MEMORANDUM

From: Mergers, Acquisitions, and Joint Ventures Working Group

To: All Commissioners

cc: Andrew J. Heimert and Commission Staff

Date: December 21, 2004

Re: Mergers Issues Recommended for Commission Study

The Antitrust Modernization Commission assigned to the Mergers, Acquisitions, and Joint Ventures Working Group the responsibility to analyze issues relating to antitrust enforcement concerning mergers, acquisitions, and joint ventures, and to recommend which, if any, such issues appear to warrant further study by the Commission at this time. This memorandum first addresses those issues that a majority of the Working Group recommends for further study by the Commission and then addresses those issues not recommended for further study at this time, with a brief explanation in each instance of the Working Group's analysis. Issues recommended for further study are listed in rough order of their priority and/or strength of consensus within the Working Group that the issue should be studied.

This memorandum reflects the consensus of a majority of the Working Group members. Some members of the Working Group may disagree with a recommendation and/or with aspects of the discussion and comments associated with a recommendation. In addition, a recommendation that the Commission should not study a particular issue at this time does not constitute a recommendation on the merits of the issue, nor does it preclude the possibility that the Commission report ultimately will endorse any particular recommendation.

Commissioner Kempf does not join in the discussion and commentary of the issues.

SUMMARY OF RECOMMENDATIONS

Issues recommended for study. The Working Group recommends that the Commission study the following issues:

1. **Should merger enforcement at the federal level continue to be administered by two separate agencies, the U.S. Department of Justice and the Federal Trade Commission? If so, should merger review responsibility be divided by industry between DOJ and FTC?**
2. **To the extent that dual enforcement continues, should steps be taken to eliminate differences in treatment arising out of which agency reviews a merger?**
3. **Should the Hart-Scott-Rodino merger review process be revised to address issues relating to the number and type of transactions requiring pre-merger notification, the length of investigations, the burden imposed by "Second Requests" and civil investigative demands on the merging companies and third parties, and transparency of the enforcement agencies' decisional process?**
4. **What role, if any, should private parties and state attorneys general play in merger enforcement? Should merger enforcement be limited to the federal level, or should other steps be taken to ensure that a single merger will not be subject to challenge by multiple private and government enforcers?**
5. **Are the federal enforcement agencies and courts appropriately considering efficiencies expected to be realized from transactions?**
6. **Has current U.S. merger enforcement policy — including as expressed in the *Horizontal Merger Guidelines* — been effective in ensuring competitively operating markets without unduly hampering the ability of companies to operate efficiently and compete in global markets?**

Issues not recommended for study. The Working Group recommends that the Commission not study the following issues:

7. **Do the *Horizontal Merger Guidelines* accurately reflect how the federal agencies analyze mergers? Should the agencies provide guidance in regard to how they analyze non-horizontal (*i.e.*, vertical and conglomerate) mergers?**
8. **Should steps be taken to attempt to harmonize further at least the procedural aspects of review of mergers by the United States and non-U.S. competition authorities in order to ensure a more timely and less burdensome multi-jurisdictional review of international mergers?**
9. **Should funding of the antitrust enforcement activities of the FTC and DOJ continue to be tied to the receipt of HSR filing fees?**

Discussion of Recommendations

<u>Issues recommended for study</u>

The Working Group recommends that the Commission study the following issues.

1. **Should merger enforcement at the federal level continue to be administered by two separate agencies, the U.S. Department of Justice and the Federal Trade Commission? If so, should merger review responsibility be divided by industry between DOJ and FTC?**

Several comments received by the Commission point to the inefficiency and potential inconsistencies that may result from vesting overlapping authority in two enforcement agencies. Notwithstanding that DOJ and FTC now both follow the same *Horizontal Merger Guidelines*, there is a perception that differences in their approaches to remedies and in the procedures followed by the agencies may still affect outcomes. (See discussion in connection with issue 2, below.) In addition, significant unnecessary regulatory delay may result where the two agencies battle for clearance to review the same transaction. Some commentators accordingly have urged the Commission to consider whether merger enforcement (and, indeed, civil antitrust enforcement generally) should be lodged in a single agency, either DOJ or FTC. Alternatively, if dual enforcement is maintained, it has been suggested that the Commission should consider whether authority to review mergers should formally be divided by industry between the two agencies, by statute or by agreement between the agencies.

