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Dear Mr. Barker and Ms. Davey:

Re: Competition Bureau Discussion Paper on the proposal to increase fees and revise its Fee and Service Standards Policy

On behalf of the National Competition Law Section of the Canadian Bar Association, I am pleased to provide you with the enclosed response to the Competition Bureau's Discussion Paper. The Section Executive and the members of the Section Mergers Committee would welcome the opportunity to discuss these issues with you in greater detail at your convenience.

Yours very truly,

"original signed by Tamra L. Thomson"

Bruce M. Graham
Chair
National Competition Law Section

encl.

cc: National Competition Law Section Executive
Peter H.G. Franklyn, Chair, Mergers Committee
Oliver J. Borgers, Vice Chair, Mergers Committee

Response to Competition Bureau Discussion Paper on the proposal to increase fees and revise its Fee and Service Standards Policy

Introduction and Summary of Recommendations

The National Competition Law Section of the Canadian Bar Association (the Section) is pleased to submit its comments on the Competition Bureau Discussion Paper on the Proposal to increase fees and revise its Fee and Service Standards Policy, issued in August 2002.

The Section welcomes the Commissioner of Competition's proposal to increase the "transaction-size" threshold under section 110 of the *Competition Act* and recommends consideration of increasing the "party-size" threshold and establishing a mechanism by which the financial thresholds in Part IX would be modified on a regular (i.e. annual) basis.

The Section suggests that further consideration be given to the appropriateness of increasing merger notification filing fees, as well as the means by which those fees are determined.

The Section suggests that further consideration be given to the appropriateness of the proposed fee levels for advisory opinions under certain provisions of the *Act*.

The Section supports consideration of potential improvements to the Fee and Services Handbook and the merger review process and offers a number of proposals to that end.

Notification Thresholds

The Section welcomes the proposal to increase the "transaction-size" threshold in section 110 of the *Act* from $35 million to $50 million.

Although periodic modification of the thresholds is contemplated in section 110, this provision has not been amended since Part IX of the *Act* came into force in July 1987. As noted by the Commissioner, the proposed increase will approximately match the consumer price index (CPI) increase since that time. (The CPI has increased by approximately 45%, resulting in an inflation-adjusted threshold of slightly over $50 million.) We believe it would be appropriate to adjust the "transaction-size" threshold in recognition of this fact alone.

The Commissioner has estimated that the threshold change will result in a 10% decrease in the number of notifiable transactions.[1] He has indicated that if the proposed increase had been implemented prior to the 2000-2001 fiscal year, every merger that gave rise to competition concerns would still have been notifiable. The Section agrees with the

[1] Although the basis for this estimate is unclear, the adjustment will certainly result in fewer mergers being notified to the Bureau.

Commissioner that the change should not affect notification to the Commissioner of a material number of possible anti-competitive mergers. Moreover, the Competition Bureau will continue to receive information about potentially problematic transactions which fall below the thresholds from monitoring press releases and from complainants. Reducing the number of notifiable transactions will also reduce the administrative burden on the Mergers Branch and thereby increase the resources that the Bureau is able to devote to potentially problematic mergers (which should also permit better service *without* the need for increased filing fees). Further, the rationale for introducing a mandatory merger notification regime was to prevent the consummation of large transactions which, if found to be likely to reduce competition substantially, would be difficult to remedy. History has demonstrated that only very few transactions are problematic, and even fewer are irremediable.

The Section recommends that the current threshold of $70 million used in the case of amalgamations in section 110(4) of the *Act* should also be increased, to $100 million. If inflation-adjustment is appropriate for asset acquisitions, share acquisitions, combinations and the acquisitions of interests in combinations, we see no reason why a corresponding adjustment should not also be made for amalgamations. If the Commissioner has reason to recommend that the threshold in the case of amalgamations not be changed, the Section would appreciate an opportunity to review and comment on those reasons.

The Section is also of the view that amendments to the *Act* ought to be contemplated that would permit automatic adjustment of the financial thresholds in Part IX on a regular (i.e. annual) basis. Adjustment of the "transaction-size" threshold, for example, has been contemplated since at least 1995. Introducing a self-adjusting formula would avoid the need to expend Bureau resources whenever increases in the thresholds are contemplated, as well as the delays inherent in the current system.

