AMERICAN BAR ASSOCIATION
SECTION OF ANTITRUST LAW

REPORT ON MULTIJURISDICTIONAL MERGER REVIEW ISSUES

PRESENTED TO THE INTERNATIONAL COMPETITION POLICY ADVISORY COMMITTEE
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1. INTRODUCTION: RECOMMENDED SCOPE AND EMPHASIS OF ICPAC/AGENCY INTERNATIONAL MERGER REVIEW INITIATIVES.*

At present, there are over 50 jurisdictions with antitrust merger control laws, up from only a handful just a decade ago. This fact, coupled with an increasing number of transactions having some international aspect, has resulted in a dramatic increase in the incidence of multijurisdictional merger reviews. Parties to international transactions of any consequence are today subject to multiple premerger notification requirements, mandatory waiting periods, substantive review and formal clearance requirements as a matter of course.

The multijurisdictional merger review process imposes significant burdens and transaction costs. The differing substantive standards and significant extra-territorial reach of many of these merger control regimes also give rise to potentially conflicting results and international friction. The Advisory Committee=s examination of these multijurisdictional merger review issues is therefore of great importance to American businesses, their legal advisors and the international enforcement missions of the Antitrust Division and the Federal Trade Commission.

The issues presented are multi-faceted, ranging from seemingly mundane procedural issues to complex issues of conflicting national merger policies and international comity. Likewise, possible means of addressing these issues -- in theory, at least -- encompass a broad range of alternatives. The Advisory Committee=s September 11, 1998 Working Draft on

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*The views expressed herein are being presented on behalf of the Section of Antitrust Law. 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 Assocaition. This report was written by an Antitrust Section working group comprised of Michael H. Byowitz, Barry E. Hawk, Spencer Weber Waller, and Joseph F. Winterscheid.

Multijurisdictional Merger Review Issues set forth the following Apossible solutions≅ to these issues:

- ∃ **Procedural Harmonization** including a common notification form, common time periods or, alternatively, fixing problems within individual jurisdictions;
- ∃ **Increased Transparency**;
- ∃ **Information Sharing and Coordination**;
- ∃ **Comity** (traditional, positive and/or a deference treaty);
- ∃ **Dispute Resolution** (mediation); and
- ∃ **Substantive Convergence** (common code or principles).

While consideration of all possible approaches is useful for purposes of identifying and refining the issues, we believe that there are insuperable obstacles to achieving broad-based convergence or harmonization of the multijurisdictional merger review process, at least in the near term. First, we believe that it is unrealistic and unproductive for ICPAC to give high priority to substantive convergence or an AInternational Merger Code.≅ There is already a "creeping convergence" of international antitrust laws due to the frequent contact among national antitrust authorities and through the discussion of antitrust concepts in various multilateral fora. The high degree of cooperation among antitrust authorities during cross-border merger reviews is increasing. This cooperative process ensures in most cases that the authorities will come to complementary conclusions, while still allowing the authorities to take into account circumstances that are unique to their own country.

The DOJ in our view is appropriately opposed to formalized substantive convergence initiatives (per Douglas Melamed) for several reasons: 1) there are real, substantive differences among nations; 2) agreement on specific rules and principles is unlikely in the near future; and 3) nations are likely to have more success by exchanging views and working together in a common law type of case-by-case process than by seeking to negotiate multinational rules. Moreover,

many countries currently do not have antitrust laws, or have only weak antitrust laws, so an attempt at substantive convergence may result in the adoption of very weak rules (*e.g.*, the Alowest common denominator≅).

If common rules are adopted, it will be much more difficult to modify or update those rules on a multilateral basis than it is for each country to change its own laws based on changing circumstances. Finally, differences in the legal cultures of nations also constitute obstacles to merger control convergence. For example, in the United States far more emphasis is placed on the review of company documents during the merger review process

The development of positive comity agreements is more important than substantive convergence because such agreements create a framework within which antitrust authorities can cooperate on specific issues. Such agreements can also define common principles and objectives. On the other hand, we believe that it is unrealistic -- and, in all likelihood, counterproductive -- to seek to formulate hard-and-fast Atraditional≅ (*e.g.*, Anegative≅) comity rules directed at achieving a series of deference treaties.

Where a transaction has a significant effect on the local economy in any given jurisdiction, there should be no dispute as to the local antitrust authority=s legitimate interest in reviewing the transaction notwithstanding the fact that the transaction=s Acenter of gravity≅ (whether determined by reference to the nationality of the parties, location of productive assets, or proportionate sales volume) lies outside its national boundaries. To be sure, traditional comity principles should play a part in the exercise of prosecutorial discretion in appropriate cases, but just as surely, pursuing an international convention of some sort that would prevent the U.S. agencies from seeking to intervene in a largely Aforeign≅ transaction which threatens the interests of U.S. consumers is not sound policy. Nor should we expect that foreign antitrust

authorities would (or should) decline to intervene in any transaction which threatens their own national interests.

These same considerations strongly suggest that it is likewise questionable whether a formalized mediation process is a realistic option. Differing substantive legal standards and underlying merger policies, national sovereignty issues and enforcement mechanisms would all present seemingly insuperable obstacles to any supra-national arbitration process, even assuming that a consensus could ever be achieved as to the identity or composition of any such body. And, as a practical matter, resort to international mediation to resolve disputes in any given matter hardly seems realistic given the time-sensitive nature of merger transactions.

In sum, broad-based initiatives directed at substantive convergence, formalized allocation of enforcement responsibility and/or supra-national mediation offer little prospect of success. We therefore believe that ICPAC=s multijurisdictional merger review should focus on a more limited agenda directed at reducing unnecessary transaction costs associated with the international merger review process, in particular as to those transactions which do not raise serious competitive issues.

In examining the sources of the costs and burdens resulting from multijurisdictional merger control, it becomes evident that this effort should focus less on "harmonization" and more on "minimization." Harmonization (either procedural or substantive) should not be the dominant focus of proposed reform. Indeed, any effort to harmonize the law of different jurisdictions must be carefully disciplined so as to avoid harmonization of bad law. Rather, it is better to identify and remedy the problems or deficiencies in individual merger control systems. In essence, the problem is that the proliferation of international merger review regimes are subjecting a large number of transactions to notification requirements that are altogether unnecessary and/or entirely disproportionate to any legitimate antitrust enforcement concerns.

Private firms suffer costs and burdens far more from the unnecessary and overbroad review of transactions than from differences, let alone conflicts, in substantive standards or remedies.