> *Comments*: The dual authority of DOJ and FTC has long been cited as a significant anomaly in U.S. antitrust enforcement. The DOJ and FTC have taken a number of steps to attempt to coordinate their activities. For example, they both now employ the same merger enforcement guidelines, they have begun conducting joint hearings, workshops, and studies on merger policy and process together, and they are considering a joint

program to review regularly the efficacy of consent orders. Many people nevertheless have recommended that the Commission consider whether either the institutional structure should be changed or — if such change proves to be politically and practically impossible at this time — whether a division of authority should be adopted to minimize the inefficiency and regulatory delay inherent in the structure. In this regard, it should be noted that the agencies' own recent attempt to divide merger review responsibility between them failed in the face of Congressional opposition. It thus may be that the Commission is in a unique position to study the question and advise the President and Congress on a course of action.

2. **To the extent that dual enforcement continues, should steps be taken to eliminate differences in treatment arising out of which agency reviews a merger?**

As noted above in the discussion of issue one, there is a perception that different procedures followed by DOJ and FTC may affect the outcome of merger review. Three differences in particular have been cited to the Commission: (1) the standards governing judicial review of agency preliminary injunction challenges to mergers, (2) the FTC's ability to pursue administrative adjudication even after it has failed to obtain a preliminary injunction, and (3) the more deferential standard of appellate review that applies to FTC administrative decisions. Some commentators believe that the combination of these three features of FTC procedure may place companies having their transaction reviewed by the FTC, rather than by DOJ, at a relative disadvantage because they are less likely to obtain timely judicial review on the merits.

First, DOJ, when it seeks to challenge a merger, must meet the traditional test for obtaining a preliminary injunction. It must prove "a reasonable likelihood of success on the merits" and that "the balance of equities" favors the government. *See, e.g.*, *United States v. Siemens Corp.*, 621 F.2d 499, 505-06 (2d Cir. 1980) (citations omitted). Courts generally require a showing of irreparable harm in order to establish that the equities favor an injunction. In contrast, Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. § 53(b), provides for the grant of a preliminary injunction "where such action would be in the public interest — as determined by a weighing of the equities and a consideration of the Commission's likelihood of success on the merits." *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109, 115 (D.D.C. 2004) (citing *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 714 (D.C. Cir. 2001)); *see also* 15 U.S.C. § 53(b). This standard, by its terms, appears to be less demanding than the standard applicable to DOJ, *see FTC v. Libbey, Inc.*, 211 F. Supp. 2d 34, 43 (D.D.C. 2002), although one may fairly question whether the difference has ever affected the outcome of an actual case.

Second, as a matter of recent practice, DOJ generally litigates requests for preliminary and permanent relief simultaneously. This practice provides the merging companies with a full hearing on the merits and puts the government to a higher burden of proof. It also offers finality as soon as the court renders its decision. In contrast, the FTC typically seeks only a preliminary injunction in federal court under the standard of 13(b) (even though the statute authorizes it to request a permanent injunction as well). Moreover, regardless of whether it wins preliminary relief, the FTC may then proceed with administrative litigation within the agency (commonly called a "Part III proceeding"). The FTC's policy is that it will reconsider whether to continue Part III litigation when it has failed to obtain a preliminary injunction, and merging parties may petition for withdrawal of the complaint. *See* Federal Trade Commission, Administrative Litigation Following the Denial of a Preliminary Injunction: Policy Statement, 60 Fed. Reg. 39,741 (Aug. 3, 1995); 16 C.F.R. § 3.26. However, nothing precludes the FTC from continuing Part III litigation even after a court has declined to enjoin the merger from closing. The prospect of facing continued Part III litigation after closing may stifle firms' integration of their businesses, preventing the immediate realization of the full benefits of the transaction, and impose additional unnecessary costs defending a transaction for the second time.

