RECOMMENDED PRACTICES FOR MERGER NOTIFICATION PROCEDURES

I. Nexus to Reviewing Jurisdiction

A. Jurisdiction should be asserted only over those transactions that have an appropriate nexus with the jurisdiction concerned.

WORKING GROUP COMMENTS
Original Comments (September 2002)

Comment 1: Jurisdictions are sovereign with respect to the application of their own laws to mergers. In exercising that sovereignty, however, jurisdiction should be asserted only with respect to those transactions that have an appropriate nexus with the reviewing jurisdiction.

B. Merger notification thresholds should incorporate appropriate standards of materiality as to the level of "local nexus" required for merger notification.

WORKING GROUP COMMENTS
Original Comments (September 2002)

Comment 1: In establishing merger notification thresholds, each jurisdiction should seek to screen out transactions that are unlikely to result in appreciable competitive effects within its territory. Requiring merger notification as to such transactions imposes unnecessary transaction costs and commitment of competition agency resources without any corresponding enforcement benefit. Merger notification thresholds should therefore incorporate appropriate standards of materiality as to the level of "local nexus" required, such as material sales or assets levels within the territory of the jurisdiction concerned.

Comment 2: This "local nexus" approach would not preclude the use of ancillary thresholds based on worldwide activities of the parties as an additional prerequisite, but worldwide revenues or assets should not be sufficient to trigger a merger notification requirement in the absence of a local nexus (*e.g.*, revenues or assets in the jurisdiction concerned) exceeding appropriate materiality thresholds.

Comment 3: The "local nexus" thresholds should also be confined to the relevant entities or businesses that will be combined in the proposed transaction. In particular, the relevant sales and/or assets of the acquired party should generally be limited to the sales and/or assets of the business(es) being acquired.

C. Determination of a transaction's nexus to the jurisdiction should be based on activity within that jurisdiction, as measured by reference to the activities of at least two parties to the transaction in the local territory and/or by reference to the activities of the acquired business in the local territory.

WORKING GROUP COMMENTS
Original Comments (September 2002)
Amended (June 2003)

Comment 1: Notification should not be required unless the transaction is likely to have a significant, direct and immediate economic effect within the jurisdiction concerned. This criterion may be satisfied if each of at least two parties to the transaction have significant local activities. Alternatively, this criterion may be satisfied if the acquired business has a significant direct or indirect presence on the local territory, such as local assets or sales in or into the jurisdiction concerned.

Comment 2: Many jurisdictions require significant local activities by each of at least two parties to the transaction as a predicate for notification. This approach represents an appropriate "local nexus" screen since the likelihood of adverse effects from transactions in which only one party has the requisite nexus is sufficiently remote that the burdens associated with a notification requirement are normally not warranted. To the extent that the "local nexus" requirement can be satisfied by the activities of the acquired business alone, the requisite threshold should be sufficiently high so as to ensure that notification will not be required for transactions lacking a potentially material effect on the local economy.

Comment 3: Notification should not be required solely on the basis of the *acquiring* firm's local activities, for example, by reference to a combined local sales or assets test which may be satisfied by the acquiring person alone irrespective of any local activity by the business to be acquired. Likewise, the relevant local activities of the acquired party should generally be limited to the local sales or assets of the business(es) being acquired.

Comment 4: It is possible that competitive issues might be presented when a local, dominant firm acquires a significant foreign potential competitor that lacks significant sales in the jurisdiction. However, the use of notification thresholds based solely on the acquiring firm's local activities to cover these exceptional cases will impose unnecessary transaction costs on a much larger number of transactions that do not pose any appreciable risk of competitive harm. Accordingly, the adoption of notification thresholds premised solely on the acquiring firm's local activities should be considered only if the competition agency would otherwise be deprived of jurisdiction over such transactions (*i.e.*, where the jurisdiction's laws preclude the agency from challenging non-notifiable transactions). If a jurisdiction adopts such notification criteria, the applicable notification thresholds should be set at a very high level. If such thresholds are insufficient to minimize unnecessary filings, other objectively-based limiting filters should be adopted.