Merely harmonizing the procedural requirements of different jurisdictions will not significantly reduce transaction costs. In particular, it is doubtful that standardized or harmonized forms would produce a significant reduction in transaction costs. It is true that a standardized form would eliminate or reduce the costs associated with duplicating certain information, but the main transaction costs associated with merger control do not result from having to submit similar information to several different agencies. Indeed, the actual incidence of truly duplicative information is somewhat limited given the fact that much of the information is necessarily jurisdiction-specific. Rather, the principal costs are the result of: first, having to ascertain potential notification obligations in literally dozens of separate jurisdictions; and second, having to file multiple merger notifications in jurisdictions having no legitimate competitive interests at issue. Thus, energy would be better expended in trying to rationalize this process than in trying to negotiate a standardized merger notification form -- an objective which, given the vast disparity in underlying substantive rules and resulting information needs, has an only limited prospect of success in any event.

At bottom, the most effective means to reduce unnecessary transaction costs associated with multijurisdictional merger review is to promote the adoption of clear, objective tests for determining when notification is required, to eliminate notification requirements in those jurisdictions lacking any reasonable basis for asserting jurisdiction over a transaction, and to limit the information required in connection with those transactions which lack antitrust significance. The ultimate goal should be to minimize transaction costs and burdens without reducing the public benefit and without compromising the ability of any jurisdiction to enforce its competition laws.

ICPAC=s main goal in addressing Multijurisdictional Merger Review Issues should therefore be directed towards promoting reforms in individual merger control regimes so that they focus on those transactions that raise competitive concerns within their territory and do not unduly burden transactions that lack anticompetitive potential. Secondarily, ICPAC should promote limited procedural reforms in an effort to reduce unnecessary transaction costs associated with the notification process in various jurisdictions -- including the United States. Toward these ends, we would propose the following specific agenda items. While these measures are admittedly Aminimalist≅ as compared with substantive convergence and other more fundamental initiatives, we believe that they represent realistically achievable goals that would produce direct and significant real-world benefits to the business community.

II. PROPOSED SPECIFIC INITIATIVES FOR MULTIJURISDICTIONAL MERGER REVIEW REFORM.

A. The U.S. Antitrust Agencies Should Advocate Objective Jurisdictional Tests For Premerger Notification Which Incorporate Appropriate *De Minimis* ALocal Contacts≅ Thresholds.

Transaction costs associated with multijurisdictional merger reviews could be substantially reduced if filing requirements were based on readily-accessible and objectively-based jurisdictional thresholds. In particular, notification thresholds based on market share-based tests should be eliminated, or, at a minimum, coupled with an appropriate objectively-based *de minimis* local sales threshold. Examples of jurisdictions which are problematic in this respect include Belgium (combined worldwide turnover of approximately $84 million and a market share in Belgium of more than 25%); Brazil (20% market share or one party with worldwide gross revenue of approximately $350 million); Czech Republic (30% market share); Greece (25% market share); Portugal (30% market share); Slovakia (20% market share); and Spain (25% market share).

Parties should not be required to undertake a full-blown substantive review of a proposed transaction simply to determine whether premerger notification is required in any given jurisdiction. In addition to the inherent difficulties associated with market definition generally, uncertainties associated with these market share-based tests are heightened by interpretive ambiguities and inconsistencies. Under Belgian rules, for example, notification is required if the parties (individually or together) have a market share of more than 25% in Belgium not only as to overlapping products, but also in any Aupstream,≅ Adownstream≅ or Aneighboring≅ markets. Likewise, filing is required in Greece if either party meets the 25% threshold, whether or not there is any horizontal or vertical overlap.

The U.S. Agencies should promote the elimination of these market share-based tests in favor of objectively quantifiable and readily accessible information, such as sales (or Aturnover≅) in the relevant jurisdiction. Appropriate models are provided in the following jurisdictions: EU Merger Regulation (EU/EEA turnover threshold); Canada (Canadian assets/sales tests); Netherlands (Dutch turnover); Switzerland (Swiss turnover); and the U.S. Hart-Scott-Rodino Act (foreign transaction exemptions based on U.S. assets and/or sales set forth in 16 C.F.R. ∍∍ 802.50 and 802.51).

Notification thresholds should also incorporate an appropriate (and objectively-based) *de minimis* standard as to the level of Alocal contacts≅ required to trigger premerger notification, especially as to Aforeign-to-foreign≅ transactions. The most significant problem area in this respect is the so-called Aeffects≅ test, pursuant to which a transaction having any potential effect on the local market may be subject to premerger notification. Prior to amendments which went into effect on January 1, 1999, the most prominent Aeffects≅ test jurisdiction was Germany. Under the old law, premerger notification was required in Germany if a transaction involved one party with annual worldwide sales of approximately $1.2 billion or two or more parties with

annual worldwide sales of approximately $580 million or more whenever the transaction had any potential Aeffect≅ on the German market. Similar rules applied under the Austrian merger statute until the Austrian Supreme Court rules that only Austrian turnover is to be considered.

Under the new German law, notification is not required unless (1) the merging parties= aggregate worldwide turnover exceeds DEM 1 billion (approximately $580 million), **and** (2) at least one of the parties has sales in Germany of over DEM 50 million (approximately $29 million). The addition of this second threshold is an improvement over the Aeffects≅ test applicable under prior law, but it does not entirely eliminate the problem since transactions may still be notifiable notwithstanding the fact that one party has no (or *de minimis*) sales in Germany. For example, if the parties= aggregate worldwide turnover exceeds the $580 million threhold and the acquiring firm=s German turnover exceeds $29 million, notification would technically be required even though the acquired firm has no presence whatsoever on the German market.

Variants of the Aeffects≅ test purportedly establish jurisdiction and/or notification requirements in numerous other jurisdictions as well, including the United Kingdom (worldwide gross assets of target of approximately $115 million); Poland (combined worldwide turnover of approximately $5.7 million or worldwide value of the assets acquired of approximately $2.3 million); Ireland (notification required in any transaction involving two or more parties with worldwide assets of at least approximately $15 million or worldwide turnover of at least approximately $30 million whenever **either** party carries on business in Ireland); Croatia (combined worldwide turnover of approximately $115 million and two or more parties with worldwide turnover of approximately $15 million); Estonia (combined worldwide turnover of $7.5 million); Lithuania (combined worldwide turnover of $2 million); Romania (combined

worldwide turnover of approximately $2.6 million); and Slovakia (combined worldwide sales of approximately $8.9 million and each party with worldwide sales of approximately $3 million).