Third, appellate court review of civil cases brought by DOJ follows the "clearly erroneous" standard for findings of fact and *de novo* review of legal questions. *See, e.g.*, *United States v. Microsoft Corp.*, 253 F.3d 34, 51-52 (D.C. Cir.), *cert. denied*, 534 U.S. 952 (2001). In contrast, appellate review of FTC decisions following Part III litigation follows the "substantial evidence" test. *See* 15 U.S.C. § 45(c) ("The findings of the Commission as to the facts, if supported by evidence, shall be conclusive."); *see, e.g.*, *Toys 'R' Us, Inc. v. FTC*, 221 F.3d 928, 934-35 (7th Cir. 2000) ("[W]e apply the substantial evidence test . . . ."); *cf.* 5 U.S.C. § 706(2)(E). The FTC also enjoys deference with respect to its decisions as to what constitute unfair methods of competition under Section 5 of the FTC Act. *See, e.g.*, *FTC v. Indiana Fed. of Dentists*, 476 U.S. 447, 454 (1986) ("[C]ourts are to give some deference to the Commission's informed judgment that a particular commercial practice is to be condemned as 'unfair'"); *see also E.I. du Pont de Nemours & Co. v. FTC*, 729 F.2d 128, 136 (7th Cir. 1977) (FTC's "interpretation of § 5 is entitled to great weight" and "its power to declare trade practices unfair is broad"). Again, however, it is fair to ask whether the different appellate review standards in fact have affected the outcome in an actual case.

> *Comments*: The differences described above are anomalies resulting from the use of two antitrust agencies, one of which is part of the Executive Branch and one of which is an independent agency. Fairness and reason would appear to counsel for similar treatment regardless of which agency reviews a merger. This may be a factor favoring the elimination of dual authority. Assuming that dual authority is retained, however, a question arises whether the standards and procedures applicable to the FTC should — or

can — be modified with respect to mergers, to make them more consistent with standards and procedures applicable to DOJ. However, change may be inappropriate at least with respect to appellate standards, because appellate review of FTC merger decisions is rare, because changing the appellate standards would potentially impact non-merger and consumer protection cases, and because it raises broader issues under the Administrative Procedures Act. Accordingly, the Working Group recommends that the Commission study the first two sub-issues (preliminary injunctions and Part III litigation), but not study the third sub-issue (appellate-review standards).

3. **Should the Hart-Scott-Rodino merger review process be revised to address issues relating to the number and type of transactions requiring pre-merger notification, the length of investigations, the burden imposed by "Second Requests" and civil investigative demands on the merging companies and third parties, and transparency of the enforcement agencies' decisional process?**

The Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR Act"), 15 U.S.C. § 18a (as amended), prohibits transactions exceeding certain size-of-parties and size-of-transaction thresholds from being consummated until after they have been reported to DOJ and FTC and certain statutory waiting periods have expired or been terminated. There appears to be continued broad support for a system of pre-merger notification in order to preserve effective merger enforcement. Several people, however, have proposed that the Commission should assess whether improvements can be made to that system to increase the efficiency and reduce the time, cost, and burden involved in HSR Act merger review while preserving the government's ability to obtain effective relief with respect to anticompetitive mergers.

The Antitrust Section of the American Bar Association, for example, observes that although the HSR Act originally was intended to apply only to the largest transactions (and did not originally impose filing fees), a substantial number of transactions are now caught by the

HSR filing requirements each year, including many that apparently raise no antitrust concern at all. (According to the Annual Report to Congress for Fiscal Year 2002 by the Federal Trade Commission and Department of Justice, 76 percent of HSR Act filings received early termination.) In addition, although Congress originally intended for HSR review of transactions to be relatively quick and non-burdensome, investigations progressing to a "Second Request" today can be protracted, costly, and burdensome. *See* 122 CONG. REC. 30,876-77 (1976) (Statement of Rep. Rodino) (stating that "lengthy delays and extended searches should . . . be rare" and that "[i]t was, after all, the prospect of protracted delays of many months — which might effectively 'kill' most mergers — which led to the deletion . . . of the 'automatic stay' provisions originally contained" in the legislation). It is not uncommon for the parties each to spend several million dollars on the production of documents and information and to produce the equivalent of hundreds (or even thousands) of boxes of documents. The age of electronic data, rather than making the process more efficient, may actually have significantly increased the cost and burden on the parties in producing (and on enforcement agency staff in reviewing) information. In addition, it has become relatively common for the enforcement agencies to request additional time beyond the statutory thirty-day waiting period following substantial compliance with a Second Request.