According to the Regulatory Analysis Impact Statement, "[a]n automatic price indexation […] would not enable the government to make a change to the threshold and assess the impact." Although the *Act* already contemplates periodic increases in notification thresholds, experience has shown that change occurs infrequently and by way of a cumbersome and time-consuming amendments process. However, it is not clear that the Commissioner is presently able to accurately predict the impact of the proposed changes or why indexation would render assessment more difficult or impossible. Nor is it clear why such assessment is necessary if there is general acceptance that at $50 million the "transaction-size" threshold would be an appropriate level for the time being and that periodic adjustment for inflation is appropriate.

Although the Commissioner cites US precedents to support the proposed increase to the "transaction-size" threshold, the US has also recently adopted an automatic index adjustment mechanism to the equivalent of its "party-size" threshold. In the Canadian context, a workable precedent for periodic adjustment is in the *Investment Canada Act*, which contemplates an annual increase (to reflect inflation) in the threshold for direct acquisitions of Canadian

businesses by "WTO investors," or where the Canadian business is controlled by a WTO investor. This model could be easily adapted to the *Competition Act*.[2]

The *Act* also contemplates periodic increases in the "party-size" threshold in section 109. The Commissioner has concluded that this threshold should not be changed because it is high relative to comparable thresholds in other jurisdictions and higher than the comparable threshold used in the US. However, it was originally contemplated that this threshold would be $500 million (see section 81 of Bill C-91) rather than the current $400 million. It is also worth noting that Part IX was apparently intended to require pre-merger notification in only a very small number of cases (5-10 per year according to the then Director![3]). If an inflation-based adjustment is appropriate, even $500 million may in fact be too low.[4]

Merger Notification Filing Fees

Given that the cost of reviewing individual mergers has increased, the Section has no objection in principle to moderately higher notification fees to reflect the increased costs, particularly where the increase is accompanied by an overdue increase in notification thresholds. However, the Section has concerns about the proposed amount of the fee increase. The Section also believes that more careful consideration should be given to the adoption of alternative fee structures, such as sliding scale fees based on party size, transaction size or transaction value.

Proposed Increase in Filing Fees

According to the Bureau's Discussion Paper, the total cost of reviewing mergers has increased from approximately $4.3 million in 1995-96 to $14.2 million[5] in 2000-01. The Bureau does not, however, fully explain why this increase in cost (or the reduction of revenues expected from the increase in merger notification thresholds[6]) justifies doubling the present fee to $50,000 per notification or ARC request. Indeed, from a review of the Annual Reports, the volume of mergers reviewed is up approximately 50%, comparing the four years prior to the introduction of fees to the most recent four years. In the current year, we understand, the volume of mergers is down.

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[2] If adopted, it would be very helpful for the Bureau to have the updated thresholds prominently featured on its website as is the practice at the Investment Review Division.

[3] See Lawson A. W. Hunter, Overview of Bill C-29, Notes for an Address to the Continuing Legal Education Seminar, Canadian Bar Association, Ontario and the Law Society of Upper Canada (June 9, 1984), p. 16.

[4] An inflation-adjusted "party-size" threshold would be approximately $580 million.

[5] It is not clear whether these estimates excluded the cost of investigating non-notifiable mergers (e.g., where the Bureau has commenced and investigation after voluntary notification by the parties, customer or "six-resident" complaints or of its own accord). They should, because fees should only relate to transactions in which a service is being performed to the parties responsible for paying the fees. The parties to notifiable mergers should not subsidise the costs of reviewing non-notifiable mergers.

[6] The Bureau estimates that the proposed increase in the transaction-size threshold will result in a decrease in revenues of approximately $750,000 per annum, but it does not estimate the concomitant reduction in costs: not all merger review costs are fixed and a decrease in the number of notifications should also reduce the overall costs of merger review (or, as noted above, free up resources to more effectively handle other cases without the need for a fee increase).

