The views stated in these Comments are presented 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.

March 29, 2019

The American Bar Association Section of Antitrust Law and Section of International Law (the “Sections”) appreciate the opportunity to submit these comments on the Draft Guide for Merger Notification dated February 2019 (“Guidelines”) published by Argentina’s National Commission for the Defense of Competition (“Commission”) for the purpose of consultation.1 The Sections welcome the Commission’s effort to clarify when transactions are required to be notified and provide greater transparency and certainty with respect to the Commission’s procedures. Certainty and transparency are important hallmarks of an effective merger enforcement program. These comments reflect the Sections’ experience and expertise with respect to the application of antitrust and merger review laws in the United States, the European Union, Argentina, and other jurisdictions and with important related international best practices, notably the International Competition Network’s Recommended Practices for Merger Notification and Review Procedures (“ICN Recommended Practices”)2 and the Organization of Economic Cooperation and Development’s Recommendation on Merger Review (“OECD Recommendation”).3

The Sections’ comments focus on the Guidelines’ discussion of: (1) the principle of economic reality; (2) the concept of control, (3) joint venture transactions, (4) transactions involving the acquisition of “business goodwill” and intellectual property, (5) monetary thresholds for notification, and (6) exemptions from notification.

I. The Principle of Economic Reality

Article II of the Guidelines states that transactions “that do not produce effects” in the Argentine national territory are exempt from notification. To illustrate this principle, the Guidelines indicate that an Argentine company acquiring a foreign firm that makes “non-substantial”


imports into Argentina would not require a notification. This illustration appears to recognize that “effects” alone should not be sufficient to trigger notification. The Sections believe it would be helpful if the Guidelines provided further clarity as to how to determine when the effects of a transaction on Argentine commerce (including, but not limited to import commerce) are “non-substantial.”

Although the Guidelines say that the “importance, regularity and predictability” of the imports must be evaluated to determine if they are non-substantial, there is a value to clear and easily administrable “bright-line” tests rather than inherently subjective and fact-intensive tests. For example, the Hart-Scott-Rodino (“HSR”) pre-merger notification regulations in the United States exempt the acquisition of foreign entities or foreign assets when those entities or assets do not generate annual sales in the U.S. exceeding a specific sales threshold (which will be $90 million on April 3, 2019). 4

Accordingly, the Sections believe it would be beneficial for the Guidelines to include some objectively quantifiable criteria to determine when the level of sales by the acquired company or assets in Argentina are “non-substantial” enough to warrant a merger notification to the Commission. We recognize that it may be appropriate to adjust the selected threshold based on experience (for example, whether it is catching too many, or too few, transactions); however, on balance, the Sections believe that establishing a certain monetary threshold would be more efficient for both the Commission and the business community.

II. The Concept of Control

A. Substantial versus Decisive Influence

In Article IV on page 5, the Guidelines provide that control over an undertaking is determined by reviewing the rights, contracts, and any other instruments granting the possibility of having a “substantial influence” over the undertaking. The Guidelines explain that “[s]ubstantial influence, in general terms, means the ability to determine the competitive strategy of the undertaking under analysis,” and they cite to an analogous provision of the relevant regulations of the European Union. However, the Sections note that the European Union’s merger control laws use the term “decisive influence” and not “substantial influence.” 5

The Sections believe that the Guidelines would be improved by explaining where, if at all, the Argentine law’s concept of “substantial influence” differs from the European concept of “decisive influence.”

4 See 16 C.F.R. §§ 802.50, 802.51.

B. Clarification of Shareholder Rights Leading to Control

Article IV of the Guidelines also indicates, at pages 5-6, that the rights that confer control over an undertaking are those that allow the owner to “exert influence on relevant decisions” of the undertaking. These include:

the approval of budgets, business plans, investment plans, commercial policies, pricing policies, volumes of production and other market variables, advertising investments, research and development investments, designation of corporate authorities and chief executives, and, in general, any other issue that implies influencing the undertaking’s competitive strategy.