In order to address these concerns, commentators have requested the Commission consider the advisability of actions such as increasing or changing HSR reporting criteria, revising information required to be reported in the initial filing, placing reasonable limits on second requests, and enhancing the ability of parties to obtain review of objections to the burden of Second Requests and CIDs. In addition, commentators have urged the Commission to consider ways in which the agencies could increase the transparency of the enforcement process, particularly with respect to non-litigated consent orders and transactions that are not challenged (*e.g.*, along the lines of the FTC statement concerning the cruise-lines mergers).

Comments: Sound merger enforcement policies and procedures are critical to the efficient operation of a free market for capital assets. Congress recognized this tenet in enacting the HSR Act in 1976. Since that time, however, the cost, burden, and delay involved in HSR review appear to have increased dramatically for many transactions (although some believe these problems are not so extensive). Even if these issues have not caused companies to abandon or forgo otherwise beneficial transactions, they may have imposed unreasonable uncertainty and costs on companies and delayed the realization of merger benefits. Commission study of the actual burdens of the HSR Act and of ways to improve the process could prove to be of significant value. Both DOJ and FTC themselves recently have undertaken efforts to evaluate and improve their processes, for which they are to be commended. As an independent reviewer, however, the Commission is well-positioned objectively to assess the costs and benefits of current practice and, if appropriate, to recommend more comprehensive change than the agencies otherwise might be expected or able to take independently.

4. **What role, if any, should private parties and state attorneys general play in merger enforcement? Should merger enforcement be limited to the federal level, or should other steps be taken to ensure that a single merger will not be subject to challenge by multiple private and government enforcers?**

Several persons submitting comments to the Commission have voiced concern about the multiple layers of review facing mergers in the United States, which includes the possibility of federal, state, and private enforcement actions. It has been recommended that the Commission consider whether standing to review mergers affecting interstate commerce should be limited to the federal agencies or whether other steps should be taken to limit the burden and uncertainty involved in multiple state and federal review. In addition to the substantive questions presented, merger review by states as well as a federal agency presents a host of procedural coordination questions, which should also be studied by the Commission to find ways (if necessary) in which the burdens on merging parties of that dual review might be lessened. More generally, the Commission should study whether clearance by a federal agency should bar any challenges to the merger by private parties or states.

Comments: A majority of the Working Group concurs in the analysis and recommendation of the Civil Procedure and Remedies Working Group that the Commission should study the appropriate role of the states and private parties in federal antitrust enforcement generally, including with respect to mergers.

5. **Are the federal enforcement agencies and courts appropriately considering efficiencies expected to be realized from transactions?**

Commentators have raised several interrelated issues relating to merger efficiencies, including what welfare standard should be employed in assessing mergers, what types of efficiencies should be recognized in antitrust merger analysis, what are the appropriate burdens of proof in establishing the likely achievement of cognizable efficiencies, and whether there are some circumstances (*e.g.*, mergers to monopoly) in which efficiencies should be disregarded.

First, should the welfare standard employed in merger review be total welfare or consumer welfare? The answer has important implications for merger enforcement policy. Under the total welfare standard, if the cost savings (or other benefits) associated with a merger exceed the amount of the deadweight loss, then total welfare rises and the merger is allowed to proceed even if might create or increase market power. Under this standard, equal weight is assigned to the loss in consumer welfare and the corresponding increase in producer surplus. In contrast, under the consumer welfare standard (currently employed in the United States), a merger that would create or increase market power is not allowed to proceed unless a net benefit to consumers can be demonstrated in terms of lower prices or new or better products or services. Under this standard, a sufficient portion of the benefits of a merger must actually be passed on to consumers so that they are not harmed by the merger. As a result, efficiencies associated with reduced marginal cost are typically given more weight than are fixed-cost savings and other efficiencies that will not affect price in the short run. It accordingly can be more difficult to prove off-setting efficiencies under the consumer welfare standard than under the total welfare standard.