II. <u>Notification Thresholds</u>

A. Notification thresholds should be clear and understandable.

WORKING GROUP COMMENTS
Original Comments (September 2002)

Comment 1: Clarity and simplicity should be essential features of notification thresholds so as to permit parties to readily determine whether a transaction is notifiable. Given the increasing incidence of multi-jurisdictional transactions and the growing number of jurisdictions in which notification thresholds must be evaluated, the business community, competition agencies and the efficient operation of capital markets are best served by clear, understandable, easily administrable, bright-line tests.

B. Notification thresholds should be based on objectively quantifiable criteria.

WORKING GROUP COMMENTS
Original Comments (September 2002)

Comment 1: Notification thresholds should be based exclusively on objectively quantifiable criteria. Examples of objectively quantifiable criteria are assets and sales (or turnover). Examples of criteria that are not objectively quantifiable are market share and potential transaction-related effects. Market share-based tests and other criteria that are more judgmental may be appropriate for later stages of the merger control process (such as determinations relating to the amount of information required in the parties' notification and to the ultimate legality of the transaction), but such tests are not appropriate for use in making the initial determination as to whether a transaction is notifiable.

Comment 2: The specification of objective criteria will require a jurisdiction to explicitly identify several elements. First, the jurisdiction must identify the measurement tool -- *e.g.*, assets or sales. Second, the jurisdiction must identify the scope of the geographic area to which the measurement tool is applied -- *e.g.*, national or worldwide. Third, the jurisdiction must specify a time component. In the case of certain measurement tools, such as revenues, sales, or turnover, the time component will be a period over which the measurement should be taken -- *e.g.*, a calendar year. In the case of other measurement tools, such as assets, the time component will be a particular date as of which the measurement should be taken. In either case, the above-referenced criteria may be defined by reference to pre-existing, regularly-prepared financial statements (such as annual statements of income and expense or year-end balance sheets).

Comment 3: The specified criteria should be defined in clear and understandable terms, including appropriate guidance as to included and/or excluded elements, such as taxes and intra-company transfers (as to sales), depreciation (as to assets), and material events or transactions that have occurred after the last regularly-prepared financial statements. Guidance should also be given as to the proper geographic allocation of sales and/or assets. To facilitate the merging parties' ability to gather multi-jurisdictional data on a consistent basis, jurisdictions should seek to adopt uniform definitions or guidelines with respect to commonly used criteria.

C. Notification thresholds should be based on information that is readily accessible to the merging parties.

WORKING GROUP COMMENTS
Original Comments (September 2002)

Comment 1: The information needed to determine whether notification thresholds are met should normally be of the type that is available to the parties in the ordinary course of business.

Comment 2: Notwithstanding C*omment 1*, the merging parties can reasonably be required to report their revenues or assets by jurisdiction even if they do not maintain data in that form in the ordinary course of business. As previously discussed, however, parties should be given appropriate guidance as to the methodology to be applied in developing the specified data. This is particularly important where information must be reported in a manner that is not consistent with a merging party's normal business practices.

Comment 3: Local currency values will generally be superior to other economic measures for purposes of establishing financial criteria in notification thresholds -- parties are more likely to maintain their financial data in the ordinary course by reference to currency values, and published data relating to currency values are generally readily accessible and available through standard international sources. It is recognized, however, that jurisdictions facing volatile local currency fluctuation may need to adopt more dynamic economic measures, such as monthly wage multiples. The general preference for local currency values is not intended to preclude a jurisdiction from expressing financial criteria in its notification thresholds by reference to a generally-recognized global trading currency if it chooses to do so. In all events, however, the relevant criteria should be clearly defined (including applicable rules pertaining to currency conversion), transparent and readily accessible by merging parties whether or not domiciled in the local jurisdiction.

III. <u>Timing of Notification</u>

A. Parties should be permitted to notify proposed mergers upon certification of a good faith intent to consummate the proposed transaction.

WORKING GROUP COMMENTS
Original Comments (September 2002)

Comment 1: Parties should be permitted to notify transactions without undue delay. This will allow parties to make filings at the time they deem most efficient and facilitate coordination of multi-jurisdictional filings. Competition agencies should not, however, be required to accept filings with respect to transactions that are merely speculative, and parties may therefore reasonably be required to submit some appropriate indicia that they intend to proceed with the transaction as a precondition for filing notification. Competition agencies may also condition acceptance of filing upon publication of the fact of such filing or otherwise complying with the jurisdiction's public disclosure requirements.