More generally, the Section would appreciate a more complete understanding of the reasons for the increased costs to the Bureau (including year over year estimates rather than just estimates for 2000-01). The Bureau notes that costs have increased since 1995-96 by 74%, "mainly due to increased staffing … and the use of outside experts." The number of full-time equivalents employed by the Mergers Branch has apparently increased from 38 to 55; which the Section estimates should have resulted in increased costs (in 1996 dollars) of some $2 million: much less than the $10 million increase cited in the Bureau's Discussion Paper. The Section questions what portion of this increase in costs is attributable to a small number of transactions that consumed a disproportionate share of Bureau resources (for example, the contested Superior Propane case). Such cases are unusual and sufficiently infrequent that they could be regarded as an aberration[7]. The Section questions whether it is appropriate to include such cases in determining the "average" cost of merger review for the purpose of setting filing fees.

Even if the total cost of reviewing mergers has indeed increased, in the Section's view this does not justify an across-the-board increase in the fees payable by all parties, when the overwhelming majority of mergers do not give rise to substantive competition issues. According to the Commissioner's 2001 Annual Report, 98% of all mergers examined (381 of 389) were found to pose "no issue under the *Act*." As noted above, a very small number of mergers must therefore consume a disproportionately large amount of Bureau resources. An across-the-board fee hike will therefore result in an even greater cross-subsidisation by parties to competitively benign mergers of the cost of reviewing the very few mergers that raise serious concerns. The Section believes that this is an issue that should be proactively addressed. The current proposals exacerbate the problem rather than correct it. If a fee is to be charged at all, fairness dictates that there be a reasonable connection between the quantum of the fee and the value of the service performed. A flat fee structure based on the average cost of all merger reviews unfairly transfers the expense of reviewing a very small number of problematic mergers to all parties to notifiable transactions.

In its June 1993 Consultation Paper on the *Implementation of User Fees*, the Competition Bureau noted that "[t]here are considerable differences in the amount of time required to complete the processing of PMN filings or ARC requests." As a result, the Bureau at that time thought it appropriate to consider three costing alternatives: one based on average completion time; one based on median completion time; and one half-way between average and median completion time.[8] There were significant differences: the average cost of merger review was approximately $19,600; the median cost $3,900; and the proposed fee based on half-way costs would have been in the range of $12,000 - $15,000.

At the time, the median cost alternative was thought to be inappropriate because it "does not shift the costs of merger review to all users involved in a merger and leaves the government subsidising costly mergers." However, the Bureau now acknowledges that because

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[7] Furthermore, the Bureau is entitled to seek (and in the Section's view should consider seeking) special financial allocations for particularly resource intensive merger reviews (as the Section understands was the case for the bank mergers).

[8] The Bureau appears to have undertaken a similar analysis when it introduced the current fee structure: See Competition Bureau, *User Fee Proposal* (1997) at p. 7.

"the general public also benefits from effective enforcement and administration of the *Competition Act*[9]", only partial cost recovery is appropriate.[10] The Section agrees and would observe that the cases in which the public receives the marginal benefit of merger enforcement are those that give rise to issues under the *Act*. It is therefore appropriate that the cost of reviewing those mergers be funded from general revenues, not fees paid by parties to non-problematic mergers. As the Section noted in its response to the Bureau's 1993 Consultation Paper: "it is only proper that the general taxpayer pay the added cost of processing the mergers that are found by the Bureau to have anti-competitive effects, since it is the general taxpayer that will benefit from the prevention of anti-competitive mergers. Thus, if any user fee is imposed for PMN filings, such a fee should be no higher that the average cost of processing notified transactions that raise no significant issues under the *Act*."[11]

The Section therefore believes that it would be most appropriate to base the fee on the average (or perhaps median) cost of reviewing "non-complex" mergers or those that pose "no issue under the *Act*." (Another method might be to vary the fee according to the type or size of transaction, a possibility discussed below, or some combination of a sliding scale plus a fee based on an appropriate cost measure.) In any event, the Section believes that a more rigorous evaluation of the appropriate fee methodology levels needs to be undertaken and the Bureau should examine the possibility of removing any limits on its ability to have access to revenues generated from filing fees before the current fees are revised upwards.[12]

