shares across competitors" and "the disparity between [a single firm's] market share and the market shares of its competitors." Therefore, we suggest that the Bureau consider directly incorporating the HHI measure of concentration into the Draft MEGS, with appropriate adjustments to any proposed safe harbors, having regard to Canada's more geographically diverse, smaller markets, and more concentrated industries. We also suggest that the Bureau make clear that concentration is only a starting point in its analysis, given Section 92(2) of the Competition Act.

Fourth, we suggest that the issuance of new Merger Enforcement Guidelines provides an opportunity for the Bureau to provide more detailed guidance as to the concentration levels at which the agency historically has, and is most likely in the future, to take enforcement action. While the Draft MEGS do set forth a "safe harbor" level of concentration within which transactions will not be challenged, we understand that, in practice, mergers generally are not challenged until much higher thresholds have been exceeded. This raises a question as to the utility of the guidance being proposed regarding which transactions in fact will or will not be subject to further review.[5] We suggest the Bureau consider providing additional, refined guidance as to the concentration levels at which no enforcement action is likely to be taken. In the U.S., for example, the FTC recently issued a detailed historical study examining the correlation between concentration levels and the likelihood that a transaction would be challenged.[6] Such disclosures are highly beneficial and the Sections encourage the Bureau to consider increasing the transparency of its decision-making process along these same lines.

Finally, in the discussion of current market shares as reflective of market position (¶¶4.17, 4.20), the Bureau may want to consider explaining the factors that might suggest that current market shares do not reflect the relative market position of the merging firms. Similarly, we suggest the Bureau consider identifying some of the various factors, other than innovation, that might suggest that current market shares may not be indicative of future competitive position. These factors could include the existence of bid markets where a firm's current share may not reflect the likelihood that it can compete for and win the next bid competition, trends in market shares and the growth of competitors, the financial condition of the firm, the state and age of a company's technology, its cost position and other factors that may suggest that its past market share does not reflect its future competitive significance.

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[4] The European Union's new merger guidelines refer to the HHI. In addition, the U.S. Merger Guidelines once included, but have since abandoned, use of the CR4, when economists suggested that HHIs are a better measure of concentration.

[5] For example, under the criteria set forth in ¶4.14, there is no implicit "safe harbor" for a merger taking place in an industry where there are 12 competitors with shares as follows: Merging Party A – 6%, Merging Party B – 5%; Other Competitors – 18%, 18%, 18%, 10%, 10%, 8%, 8%, 7%, 7%, 5%. Such a merger results in the merged entity having over 10% and the CR4 being 65%. Yet we believe there has been no enforcement action in an industry even approaching that level of concentration and hence no need for further consideration of such a merger once concentration has been considered.

[6] FTC, HORIZONTAL MERGER INVESTIGATION DATA, FISCAL YEARS 1996-2003 (Feb. 2, 2004).

VII. Anti-Competitive Effects

Part 5 of the Draft MEGS clearly delineates theories of anti-competitive harm. These theories are generally consistent with established legal and economic principles used in assessing mergers. Notwithstanding this sound approach, the Bureau may want to consider additional clarification in several areas.[7]

First, although other sections of the Draft MEGS (¶¶5.20, 5.21 on coordinated effects) state that a high post-merger concentration level is a "necessary condition" to a finding of a substantial lessening of competition, this language does not appear in ¶5.1 of the Draft MEGS, which can be read to suggest that the Bureau will often investigate mergers that do not produce very high post-merger concentration.[8] Paragraphs 5.10-5.16 state only that unilateral effects will not be the basis for concern where the combined firm's share is less than 35 percent. The Bureau may want to consider whether these omissions render the safe harbor provisions less certain and the Draft MEGS perhaps inconsistent. Paragraph 4.2.1 of the 1991 Canadian Merger Enforcement Guidelines does provide expressly that a high post-merger concentration level is a "necessary condition" to a finding of a substantial lessening of competition, and we do not understand the Bureau to apply a different standard.