The Guidelines also note that control can be exercised both through “positive” and “negative” actions, presumably with respect to the “relevant decisions” described above.

While the Guidelines provide a few examples of minority shareholder protections that “might not” be considered to grant control, the Sections urge the Commission to provide more definitive guidance as to which shareholder rights will (or will not) be sufficient to provide a shareholder with control over an undertaking. For example, it would be helpful for the Guidelines to address the following questions that could be expected to arise:

- If a shareholder has positive or negative rights in respect of some, but not all, of an undertaking’s “relevant decisions,” what is the threshold for determining when the shareholder will have control? Are some of the “relevant decisions” more important than others?

- Are there any additional minority shareholder protections that will likely be presumed insufficient to establish control other than those listed in the current Guidelines? For example, would a veto over a major or material capital expenditure ever be viewed as merely protecting the financial interests of a minority shareholder rather than an acquisition of control? If so, it would be helpful for the Guidelines to illuminate the governing principles or situations when veto rights granted to a minority shareholder over “investment plans” will not be deemed to result in an acquisition of control.

- Are there any specific ownership interest percentages that would give rise to a presumption of control or lack of control? For example:
  - The HSR Act provides that any person may acquire up to 10% of an issuer’s voting securities and certain “institutional investors” may acquire up to 15% of an
issuer’s shares (regardless of the value of those securities) without making a pre-merger filing if the acquisition is “solely for the purpose of investment.”

○ “Control” under the HSR Act is also defined as “holding 50 percent or more of the outstanding voting securities of an issuer” or in the case of an unincorporated entity, “having the right to 50 percent or more of the profits of the entity, or having the right in the event of dissolution to 50 percent or more of the assets of the entity.” Likewise, control is presumed when a party has “the contractual power presently to designate 50 percent or more of the directors of a for-profit or not-for-profit corporation, or 50 percent or more of the trustees in the case of trusts that are irrevocable and/or in which the settlor does not retain a reversionary interest.”

○ Other jurisdictions, such as Brazil and Germany, consider an acquisition that exceeds a certain percentage interest (e.g., 20-25%) to be a potentially reportable transaction if other thresholds relating to the parties are satisfied.

In short, the Sections believe the Guidelines would benefit from the inclusion of more specific examples and more detailed criteria to enable merging parties to determine their compliance obligations more easily, including descriptions along the lines of Section B.II.3.2 of the EU’s Jurisdictional Notice regarding the types of veto rights that may confer joint control. As the ICN has recognized, there is great value for the reviewing agency as well as merging parties, to have clear, predictable and easily administrable criteria for determining whether a particular transaction requires notification. Notably, the ICN recommends that to the extent that a merger regime relies on concepts such as the acquisition of “control” or of a “competitively significant influence” to determine which transactions are reviewable, “they should seek to maximize legal certainty and predictability, in particular through a consistent and transparent decision making practice, and the use of guidelines or informal guidance.” In this regard, the Sections commend the Commission for proposing to issue Advisory Opinions to provide additional clarity and guidance on transaction structures and situations that are not clearly covered by the guidance. The Sections recommend that the Commission adopt a process similar to the Federal Trade Commission Pre-Merger Notification Office’s Informal Opinions, which are issued based on a written description of the transaction and questions provided by counsel on a “no names” basis. The Sections also recommend that such transaction descriptions and Opinions are made publicly available (with appropriate redactions to preserve the parties’ confidentiality) to ensure that the guidance is broadly available.

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6 See 15 U.S.C. § 18a(c)(9); 16 C.F.R. § 802.9; 16 C.F.R. § 802.64(b). These exemptions are not available to a party that intends to influence the basic management decisions of the issuer (e.g., by holding a management position with the issuer) or obtains a right to nominate or appoint a director on the issuer’s board of directors.

7 See supra note 5.

III. Joint Venture Transactions

Article V of the Guidelines states that there are three categories of business transactions that may be subject to mandatory notification: “i) Proper mergers; ii) Acquisitions of the control over existing undertakings, and iii) Creation of joint ventures with “full functions.” While it is implied that non-full function joint ventures will not be subject to mandatory notification, the Sections recommend stating this explicitly.

