Joint Comments of the American Bar Association
Section of Antitrust Law and Section of International Law on the
Competition Bureau Canada's Merger Enforcement Guidelines:
Draft for Consultation, Dated June 2011

August 30, 2011

The views stated in this submission are presented jointly on behalf of the Section of Antitrust Law and the Section of International Law. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, therefore, may not be construed as representing the policy of the American Bar Association.

The Section of Antitrust Law and the Section of International Law (together, the "Sections") of the American Bar Association ("ABA") respectfully submit these comments to the Competition Bureau Canada (the "Bureau") as part of its consultation concerning the Merger Enforcement Guidelines: Draft for Consultation, Dated June 2011 (the "MEGs"). Overall, the Sections believe the MEGs will be useful to parties before the Bureau, while also furthering the advancement of international best practices concerning state-of-the-art merger review.

The Sections commend the Bureau's efforts to update the MEGs to better reflect current Bureau merger review practices, to incorporate developments in law and economics since the 2004 MEGs, and, where appropriate, to reach consistency with recently revised merger review guidelines in other jurisdictions, including the United States. The Sections believe the MEGs make substantial steps towards achieving each of these goals – building on the strengths of the 2004 MEGs and providing helpful additional detail on unilateral and coordinated effects, monopsony power, acquisitions of minority interests, vertical merger analysis and other issues. In addition, the Sections welcome the added detail concerning the Efficiency Exception and commend the Bureau for formally incorporating into the MEGs much of the substance from the Bulletin on Efficiencies in Merger Review.

The Sections support the Bureau's elaboration of its competitive effects analysis but do not endorse the extent of the MEGs' de-emphasis of market definition as a necessary and fundamental element of merger review. Proposed new language in the MEGs suggests that market definition may be unimportant or unnecessary in certain cases in which the Bureau nonetheless finds a likelihood of anticompetitive effects. Market definition should be restored in the MEGs to its essential, issue-framing analytical role. With respect to non-horizontal mergers, the MEGs' discussion of vertical mergers is more precise and useful than the discussion of conglomerate mergers; the Sections respectfully recommend removing the discussion of
conglomerate mergers. Elaboration on the Section's views and recommendations on these and other issues is offered below.

Part 1: Definition of Merger

Section 91 of the Competition Act defines a "merger" as "the acquisition or establishment, direct or indirect, by one or more persons . . . of control over or a significant interest in the whole or part of a business . . . ." The MEGs note that "control" relates to de jure control (as defined in the Competition Act) while "significant interest" relates to "the ability to materially influence the economic behaviour of the target business." It is unclear why an ability to influence a business, however, would necessarily constitute an "interest" in that business. An "interest" generally is understood as an interest in the economic performance of the business or its underlying assets.

The factors listed in ¶1.6 of the MEGs have various objectives and effects, not all of which involve an ability to influence the business (e.g., the dividend or profit share of the minority interest and access to confidential information, neither of which, in and of itself, conveys any ability to influence the behavior of the target business). The Sections do not have a position on the proper interpretation of the statutory language, but note that the factors in ¶1.6 relate both to an ability to influence, as well as rights to participate in the economic fruits of the enterprise and to gain access to information concerning the business. Thus, some clarification may be appropriate.

With respect to whether interlocking directors constitute an acquisition or establishment of a significant interest, ¶1.16 indicates that the Bureau will look to the factors set out in ¶1.6 and any other relevant factors. Virtually none of the factors set out in ¶1.6, however, appear to be relevant to an assessment of the impact of the interlocking directors. Rather, ¶1.6 lists additional factors, which would tend to indicate an ability to materially influence the target business. The Sections also suggest that it would be useful to consolidate, or clarify the relationship between, the ¶1.6 factors and Part 10 of the MEGs, which sets out the framework for analysis of both interlocking directors and minority holdings.