Finally, the Section would note that one of the underlying purposes for charging for the merger review "service" was to improve the quality of that service.[13] The Bureau has, to its great credit, demonstrated the ability to quickly and effectively process most non-complex merger notifications and ARC requests. However, notwithstanding the Bureau's own performance statistics, there is a belief among a substantial number of members of the Section that the Bureau has not achieved the same standards in its review of complex and very-complex mergers. Indeed, with the reduction of the number of merger filings in the current year, there appears to be some anecdotal evidence of less, rather than more efficient review. Nor has the Bureau explained why a fee more than double the present fee will enable the Bureau to achieve those standards in difficult cases. Additional financial resources are not necessarily the complete (or necessary) answer to improving service levels. Other initiatives, including those discussed below, which are designed to improve the Bureau's merger review process, can go a long way towards expediting and improving the process without the need for additional financial resources. The Section applauds the Bureau for the considerable progress on improving service standards that it has made to date, but it is not convinced that service levels have increased as

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[9] Indeed, in the view of the Section, it is the public interest which receives **all** of the benefit from merger review, but we do not wish to revisit that argument in this submission.

[10] See Competition Bureau, *User Fee Proposal* (1997) at p. 3 and Competition Bureau, (2002)

[11] For these reasons, a fee based on costs between average and median completion time is also inappropriate.

[12] The Section understands that the Bureau is currently only entitled to retain $9.5 million of revenues generated from merger filing fees, with the balance being payable to the Treasury.

[13] In its 1997 User Fee Proposal, the Competition Bureau said that it "will use this revenue [from fees] to make improvements to its operations and service levels."

much as they ought to have with the introduction of filing fees or that doubling the fee will correspondingly improve the level of service.

Alternative Bases for Determining Fees

The Section believes that greater consideration should be given to the merits of alternative fee charging policies. The Bureau appears to have rejected sliding scale fees without adequately justifying the flat fee alternative. Where the choice involves selecting the best of a series of imperfect options, the Section believes the options should be fully investigated and the ultimate decision persuasively justified on a reasoned basis. The Bureau has identified two alternatives, both of which have been rejected in favour of the flat fee proposal.

Fee based on review time / transaction complexity

The Section acknowledges that a sliding scale based on time spent on review or complexity suffers from significant problems. Some of these problems have been highlighted by the Bureau, others by the Section in previous consultations on user fees.[14] The Bureau notes that such a system could result in the first merger in an industry subsidising the costs of subsequent reviews as the Bureau will necessarily have to spend more time on the initial review than on those that follow. However, in reality this may not be as significant an issue as suggested because the Bureau has, over the 15 years since the introduction of a mandatory notification and review regime, undoubtedly developed considerable expertise in most sectors of the Canadian economy. Nonetheless, such a system likely would:

- involve considerable "up-front" uncertainty as to the amount of fees payable;
- be administratively difficult to implement (requiring staff to keep detailed time records, for example);
- require some sort of post-merger reckoning (unappealing, because as much of the review process as possible should be predictable); and
- in the extreme, result in massive fees in some cases, if something approaching actual cost recovery was attempted. A poorly constructed scheme could conceivably have an impact on the economics of some small transactions with serious issues.

Such a fee structure might also create the perception of a "moral hazard" in that it could be argued that the Bureau would have a financial incentive to delay reviews. (Although the Section does not question the integrity of Bureau staff, a time or complexity-based regime may result in such a perception).

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[14] See, e.g., letter from CBA National Competition Law Section to George Addy, 29 June 1994.

The Section therefore agrees with the Bureau that this form of fee structure is inappropriate. It suffers from such serious shortcomings that further consideration of possible merits is not warranted.

Fee based on party / transaction size / value

As the approach taken in the US, UK and elsewhere, the Section believes the sliding scale fee alternative based on "party-size," "transaction-size" and / or transaction value deserves more serious consideration. At a minimum, it would be helpful for the Bureau to elaborate on why it believes that conditions in Canada are sufficiently different from those in the US and UK to warrant taking a different approach.

The Bureau has concluded that the size of a proposed transaction bears little or no relationship to the cost of processing a pre-merger notification or Advance Ruling Certificate. While this may be so, fixed fees can similarly have little or no relationship to the cost of processing a merger notification or ARC. Further, while there may be no doctrinal reason for this, and while admittedly it is difficult to gauge this with precision, members of the Section report a perception that very large transactions tend on average to undergo a longer review process. (This would appear to be consistent with the experience in the US, where larger transactions are the subject of "second requests" for information more often than smaller transactions.[15]) Clearly more empirical work would be desirable. However, if properly analysed and implemented, a sliding scale might go some way toward rectifying the current imbalance between the fee and the requisite amount of regulatory effort needed to review the majority of notifiable mergers. Such a fee structure would also have the advantage of not being difficult to administer (by the Bureau or merging parties) if based on easy-to-calculate criteria such as asset value, revenue or transaction value.