Comment 2: Jurisdictions differ considerably in their practices as to when parties are permitted to submit their formal notification. Convergence of these practices can be a way of promoting greater efficiency in the coordination of the multi-jurisdictional review process. Certain jurisdictions do not permit formal notification until a definitive agreement has been executed. Other jurisdictions permit filing on the basis of a letter of intent, agreement in principle or public announcement of the intention to make a tender offer (with some jurisdictions also requiring an express certification by the notifying party or parties of a good faith intention to consummate the notified transaction), and these jurisdictions have found that this practice has not resulted in a significant incidence of speculative notifications. The cost (including filing fees), information-gathering burdens and potential for public disclosure associated with the notification process also have a natural tendency to inhibit parties from notifying merely speculative transactions.

Comment 3: In determining when notification will be permitted, jurisdictions may consider whether requests for confidentiality during the review period will impede the competition agency's ability to conduct an effective investigation (as, for example, by contacting third parties) or otherwise conflict with applicable public disclosure requirements in the jurisdiction concerned.

Comment 4: Where formal notification is not permitted until a definitive agreement is in place, competition agencies should accord the parties the opportunity for confidential pre-notification consultations to present and discuss the proposed transaction in advance in order to facilitate timely submission and review of the formal notification. In addition, the standards for determining when a "definitive agreement" has been reached should be clearly defined so that the parties can determine when their notification will be accepted for filing.

B. Jurisdictions that prohibit closing while the competition agency reviews the transaction or for a specified time period following notification should not impose deadlines for pre-merger notification.

WORKING GROUP COMMENTS
Original Comments (September 2002)

Comment 1: Notification regimes differ substantially in terms of the nature and volume of information that must be submitted at the time a transaction is notified, and there will be circumstances in which it will take parties substantial time to prepare the necessary submissions after they have reached an agreement. Jurisdictions that prohibit closing until there has been an opportunity for the competition agency to review the transaction should not impose a deadline upon the parties to file notification within a specified time after reaching an agreement. Parties will have the incentive to file promptly after reaching an agreement because they know they will be unable to close their transaction until it has been reviewed. Elimination of filing deadlines will also facilitate the coordination of multi-jurisdictional filings and reviews.

C. Jurisdictions that do not prohibit closing pending review by the competition agency should nevertheless allow parties a reasonable time in which to file notification following a clearly defined triggering event.

WORKING GROUP COMMENTS
Original Comments (September 2002)

Comment 1: Certain jurisdictions require notification of transactions but do not prohibit the parties from closing pending competition agency review (so-called "non-suspensive jurisdictions"). Such jurisdictions have a legitimate basis for requiring a filing within a time-frame that will permit the competition agency to conduct a timely review. Where notification is required within a specified period following a triggering event, such period should accord the parties a period of time to prepare the necessary submissions that is reasonable in view of the information requirements to be satisfied.

Comment 2: The triggering event for purposes of calculating the filing deadline should be clearly defined so as to permit the parties to determine the timing of their notification obligation in a definitive manner. The triggering event should also be defined so as to avoid imposing mandatory notification requirements with respect to proposed transactions that have not yet reached an appropriate level of development in the negotiation process. This will avoid premature filing requirements and thereby promote the efficient allocation of enforcement resources and avoid imposing unnecessary costs and burdens on parties contemplating (but not yet fully committed to) a possible transaction.

IV. <u>Review Periods</u>

A. Merger reviews should be completed within a reasonable period of time.

WORKING GROUP COMMENTS
Original Comments (June 2003)

Comment 1: Merger transactions may present complex legal and economic issues. In such cases, competition agencies need sufficient time to properly investigate and analyze them in order to reach a well-informed decision. At the same time, merger transactions are almost always time sensitive, and the completion of merger reviews by relevant competition agencies is often a condition to closing either by operation of law or contract. Delay in the completion of such reviews may give rise to a number of risks. Delay may jeopardize the consummation of the transaction itself due to intervening developments and/or other time-sensitive contingencies such as financing arrangements. Delay may also have an adverse impact on the merging parties' individual transition planning efforts and on their ongoing business operations due to work force attrition and marketplace uncertainty. In addition, it defers the realization of any efficiencies arising from the transaction. Merger reviews should therefore be completed within a reasonable time frame. A reasonable period for review should take into account, *inter alia*, the complexity of the transaction and possible competition issues, the availability and difficulty of obtaining information, and the timeliness of responses by the merging parties to information requests.