Part 3: Analytical Framework

Pursuant to the MEGs, market definition is not required in every merger analysis. The Bureau's market power assessment "may involve . . . defining the relevant markets" but "[m]arket definition is not necessarily . . . a required step" in the analysis. (¶3.1) The MEGs add that "[w]hile the Bureau generally defines markets, it may elect not do so in cases in which other reliable evidence of competitive effects is available." (¶3.3)

The Sections continue to be concerned about this approach to market definition. In Comments to the Discussion Paper on the MEGs Consultations ("Prior Comments"), 1 the Sections recommended that the Bureau "reaffirm in the MEGs that market definition is an

1 Comments of the ABA Sections of Antitrust Law and International Law to the Canada Competition Bureau’s Discussion Paper for the Merger Enforcement Guidelines Consultations (December 22, 2010) (hereinafter “Prior Comments”).
indispensable element in any decision to challenge a transaction."\(^2\) The Sections submit that the MEGs should continue to underline the importance of market definition. Rigorous application of the market definition exercise helps to ensure that the Bureau will identify the competitive alternatives available to consumers, determine the individual and collective importance of those alternatives, and ultimately strengthen the Bureau's ability to make the right decisions in merger cases.\(^3\) An analysis of competitive effects as such is uninformative—certainly as to magnitude—absent an indication of the market or markets in which those effects have supposedly occurred.

The Sections recognize that the Bureau's approach to market definition parallels principles stated in the U.S. 2010 Horizontal Merger Guidelines,\(^4\) but the U.S. antitrust agencies affirm the relevance of market definition to an extent not found in the revisions to the MEGs. Section 4 of the U.S. 2010 Guidelines states: "In any merger enforcement action, the Agencies will normally identify one or more relevant markets in which the merger may substantially lessen competition."\(^5\) This sentence was not contained in the draft version that the U.S. agencies had previously issued for public comment. The Sections urge the Bureau to adopt into the MEGs a similar re-confirming principle regarding the importance of market definition.

In ¶3.3 of the MEGs, the Bureau identifies four situations in which it asserts that market definition may not be necessary. One is where market power will clearly not result under any plausible market definition—a conclusion that readily applies to the vast majority of mergers. The absence of any need to define the relevant market in cases that on their face warrant no significant competitive scrutiny is incontrovertible—although even in such cases there is usually an implicit working market definition. The second involves mergers in which market power clearly will result under all plausible market definitions. With regard to mergers falling in this category, it is not that market definition is an unnecessary analytical step; what is unnecessary is identifying the precise relevant market from within the range of plausible markets. This is different from saying that market definition is unnecessary. In any event, in the Sections' experience, such mergers are highly unusual.

Third, the MEGs state that the Bureau may rely on evidence of a "material price increase" after a completed merger. As a threshold matter, the Sections recommend that the Bureau clarify that a simple "before and after" analysis of pre- and post-merger prices showing a price increase would not be sufficient proof of an anticompetitive effect. Rather, the Bureau would rigorously assess whether other factors (e.g., rising input costs) materially contributed to the price increase, or would have been expected to affect prices in the absence of the merger, and only after ruling

\(^2\) Id. at 2-3 (emphasis in original).
\(^3\) See id.
\(^5\) Id. at sec. 4. See also Remarks of J. Thomas Rosch, Commissioner, Federal Trade Commission, “Theoretical and Practical Observations on Cartel and Merger Enforcement at the Federal Trade Commission,” presented at the George Mason Law Review’s 14th Annual Symposium on Antitrust Law (Feb. 9, 2011) at 20 (noting “the importance of market definition in Section 7 [of the Clayton Act] cases” and that “the antitrust agencies must … carefully consider what the relevant market is before going into court”).
out other potential causes would it conclude that these effects were the result of market power created by the merger.

The Sections further observe that, rather than obviate the need to define markets, competitive effects analysis of consummated mergers highlights the value of market definition. When prices rise after a completed merger, a key antitrust question is whether the new price is an effect of market power created by the merger or, alternatively, the result of factors irrelevant to the merger. The market definition exercise can provide important information for answering that question.

Defining the market establishes the structure within which to analyze the likelihood of anticompetitive effects – an analysis that can tend to corroborate or call into question inferences drawn from actual post-merger evidence. If, under a traditional analytical approach starting with market definition, a merger is found likely to result in market power, then evidence of actual post-merger price increases would carry relatively more weight as proof of an anticompetitive effect. If, on the other hand, the market definition exercise does not lead to a reasonable expectation of post-merger market power, then a post-merger price increase may require enhanced scrutiny into its causes before the conclusion could reasonably be drawn that the price increase is an anticompetitive effect of the merger.