Advisory Opinion Fees

The Section supports the collection of fees that cover a reasonable portion of the cost of providing binding written advisory opinions in non-merger cases.

The Bureau's statistics indicate that the number of non-merger advisory opinion requests is relatively low and has been declining since 1998. It is possible that the number of such requests will increase now that the opinions will be binding on the Commissioner. However, the Section is concerned that imposing too high a fee could discourage parties from seeking advisory opinions. It would seem that imposing fees in 1998 has had that effect already. Without more information about the historical costs of providing opinions under the non-merger provisions of the *Act*, it is difficult to evaluate the appropriateness of the proposed fees. However, fees in the range of $10,000 to $15,000 seem rather high, given that the Bureau has years of experience with these provisions, that in some cases there is a substantial body of jurisprudence, and that the Bureau has issued detailed guidelines on many of the provisions in question (e.g. price discrimination, predatory/unreasonably low pricing, abuse of dominance).

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[15] See Table IV of the Federal Trade Commission and Department of Justice, *Annual Report to Congress Fiscal Year 2000 Pursuant to Subsection (j) of Section 7A of the Clayton Act Hart-Scott-Rodino Antitrust Improvements Act of 1976* (Twenty-Third Report).

The Bureau has proposed that binding opinions will not be issued with respect to mergers and acquisitions. To encourage compliance with the *Act* and reliance on section 124.1, the Section recommends revisiting this position and establishing a lower fee (perhaps $1,000 to $2,000) in respect of merger notification opinions (i.e., opinions on the application of Part IX of the *Competition Act* to a particular set of facts). Consideration of the potential application of the notification provisions to fact situations which have not previously been encountered may arise from time to time, although one would think such occurrences will be increasingly rare given that the Bureau has more than 15 years of experience in these matters. The Section expects that in the vast majority of cases such opinions would not require market contacts or extensive analysis.

The Section strongly supports the Bureau's commitment to continue to provide oral advice and other preliminary views without charge. It would be unfortunate if the Bureau's fee policy discouraged consultation and efforts to voluntarily comply with the *Competition Act*.

The Section also recommends that the Bureau make written advisory opinions publicly available on its website, with confidential information deleted. This practice would increase transparency and promote a more consistent interpretation of the *Competition Act*. It may also reduce demands on the Bureau's resources, to the extent that persons elect to rely on guidance provided in similar situations without seeking a binding opinion.

Merger Review Service Standards

We understand that the Bureau intends to circulate a draft revised Fee and Service Standards Handbook ("Handbook") prior to the consultations to be held later this year, and to subsequently incorporate comments provided at the consultations and in written briefs with a view to implementing a revised Handbook some time in the first quarter of 2003. The Section looks forward to having further discussions with the Mergers Branch and working with them to develop a more streamlined merger review process. We would welcome an opportunity to provide more detailed comments following the release of a draft revised Handbook, in the course of the Bureau's stakeholder consultations and perhaps through a series of follow-up meetings. In anticipation of such discussions we offer a number of preliminary comments below.

- The Merger Notification Unit has been quite successful in processing non-complex cases within the 14-day service standard period. Indeed, it appears from the Bureau's statistics that the average review time for non-complex transactions declined slightly in the last fiscal year. Overall, the Section is satisfied with the Bureau's treatment of non-complex mergers and we do not recommend that any significant changes be made in this area.

- As noted above, the Section believes that issues remain with respect to the length of time required to review complex and very complex mergers. While the Bureau's statistics indicate that the service standard is met in roughly 90% of complex cases and almost all very complex cases, these statistics can be somewhat misleading insofar as the Bureau does not consider the service standard period to have started until it has determined that it has received all the information which it considers sufficient to commence its review, which may be several weeks after it receives the notification filing. Indeed, Section members refer to cases in which the Bureau has taken the position that the service standard period only began to run

once the parties had responded to a section 11 order, which was issued several months after review of a merger had commenced. The Section believes there should be very clear guidelines as to when the service standard period will commence, and that in order to prevent abuse (or the perception thereof) there should be as little discretion as possible available to case officers to deviate from or override such guidelines.