Although the consumer welfare standard has been adopted by the United States and most other industrialized countries (except Canada, New Zealand, and, apparently, Australia), its use has been criticized. *See generally* Oliver Williamson, *Economies as an Antitrust Defense: The Welfare Tradeoffs*, 58 AM. ECON. REV. 18 (1968). In addition, it has been argued by some that where consumers are large corporations purchasing intermediate goods and services, the beneficiaries of efficiencies are the shareholders of those corporations. Some critics believe that the impact on shareholders and consumers in such instances should be given equal weight. They further argue that where the corporate consumers are non-U.S.-controlled, the beneficiaries of a blocked domestic merger are non-U.S. entities.

Second, with respect to what kinds of efficiencies should be recognized in merger analyses, the *Horizontal Merger Guidelines* generally recognize marginal-cost efficiencies as being most likely to offset the anticompetitive effects of a merger. *See* U.S. Department of Justice & Federal Trade Commission, *Horizontal Merger Guidelines* § 4 (1997). However, there are other types of efficiencies that result from a merger that relate to nominally "fixed" costs, which, in the long run, may reduce prices (or increase quality) to consumers. Independent of whether a total-welfare or consumer-welfare standard applies, should the approach taken in the *Horizontal Merger Guidelines* be altered to encourage recognition of a greater range of efficiencies that may result from a merger? In addition, even as to efficiencies cognizable under the *Horizontal Merger Guidelines*, is the standard of proof apparently demanded by the agencies to establish the existence and magnitude of efficiencies too high?

Finally, are there some mergers to which efficiencies should not be relevant? For example, a merger to monopoly may create substantial efficiencies. Should the agencies consider efficiencies arising from such mergers, despite the creation of a monopoly?

> *Comments*: The appropriate treatment of efficiencies has long been a central issue in antitrust enforcement policy generally, implicating fundamental questions regarding the appropriate goals of antitrust enforcement. Given the central importance of efficiencies and the apparent persistent confusion or disagreement that may exist as to how efficiencies should be evaluated and treated, a majority of the Working Group believes that it is an appropriate area for Commission study, building on prior FTC study and other important work in the area. *See, e.g.*, Federal Trade Commission Bureau of Economics Roundtable, *Understanding Mergers: Strategy & Planning, Implementation and Outcomes* (Dec. 2002), *available at* http://www.ftc.gov/be/rt/mergerroundtable.htm.

6. **Has current U.S. merger enforcement policy — including as expressed in the *Horizontal Merger Guidelines* — been effective in ensuring competitively operating markets without unduly hampering the ability of companies to operate efficiently and compete in global markets?**

There appears to be fairly broad-based support for the basic enforcement standards currently employed by U.S. courts and federal enforcement agencies. Those same standards largely have become part of the enforcement regime of significant trading partners around the world. Nevertheless, important issues have been raised by several persons submitting comments to the Commission and in the academic, business, and enforcement communities generally about certain aspects of current merger analysis, such as with respect to market definition, the relationship between concentration and the competitiveness of markets, analysis of mergers in "new economy" industries, and efficiencies. It also has been suggested to the Commission that it would be worthwhile generally to review the success of merger enforcement in the United States — *i.e.*, whether decisions to challenge or not challenge certain mergers (or to accept certain types of relief) were in retrospect sound. Did the government err in allowing certain mergers? If so, what were the characteristics of those mergers? How does U.S. enforcement compare to enforcement in other countries?

Comments: Given the importance of sound merger policy to the competitive functioning of our markets and the success of our economy, there is good reason continually to evaluate the effectiveness and effect of that policy in general, against the policies of other countries, and in light of recent economic learning. For that reason, and others, the FTC and DOJ themselves periodically evaluate their analyses and analytical tools, as does the antitrust bar. In February 2004, for example, the FTC and DOJ sponsored a three-day workshop to assess the efficacy of the *Horizontal Merger Guidelines* based on twelve years of experience. (According to FTC Chair Deborah Majoras, the FTC has concluded that no "major revamping" of merger policy is appropriate, although the FTC and DOJ intend to issue a joint "commentary" on the *Horizontal Merger Guidelines* to clarify certain aspects of their analysis. *See* Deborah Platt Majoras, Looking Forward: Merger and Other Policy Initiatives at the FTC, Remarks Before the Fall Forum of the Antitrust Section of the American Bar Association, at 4-7 (Nov. 18, 2004), *available at* http://www.ftc.gov/speeches/majoras/041118abafallforum.pdf.)