Requiring premerger notification on the basis of worldwide assets or sales (especially at these exceedingly low worldwide thresholds) as to transactions that lack any significant local nexus increase transaction costs without any corresponding enforcement benefit. Notification should not be required in any jurisdiction based solely on potential local Aeffects≅ or local business activity unless such effects or activity exceed some *de minimis* standard as measured either by reference to the target=s local activities and/or appropriate minimum local contacts by at least two parties to the transaction. Suitable models in this regard include Canada (target company business operations in Canada coupled with Canadian assets/sales tests); Netherlands (combined worldwide turnover plus parties= individual Dutch turnover); U.S. Hart-Scott-Rodino Act (foreign transaction exemptions in 16 C.F.R. ээ 802.50 and 802.51); and the EU Merger Regulation (combined worldwide turnover plus EU/EEA turnover tests).

B. The U.S. Antitrust Agencies Should Promote Harmonization Of Initial Merger Review Periods And Harmonization Of Rules Pertaining To *When* Premerger Filings Can (Or Must) Be Made.

Achieving harmonization of review periods in cases which raise serious competitive issues is an unrealistic objective, at least in the short run. It will be exceedingly difficult to achieve consensus as to uniform review periods in such cases due to the differing legal consequences which flow from the expiration of the prescribed time periods -- in particular, the Adeemed approval≅ of the transaction in the EU and many other non-U.S. jurisdictions. Different procedural frameworks and triggering events further complicate harmonization of Asecond phase≅ review periods. *Compare, e.g.*, Hart-Scott-Rodino Act Second Request waiting period extension (20-day extension from parties= substantial compliance with Second Request) *with* EU Merger Regulation (absolute 4-month deadline following initiation of investigation).

Moreover, we believe that, in all events, hard-and-fast deadlines in Asecond phase≅ cases are more important than marginal differences in review periods. In short, trading shorter mandatory waiting periods in Asecond phase≅ cases in exchange for lack of legal certainty at the conclusion of the review period (as is the case under U.S. practice, for example) would be a poor bargain.

With respect to timing issues associated with multijurisdictional merger review, we believe that the agencies should focus on disparate *initial* review periods affecting transactions which do not raise competitive issues. In most jurisdictions, the initial review period is in the one-month range, as, for example, under the EU Merger Regulation (one month); under the Hart-Scott-Rodino Act (30 days); Germany (one month); and Canada (7 days for short-form filing; pending amendment would extend to 14 days).

Marginal differences in the initial review periods are inconsequential since they are manageable from a transaction planning standpoint. The Agencies should therefore focus on Aoutliers,≅ that is, jurisdictions where the initial review period substantially exceeds the one-month baseline or is undefined. This would include, for example: Czech Republic (indefinite review period); France (2 months); Greece (3 months); Hungary (90 days); Poland (indefinite); and Taiwan (2 months).

The Agencies should also promote harmonization of rules pertaining to **when** parties are permitted to file premerger notification. Under the Hart-Scott-Rodino Act, parties are able to file their Premerger Notification and Report Forms as soon as a letter of intent, agreement in principle or contract to merge or acquire has been executed. Many other jurisdictions, such as Germany and Canada, likewise permit premerger notification prior to the execution of a definitive agreement.

In many jurisdictions (including the EU, Belgium, Finland, the Czech Republic and Hungary), however, premerger notification is not permitted until the parties have actually

executed a definitive agreement. This Adefinitive agreement≅ requirement is unnecessary and impedes the parties from orchestrating multijurisdictional filings in the most efficient manner. This Adefinitive agreement≅ requirement is intended to avoid burdening the agencies with reviewing speculative transactions, but this concern can be addressed with a Agood faith intention to consummate≅ representation similar to the Hart-Scott-Rodino Act affidavit requirement. Moreover, it is unlikely that parties will undertake the significant burden and expense associated with a Form CO-type filing in connection with a purely speculative transaction.

The difficulties associated with the Adefinitive agreement≅ requirement are exacerbated by the fact that although the parties **cannot** file prior to the execution of a definitive agreement, in many of these jurisdictions, the parties **must** file within a short period of time following its execution. For example, under the EU Merger Regulation, the Form CO must be filed within one week following the execution of the definitive agreement. Similar requirements are imposed in Belgium (one week), Finland (one week), Greece (10 days), Hungary (8 days), Poland (14 days) and Slovakia (15 days). It is virtually impossible to prepare the required submissions within these specified periods, and, to the extent that the parties must observe mandatory waiting periods following their filings, these filing deadlines are entirely superfluous. Although the enforcement authorities in some of these jurisdictions (*e.g.*, the European Commission) are typically relatively accommodating in granting waivers respecting the filing deadline, having to sort through the maze of disparate jurisdictional tests on an accelerated basis in these Afast track≅ jurisdictions and thereafter having to seek waivers in multiple jurisdictions increases transaction costs with no corresponding enforcement benefit.

As a consequence, we believe that the U.S. Agencies should advocate the elimination of the Adefinitive agreement≅ requirement and these compressed post-execution filing deadlines.

Elimination of these artificial requirements would not only permit the parties to proceed more efficiently and without undue burden, but would also promote *de facto* harmonization of multijurisdictional initial review periods. Harmonization of notification timetables will also promote inter-agency coordination and, perhaps, voluntary confidentiality waivers as well.

C. The U.S. Antitrust Agencies Should Promote Elimination Of Unnecessary Burdens Imposed By Premerger Notification Systems.

1. Initial Filing Requirements.

Some jurisdictions, particularly those that have enacted merger control systems in recent years, impose very substantial burdens through the use of very detailed initial filing forms. Many of these forms require the submission of extensive information about markets, competitors and entry conditions in each of the various markets in which the merging parties operate. In some cases, such information is required even in markets in which there are no overlaps between the parties. Agencies have a legitimate interest in requiring the submission of enough information to make sure they do not miss competitively-sensitive transactions. But the forms used by some jurisdictions can and do impose very substantial and unreasonable burdens on transactions that do not raise competitive issues.

Jurisdictions that have overly-burdensome initial filing requirements include, among others, the following countries:

∃ **Hungary** requires, *inter alia*, a detailed breakdown of controlled entities (including creation of a chart showing Acontrol relationships≅), identification of other entities on the boards of which directors of the parties sit, turnover for direct and indirect participants, a description of acquisitions in the last two years which were not reported, market definitions, parties sales and shares in such markets, expectations of growth in market share, identification of competitors, customers and suppliers, description of entry conditions, significance of research and development efforts, supply/demand factors, and horizontal/vertical relationships.