- Service standards for merger review should perform two functions: They should provide merging parties a reliable measure of the time that will likely be required to obtain *Competition Act* clearance, and they should provide a standard against which the Bureau and the public can measure the Bureau's performance. The Section believes that the review of the Handbook provides an opportunity to re-evaluate the appropriateness and effectiveness of service standards in meeting these objectives. There is a belief among members of the Section that the current three category classification of service standards, and the manner in which time periods in connection therewith are calculated are confusing to clients, difficult to explain and often uncertain in their application.

- The Section recommends that the Bureau maintain and publish statistics on the time from receipt of a pre-merger notification filing to the conclusion of its review. We recognise that this timing is not entirely within the Bureau's control (the initial filing may be incomplete; the parties may provide little or no supplementary information about market conditions, or may do so long after the notification filing; the Bureau may be required to delay making market contacts pending a public announcement). Consequently, it would be inappropriate to judge the Bureau's performance exclusively on the basis of such statistics. However, at a minimum such information would give merging parties a more realistic gauge of the time required to obtain *Competition Act* clearance. Knowing such statistics are being maintained and published may also motivate reviewing officers to complete initial assessments more quickly and, where necessary, seek additional information from the parties at an earlier stage.

- The Section encourages the Bureau to consider ways in which the classification and review of what are currently treated as "complex" and "very complex" mergers can be streamlined. As indicated above, we would welcome an opportunity to work with the Mergers Branch to develop such proposals. To facilitate that discussion we offer the following preliminary suggestions:

    - The Bureau consider adopting as a standard practice that reviewing officers in complex and very complex cases communicate their preliminary assessments to the parties as early in the review process as possible and regularly communicate updated assessments as the review progresses. In many cases the parties will be able to provide additional information to address the reviewing officer's concerns, thus avoiding prolonged investigations or the need to resort to time-consuming, formal information requests. If the parties are unable to satisfactorily address the reviewing officer's concerns through this process, it is still preferable to learn this at an early stage of the review.

    - Within a relatively short period of time (perhaps 21-30 days) after receiving a completed notification filing, the Bureau should provide the parties with a detailed preliminary assessment of the potential issues which have been identified in the course of its preliminary review and which the Bureau intends to examine in further detail, together

with a statement of further information requirements. This assessment should be provided to the parties before any formal information request is made.

- The use of formal powers to collect information (and the delay inherent in the use of such powers) has been an issue in a number of cases. In most cases it should be apparent soon after the Bureau begins making market contacts whether a formal information request or a section 11 order will be necessary. We recommend that the Bureau adopt a policy of making every effort to communicate its supplementary information requirements to the parties within 30 days after receiving a completed notification filing. The Section believes that the Bureau should only resort to the use of formal powers where information is not available by less intrusive means or where there are unusual circumstances (i.e., the parties have refused to cooperate or to voluntarily provide necessary information). Other than in such unusual circumstances, the Bureau should commit to only using these powers within a certain period of time (perhaps 30 days) following receipt of a complete merger notification. In addition section 11 orders should rarely, if ever, be sought against persons who have already complied with a detailed formal information request.

- In the US, the Federal Trade Commission[16] and Department of Justice[17] are willing to participate in early conferences with the merging parties to identify issues and have adopted administrative procedures intended to regulate and streamline the merger review process. The Section suggests that the Bureau consider the feasibility of implementing similar policies and communicating them to the public, perhaps in the revised Handbook.

The Section welcomes the opportunity to discuss these matters further with the Bureau.

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[16] FTC Announces Changes to 'Second Request' Procedures During Premerger Review" (April 5, 2000), available online at <http://www.ftc.gov/opa/2000/04/hsrinits.htm>.

[17] See "Antitrust Division Releases Details of Merger Review Process Initiatives" (October 12, 2001), available online at <http://www.usdoj.gov/atr/public/press_releases/2001/9305.htm>; and "Antitrust Division Announces Merger Review Process Improvements" (April 6, 2000) available online at <http://www.usdoj.gov/atr/public/press_releases/2000/4511.htm >.