Second, the Draft MEGS suggest (¶5.9) that a merger of an innovative firm may hinder or delay the introduction of new products. The Draft MEGS fail to note, however, that there may be instances when the opposite is true – the acquisition of a small innovative firm whose innovations or products have little distribution may, in fact, bring those products or innovations to a competitor in the market with greater resources and thereby make those innovations available to more customers more quickly. In addition, many firms claim to be innovative but their innovations may not be significant to the marketplace. The Bureau may want to consider: (1) providing more guidance as to the circumstances, if any, under which acquiring an innovative firm would raise concerns distinct from those raised by the combination with respect to the particular product market at issue; and, (2) clarifying when the acquisition of an innovative firm would be procompetitive.

Third, the Bureau may want to consider clarifying in ¶5.15 that a merger is unlikely to lead to anticompetitive unilateral effects if rival sellers would likely replace competition lost through the merger by repositioning their product lines.

Fourth, the Bureau may want to consider clarifying whether coordinated behavior is *not* sustainable if any of the three conditions listed in ¶5.19 are not met.[9]

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[7] In addition, we suggest that the Bureau consider consolidating Part 5 of the Draft MEGS with Part 2 (The Anti-Competitive Threshold). *See* Section IV, footnote 3.

[8] Section 5.1 states "[w]hen the above-mentioned [safe harbor] thresholds are exceeded ***or when other information suggests*** that a merger may result in a substantial lessening or prevention of competition, the Bureau undertakes a competitive effects analysis of the merger." (Emphasis added.)

[9] As in the case of the acquisition of a "significant interest," the Bureau may want to consider clarifying whether coordinated behavior includes express collusion. Footnote 68 suggests that explicit understandings

Finally, the Bureau may want to consider clarifying whether a "maverick" (¶5.26) is always the same as a "vigorous and effective competitor" (¶5.5), and, if not, what conditions trigger the Bureau's separate consideration of this category. Paragraph 5.26 states that a "maverick" is a "particularly vigorous and effective competitor." The Bureau could consider providing some guidance in ¶5.26 regarding the additional factors that distinguish a maverick.[10]

VIII. Entry and Sunk Costs

We support the substantive convergence reflected in the Draft MEGS in relation to the U.S. Merger Guidelines, providing for analysis of entry from the perspectives of timeliness, likelihood and sufficiency. We suggest, in this respect, that the Bureau consider including an acknowledgment that timely entry in the case of durable goods may require more than two years, and that minimum viable scale and the possibility of sponsored entry by a downstream buyer are among the factors that are routinely considered in determining the likelihood of entry.

Finally, the reference in ¶6.14 to long-term contracts as a barrier to entry may be too categorical. For example, while these types of contracts may raise entry costs for a potential entrant to some extent, this effect may not rise to the level of a barrier if, for example, the potential entrant may be willing to pay the termination fee or split the cost with customers that desire alternatives.

IX. Countervailing Power

We endorse the Bureau's proposal to expressly take account of buyer market structure in mergers analysis. This is not addressed in either the current MEGS or the U.S. Merger Guidelines,[11] although as a matter of economics, countervailing power may be an

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or agreements will generally be criminally investigated. Economic theory suggests that coordinated interaction includes both tacit and express collusion.

[10] For example, the U.S. Merger Guidelines (§2.12) describe mavericks as "hav[ing] a greater economic incentive to deviate from the terms of coordination than do most of their rivals." In a "market where capacity constraints are significant for many competitors, a firm is more likely to be a maverick the greater is its excess or divertable capacity in relation to its sales or its total capacity, and the lower are its direct and opportunity costs of expanding sales in the relevant market." *Id*. (footnote omitted). Furthermore, "[a] firm also may be a maverick if it has unusual ability secretly to expand its sales in relation to the sales it would obtain if it adhered to the terms of coordination." *Id*.