∃ **Slovakia** requires detailed asset information for the parties and affiliates involved, market definitions, market share calculations, balance sheets and financial statements for the parties Aincluding undertakings in which the parties have an ownership interest or stock or in which they are directors, officers or otherwise similarly

interconnected,≅ a description of reasons for and effects of the concentration and its competitive impact, and a list of principal suppliers, customers and competitors of the parties.

∃ **Belgium** requires essentially the same detailed level of information required by the European Commission=s Form CO.

∃ **Turkey** requires definitions of relevant markets (product and geographic), contact information regarding competitors and customers, estimated market shares of competitors, a description of entry conditions, submission of Aaccount information≅ (in addition to that contained in annual reports), and production of business plans, market research, and related studies by the parties or by Athird persons.≅ Even if the merger thresholds are not met, the parties may be required to submit detailed information concerning Aother agreements, decisions or practices≅ affecting Turkey, *e.g.*, distribution agreements by foreign parties with local sales agents.

∃ **Brazil** requires detailed information about the parties= worldwide activities and imposes onerous translation and procedural requirements (*e.g.*, that the entire merger agreement not only be translated into Portuguese, but that it be a certified and notarized/apostilled translation).

∃ **Mexico** requires exhaustive certifications of the certificates of incorporation of all subsidiaries and affiliates, whether or not they have any relevance to the competition analysis, and otherwise imposes highly formalistic burdens that are not needed for the competition authority to make its judgments.

These relatively new merger control systems impose substantial burdens on merging parties that are unwarranted in transactions that do not raise competitive issues. Many other jurisdictions that have more experience with merger control employ varying methods to avoid such problems. The EU, the United States, Canada and Germany, for example, have different systems that avoid problems of undue burden in initial filings. Each of these jurisdictions provides a useful model that may be followed by jurisdictions that wish to avoid placing undue burdens on transactions that do not raise competitive issues.

The OECD has also issued a AReport on Notification of Transnational Mergers≅ (DAFFE/CLP(99)2/Final), which includes a AFramework for a Notification and Report Form for Concentrations.≅ The OCED effort also merits further review in connection with possible

approaches to the initial filing burden issue. A copy of the OECD Report and accompanying Framework are attached hereto for reference.

Additional comments on these various systems and the OECD Report and Framework are set forth below.

The European Union. One way to avoid imposing undue burdens in the initial filing is to use a detailed form, but administer it in a flexible manner. This is the practice that has developed, for example, in the European Union. The EU=s Form CO is quite burdensome on its face. It seeks extensive information about the markets in which either of the merging firms operate, and for each such market, extensive information concerning competitors, market shares and entry conditions. This information must in theory be provided even for markets in which there is no competitive overlap between the merging parties.

Generally, the EU=s Mergers Task Force (AMTF≅) has sought not to impose undue burdens on transactions that do not raise competitive issues by the manner in which they administer the form. There is an expectation that counsel to the parties will contact the MTF for a meeting or telephone call before filing their Form CO to describe and provide basic information as to the proposed transaction, the merging parties and any competitive overlaps. During or shortly after that discussion, the MTF will inform the parties of the markets for which information will be required and the level of detail to present. In many transactions, the MTF grants derogations that free the parties from the need to provide much of the information that is literally called for by the Form CO.

This system has worked fairly well in avoiding the imposition of undue burdens on transactions that do not raise competitive issues. This is not to say, however, that the EU model is a suitable international template. It would obviously be burdensome, for example, to deal with

a dozen or more jurisdictions with an analogue to Form CO even if administered in the same manner as the EU, since that would require separate discussions with each jurisdiction.

The United States. Another way to avoid undue burdens is to use a form that is relatively easy to complete that applies to all transactions, and place the onus on the competition law authority to screen out the transactions that raise issues from those that do not. This is essentially the approach employed under the Hart-Scott-Rodino Act (AHSR≅) in the United States.

The HSR Form requires fairly basic information including a description of the transaction, the parties= most recent SEC filings, lists of certain subsidiaries and affiliates, and SIC Code data (data reported to the census bureau every five years). The HSR Form also requires the submission of so-called item 4(c) documents -- documents that evaluate the proposed transaction from the standpoint of factors such as markets, market shares, competition and competitors. Item 4(c) documents are frequently the most informative part of an HSR filing.

Under HSR, the initial filing burden is kept relatively manageable. To be sure, for a company with multiple produce lines and/or subsidiaries or affiliates, a fair amount of effort is required the first time a company completes an HSR filing, and collection of 4(c) documents can be time consuming as well. But the burden is sufficiently manageable that acquisition-minded companies choose to keep the non-transaction specific parts of their HSR Form current so that they are able to complete a filing for a new transaction and file in relatively short order without too much additional effort. This is not something that many companies would choose to do with the Form CO, since the most time consuming aspects of the form relate to detailed information about overlapping products.

The HSR regime does a good job of bringing to the government=s attention most transactions that raise potentially serious competitive issues. The agencies nonetheless can and

sometimes do miss transactions that raise competitive issues. This can occur because SIC codes are often overly broad or ambiguous so that overlaps are not apparent on the face of the form, or the companies may report in the ordinary course of business under different codes. Transactions may be missed where the parties have not created 4(c) documents or those that exist do not reveal the competitive overlaps, and where the transaction is not sufficiently high profile to attract attention from the business press or from competitors or customers who might wish to complain. There is a broad consensus in the United States that HSR has struck the right balance between the burden of an initial filing and the government=s desire to identify competitively sensitive transactions.[*]

Canada. Canada uses a system that employs two different initial forms, known as the short form and the long form, leaving it to the notifying parties to choose in the first instance which form to use. Both forms require basic information such as a description of the proposed transaction, copies of current drafts of relevant legal documents, descriptions of the principal businesses of the notifying party and its affiliates, certain financial information, certain documents filed with stock exchanges and securities commissions, and any pro forma financials on the combined firm.

The short form is designed to allow for the provision of less extensive information in transactions that do not raise competitive problems. The long form requires significantly more information concerning affiliates of the notifying party and the products produced, supplied or distributed by the parties and their affiliates, as well as the filing of all financial or statistical data

[1] Complaints about the U.S. system focus on two areas: (1) the filing thresholds, which are based on the size of the parties (revenues or assets) and the size of the transaction, have not been raised in the more than two decades that HSR has been in effect, and are now quite low, and (2) second requests are unduly burdensome, as discussed below.

prepared to assist the board of directors or senior management of the parties in analyzing the proposed transaction.