Fourth, where "the choice among several plausible market definitions may have a significant impact on market share . . . the Bureau may give greater weight to evidence regarding likely competitive effects that is not based on market share and concentration." (¶3.3). Where one or more plausible markets result in share and concentration metrics that do not reasonably suggest a likelihood of anticompetitive effects, however, it is not apparent on what basis the Bureau would conclude that effects evidence not consistent with share and concentration should be ascribed greater weight. For purposes of transparency, should the Bureau challenge a merger of this type but not define the market, the Sections respectfully urge the Bureau (i) to identify each plausible relevant market and (ii) explain why the competitive effects evidence supports the challenge despite the existence of plausible markets involving low market shares and concentration.

Part 4: Aftermarkets and Two-Sided Markets (¶¶4.17 - 4.18)

The MEGs' discussion of product market definition (¶¶4.10 - 4.18) includes two new paragraphs concerning special circumstances that might cause a hypothetical monopolist's pricing incentives for products in the candidate market to be affected by the prices of other products that are not substitutes for the products in the candidate market. Paragraph 4.17 concerns secondary markets, or aftermarkets for consumable products that are used in conjunction with durable goods, and ¶4.18 concerns two-sided markets in which networks or platforms bring together two distinct groups of users with different demand characteristics.

Paragraph ¶4.17 indicates that the Bureau may define a single "systems market" encompassing both primary and secondary products. It further states that a single market is likely "when customers buy both products from the same supplier." Conversely, it states that "when customers purchase the primary and secondary products from different suppliers, and the primary and secondary products of different suppliers are generally compatible, it is more likely
that the Bureau would find separate product markets for the primary and secondary products." It is not clear, however, that the existence of separate sellers is likely to correlate with single-product product markets. For example, customers may compare the total cost of ownership between Vendor A, which sells the durable good with a contract for the purchase and supply of the consumable good, and Vendor B, which sells only the durable good and whose customers purchase the consumable good from third parties. The analysis suggested in the MEGs could lead to the incorrect conclusion that Vendor A does not compete with Vendor B in a systems product market notwithstanding the fact that customers view them as viable alternatives.

The Sections respectfully recommend that the MEGs take a more general approach to special circumstances when highlighting that market definition should be sufficiently flexible to account for complex pricing incentives. Specifically, the Sections suggest that ¶¶4.17 and 4.18 could be replaced with a statement that the Bureau will adjust its analysis to account for special circumstances affecting the merging parties' actual pricing incentives and mention aftermarkets and two-sided markets as examples. The Sections note that footnote 4 of the U.S. Department of Justice and Federal Trade Commission 2010 Horizontal Merger Guidelines states that, to account for special circumstances, the U.S. agencies may use the concept of a "hypothetical profit-maximizing cartel comprised of the firms (with all their products) that sell the products in the candidate market." The Bureau may wish to adopt a similar approach, or provide further detail concerning the mechanics of the analysis without articulating rules of thumb, which could lead to misleading results in some instances.

Part 6: Coordinated Effects (¶¶6.23 – 6.39)

The MEGs contain numerous revisions to the 2004 MEGs with regard to coordinated effects. The Sections view the proposed revisions to be helpful for understanding the Bureau's methodology. Paragraph 6.27 states a “materiality” requirement for finding likely coordinated behavior. Further explanation of the materiality standard would provide helpful guidance for firms contemplating a combination.

Identified in ¶¶6.26-6.27 are factors that are necessary for and conducive to successful coordination (along with the caveat that the mere presence of these factors “is not sufficient to conclude that there are competition concerns”). This discussion and that which follows (see, e.g., ¶¶6.29-6.33) provide helpful clarification of the Bureau's framework for assessing the likelihood of coordination. The Sections welcome the Bureau’s articulation of a comprehensive analytical approach – taking into account the totality of the circumstances and market conditions – in lieu of application of a rote checklist of factors.

