The views expressed herein are presented on behalf of the Sections of Antitrust Law and International Law. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association (“ABA”) and, accordingly, should not be construed as representing the position of the ABA.

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I. Introduction

The American Bar Association Sections of Antitrust Law and International Law (“the Sections”) appreciates the opportunity to submit these comments on the public consultation version of the South African Competition Commission’s (the “Commission”) draft Guidelines for the Determination of Administrative Penalties for Failure to Notify a Merger and Implementation of Merger (the “Guidelines”), issued in February 2017.1 These comments reflect the Sections’ experience and expertise with respect to the application of merger control laws in the United States, the European Union, and numerous other jurisdictions and with important related international best practices, notably the International Competition Network’s Recommended Practices for Merger Notification and Review Procedures2 (“ICN Recommended Practices”) and the Organization of Economic Cooperation and Development’s Recommendation on Merger Review (“OECD Recommendation”).3

The Sections appreciate the substantial thought and effort reflected in the Guidelines, which the Sections understand have been prepared in response to “a growing number of cases of failure to notify a merger and/or implementation of mergers”4 contrary to South Africa’s Competition Act,5 and the Commission’s desire to “deter firms from ….prematurely implementing notifiable mergers” and to establish a “methodology setting out its approach ….in


4 Guidelines, supra note 1 at 3.

5 Competition Act No. 89 of 1998, as amended (the “Act”).
determining penalties in prior implementation cases.”6 The Sections commend the Commission for its desire to increase transparency by issuing public guidelines on, and for establishing a public consultation process regarding, this important topic, and offer these comments to share their experience and provide suggestions to enhance the effectiveness of the Guidelines and their conformity with international best practices.

II. **Distinguishing Failure to Notify and Premature Implementation**

A. **Distinguishing Relative Culpability in Part 5 of the Guidelines**

The Guidelines indicate that their “primary objective” is to “provide some measure of transparency, certainty and objectivity in how the Commission will determine administrative penalties in non-notification and prior implementation cases.”7 This is a laudable and worthwhile goal. In the Sections’ view, however, the Guidelines would be improved by distinguishing between the analysis of — and penalties for — instances of failure to notify versus instances of premature implementation. There is a principled basis for distinguishing between these two forms of conduct.

Failure to notify an otherwise reportable transaction generally involves, at best, negligence by the transaction parties in their awareness of local laws applicable to their proposed transaction and, at worst, a deliberate attempt to evade competition law scrutiny of the transaction. In the instance of South Africa, the notification obligations found in section 13A of the Competition Act have been in force for nearly twenty years and, the Sections understand, have been the subject of several well-publicized enforcement actions in South Africa.8 As a result, it is reasonable to expect that parties to the intermediate or large mergers that are caught by section 13A of the Competition Act are aware, or ought to be aware, of their notification obligations under the Act, which are based on transparent and predictable asset and/or turnover amounts within South Africa. The notification obligations set out in the Act and relevant regulations provide what is generally a bright-line test for notification, consistent with the advice of the ICN Recommended Practices.9

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6 Ibid.
7 Guidelines, supra note 1 at section 3.1.
8 See, e.g., The Competition Commission v Aveng (Africa) Limited t/a Steeledale and others (84/CR/DEC09), Competition Commission v Deican Investments (Pty) Ltd and New Seasons Investments Holding (Pty) Ltd (FTN151Aug15 / Competition Commission v Dickerson Investments (Pty) Ltd and Nodus Equity (Pty) Ltd (FTN127Aug15), Competition Commission and Fruit & Veg Holdings (Pty) Ltd and others (Case No. FTN131Sep15), Competition Commission / Edgars Consolidated Stores Limited and others (95/FN/Dec02), Competition Commission / Structa Technology (Pty) Ltd and others (83/LM/Nov02), Competition Commission / The Tiso Consortium and others (82/FN/Oct04), Competition Commission v Standard Bank of South Africa Ltd (FTN228Feb16).
9 ICN Recommended Practices, Recommended Practice II.A, Comment 1 (“competition agencies and the efficient operation of capital markets are best served by clear, understandable, easily administrable, bright-line tests”) (emphasis added).
Unlike the relatively clear provisions for merger notification, in many instances what constitutes an impermissible premature implementation of a transaction can be very difficult to determine *ex ante* with certainty in the context of ordinary commercial practice. The Guidelines also caution that the various examples of premature implementation that are provided “do not constitute an exhaustive list of instances of prior implementation.”\(^\text{10}\) Given this uncertainty, the Sections believe that the culpability associated with premature implementation is to be distinguished from that relating to failure to notify. This is particularly so in instances where transaction parties have voluntarily notified the deal to the Commission, thereby eliminating any suggestion of their willfully evading competition law scrutiny, and the buyer is engaged in routine due diligence or independent integration planning efforts. The line between permissible integration planning and unlawful integration is also very fact specific. The Guidelines note, for example, at section 5.10.11 that premature implementation may occur where a proposed buyer “becomes involved in the strategic planning of the target firm, identifies target markets, develops new products or services, takes charge of ordering raw materials, amends procurement policies or becomes involved in customer relations.”\(^\text{11}\) Some of these activities could be permissible to undertake jointly (e.g., a joint procurement program) independently of the merger and in those circumstances should not necessarily be condemned as unlawful premature implementation.