The two forms have different waiting periods. The short form has a seven day waiting period (to be extended to 14 days once regulations are adopted under legislation recently enacted legislation in Parliament). The long form has a 21 day waiting period (to be extended to 42 days).

Canada places the onus on the merging parties to select in the first instance which form to file. If the short form is chosen, and the Canadian Competition Bureau determines that it needs more information, then it may require the merging parties to submit the long form, which triggers the running of the longer waiting period, without any credit for the shorter waiting period. As a result, parties tend to choose the form most appropriate for their transaction, with the long form being used only in those cases where competitive issues may exist.

Under recently enacted amendments to the Canadian Competition Act, the Act=s pre-merger notification provisions will be revised in the near future in a number of ways. There will be an increase in the information required to be supplied in the short form, while the burden imposed by the long form will be substantially increased. The changes, which will become effective on the issuance of implementing regulations by the Canadian Competition Bureau, are as follows:

∃ The short form will require significantly more information as to the parties= principal customers and suppliers.

∃ The long form will require the provision of strategic and marketing plans for the past three years, thereby going far beyond HSR Item 4(c) which covers only transaction-specific documents.

∃ By making both waiting periods longer, the proposed amendments Aup the ante≅ for parties choosing the short form in the first instance. If the Competition Bureau decides that a long form is required, the parties will now have lost two weeks (instead of one week) and then face a long-form waiting period of 42 days,

which won=t begin to run until they comply with the substantially more burdensome requirements of the long form.

Canada also has another option that merging parties can pursue in transactions that do not raise competitive issues. The parties can apply for an Advance Ruling Certificate (AARC≅). Issuance of an ARC is a discretionary act by the Director of the Bureau of Competition Policy. If one is granted, then no pre-merger notification is required. If not, the parties must file a short form or long form if their transaction is notifiable. Generally, an ARC can be obtained with the submission of less information than is required under the long or short form, mostly a description of the parties businesses and the fact that they do not overlap or, if they do, that the market shares are too low to warrant concern under the standards applied in Canada. Requests for an ARC can be acted upon by the Competition Bureau in as little as two weeks.

Germany. Under the German system, there is no specific filing form -- the onus is on the merging parties to provide sufficient information to allow for a preliminary assessment by the Federal Cartel Office (AFCO≅). This is frequently worked out in informal consultations with the FCO. In practice, the amount of information required varies from very little in most transactions to far more extensive data in deals that appear to raise competitive issues. The German authorities have routinely cleared transactions in a very short time after an initial filing (10 days to two weeks, or even less) when the transaction is uninteresting from a competitive standpoint.

OECD Report/Framework. The OECD=s February 24, 1999 Report discusses transaction costs and burdens associated with transnational merger reviews in some detail. The AFramework for a Notification and Report Form for Concentrations≅ which is appended to the Report represents OECD=s attempt to synthesize the common essential elements of international notification forms, and is intended to serve as a guide for the development of individual

jurisdiction=s merger report forms and, in the longer run, as a possible basis for harmonization of global notification requirements.

While useful as a basis for discussion, the Framework raises a number of potential concerns. The principal concerns raised by the Framework are as follows:

- ∃ **Framework Part A -- Identification of Parties to the Transaction.** In their comments to OCED on the Framework document, the United States Council for International Business, the Section of Antitrust Law and the Section of International Law and Practice of the American Bar Association[**] and the Canadian Bar Association have all previously expressed reservations concerning the inclusion of a subjective standard (*e.g.*, "decisive influence") in the definition of "control." It is believed that the control test should be limited to objective criteria, such as those set forth in parts a and b of the proposed definition (ownership of 50% or more of the voting shares of a corporation or the ability to appoint a majority of its directors or their equivalent).

- ∃ **Framework Part B, Section B-5 -- Business Purpose.** Requiring the Notifying Person to "[d]escribe the business purpose or purposes of the transaction," as proposed in the Framework document, is unnecessary and unlikely to yield any useful information. In addition, it intrudes unnecessarily into the parties' confidential strategic thinking. To the extent that such information might be deemed pertinent, perhaps an acceptable alternative would be to ask the parties to provide any press releases issued in connection with any public announcement of the transaction.

- ∃ **Framework Part C -- Description of Operations in the Notified Country.** The Framework proposes alternative methods of describing a party's operations in the Notified Country, either by reference to a standard classification system (*i.e.*, the Standard Industrial Classification system employed under the Hart-Scott-Rodino Act) or by reference to "lines of business" employed by the parties in their regular course of business for accounting or reporting purposes. The latter approach is more consistent with the objective of seeking to elicit information maintained by Notifying Parties in the normal course of business (at least where there is no legal obligation to compile and submit SIC-type information in the Notified Country in the ordinary course). Moreover, there is wide recognition of the fact that SIC-type classifications do not necessarily bear a direct relationship to relevant product markets in an antitrust sense in any event. Accordingly, requiring the parties to re-calculate revenues based on some SIC-type system imposes unnecessary burden and expense.

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[2] *See* Section of Antitrust Law and Section of International Law and Practice of the American Bar Association, *Comments on OECD Framework Document* submitted under expedited blanket authority (August 1998).

∃ **Framework Part D -- Identification of Markets.** Both the American Bar Association and the Canadian Bar Association have expressed serious reservations about Part D's focus on "subjectively-oriented information" (*e.g.*, market definition), noting that such an approach is likely to meet with "significant resistance" in many jurisdictions and, therefore, reduce the prospects for widespread endorsement of the Framework. Both bar groups suggested that Notifying Parties merely be required to supply information on the basis of their products as normally described by them in their day-to-day operations.

∃ **Framework Part E -- Documents.** The optional requirement for the submission of competitive analyses is appropriately tailored to capture potentially relevant documents while minimizing compliance burdens. Perhaps it would be useful to add another option as to this item wherein the parties might merely be required to submit an index of such documents. This approach has been adopted in many jurisdictions in lieu of actually requiring submission of the documents in the first instance as to transactions which may not merit closer scrutiny. The "index" approach would also facilitate compliance by easing potential confidentiality concerns associated with having to submit these highly sensitive documents (which are very often business confidential even as between the parties) with the initial filing. Finally, it avoids the always nettlesome question of any translation requirement as to such documents, at least until it is determined that further investigation is warranted. As to this issue, it is submitted that if parties are required to produce competitive analyses and/or other documentary materials with their initial filings, they should be permitted to submit the documents in the original language text (unless a translation is already available).