Furthermore, the Sections recommend that the Guidelines provide more clarity on when a joint venture would be understood as non-full function. For instance, with respect to the functions that the joint venture must perform under Article V.4.2(a) of the Guidelines, is it necessary that the joint venture be designed to perform those functions at the time of its formation, or is it sufficient if there is some possibility that the joint venture will perform those functions in the future? Is it necessary that all three requirements set out in the Guidelines are met, or is fulfillment of one requirement enough to cause the joint venture to be deemed full-function?

In particular, the Sections suggest that the Commission review the discussion in Section B.IV of the EU’s Jurisdictional Notice regarding the factual circumstances that may affect the analysis of whether a joint venture meets the full function criteria and consider additional explanation of the standards merging parties must follow and how (if at all) they may be consistent with or differ from the EU standards.9

IV. Transactions Involving the Acquisition of “Business Goodwill” and Other Intellectual Property

At Article V.2, on page 7, the Guidelines explain that the element of an ongoing “business establishment” or “business goodwill” include:

facilities, merchandise stocks, business names, clientele, right to premises, innovation patents, trademarks, industrial designs, honorific distinctions, and all the other rights derived from commercial, industrial or intellectual property.

The Guidelines further provide that the change in control of “business goodwill,” whether “total or partial,” may constitute a notifiable merger. These statements appear to imply that the acquisition of inventory (or other supplies held for consumption, resale or lease), used goods, and intellectual property without any revenue generating assets or contracts may be notifiable. Similarly, an agreement for an exclusive license may appear to be notifiable.

However, in Article V.4.1, on page 9, the Guidelines explain that for an asset transfer to qualify as a notifiable merger, three requirements must be met:

9 See supra note 5.
(i) The transaction must involve all those assets that enable the realization of one or more economic activities; (ii) It must be possible to assign, currently or potentially, an independent volume of business to the transferred assets, with its own clientele and economic value; and (iii) The assets must, by themselves, generate matters of an economic nature, that is, they must allow in some way to produce goods or services that can be supplied in a market.

The Sections recommend that Article V.2 of the Guidelines clarify that the transfer of “business goodwill,” whether “total or partial,” may constitute a notifiable merger only if the transaction also meets the asset transfer requirements noted at Article V.4.1. In particular, Paragraph 24 of the EU’s Jurisdictional Notice provides additional discussion that the Commission may want to consider including in the Guidelines when the acquisition of a portion of the target company’s assets constitutes a business to which market turnover can be attributed. 10

In addition, it would be helpful for the Commission to identify specific categories of asset acquisitions that would not satisfy the criteria in Article V.4.1 and would therefore be exempt from the notification requirements. The Sections note that other merger notification regimes, such as that of the United States, exempt various transfers of assets that are unlikely to involve the transfer of economic activities that give rise to competition concerns. For example, ordinary course business acquisitions of assets (e.g., the acquisition of inventory, used goods), as well as acquisitions of mortgages, deeds of trust, commercial and office property, hotels and motels, investment rental properties (i.e., real properties that will be held solely for rental or investment purposes), cash, and other financial assets, are all exempt from the HSR notification requirements because they are unlikely to raise competition law issues. 11

Likewise, if the grant of a license of intellectual property may be considered a sufficient transfer of rights to trigger a merger notification, the Sections believe the business community would benefit from more detailed guidance on what type of rights must be included in the license to trigger a filing. For instance, in the U.S., the antitrust agencies have, outside the pharmaceutical industry, followed a “make, use and sell” approach to determine whether a license is sufficiently exclusive to be considered the transfer of an asset. 12 If the license grants the licensee the

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10 See supra note 5.