Comment 2: Many jurisdictions (so-called "suspensive jurisdictions") prohibit the consummation of notified transactions pending the expiration or early termination of specified "waiting periods." In so-called "non-suspensive jurisdictions," the parties are permitted to close notified transactions pending review by the competition agencies. Merging parties may voluntarily defer closing in non-suspensive jurisdictions, however, in the interest of achieving legal certainty. In some instances, receipt of all required regulatory approvals may also be a condition to obtaining financing, completing company law formalities or other matters necessary to allow the transaction to proceed. Accordingly, merger reviews should be completed within a reasonable time frame in both suspensive and non-suspensive jurisdictions.

Comment 3: Completion of merger reviews within a reasonable time frame in non-suspensive jurisdictions also promotes more effective enforcement because the passage of time may render it more difficult for the competition agency to obtain effective post-closing remedies.

B. Merger review systems should incorporate procedures that provide for expedited review and clearance of notified transactions that do not raise material competitive concerns.

WORKING GROUP COMMENTS
Original Comments (June 2003)

Comment 1: Given that the vast majority of notified transactions do not raise material competitive concerns, merger review systems should be designed to permit such transactions to proceed expeditiously. Many jurisdictions achieve this objective by employing review procedures that allow such non-problematic transactions to proceed following a preliminary review undertaken during an abbreviated initial review period, and subjecting only transactions that raise material competitive concerns to more extended review periods.

Comment 2: In some merger review systems, the initial review period is referred to as "Phase I," while the extended review period is referred to as "Phase II." Other jurisdictions employ single phase or multi-phase review procedures that likewise permit - transactions that do not present material competitive concerns to proceed expeditiously following an abbreviated review and/or waiting period.

C. In suspensive jurisdictions, initial waiting periods should expire within a specified period following notification and any extended waiting periods should expire within a determinable time frame.

WORKING GROUP COMMENTS
Original Comments (June 2003)

Comment 1: In suspensive jurisdictions, the parties' ability to lawfully consummate notified transactions is dependent upon the expiration of applicable waiting periods. Accordingly, initial waiting periods should be subject to definitive and readily-ascertainable deadlines to permit transactions that do not present material competitive concerns to proceed with minimal delay and disruption. While certain transactions will require more extended reviews, waiting periods associated with such reviews should expire within determinable time frames, whether measured from the date of the initial filing, the commencement of "Phase II" or similar proceedings, or from the merging parties' submission of information the competition agency requires to complete the extended review.

Comment 2: To facilitate coordinated reviews and clearances, jurisdictions should seek convergence of their waiting periods with the time frames commonly used by competition agencies internationally. Thus, initial waiting periods should expire in six weeks or less, and extended or "Phase II" reviews should be completed or capable of completion within six months or less following the submission of the initial notification(s).

Comment 3: Uncertainty with respect to applicable waiting periods can be avoided only if the parties can readily ascertain the commencement and the anticipated expiration dates thereof. Competition agencies should therefore provide notifying parties with timely notice as to any deficiencies in their submissions, and should inform the parties of the specific details of any such deficiencies to facilitate the prompt submission of corrective filings. In those jurisdictions where requests for additional information have the effect of automatically interrupting or suspending the waiting period, competition agencies should seek to consolidate information requests in order to increase the predictability of the anticipated duration of the waiting period.

Comment 4: Parties should be free to consummate properly notified transactions upon the expiration of specified waiting periods unless the competition agency takes formal action to extend the waiting period (as, for example, by initiating Phase II proceedings), to impose conditions to closing, or to prohibit or enjoin the transaction. In certain jurisdictions, the expiration of applicable waiting periods does not bar subsequent challenge by the competition agency, but parties are nevertheless legally permitted to consummate transactions following such expiration.