The Sections recommend that the first sentence of ¶6.27 be revised as follows: “Competition is likely to be prevented or lessened substantially when a merger materially increases the likelihood of coordination, including the likelihood that any pre-existing coordination might be more readily sustained." This change clarifies the applicability of the materiality standard to markets already characterized by coordination. It also reinforces the MEGs' welcome discussion of maverick firms, which, depending on the circumstances, a merger in an oligopolistic market may eliminate or create. The text regarding how the Bureau identifies maverick firms (¶6.38 and note 44) is especially helpful.
Organizationally, the Sections suggest that the first sentence of footnote 44 would be better placed in ¶6.38.\(^6\) We also suggest that the sentence in ¶6.38 that begins "Such a firm may have less" be combined with the second and third sentences of note 44 to create a new paragraph on possible means to identify a maverick within the context of coordinated effects analysis.\(^7\)

**Part 6: Anticompetitive Effects (¶¶6.1 – 6.9)**

The MEGs at ¶¶5.9 & 6.1 set forth safe harbor criteria under which the Bureau is unlikely to conduct a detailed merger analysis: a merger will not generally be challenged on the basis of unilateral concerns when the post-merger share of the merged firm is less than 35 percent, or on the basis of coordinated effects concerns when the four-firm concentration ratio is less than 65 percent or the post-merger share of the merged firm is less than 10 percent.\(^8\) While we support the use of safe harbors, the Sections raise a few considerations with respect to these proposed safe harbors.\(^9\)

The Sections note that the Bureau's continued use of a safe harbor based on market shares may result in a continued emphasis on market definition. The Sections consider this to be appropriate for the reasons outlined above, but note that such an emphasis seems inconsistent with what appears to be an attempt elsewhere in the MEGs to downplay the significance of market definition. A market share-based safe harbor is particularly appropriate for coordinated effects cases. The particular threshold proposed of a four-firm concentration ratio less than 65 percent and the post-merger share of the merged firm is less than 10 percent seems well below the level where coordinated effect concerns are likely to arise. Nonetheless, the proposed safe harbor still provides useful guidance to merging parties.

The Sections also support the Bureau's effort to define a safe harbor in unilateral effects cases and believe that an appropriately defined safe harbor would provide useful guidance. Because unilateral effects analysis concerns the closeness of competition between products sold by the merging parties, a safe harbor that is defined by a metric that measures whether products

\(^6\) New ¶6.38 would read as follows: “Effective coordination may be constrained before the merger by the activities of a particularly vigorous and effective competitor (a “maverick”). A maverick firm places a higher value on the profits that it expects to earn by deviating from coordinated behaviour, compared to the profits that it expects to earn from coordinated behaviour. A maverick firm thus has a disproportionate incentive to deviate from coordinated behaviour and thereby plays a disruptive role and provides a stimulus to competition in the market.”

\(^7\) This new paragraph would read as follows: “Often a maverick firm is smaller than the main market participants, although it must be sizeable enough that its conduct affects the likelihood of successful coordination. Mavericks can often be identified through past behaviour, such as not following other firms’ attempts to increase prices or being among the first of firms to cut prices. Such a firm may have less to gain from coordination or be less threatened by punishments from rivals because of the kinds of products it sells, its cost structure, its degree of vertical integration, or its use of a different business model or technology. An acquisition of a maverick may remove this constraint on coordination and, as such, increase the likelihood that coordinated behaviour will be effective.”

\(^8\) These safe harbor criteria are largely unchanged relative to the 2004 Merger Enforcement Guidelines.

\(^9\) The Sections note that these safe harbors were not flagged as an issue by the Bureau in their previous call for comments (“Discussion Paper for the Merger Enforcement Guidelines Consultation”), and the Sections did not comment on that issue in their Prior Comments.
are close or distant competitors may be more accurate and useful than a safe harbor defined only by market share. While the Sections do not endorse any particular approach, customer diversion patterns, or a similar metric, could offer a sounder basis for a unilateral effects safe harbor. If, however, the Bureau elects to retain the 35 percent safe harbor for unilateral effects cases, the Sections believe that it is an appropriate level that will provide useful guidance for some cases.

**Unilateral Effects (¶¶6.10 – 6.22)**

The MEGs identify three types of market environments (see ¶6.12) under which unilateral effects are possible: differentiated product industries, homogeneous product industries, and bidding and bargaining markets. For each of these market environments, the MEGs articulate different types of competitive analyses that may apply. The Sections suggest that the Bureau reconsider this approach of delineating distinct market environments, each with its own set of relevant analyses, for the following reasons.