Consequently, the Sections respectfully suggest that the Commission consider amending Part 5 of the Guidelines to distinguish the varying levels of culpability between failure to notify an otherwise reportable transaction and premature implementation. The Sections suggest that doing so should also have incremental effects on the penalty analysis set out at Part 6 of the Guidelines, as discussed below. In addition, some of the examples listed\(^\text{12}\) are more suited to instances of failure to notify transactions, while others are instances of premature implementation, and the Sections believe that the Guidelines would be improved if this distinction were drawn more carefully.

The Sections also believe that the Guidelines would be improved if the Commission were to identify safe-harbor measures (e.g., non-disclosure agreements, clean teams, standard interim covenants) available for use in due diligence and other pre-closing phases of the transaction, so as to provide assurance that routine due diligence, integration planning, and other transaction-related activities would not be viewed by the Commission as creating exposure to assertions of premature implementation.

**B. Penalties Analysis in Part 6 of the Guidelines**

The Sections agree with the reference in section 6.3 of the Guidelines that the Commission should “first look at the nature of the conduct which gave rise to the prior implementation or non-notification contravention” since “[a] prior implementation contravention

\(^{10}\) Ibid. at section 5.11.

\(^{11}\) Guidelines, supra note 1 at section 5.10.11.

\(^{12}\) Ibid. at section 5.10.
can take different forms and the Commission will consider how the prior implementation occurred.”

This approach appears to be consistent with the Sections’ views, expressed above, on the different degrees of culpability between failure to notify and premature implementation.

The proposed penalty levels in the Guidelines are quite significant. The Sections understand that the proposed penalty range for intermediate mergers would be from double the applicable filing fee to as high as 5 million Rand (approximately US$15,000 – US$375,000), and that the proposed penalty range for large mergers would be from double the applicable filing fee to as high as 20 million Rand (approximately US$52,000 – US$1,500,000).

First, it is not clear why larger mergers should automatically be subject to a higher maximum penalty, when the conduct being penalized (failure to notify or premature integration) does not relate to the size of the transaction. The proposed penalty at the high end of the large merger range is very significant — 20 million Rand is well above the fine levels typically imposed by the US antitrust agencies in “gun-jumping” cases, most of which have ranged from US$180,000 – US$720,000 in recent years (absent other culpable conduct). While the Act provides for penalties of up to 10% of annual turnover in South Africa for a failure to adhere to the requirements of Chapter 3, at the high end of both ranges, the maximum penalties are well in excess of the financial penalties provided for the various Chapter 7 offences, as set out in sections 74(1)(a) and 74(1)(b) of the Act. Accordingly, the Sections respectfully suggest that the range of penalties should be consistent as between large and intermediate mergers.