Comment 5: The existence of specified waiting periods should not preclude competition agencies from granting early termination once they determine that a proposed transaction does not raise material competitive concerns. Accordingly, each jurisdiction's procedures should enable the competition agency to grant early termination of applicable waiting periods.

Comment 6: In certain situations, the specified waiting periods may not be sufficient for the competition agency to reach a determination. Additional time may be needed, for example, for particularly complex transactions and/or to finalize mutually acceptable conditions for clearance. To accommodate these situations, procedures should be sufficiently flexible to allow for a limited extension, with the consent of the notifying party(ies), of applicable waiting periods to avoid the initiation of Phase II proceedings and/or an adverse enforcement decision where such a result might be avoided by a limited extension. Competition agencies should not invite or encourage such extensions unless there is reason to believe that the extension may avoid a more protracted, formal extension of the waiting period and/or an adverse enforcement decision.

D. In non-suspensive jurisdictions, initial merger reviews should be completed within a specified period following notification and any extended reviews should be completed within a determinable time frame.

WORKING GROUP COMMENTS
Original Comments (June 2003)

Comment 1: Although merging parties are not legally prohibited from consummating transactions following notification in non-suspensive jurisdictions, the pendency of review may nevertheless impact the parties' practical ability and/or willingness to close prior to competition agency clearance. As a consequence, many of the same timing considerations discussed in the Comments to Recommended Practice C with respect to waiting periods in suspensive jurisdictions are also applicable with respect to review periods in non-suspensive jurisdictions.

Thus, *inter alia*, initial review periods should be subject to definitive and readily-ascertainable deadlines to facilitate clearance of transactions that do not present material competitive concerns with minimal delay and disruption, and extended review periods should be subject to determinable deadlines.

Comment 2: Non-suspensive jurisdictions should likewise seek convergence of their review periods with time frames typically used by competition agencies internationally to facilitate coordinated reviews and clearances. Thus, initial reviews in non-suspensive jurisdictions should be completed in six weeks or less, and extended or "Phase II" reviews should be completed or capable of completion within six months or less following the submission of the initial notification(s).

E. Jurisdictions should adopt appropriately tailored procedures to accommodate particular circumstances associated with non-consensual transactions and sales in bankruptcy.

WORKING GROUP COMMENTS
Original Comments (June 2003)

Comment 1: Notification procedures designed primarily to cover negotiated transactions may be ill-suited for non-consensual transactions such as public bids and tender offers. In such transactions, the acquired firm may be apathetic or even hostile to the proposed transaction and correspondingly disinclined to cooperate in any applicable notification and review process. These difficulties may be especially pronounced in jurisdictions where notifications must be filed by both the acquiring and acquired persons or where joint notification is required. Non-consensual transactions may also be particularly time-sensitive due to applicable company or securities law deadlines and the possibility of competing, and potentially non-reportable, bids. Jurisdictions should adopt appropriately tailored procedures to take the particularized nature of these transactions into account. For example, jurisdictions have variously adopted the following measures designed to address specific issues raised by non-consensual transactions: shortened review periods (or, where applicable, waiting periods); permitting the applicable initial review period to commence upon filing by the acquiring party only (where filings by both the acquiring and acquired parties are normally required); discretionary waivers of information requirements relating to the target company in hostile situations; and/or discretionary derogations permitting the implementation of the bid during the review period, provided that the acquiring person does not exercise voting rights or does so only to maintain the full value of the shares.

Comment 2: Jurisdictions should consider adopting procedures for accelerated review of transactions involving sales of companies in financial distress which are subject to court-supervised processes (*e.g.*, bankruptcy or similar restructuring). The risks associated with the potential deterioration of the assets of such firms suggest that expedited review and/or waiting periods should be considered, whether by means of particularized rules or discretionary early termination. Non-consensual sales by trustees in bankruptcy also may raise the difficulties set forth in the preceding Comment.

V. Requirements for Initial Notification

A. Initial notification requirements should be limited to the information needed to verify that the transaction exceeds jurisdictional thresholds, to determine whether the transaction raises competitive issues meriting further investigation, and to take steps necessary to terminate the review of transactions that do not merit further investigation.