[11] Notwithstanding its absence from the U.S. Merger Guidelines, the U.S. enforcement agencies in fact consider buyer power in analyzing transactions. Both speeches by agency officials and the experience of U.S. antitrust practitioners suggest the importance of buyer power in merger analysis. *See, e.g.*, Mary Lou Steptoe, The Power Buyer Defense in Merger Cases, Remarks before the ABA Section of Antitrust Law (Aug. 10, 1992); Robert Pitofsky, Thoughts on "Leveling the Playing Field," Remarks before the National Health Lawyers Association Twentieth Annual Program on Antitrust in the Health Care Field (Feb. 13, 1997); Marius Schwartz, Buyer Power Concerns and the *Aetna-Prudential Merger*, Address at the Fifth Annual Health Care Antitrust Forum (Oct. 20, 1999); *see also*, Mary Lou Steptoe, *The Power-Buyer Defense in Merger Cases*, 61 ANTITRUST L.J. 493 (1993); MERGERS AND ACQUISITIONS: UNDERSTANDING THE

important consideration in some circumstances. The Draft MEGS, therefore, reflect the better practice.

The Draft MEGS recognize some of the main structural factors that are important in the consideration of countervailing market power and its potential effects on entry. The Bureau may wish to consider whether there might be circumstances other than the three examples listed in ¶7.2 in which buyer power could affect the market power analysis for a merger. For example, there may be instances where the presence of a strong buyer may not only constrain the merged entity's ability to raise prices, but also induce the merged entity to treat the large buyer more favorably than other buyers, or lead the merged entity to resist such demands for favorable treatment.

X. The Efficiency Exception

The Draft MEGS outline a three-step process for assessing efficiencies: (1) the consideration of the efficiencies claimed by the merging parties; (2) a consideration of anti-competitive effects;[12] and (3) a balancing between the two.

In this regard, the first step articulated in the Draft MEGS is largely consistent with the approach taken in the United States. Similarities include the merger specificity requirement; the recognition of real economic, as opposed to merely pecuniary, efficiencies; and the importance of both dynamic and productive efficiencies. While the language on merger specificity in the Draft MEGS is similar to that in the U.S. Merger Guidelines, the U.S. Merger Guidelines also recognize that, if a merger affects only *when* an efficiency will be achieved and not *whether* an efficiency will be achieved, this "timing advantage" will represent a merger-specific efficiency. We suggest that the Bureau consider adopting a similar approach in the final MEGS.

The discussion of merger-specificity has been truncated from the language in the current MEGS. The Bureau may, however, wish to consider retaining those parts of the original formulation that ensure that "theoretical alternative means" do not preclude the consideration of efficiencies in appropriate cases.

The detailed consideration of anti-competitive effects (step 2) and the balancing analysis (step 3) do not have direct analogues in the United States[13] and reflect differences

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ANTITRUST ISSUES 160-63 (2d ed. 2004). Of course, the U.S. Merger Guidelines are also concerned about monopsony power.

12 As stated in Section IV, we believe that it may be clearer to consolidate the discussion of anti-competitive thresholds and effects into one part, and in the discussion of the efficiency exception to refer to that one part for the analysis of anticompetitive effects that will be needed in applying the efficiency exception. *See also*, footnote 3.

13 The U.S. Horizontal Merger Guidelines (at §4) do provide that "[t]he Agency will not challenge a merger if cognizable efficiencies are of a character and magnitude such that the merger is not likely to be anticompetitive in any relevant market. To make the requisite determination, the Agency considers whether the cognizable efficiencies likely would be sufficient to reverse the merger's potential to harm consumers in the relevant market…. In conducting this analysis, the Agency will not simply compare the magnitude of the cognizable efficiencies with the magnitude of the likely harm to competition absent the efficiencies." (Footnotes omitted.)

in the law (*i.e.*, Section 96 of the Competition Act and its interpretation).[14] While we support convergence in merger review with major trading partners of the United States, we recognize that differences in approach mandated by statute must be respected.[15] Moreover, we note that Canada, among other jurisdictions (including the United States), is debating the role and scope of efficiencies in merger analysis. The trend in assessing efficiencies is towards according efficiencies greater weight in merger analysis.