∃ **Framework Part F -- Confidentiality.** As further discussed below, the assured confidentiality of merger notification materials is of the utmost importance to the business community. Confidentiality also facilitates effective enforcement since it promotes compliance with regulatory disclosure requirements. While voluntary waivers of confidentiality, while appropriately reminding parties that limited waiver of confidentiality as between antitrust enforcement agencies may mitigate compliance burdens in the transnational review context, the "check-the-box" confidentiality waiver option proposed in Part F of the Framework document is undesirable because it may (1) place undue pressure on parties to check "yes" and/or (2) lead to an inadvertent waiver as to jurisdictions which do not have adequate confidentiality protection or formal procedural requirements for the designation of "business secrets" and the like.

2. Merger Investigations/APhase 2≅ Proceedings.

Transactions that are perceived as potentially raising serious substantive issues are subjected to more extensive review in all jurisdictions with merger control. However, the

information and documents required to be provided by the parties in such investigations varies considerably.

The EU Model. In transactions deemed worthy of investigation because there is a credible theory under which the deal would appear to raise serious competitive problems, most jurisdictions require the submission of more detailed information, frequently in written form. This second step (or APhase 2≅) review process is typically not document intensive.

Most jurisdictions also provide for an extended waiting period for transactions that the government determines to review. The extended waiting period is fixed and does not depend on how long it takes to reply to the request, as long as that is done in a reasonable period of time. For example, the EU has an initial review period of one month and an extended review period of four months. Similarly, Germany has an initial review period of one month and an extended review period of three months.

The H-S-R System. Although the U.S. system avoids placing undue burdens at the initial filing stage, it is by far the most burdensome system in the second stage of the process with regard to the information and documents that merging parties are required to provide in transactions that are perceived as raising competitive issues. Through the mechanism of a request for additional information and documentary materials (referred to colloquially as a ASecond Request≅), merging parties in transactions deemed worthy of in-depth review are regularly required to provide reams of data, extensive answers to written interrogatories, and literally hundreds of boxes of documents.

The extended waiting period that is triggered by the issuance of a Second Request does not commence until substantial compliance with the Request, and there is little prospect for effective judicial review of most substantial compliance issues. This gives Agency staffs the incentive to err on the side of being over inclusive in drafting Second Requests in the first

instance, while not being terribly forthcoming in responding to party requests to modify Second Requests thereafter.

The underlying justification for these extremely broad document and information requests is that in the United States agencies do not have the power to block a transaction themselves, but must go to court to seek a preliminary injunction to do so. As a result, the agencies feel that they need far more extensive information and documents than do their counterparts in jurisdictions like the EU, where the agency can block a merger by its own order, subject to after-the-fact judicial review. As a practical matter, few companies can keep their deals together long enough to seek judicial review in the EU, which frequently takes many months, if not years.

It is true that the United States agencies may need more information than their EU counterparts in order to be ready to litigate a preliminary injunction case.[***] But the United States= Agencies frequently appear to seek far more information and documents than they reasonably require to litigate. There are systems where the Agency has to go to court to stop a transaction, as in the United States, but where the process does not involve the massive document productions that are common in the U.S. process. Canada is an example. The need to be prepared for litigation does not justify the sweeping breadth of Second Requests in the United States, which seek documents at very junior levels within companies and often from remote facilities. In companies with foreign operations, the Agencies have been known to insist on

[3] There are grounds to question the legitimacy of this concern. The H-S-R process was designed to give the Agencies sufficient information to determine whether or not to challenge a merger. Preliminary injunction merger cases frequently involve extensive, expedited discovery in which the Agency (as well as the merging parties) can seek to enhance its litigation position.

English translations for all responsive documents, whether or not the documents appear to be competitively important.

Practitioners and the business community widely perceive Second Requests to be unduly burdensome. Four years ago, the Agencies announced with much fanfare that they had addressed the problem by adopting a model form of Second Request that eliminated some of the worst abuses of the process. This Areform≅ helped reduce burdens marginally. Unfortunately, Second Requests issued by the Agencies in the last year or two have departed so substantially from the model as to constitute its virtual abandonment. The burdens imposed by Second Requests today are frequently worse than they were before the model was adopted.

Second Requests and the fact that the waiting periods they trigger do not commence to run until substantial compliance represent one of the major impediments to harmonization or convergence of pre-merger notifications processes and time tables. There is little prospect of other countries adopting a U.S.-style system. The United States is very unlikely to move away from its system and adopt a more European- or Canadian-style process.

D. The U.S. Antitrust Agencies Should Promote Greater Clarity And Transparency In The Multijurisdictional Merger Review Process, Particularly As It Relates To International Cooperative Enforcement Initiatives.

Antitrust enforcers in North America, Europe and elsewhere frequently tout the benefits of information sharing and cooperation with their foreign counterparts. There is an ever-increasing array of mechanisms for such cooperation, including bi-lateral agreements and informal arrangements involving jurisdictions in North America (Canada and the United States), Europe (the EU, Germany) and elsewhere (Australia) that allow for varying degrees of cooperation. These arrangements are valued by competition law enforcement agencies, which perceive them as permitting the agencies to unearth more evidence of violations of antitrust laws than they could acting alone.

There are limits to the extent to which antitrust enforcers can exchange information and cooperate today. As the ICPAC draft merger paper notes, the principal limits are imposed by laws safeguarding confidential commercial information from public use or disclosure other than in specified situations. The confidentiality laws in question rarely, if ever, include disclosure to foreign competition law enforcers among the permitted categories of recipients of such information. This limit is of particular importance in mergers because confidential commercial information (such as assessments of the strengths and weaknesses of the merging parties and other competitors in an industry) is often at the heart of merger cases.

Competition law enforcers seek to avoid these limits through voluntary confidentiality waivers by merging parties and other subjects of antitrust investigations. There have been a number of highly publicized instances that the agencies often point to. These include:

- In the first investigation of Microsoft in 1995, voluntary waivers allowed Microsoft to resolve antitrust investigations by the United States Department of Justice and the European Commission through joint negotiations.

∃ In the Worldcom/MCI merger last year, the parties waived confidentiality, permitting the Justice Department and DG-IV to work together, including holding a joint meeting with the two companies to discuss the issues and possible solutions.

∃ In the Halliburton/Dresser Industries transaction, also last year, the Antitrust Division and DG-IV conducted separate, but coordinated, investigations.