WORKING GROUP COMMENTS
Original Comments (June 2003)

Comment 1: Because most transactions do not raise material competitive concerns, the initial notification should elicit the minimum amount of information necessary to initiate the merger review process. It should be used to collect information to verify that the transaction is properly before the competition agency in light of applicable jurisdictional requirements and notification thresholds and to determine whether the transaction raises competitive issues meriting further investigation. The initial notification also may be used to collect information that the competition agency needs for a clearance decision or to prepare other documentation required to terminate the review process.

Comment 2: The amount of information required in the initial notification may vary depending on the approach to notification thresholds taken by the jurisdiction. Jurisdictions that review transactions of limited value, transactions with limited local nexus, or large numbers of transactions due to low jurisdictional thresholds should be particularly sensitive to any disproportionate burdens arising from the breadth of their initial filing requirements.

B. Initial notification requirements and/or practices should be implemented so as to avoid imposing unnecessary burdens on parties to transactions that do not present material competitive concerns.

WORKING GROUP COMMENTS
Original Comments (June 2003)

Comment 1: Because the duty to notify applies to transactions covering a wide range of possible competitive effects, no single set of initial notification requirements will be optimal for all transactions. To enable the competition agency to accomplish its mission without imposing unnecessary burdens on merging parties, jurisdictions should adopt mechanisms that allow for flexibility in the content of the initial notification and/or with respect to additional information requirements during the initial phase of the review.

Comment 2: There are various ways to provide flexibility in the initial review. Many jurisdictions use one or more of the following:

- *Alternative notification formats* – different initial notification formats varying with the likely complexity of competitive analysis of the transaction; examples include: (a) advance ruling certificates, which enable the merging parties to use a simplified advance procedure instead of a formal notification; and (b) short and long form notification options, enabling the merging parties to elect to submit abbreviated information in transactions that do not present material competitive concerns.

- *Discretionary waiver* – extensive initial notification requirements coupled with procedures providing competition agency staff discretion to waive responses to information specifications that are not sufficiently relevant to the agency's disposition of the transaction to justify the burden that the responses would impose.

- *Discretionary supplementation* – abbreviated initial notification requirements coupled with procedures providing competition agency staff discretion to seek additional information during the initial review period.

Comment 3: Whichever mechanisms are used to provide flexibility, competition agencies should seek to limit the information sought from parties to transactions that do not appear to present material competitive concerns. It is, however, legitimate for competition agencies to require the merging parties to provide information sufficient to demonstrate that the transaction does not present such concerns. At the same time, competition agencies should be flexible as to formal requirements where the merging parties are able to demonstrate the absence of material competitive concerns by reference to objectively quantifiable information maintained in the ordinary course of business, as opposed to the detailed market information sometimes required upon notification.

Comment 4: Competition agencies that use discretionary supplementation should consider providing guidance on the types of information (*e.g.*, business reports and plans, transaction documents, customer lists) that they commonly request for the purpose of determining whether a transaction presents material competitive concerns.

Comment 5: Competition agencies are entitled to expect notifications to contain specific original material relating to their jurisdiction. Where a jurisdiction's notification requirements specify the format in which information is to be submitted, the competition agency should consider accepting substantially responsive information in a different format prepared by parties in the ordinary course of business or for submission to another jurisdiction. Examples of circumstances in which such consideration might be warranted include: (a) where parties that maintain records on a fiscal year basis are notifying in a jurisdiction that ordinarily requires calendar year data; and (b) where parties that maintain data on a geographic basis that does not conform precisely to the format required by the notification form of the jurisdiction concerned.

Comment 6: Competition agencies should allow merging parties voluntarily to provide information beyond that required in the initial filing to assist the agencies in narrowing or resolving potential competitive concerns or engaging in a focused inquiry into such issues.

C. Competition agencies should provide for the possibility of pre-notification guidance to parties on the notifiability of the transaction and the content of the intended notification.

WORKING GROUP COMMENTS
Original Comments (June 2003)

Comment 1: It is generally in the interest of competition agencies and merging parties to clarify the legal and factual issues related to the notification of intended transactions as early as possible. Guidance is likely to be particularly valuable for transactions that present complex jurisdictional or competition issues. Jurisdictions should consider making available pre-notification consultations upon the request of the merging parties in order to advise the parties on whether their transaction will be subject to notification obligations and, if so, what information will be needed for their intended notification.