The Commission can valuably build on the federal agencies' efforts in this area to produce a report to the President and Congress that may have broader impact than the agencies' self-evaluation. Both the Single-Firm Conduct Working Group and the Intellectual Property Working Group have also observed the potential value from Commission study of analytical issues raised by the "new economy." Even if the Commission were to conclude that no changes in policy or analysis are warranted, its report could add value by building consensus on our nation's merger enforcement policy and advising the President and Congress with respect to calls for change that might from time to time arise in the future.

It also could be argued, however, that the Commission lacks the time and resources to undertake a full review of current merger policy and the effectiveness of past enforcement, that the existence of an apparently broad consensus on most aspects of current U.S. merger enforcement policy should make this issue a low priority, and/or that it would be unwise for the Commission to weigh in on analytical approaches that may still be evolving.

On balance, a majority of the Working Group recommends that the Commission study this issue. To the extent that the Commission determines to study "new economy"-related issues recommended for study by the Single-Firm Conduct Working Group and Intellectual Property Working Group, these issues should be examined in the context of merger enforcement as well.

<u>Issues not recommended for study</u>

The Working Group recommends that the Commission not study the following issues:

7. **Do the *Horizontal Merger Guidelines* accurately reflect how the federal agencies analyze mergers? Should the agencies provide guidance in regard to how they analyze non-horizontal (*i.e.*, vertical and conglomerate) mergers?**

The *Horizontal Merger Guidelines* state the agencies' merger enforcement policy. Some observers have argued, however, that the agencies' actual enforcement decisions have diverged from their stated policy. For example, although the *Horizontal Merger Guidelines* specify threshold Herfindahl-Hirschman Index ("HHI") concentration levels (and increases in HHIs) at which a merger presumptively will raise significant competitive concern, actual enforcement actions may suggest that, in practice, transactions do not raise concern except at considerably higher thresholds. It accordingly has been argued that the agencies should provide updated guidance that more accurately reflects actual enforcement policies. In addition, although the FTC and DOJ have investigated and challenged mergers under "vertical" theories, they have not issued guidelines describing their analysis or policy in this area since 1984. *See* U.S. Department of Justice, *Non-Horizontal Merger Guidelines* (1984), *available at* http://www.usdoj.gov:80 /atr/public/guidelines/2614.htm. Although DOJ and FTC have not tended to challenge mergers based on "conglomerate" theories such as those employed recently by the European Union, they have not issued guidelines in this area either.

Comments: In general, transparency and clear articulation of enforcement policy is important to providing certainty to the business community and enhancing compliance with the antitrust laws. That objective is undermined to the extent there is at least a commonly perceived gap between actual enforcement policy and the articulation of that practice in the *Horizontal Merger Guidelines*. On the one hand, a concern has been raised that businesses, and perhaps even courts, relying on the *Horizontal Merger*

Guidelines will act based on a misinformed understanding of actual enforcement policy. On the other hand, through speeches and other communications, the agencies already appear to be working to provide clarification as to their policies. This past year, for example, the FTC and DOJ released data on merger investigations, and the FTC issued an analysis of its own horizontal merger investigations. *See* Federal Trade Commission & U.S. Department of Justice, *Merger Challenges Data, Fiscal Years 1999-2003* (2003), *available at* http://www.ftc.gov/os/2003/12/mdp.pdf; Federal Trade Commission, *Horizontal Merger Investigation Data, Fiscal Years 1996-2003* (Aug. 2004), *available at* http://www.ftc.gov/os/2004/08/040831horizmergersdata9603.pdf. In addition, FTC Chair Majoras recently announced that the two agencies are planning to prepare a commentary on the *Horizontal Merger Guidelines* to better explain how they are applied. *See* Majoras, Looking Forward, *supra*, at 4-7. It thus is not clear what the Commission could uniquely or effectively contribute in this area.