Although the merging parties in these situations apparently were convinced that they benefited from waiving confidentiality and allowing EU and U.S. authorities to work together, it is far from clear that the same calculus applies to every transaction. Put another way, it is sensible for merging parties and their counsel to ask whether in the unique circumstances of their own transaction, a waiver advances the mutual interests of merging parties and competition law enforcers or just those of the enforcers.

The enforcement agencies seemingly believe that there are no legitimate grounds for refusing a cooperation request. Indeed, some jurisdictions outside the United States respond to initial refusals (or expressed unwillingness) to waive by asking what the merging parties have to hide. This attitude perhaps explains (and, concommitantly, underscores our reservations about) the Acheck-the-box≅ confidentiality waiver approach set forth in the OECD Framework document and it ignores the fact that there are legitimate reasons to at least seriously consider not waiving confidentiality.

For example, consider the case of a substantial aerospace merger. Assume the transaction is being investigated by DG-IV and one of the U.S. antitrust agencies. Europe has aerospace companies that have received a great deal of state aid over the years from countries such as Germany, France and the United Kingdom. Under European Commission rules, a copy of the file must go to the antitrust authorities in each and every EU member state. American companies involved in such an investigation might be unwilling to waive confidentiality for fear that some of their sensitive information will end up in the hands of the companies that receive

state aid. The concern exists because the U.S. authorities usually insist on the production of a great deal of extremely sensitive information in investigations, while the Europeans frequently are satisfied with far less information. It does not necessarily matter if the fear of improper disclosure is well-founded. The perception -- and the harm that would come with the disclosure -- may be enough to justify not waiving.

There are other situations where refusing to waive might make sense. Assume that it appears that one of the reviewing jurisdictions has already made up its mind to oppose the deal, while the other seems to have an open mind. The merging parties might want to keep the undecided Agency from being influenced by the opposing agency. Of course, in some circumstances the judgment on waiver might go the other way. It may be that the undecided Agency might be able to convince the one that seems not to have an open mind.

The Agencies need to do more to help the business community (and their lawyers) better understand the cooperative process, with particular emphasis on how voluntary confidentiality waivers can be beneficial to merging parties. After all, the agencies have a much better idea of the nature of the information sharing and cooperation process than do merging parties and their counsel. This lack of transparency makes it difficult to assess the benefits of voluntary waivers to merging parties -- notwithstanding the Agencies= assurances that it is in the clients= best interests. To many experienced practitioners, the Agencies have not made the case for merging parties to agree to voluntary waivers as a general matter, much less in specific transactions.

Competition law authorities frequently tout avoidance of inconsistent remedies as the benefit that merging parties will derive from a voluntary waiver of confidentiality. There is a real question, however, as to how frequently situations arise in which there is a realistic prospect of inconsistent remedies that could be avoided by closer coordination through voluntary waivers.

Many cases involve different production assets serving different geographic areas, so that relief will be jurisdiction specific. In such cases, the Agencies have yet to make the case for cooperation and voluntary waivers to avoid inconsistent results.

The most common situation of inconsistent results is where one Agency challenges a transaction and the other does not. In most instances, however, the inconsistency in result is more apparent than real, since the facts vary among the jurisdictions involved, this is recognized by each side, and no authority feels aggrieved about the action taken by the other. Indeed, there are very few situations where there have been complaints about inconsistent results. One situation where inconsistency of result was controversial was Boeing=s acquisition of McDonnell Douglas. The European Commission=s high profile decision to challenge the transaction was attacked by some on this side of the Atlantic, where the deal was viewed as competitively benign, as reflecting an industrial policy favoring a Anational champion≅ rather than the principled application of EU competition law principles. Some Europeans viewed the lack of an FTC challenge as inexplicable, given that agency=s aggressive enforcement posture in many other merger cases. Such disputes, however, are quite rare. Another situation where conflict can arise over inconsistent results involves the imposition by the competition law authorities of one jurisdiction of a remedy that is implemented within the territory of another jurisdiction. A decade ago, the FTC provoked a dispute with Canada in the *Institute Merieux* case (FTC Dkt. No. #3301 (1992)), wherein the FTC imposed a remedy in a merger case that had to be implemented in Canada without first consulting with Canadian authorities. Today, such consultation would occur as a matter of course, with the FTC or Justice Department insisting on the parties= permission for such consultation, if required, before accepting such a settlement.

The ICPAC paper refers to a possible analogy in the domestic context arising from the protocol between the state attorneys general and the federal antitrust enforcement authorities

concerning voluntary waivers of confidentiality so that the states can have access to H-S-R materials and the ability to discuss those materials with the federal agency personnel, particularly economists. There are good reasons why many experienced practitioners view the state protocol as unsatisfactory for merging parties.

The protocol is used widely not because it is viewed as effective, but because the states have essentially pushed the private bar and the business community into doing so, by their unremitting hostility to anyone who asks what benefit their client will obtain before agreeing to the waiver. Over time, an increasing number of parties have acceded to state requests, further enhancing state expectation that waivers will be forthcoming, and making it more difficult to say no in the next merger.

The protocol was touted as providing a substantial benefit to merging parties, because it would enable them to avoid numerous, inconsistent document and information requests from a number of states as well as from the federal reviewing agency. The fact is that in many mergers, state attorneys general have issued CIDs seeking information not called for by federal Second Requests.

In theory, avoidance of inconsistent remedies might be a benefit of the protocol. The fact is that there is not much of a danger of inconsistent federal/state remedies. By contrast, there is a danger that allowing state attorneys general a Aseat at the table≅ simply gives them more leverage to demand relief that goes beyond what the federal authorities find sufficient. The result is that in some mergers, merging parties have been agreeing to more divestitures or other relief, often to resolve state concerns that have little, if anything, to do with competition law and a great deal to do with obtaining economic benefits for the state in question.

This is not to say that invoking the federal/state merger protocol is always inconsistent with the parties= interests. Rather, there have been situations recently where state attorneys

general have taken more measured positions on mergers than the federal agency involved, and their presence has helped the parties to complete mergers with less extensive divestitures than if the states had not been involved in the process. Whether it is useful to facilitate the involvement of state attorneys general by consenting to the protocol is a question the answer to which may vary depending on the specific facts of the matter and the predilections of the federal agency and state attorneys general involved.