11 See 15 U.S.C. § 18a(c); 16 C.F.R. §§ 801.21(a)-(b), 802.1, 802.2, 802.5.

12 See ABA SECTION OF ANTITRUST LAW, Premerger Notification Practice Manual, 5th Edition (2015), Int. No. 26 (hereinafter “Premerger Manual”) (citing multiple HSR Informal Interpretation Letters). In 2013, the HSR regulations were revised to create specific rules for exclusive patent licenses in the pharmaceutical industry. A license or other transfer of pharmaceutical patent rights is potentially reportable under the HSR Act as an asset acquisition if the patent owner transfers all “commercially significant rights,” which are defined as “the exclusive rights to a patent that allow only the recipient of the exclusive patent rights to use the patent in a particular therapeutic area (or specific indication within a therapeutic area).” See generally 16 C.F.R. §§ 801.1(o), 801.2(g). Assuming the jurisdictional tests are met, a transfer of exclusive pharmaceutical patent rights will be reportable even if (1) the patent holder retains the limited right to manufacture product(s) covered by the patent for the recipient of
exclusive right to use a patent to develop, manufacture, and sell the product without restriction, the license would be considered a transfer of an asset potentially subject to HSR reporting.\textsuperscript{13}

Under the “make, use and sell” approach, the grant of marketing and distribution rights, even if granted on an exclusive basis and even if coupled with a grant of exclusive rights to a trade name, does not constitute the acquisition of an asset.\textsuperscript{14} Similarly, the licensor’s limited right to manufacture the product under the patent solely for the licensee defeats exclusivity for purposes of HSR reporting.\textsuperscript{15} The Sections believe the Guidelines would benefit from additional discussion of how the general requirements set forth in Article V.4.1 will be applied to these different types of license relationships so that the business community can clearly understand the types of license agreements that must be notified to the Commission.

\textbf{V. The Notification Monetary Thresholds}

Article VI on pages 11-14 of the Guidelines provides details on the monetary thresholds required for a merger to be notifiable in Argentina.

The Sections recommend clarifying that the business turnover threshold of 100 million mobile units within Argentina, which is discussed in Article VI and at page 12 of Article VI.1, should explain that this turnover value relates to direct shipments or sales to customers in Argentina and export sales from Argentina, as many other countries do not consider export sales when assessing whether sales-based notification thresholds are satisfied.

In addition, regarding the calculation of the asset turnover threshold of 20 million mobile units or more of assets in Argentina described in Article VI.3 at pages 13-14 of the Guidelines, the Sections recommend that the acquiring firm be permitted to make a good-faith determination of the value of the assets in Argentina being acquired under any reasonable valuation methodology.\textsuperscript{16} While the Sections appreciate that the Guidelines have offered an example of one acceptable valuation methodology based on the percentage of sales made by the target entity in Argentina, the Sections believe this methodology may not reflect the true fair market value of the Argentina assets or business operations being acquired in every situation.

In addition, the Sections believe it would be appropriate to allow acquiring firms to exclude from the calculation the value attributed to cash and cash equivalents held by any Argentine entity that

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\textsuperscript{13} Premerger Manual, at Int. 26.

\textsuperscript{14} \textit{Id.}

\textsuperscript{15} \textit{Id.}

\textsuperscript{16} The Sections note, for instance, that for purposes of determining if “size-of-transaction” threshold is satisfied, the HSR regulations allow the acquiring person’s board to make a good-faith determination of the fair market value of the non-exempt assets being acquired without specifying any specific methodology. \textit{See} 16 C.F.R. § 801.10(c)(3).
is being directly or indirectly acquired. While these may be viewed as assets within Argentina, transactions that trigger merger notification requirements only due to the high values of cash and cash equivalents being acquired from the target company are highly unlikely to involve the transfer of businesses with sufficient economic activities that would raise a substantive competition law concern. For this reason, the HSR rules do not consider cash and cash equivalents to be an asset of the acquired person and therefore the value of these cash assets do not need to be considered in calculating the value of the assets being acquired.17

While the Sections commend the Commission for providing clarity that the turnover of the “selling party” does not need to be considered when assessing whether the notification thresholds are satisfied, the Sections believe the Guidelines would benefit from a more detailed explanation of how merging parties can determine the entities or businesses that must be included within the “acquiring group” or the “acquired group.”