Moreover, and consistent with the distinction that the Sections recommend be made between failure to notify and premature implementation, we note that each of the penalty provisions in sections 6.9 and 6.10 of the Guidelines begins with the phrase “[f]or prior implementation of intermediate mergers” and “[f]or prior implementation of large mergers,” before stating the relative penalty ranges. Neither of these penalty provisions refers explicitly to failure to notify. The Sections therefore respectfully recommend that the Guidelines provide

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13 Ibid. at section 6.3.
14 Ibid. at sections 6.9 and 6.10.
15 Under the U.S. Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (the “HSR Act”), a civil penalty of not more than $40,000 per day (adjusted annually based upon U.S. gross domestic product) may be imposed for each day the parties are in violation of the HSR Act. This time period is calculated from the date the parties consummated the transaction in violation of the HSR Act to the day on which the HSR Act waiting period expires or is terminated by the reviewing agencies. The adjusted maximum penalty for 2017 is $40,456 per day, however in practice, penalties actually imposed are significantly lower than the statutory maximum. Although both parties are subject to penalties, historically the Federal Trade Commission (“FTC”) has sought penalties only from the acquiring person. The FTC also has a “one free bite” policy, under which it may elect not to seek civil penalties from a party for its first failure to file if the failure was inadvertent.
16 Competition Act No. 89 of 1998, as amended, section 74(1).
17 If there are valid policy grounds for imposing larger fines based on the value of the transaction, it would be useful if the Commission could explain the policy rationale.
18 Guidelines, supra note 1 at sections 6.9 and 6.10 (emphasis added).
explicit penalty ranges for both premature implementation and failure to notify and that the penalty range for premature implementation should be lower than for failure to notify.

III. Aggravating and Mitigating Penalty Factors in Part 6 of the Guidelines

The Sections applaud the Commission’s attempt to bring greater transparency to the fining process by outlining a series of aggravating and mitigating factors in the Guidelines. Generally speaking, the Sections agree with these various factors, subject to the following observations that are offered to help improve the consistency and predictability of the Guidelines:

- Section 6.14.1 provides for an aggravating factor where parties “failed to notify the merger transaction in order to … obviate the merger approval process at the outset.” However, section 6.14.3 also creates an aggravating factor where parties “were trying to avoid scrutiny of the regulator.” In the Sections’ view, these aggravating factors target the same underlying conduct (i.e., a willful attempt to avoid competition law scrutiny) and should be combined within a single aggravating factor to improve transparency, avoid potential conflict in the application of the Guidelines, and avoid potential double-penalization of the same underlying conduct.

- Section 6.14.4 creates an aggravating factor where “the duration of the contravention was long.” It is not clear to the Sections why “duration,” considered alone, should be an aggravating factor. If the merging parties were unaware of the notification requirement, it is unclear what would prompt the merging parties subsequently to realize their failure to file on a shorter timeframe as compared to a longer duration. Recognizing that the underlying failure to file itself will already be penalized through the imposition of a fine, the Sections believe that length of time, should only be an aggravating factor where there is evidence that the parties intentionally chose not to notify the transaction.

- Section 6.14.5 provides for an aggravating factor where “the transaction resulted in the substantial lessening of competition or raises public interest concerns,” and section 6.16.8 creates a mitigating factors where “the outcome of the merger hearing regarding the transaction was ultimately an[đ] unconditionally approved, this would be indicative that no harm or undue profit arose as a result of the pre-implementation of the merger.” Respectfully, in the Sections’ view neither of these circumstances should be considered to be an aggravating or mitigating factor on its own — it is not clear why the ex post analysis of the Commission or the Competition Tribunal (or a court) should affect the fine imposed for an ex ante failure to notify a transaction. However, if evidence exists that the parties deliberately chose to avoid a filing and the transaction was found to be anticompetitive, such conduct could be a basis for increasing the penalty.

- Section 6.14.8 provides for an aggravating factor where “the merging parties were competitors.” It is not clear to the Sections why a merger of competitors should qualify for an aggravated penalty when the underlying conduct — i.e., the failure to notify — is already being penalized. The mere fact that the parties may have been competitors does not, in the Sections’ view, increase the culpability of the conduct. If the transaction
resulted in a substantial lessening of competition, this is already accounted for as an aggravating factor in 6.14.5 above and therefore, 6.14.8 may be superfluous.

IV. Conclusion

The Sections appreciate this opportunity to comment on the Guidelines. The Sections would be pleased to respond to any questions that the Commission may have regarding these comments or to provide any additional comments or information that may assist the Commission in finalizing the Guidelines.