- The MEGs suggest that the competitive analyses and competitive concerns are likely to be unique to each of these three environments. The Sections believe, however, that the discussion of competitive effects and analyses in the MEGs generally apply to all of the market environments. This commonality of analyses across market environment stems in part from there being a continuum between the two extremes of differentiated and homogeneous products. The Sections suggest that the MEGs be modified to eliminate the suggestion of bright lines and discuss how different analyses may be more or less probative depending on the market structure.

- In characterizing bidding/bargaining markets as distinct from differentiated or homogeneous product markets, the MEGs imply that the competitive analysis involved in bidding/bargaining models does not depend on the degree to which the relevant products are differentiated. The Sections respectfully suggest, however, that bidding/bargaining models can be relevant in markets characterized by differentiated products as well as homogeneous products. Perhaps the MEGs could be clarified to acknowledge that markets can differ in multiple dimensions, such as the nature of the products (e.g., the degree of product differentiation) and the mechanism by which prices are set (e.g., bidding or bargaining models, or price-setting models such as Cournot or Bertrand models).

The Sections welcome the inclusion of the new discussion regarding bargaining and bidding models (¶¶6.21 and 6.22). The Bureau may wish to add that, when relying on bargaining or bidding models, it will often be appropriate to focus on a particular materially significant segment of customers as most likely to be affected by the merger, even if other customers are unlikely to be significantly affected (i.e., that competitive concerns may involve aspects of price discrimination).
Part 4 and 7: Entry

Sufficiency

The first sentence in ¶7.7 speaks of entry "on a scale and scope that would be sufficient to eliminate a material price increase." For clarity and consistency with other changes made to Part 7, the Sections suggest replacing the word "eliminate" with the phrase "deter or counteract." The second sentence of ¶7.7 identifies "minimum viable scale" (MVS) as a factor relevant to the Bureau's evaluation of the sufficiency of entry. The Sections believe that the MVS concept fits better within the discussion of the likelihood of entry as it implicates the costs, risks, and profitability of new entry. Sufficiency of entry, on the other hand, concerns the size one or more entrants must reach to deter or counteract a price increase, which is a concept different from MVS. The Sections respectfully suggest that any discussion of MVS in the context of sufficiency of entry could cause some readers to incorrectly conclude that MVS is the proper criterion for measuring the sufficiency of entry. The Sections believe that a general discussion in ¶7.7 of constraints or limitations on new entrants' capacities or competitive effectiveness would be helpful. The concept of MVS, on the other hand, fits within the ¶7.6 discussion of the risk and reward calculation confronting a new entrant.

Likelihood

The MEGs’ discussion of the likelihood of entry in ¶¶7.4 to 7.6 does not specifically address two issues that the Sections believe are pertinent to the analysis. First, the Sections suggest that the MEGs be revised to include a discussion of whether customers are likely to support an entrant's investments or guarantee it a needed volume of sales once it enters. Furthermore, it would be helpful for the MEGs to address how a potential entrant's views of potential incumbent responses may affect the likelihood of entry. Both topics are addressed in other parts of the MEGs (for example, in the Part 8 discussion of countervailing power and in Appendix A, which concerns strategic behavior). Because customer and incumbent responses are often crucial to the determination whether an entrant would likely obtain sufficient sales to recover costs and become profitable, reference to customer and incumbent responses within the MEGs’ discussion of the likelihood of entry would be helpful.

Part 9: Monopsony Power (¶¶9.1 – 9.4)

The Sections welcome the addition to the MEGs of a separate discussion of monopsony power. This concept is described in ¶¶2.4 & 9.1 as the ability to profitably depress prices paid to sellers to a level that is below the competitive price, with a corresponding reduction in the overall quantity of the input produced or supplied or a corresponding reduction in any other dimension of competition. Footnote 48 provides that cases where the supply curve is perfectly inelastic, such that a price decrease below competitive levels does not result in a decrease in output but only a wealth transfer, may also give rise to concerns. It is not clear why the MEGs make this point only with respect to buy-side market power and not also with respect to the more common focus of merger analysis: seller market power. The MEGs also do not clarify the nature and types of these concerns or the circumstances in which they might arise. The Sections urge the Bureau to provide further guidance in the MEGs on the concerns arising from the absence of output reductions.
The Sections suggest deletion of the clause "be able to profitably" from ¶9.2. The Sections believe it is appropriate to ask whether it would be profitable for the monopsonist to impose a price reduction, but see no need to impose a profitability test when assessing how sellers would respond. Indeed, there is no counterpart requirement to ask whether buyers would find it profitable to switch suppliers when facing a hypothetical monopolist.