XI. Failing Firm

There are three instances in which substantive language in the current MEGS has been omitted in the Draft MEGS. The omitted language is as follows: (a) the statement that "[t]he impact that a firm's exit can have in terms of matters other than competition are generally beyond the scope of the assessment contemplated by Section 93(b);" (b) the statement that a failing firm analysis might be appropriate in situations where a firm wishes to exit a market for reasons other than failure, such as unsatisfactory profits; and (c) the description of the price that a failing/exiting firm may have to accept if offered by a competitively preferable purchaser. As close attention will be given to all changes from the current MEGS, the Bureau may wish to detail in the Draft MEGS, or in accompanying explanatory text, the intended effect of these language changes. In addition, with respect to the description of the price a failing or exiting firm may have to accept if offered by a competitively preferable purchaser, the Bureau may want to consider including a brief clarification of the Bureau's policy about that price.[16]

The Draft MEGS take an appropriate step in eliminating the presumption that the search for a competitively preferable purchaser be conducted by an independent third party. The proposed standard is also more closely aligned with the U.S. standard that the search for such a purchaser be conducted in "good faith." We suggest, however, that the Bureau consider providing further guidance as to what constitutes a "thorough search."

XII. Vertical Mergers

The Draft MEGS represent substantial convergence with the 1984 U.S. Merger Guidelines with respect to vertical mergers, focusing on the impact on barriers to entry and upstream and downstream competition. However, the Bureau may want to evaluate the extent to which the Draft MEGS reflect the modern competition analysis of vertical mergers, and to further articulate the potential harm from vertical mergers. The Bureau may wish to consider identifying the circumstances in which a vertical merger might raise anticompetitive concerns. Finally, as we explain in Section XIII below, the types of

[14] In particular, U.S. merger analysis does not consider factors such as the effects on small and medium-sized businesses, effects in interrelated markets, effects on "domestic" firms and their ability to compete internationally, and redistributive effects.

[15] Canada uses a net benefits methodology approach in assessing efficiencies while the U.S. utilizes a consumer welfare test. *See*, footnote 14.

[16] For example, the U.S. Merger Guidelines (footnote 39) note that: "Any offer to purchase the assets of the failing firm for a price above the liquidation value of those assets – the highest valued use outside the relevant market or equivalent offer to purchase the stock of the failing firm – will be regarded as a reasonable alternative offer."

concerns that may be raised by a vertical merger may be potential competition concerns that may also arise in conglomerate mergers, so that it may be helpful to consolidate discussion of both vertical and conglomerate mergers into one part titled "Non-Horizontal Mergers" that will address potential competition concerns generally.

XIII. Conglomerate Mergers

We encourage the Bureau to provide precise guidance as to when, if ever, conglomerate mergers are likely to raise competitive concerns other than potential competition concerns.[17] The current draft states that "in general" conglomerate mergers raise no concerns other than potential competition. The Draft MEGS do not explain the circumstances in which that generality might not hold true or how likely those circumstances are to lead to enforcement activity.

Conclusion

The Sections appreciate the thorough and careful revisions of the Merger Enforcement Guidelines that the Bureau is undertaking. We are encouraged by the increasing convergence reflected in the Draft MEGS with the current trends in merger competition analysis worldwide.

We appreciate the opportunity to comment and would be pleased to respond to any questions the Bureau may have, or to provide any additional information that may be of assistance to the Bureau.

May 25, 2004

[17] The Draft MEGS define (footnote 126) conglomerate mergers as those in which the parties "do not compete in the same relevant market or in relevant markets that are vertically integrated." They then provide (¶11.1) one scenario under which conglomerate mergers might generate antitrust concerns: when one of the merging parties, absent the merger, would likely have entered the relevant market *de novo*. This concern, however, appears to be directed at potential competition generally, which could also arise in a vertical transaction, rather than at a harm likely to occur uniquely within the context of conglomerate mergers. One approach for the Bureau to consider is to title Part 10 "Non-Horizontal Mergers" and list Vertical Mergers, Potential Competition and Conglomerate Mergers as subparts under Part 10. In addition, we suggest that, in the third sentence of Part 11.1, rather than "buyers of the dominant firm" it might be clearer to state "with buyers of the dominant firm's relevant product" or "customers of the dominant firm."