Finally, the ICPAC paper refers to the possibility of applying the principle of Acomity≅ to remedies. The paper refers to the possibility of a deference treaty in which jurisdictions whose interests are less directly affected by the merger or with which the merging parties have few jurisdictional contacts defer to remedies ordered by another jurisdiction more directly affected or with greater jurisdictional contacts. We are dubious that any jurisdiction will agree to such deference in any case where there is a basis under its law to assert jurisdiction over the transaction, and the merger is perceived to have an anticompetitive effect in its territory. This is particularly so where there is concern that the remedy applied by another jurisdiction may not fully resolve the problem. The ICPAC paper acknowledges as much.

To be sure, there are situations short of a deference treaty where deference could occur through a combination of comity and (presumably) assent from the merging parties, with less effected jurisdictions deferring investigation or action in the first instance while the parties negotiate relief with more effected jurisdictions. For example, in the Kimberly Clark/Scott Paper transaction, Canada effectively deferred taking action and ultimately was satisfied that the U.S. remedy resolved the Canadian competitive concern. Likewise, in 1998, the European Commission relied on a U.S. consent decree in the Halliburton/Dresser transaction as an adequate solution to a perceived global problem in drilling fluids. Finally, the FTC included polymer bearing products in the 1998 Consent Order in the Federal Mogul/T&N transaction at

Federal Mogul=s request to respond to concerns raised by the FCO as to potential competitive effects on the dry bearings market in Germany.

It is far from clear that such deferrals will prove practical in many deals. In particular, mergers are usually time-sensitive and the merging parties will not have absolute assurance that provisional deferral will result in a Aone-stop-shop≅ since the less effected jurisdictions will invariably reserve the right to investigate and take further action if the relief negotiated by the lead jurisdiction is perceived to be inadequate.[4] The parties will therefore frequently choose to take on the additional burden of multiple, simultaneous investigations, if the only alternative is to defer some investigations and run the risk that the deferring jurisdictions will deem the settlements already reached to be inadequate and then insist upon more time.

III. RECOMMENDATIONS FOR U.S. INTER-AGENCY COORDINATION AND INTERNATIONAL TARGET GROUPS/CONSTITUENCIES.

In working toward the changes outlined above, the United States must present a consistent message to the rest of the world if serious progress is to be made. This requires both substantial coordination between the various United States government agencies and private groups involved in the formulation of competition and trade policy as well a targeted strategy for conveying this message in the international arena.

[4] Indeed, two of the foregoing examples are illustrative of this risk as well. In Kimberly Clark/Scott Paper, for example, Mexico was not satisfied that the U.S. remedy adequately dealt with competitive issues in Mexico and, after pursuing its own investigation, Mexico ultimately required the divestiture of an additional plant. Likewise, in Halliburton/Dresser, the U.S. authorities did not rely on the European Commission=s determination that there was no competitive problem in Alogging-while-drilling≅ services, and therefore required a global divestiture in that segment.

It is our impression that the Antitrust Division of the Justice Department and the Federal Trade Commission have done a good job of presenting a uniform and coordinated message in consulting with other nations= enforcement agencies and in participating in the work of international organizations. However, there are several other United State government agencies whose work touches on antitrust enforcement especially in the international arena. Such agencies whose work touches on antitrust and merger enforcement in particular include the United States Trade Representative, and the Departments of State, Defense, Transportation, Commerce, and the Treasury. These agencies all discuss antitrust issues in a variety of contexts in which they often have differing interests and levels of expertise in comparison to the enforcement agencies themselves. Finally, there are a myriad of private groups and individuals that have contact with foreign and international competition policymakers on these issues. These range from local, state, and federal bar associations to trade associations, academic and policy-oriented groups, as well as individuals. With so many voices being heard, greater coordination will be needed to move the developing merger system in the direction outlined above.

The message of objective jurisdictional triggers, minimization of filing burdens, limited harmonization, greater use of positive comity, and non-coercive coordination of investigations and relief must be conveyed at every opportunity to halt the adoption of even more conflicting and burdensome merger review regimes and to promote the reform of existing regimes. The United States enforcement agencies should use the opportunity to advance this agenda in all of its formal and informal contacts with its sister agencies around the world. These contacts frequently arise during bilateral consultations with other enforcement agencies, longer term technical assistance programs with enforcement agencies in developing and transition economies, and through discussions in multilateral fora where merger issues are reviewed such as in the work of the Organization of Economic Cooperation and Development, the North

American Free Trade Area, the Asia Pacific Economic Cooperation, the United Nations Conference on Trade and Development. If the United States government speaks with a single responsible voice, it also can effect change through influencing the direction of the World Bank, the International Monetary Fund, and regional inter-governmental lenders which often advise or impose competition policy reforms on borrowers as part of structural adjustment programs.

Opportunities to halt the spread of conflicting and burdensome regimes and to promote the reforms outlined above will arise in the myriad of negotiations touching on competition policy in which the United States participates on a daily basis. These current or anticipated negotiations where these issues may arise include sector specific codes under the General Agreement on Trade and Services, multilateral and bilateral investment treaties, the ongoing Free Trade of the Americas working groups, and the negotiation of antitrust cooperation and positive comity agreements.

The United States government also should continue to take advantage of every opportunity to use private and informal fora to convey a consistent message to the rest of the world of the need for a consistent and coherent system of national merger controls and to build consensus with foreign enforcers, policy makers, and practitioners. In recent years, government officials have been featured at events as diverse as the Fordham Corporate Law Institute, law school symposia, practitioner conferences, bar association programs, more informal and off the record discussions, trade association meetings, and all manner of speeches. We urge appropriate agency officials to continue to bring a message of minimization and sensible jurisdictional limits before the public in both the United States and abroad and to explicitly seek to build support for change.

In particular, working toward a common position with the European Union should be a priority. The EU is a source of both consolidation and proliferation of merger regimes. The EU

Merger Regulation has been one of the single most helpful developments creating the very real possibility of Aone stop shopping≅ in lieu of multiple national review. However, the EU approach is itself different from that of the United States and has served as a model for other countries with mixed results. EU member states have reacted by introducing their own national merger control regimes to address transactions not covered at the community level. There has been no actual harmonization of member state merger regulations producing greater disparity and burden than ever before. In addition, non-member states have often looked to all aspects of EU competition policy, including merger regulation, as an attractive model to implement for their own economies. Too often, these countries have either implemented the wrong lessons of EU-style merger control or lacked the resources, expertise, or restraint that the EU itself has shown. Finding common ground with the EU on the burdens and benefits of merger regulation thus hold forth the greatest promise of halting the tide of even more outlandish merger control regimes around the world and allowing existing systems to regulate competitive abuses without unduly burdening the vast majority of transactions.

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