The Sections support the addition in ¶9.4 of the list of factors that the Bureau will consider to determine whether the merged firm is likely to have the ability to exercise monopsony power. In particular, the Bureau has provided useful guidance about the interplay between the upstream and downstream markets, specifically its consideration of the extent to which downstream output profit reduction is large enough to reduce the merged firm's incentive to restrict its purchases in the upstream market. It is not clear, however, whether the Bureau will also balance the potential upstream output reduction with possible price reductions to consumers due to a price reduction to buyers and, if so, what factors it would take into account in this analysis.

The Sections question the purpose of the second bullet in ¶9.4, which seems to suggest that monopsony concerns are greater when there are many sellers and the sell-side price is likely competitive. When considering the buy-side market, it is the change in competition, not the pre-merger level of competition, that matters. Similarly, in the case of the sell-side market, monopsony concerns should be evaluated based on the change in competitive conditions as a result of the merger.

Part 10: Minority Interest Transactions and Interlocking Directorates

The Sections welcome the additional guidance provided in the MEGs on minority interest transactions and interlocking directorates and mention below a few clarifications for the Bureau's consideration.

The MEGs indicate that the analysis will begin with a preliminary examination of the transaction as a full merger (¶10.2). From a U.S. law perspective, minority holdings would be evaluated differently from a full merger, which typically entails substantial efficiencies from the integration of the businesses. The Sections respectfully suggest that the use of a full merger review as a screen may be cumbersome, often over-inclusive, and occasionally under-inclusive. The Sections agree, however, that ¶¶10.2-10.6 identify relevant factors and provide useful guidance concerning the Bureau's analytical approach.

If the Bureau retains the MEGs' two-step approach to partial acquisitions, some additional clarification would be helpful. For instance, where the Bureau concludes that a full merger would not likely prevent or lessen competition substantially the MEGs indicate that the Bureau would not generally engage in a more detailed analysis. While the Sections appreciate that there may be situations where a partial interest could raise substantive issues where a full merger would not, it appears that this would be limited to situations where competitors had partial interests in a business that could be used to facilitate coordination (whether that interest is with an upstream or downstream firm or in another competitor). The Bureau may wish to consider including this possibility in the MEGs. Moreover, to the extent that there are other factors that might cause the Bureau to undertake a more detailed analysis after concluding that a
full merger would not likely prevent or lessen competition substantially, it would be useful to set those out in the MEGs.

While the MEGs continue to refer to the 10 percent voting interest threshold for acquisitions of a "significant interest" (¶1.10), it would be desirable to state this more clearly as a "safe harbor" since it is unlikely that lesser ownership interests could implicate the statutory criteria of a "significant" interest or a "substantial" lessening or prevention of competition. The Sections encourage the Bureau to consider additional "safe harbor" guidelines regarding interlocking directorates. Such "safe harbors" could, for example, take the form of de minimis thresholds such as those found in Section 8 of the U.S. Clayton Act, which currently exempts interlocking directorates if competitive sales of either corporation are less than $2,686,700, are less than 2 percent of either corporation's total sales, or are less than 4 percent of each corporation's total sales. As an alternative, should the Bureau not wish to provide safe harbor guidance, the addition of examples in the MEGs would be helpful in order to illustrate the types of situations in which partial interests and/or interlocking directorates may be of concern to the Bureau.

The second sentence of ¶10.3, states that "the Bureau is not generally concerned when board representation ... occurs solely through 'independent' directors when the businesses do not compete". This sentence may be missing the word "or" between "directors" and "when the businesses do not compete" as each factor separately reduces or eliminates competitive concern. Alternatively, if there are situations in which the Bureau would be concerned where the interlocking directorates occur solely through independent directors, it would be useful to provide further explanation or examples.