For instance, if buyers must include all companies controlled by its ultimate parent or controlling entity, it would be helpful for the Guidelines to explain what definitions of “control” should be used for the purpose of determining the ultimate parent and what companies must be included in the “group.” Will it be the same criteria for “control” discussed in Article IV of the Guidelines? If so, companies that may have minority shareholding interest and “substantial influence” over strategic commercial decisions of other entities may not have access in the ordinary course to the sales in Argentina for those “controlled” entities. Accordingly, the Sections believes it would be beneficial for the Commission to provide more bright-line definitions of control that are more likely to correspond to information that is readily available in the regularly prepared consolidated financial statements of the acquired entity or the ultimate parent company of the acquiring entity.

Finally, the Sections recommend moving the last paragraph on page 14 of Article VI.3 to Article VI.1 (‘Business Turnover threshold’), as it describes how the business turnover of the investment fund should be calculated, rather than the value of the merger and of the assets. Since there is a specific section addressing the business turnover threshold and its calculation, the Sections suggest placing the description on how it works for investment funds in the Article as well. The Sections also believe that the discussion in the Guidelines on the calculation of turnover for transactions involving investment funds would benefit from further clarification. In particular, Paragraphs 189-191 of the EU’s Jurisdictional Notice contain additional discussion of this issue; the Sections believe it would be useful to explain whether the Commission intends to follow a similar approach to the EU’s or clarify the ways in which the Commission may calculate turnover by investment funds differently.18

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17 See 16 C.F.R. § 801.21(a).

18 See supra note 5.
VI. Exemptions from Notification

A. The Acquisition of Debt Securities and Options

The Sections recommend that the Guidelines provide additional detail concerning the exemption described in Article VII.2 relating to the acquisition of bonds, debentures, non-voting shares, or debt securities. This exemption provides that “[b]onds, debentures, non-voting shares and debt securities are financial instruments that usually do not affect, by themselves, the corporate governance of a firm or its decision-making process” and therefore the acquisition of these instruments are “not considered to be mergers” and “must not be notified”.

However, at page 7 of Article V.3, the Guidelines indicate that the following type of acquisition may be subject to merger notification:

- the acquisition of property rights or any other rights over a company’s shares, or over debt securities that grant any kind of right to be converted into shares or to have any sort of influence on the decisions of the company that issues them.

This statement suggests that the acquisition of debt securities and options may in fact be subject to merger notification in Argentina. The Sections recommend that the Guidelines provide more clarity as to when the exemption applies and when the acquisition of debt securities or options may constitute a merger requiring the application of the notification rules. For instance, will a notification be required only prior to converting the debt securities or non-voting shares into voting shares, or is a notification required at the time the debt or non-voting shares are acquired?

B. The “First Landing” Exemption

In Article VII.3, the Guidelines describe an exemption for the acquisition of a single undertaking in Argentina by a single foreign economic agent, which is known as the “first landing” exemption. The Sections recommend that the Commission provide further detail on when this exemption may be available. For instance, the Guidelines state that if the buyer is a foreign company that is already present in Argentine markets through “significant, habitual and frequent exports,” then the first landing exemption is not applicable. It would be helpful if the Guidelines provide further explanation of the criteria that are relevant to determining whether a buyer meets this criteria.

We understand, for example, that Argentina’s Antitrust Law requires parties to review exports to Argentina for the prior three year period when considering the applicability of this exemption. However, it would be helpful for companies to know how insignificant or how infrequent the export sales activities in Argentina must be for this exemption to apply. Likewise, if the buyer’s existing presence in Argentina relates to product markets that have no horizontal or vertical relationship to the target company’s business, would this enable the acquisition to qualify as a “first landing” even if the buyer is sufficiently present in the unrelated markets?
VII. Conclusion

The Sections welcome the Commission’s Consultation and appreciate the opportunity to comment on the Guidelines. The Sections would be pleased to respond to any questions regarding these comments.