Similarly, while the Working Group generally believes that there is a value to having the agencies articulate their enforcement policies in respect to non-horizontal mergers, it is not clear what contributions the Commission uniquely could make in this area other than to encourage greater transparency and communication by the agencies through guidelines or otherwise. On balance, a majority of the Working Group recommends that the Commission not study this issue.

8. **Should steps be taken to attempt to harmonize further at least the procedural aspects of review of mergers by the United States and non-U.S. competition authorities in order to ensure a more timely and less burdensome multi-jurisdictional review of international mergers?**

A significant and growing number of mergers are subject to review by multiple competition authorities in addition to the United States. The costs and delay arising from this multiplicity of review and the risk of inconsistent decisions and relief are substantial. *See* International Competition Policy Advisory Committee, *Final Report* (2000), *available at* www.usdoj.gov/atr/icpac/icpac.htm. Inconsistent approaches to the same transaction have in relatively rare circumstances given rise to friction between the United States and the European Union. *Compare* Press Release, U.S. Department of Justice, Justice Department Requires Divestitures in Merger Between General Electric and Honeywell (May 2, 2001), *available at* http://www.usdoj.gov/atr/public/press_releases/2001/8140.pdf, *with* Commission Decision, Case No. COMP/M.2220, General Electric/Honeywell (July 7, 2001), *available at* http://europa.eu.int/cgi-bin/eur-lex/udl.pl?REQUEST=Seek-Deliver&COLLECTION=oj&SERVICE=all&LANGUAGE=en&DOCID=2004l048p0001. In addition, with or without basis, some persons have expressed the concern that some jurisdictions either have applied, or could apply, their competition laws in a way that favors their own domestic industry. Although the United States and other jurisdictions have made efforts to harmonize procedures and substance through the International Competition Network and other means, some commentators have suggested that the Commission should consider whether additional steps should be taken to further harmonize international review of mergers.

> *Comments*: There appears to be no doubt that the proliferation of merger enforcement regimes around the world has subjected cross-border mergers to considerably greater regulatory burden and uncertainty. Agreements between jurisdictions to further harmonize procedures and substantive standards, or under which one jurisdiction would defer to another with respect to at least some aspects of merger review, would substantially improve the situation. However, as DOJ, other parts of the Executive Branch, and the FTC already appear to be pursuing appropriate harmonization with other

jurisdictions, it is not clear what the Commission could uniquely or effectively contribute in this area.

9. **Should funding of the antitrust enforcement activities of the FTC and DOJ continue to be tied to the receipt of HSR filing fees?**

Currently, filing fees paid pursuant to the HSR Act are viewed as funds available to fund FTC and DOJ operations. *See, e.g.*, United States Department of Justice, *Appropriation Figures for the Antitrust Division, Fiscal Years 1903-2005* (May 2004), *available at* http://www.usdoj.gov:80/atr/public/10804a.htm. This arrangement has been criticized by some commentators. *See, e.g.*, ABA Section of Antitrust Law, *The State of Federal Antitrust Enforcement — 2001, Report of the Task Force on the Federal Agencies*, at 4, *available at* http://www.abanet.org/antitrust/transition/transitionreport01.pdf. On the one hand, while filing fee receipts vary with fluctuations in merger activity, antitrust enforcement demands may be less variable. On the other hand, such reliance on HSR Act fees may provide incentives to increase the levels of the fees or to preserve the filing requirement even for mergers that, because of their size, the industry involved, or the lack of competitive overlap, are unlikely to raise significant antitrust concern.

Comments: There are good arguments for not linking agency funding to HSR Act filing fee receipts. For example, the relationship between fees assessed and the amount of agency resources dedicated to reviewing a transaction is fairly tenuous. Furthermore, the arrangement calls for fees relating to mergers to help fund other activities, such as non-merger enforcement and (in the case of the FTC) consumer protection efforts. However, Congress does not appear to have viewed HSR Act filing fee receipts as the sole funding source for the agencies, and in fact it appears to have provided the FTC and DOJ with relatively stable appropriations even when fee receipts have been relatively low. *See*

Appropriation Figures for the Antitrust Division, *supra*. In addition, this is principally a matter of budgetary policy, rather than antitrust policy. For these reasons, the Working Group does not recommend that the Commission study this issue at this time.