Part 11: Non-Horizontal Mergers (¶¶11.1 – 11.9)

The MEGs provide new guidance on how the Bureau will assess non-horizontal transactions. The Sections believe Part 11's discussion of vertical mergers and analysis of foreclosure generally will be useful to merging parties. Paragraphs 11.4 to 11.7 and the first bullet of ¶11.9 identify relevant factors and provide sufficient structure and detail to illuminate the Bureau's analytical approach. By comparison, the Sections believe that Part 11's discussion of conglomerate mergers provides insufficient detail to be instructive, and may mislead readers by creating a false impression that conglomerate mergers are often problematic when, in the Sections' experience, conglomerate mergers rarely, if ever, raise competitive concerns. For this reason, the Sections respectfully recommend that the Bureau delete ¶11.8 and the second bullet of ¶11.9 concerning conglomerate mergers from Part 11 of the MEGs.

The Sections note that ¶11.8 does not provide any method of analysis to determine whether a conglomerate merger creates a firm with an incentive to engage in anticompetitive tying or predatory bundling of products. Likewise, the second bullet of ¶11.9 concerning when conglomerate mergers may facilitate coordination does not provide the specific guidance

10 15. U.S.C. § 19(a)(2). It is worth noting that the de minimis exemption was added in 1990 to address difficulties that companies were experiencing in adding qualified individuals to their boards, particularly women and minorities. Canadian companies face these same difficulties today, as evidenced by recent media reports.
necessary for any degree of predictability regarding the approach the Bureau will use to assess whether a merger is likely to facilitate coordination. In the Sections' experience, the rare instances when conglomerate mergers are deemed to result in anticompetitive effects are context-specific and often controversial. Mindful of the difficulty of framing accurate, general statements concerning such unique and unusual circumstances, the Sections respectfully suggest that it will be difficult to cure the vagueness of the MEGs' discussion of conglomerate mergers. For this reason, the Sections suggest that the Bureau limit Part 11 to a discussion of the potential for foreclosure effects from vertical mergers.

If, however, the Bureau concludes that the MEGs should address conglomerate mergers, the Sections recommend that the Bureau expressly note that the vast majority of conglomerate mergers are competitively neutral or procompetitive. In addition, the Bureau may want to acknowledge that, when it does examine conglomerate mergers, its analysis may be context-specific and guided by the particular facts of the case.

Part 12: The Efficiency Exception (¶¶12.1 - 12.35)

The Sections note that the Bureau is proposing to incorporate into the MEGs much of the guidance that is currently found in the Bulletin on Efficiencies in Merger Review. The Sections support the Bureau's desire to incorporate into a single document its approach to efficiencies analysis. This approach will help avoid any potential confusion or inconsistencies in the treatment of efficiencies under the Act and will allow for greater ease of reference.

The area of efficiencies is particularly challenging, and providing as much clarity as possible will assist all parties. In this context, the Sections are concerned that the Bureau has eliminated the discussion of its approach to weighing efficiency gains against the anti-competitive effects of a merger. While the Bureau has set out details on the types of efficiencies generally included in the trade-off, as well as a discussion of the price effects, it has removed all references to its approach to the wealth transfer aspect of the trade-off and has simply indicated in ¶12.28 that "the appropriate approach . . . depends on the circumstance of a particular case."

While the Sections recognize that merger review is heavily dependent on the facts of each case, they nonetheless believe the Bureau should explain whether, and when, it will follow the balancing weights standard established in Superior Propane. Moreover, the Sections believe that it would be valuable for the Bureau to include details regarding its likely assessment of which portion of the transfer will be included as part of the loss in surplus and how a weight will be assigned to that transfer.

The Sections appreciate the difficulty of anticipating the wide range of factual situations that might be involved in efficiency claims. However, removing the little guidance on wealth transfers that currently exists in the Bulletin would reduce the transparency of the analysis that

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12 Canada (Commissioner of Competition) v. Superior Propane Inc. (August 30, 2000), CT-1998/002 (Competition Tribunal).
the Bureau will conduct. Given that the Bureau is willing to examine efficiency claims when provided on a timely basis, as set out in ¶12.3, it would be of considerable assistance to the parties if further details were provided on this necessary component of the framework.

The Sections applaud the Bureau for its openness and transparency throughout the important process of incorporating substantive revisions to the MEGs. We hope the Bureau finds value in these comments and appreciate this opportunity to submit our views for your consideration.