Comment 2: In jurisdictions that use discretionary waiver as a mechanism for flexibility, pre-notification consultations should provide merging parties with the opportunity to seek a waiver of the obligation to produce requested information on the grounds that the burden of compiling and submitting the information outweighs its value the competition agency.

D. Jurisdictions should limit translation requirements and formal authentication burdens.

WORKING GROUP COMMENTS
Original Comments (June 2003)

Comment 1: While it is appropriate for jurisdictions to require notifications to be in an official language (although they may choose to accept them in additional languages), they should not require extensive translation of supporting documents, such as transactional materials and annual reports, submitted as part of the notification. Competition agencies should accept translated summaries, excerpts, and other means of reducing translation burdens, without prejudice to their ability to require full translations if the transaction appears to present competitive concerns.

Comment 2: Jurisdictions are entitled to reasonable assurance of the validity of notifications and supporting information. These assurances can and ordinarily should be achieved without requiring the parties' senior officials to provide for notarization or consularization personally. Many jurisdictions allow notification to be perfected based on representations by counsel or simple signatures of company personnel. Jurisdictions that require formal authentication should allow notification to be perfected on the basis of an appearance by duly authorized persons residing in the jurisdiction.

VI. Conduct of Merger Investigations

A. Merger investigations should be conducted in a manner that promotes an effective, efficient, transparent and predictable merger review process.

WORKING GROUP COMMENTS
Original Comments (April 2004)

Comment 1: Effectiveness, efficiency, transparency and predictability are fundamental attributes of a sound merger control regime, and these objectives should be pursued at all stages of the merger review process. During the investigative stage, achieving these objectives can be facilitated by adopting procedures that address recurring issues encountered by the competition agency and merging parties in the merger review process and by adopting practices designed to focus the investigation on relevant legal and factual issues as promptly as possible and to resolve any perceived competitive concerns expeditiously.

Comment 2: These objectives can best be achieved if there is a frank and open dialogue between the competition agency and the merging parties. The cooperation of the merging parties is a key factor in the competition agency's ability to pursue these objectives most effectively.

B. Merger investigation procedures should include opportunities for meetings or discussions between the competition agency and the merging parties at key points in the investigation.

WORKING GROUP COMMENTS
Original Comments (April 2004)

Comment 1: The competition agency should be available for consultation with the merging parties to inform them of any significant legal or practical issues that arise during the course of the investigation. Although scheduling meetings may not be necessary in non-complex cases, in appropriate cases merging parties should be afforded an opportunity to meet with the competition agency at key points of the investigation. For example, wherever possible, merging parties should have an opportunity to meet with the competition agency prior to the agency's decision to initiate a second stage inquiry (in jurisdictions with two-phase review procedures), to impose conditions, or to challenge or prohibit the transaction.

Comment 2: As early as feasible, the competition agency should be prepared to discuss its current evaluation of the transaction with the merging parties and attempt to identify potentially dispositive issues. Some jurisdictions find it valuable to hold pre-notification guidance sessions in appropriate cases, for example, where the competition agency has experience in the sector and/or where the parties have provided sufficient information prior to notification to permit the competition agency to formulate preliminary views. While the competition agency should endeavor to identify such issues as soon as possible, certain issues may not come to light until later in the process. Such discussions therefore would not limit the competition agency's discretion to pursue new or additional theories of competitive harm that may emerge during the investigation.

C. Merging parties should be advised not later than the beginning of a second-stage inquiry why the competition agency did not clear the transaction within the initial review period.

WORKING GROUP COMMENTS
Original Comments (April 2004)

Comment 1: The competition agency should provide the merging parties with an explanation (either orally or in writing) of the competitive concerns that give rise to the need for an in-depth review. In jurisdictions that use a two-phase review procedure, this explanation should be provided not later than the beginning of a second-stage inquiry. In single-phase jurisdictions, the competition agency should advise the merging parties of perceived competitive concerns as promptly as possible. At a minimum, the explanation should consist of a short and plain statement of the competitive concerns. Any such statement would not limit the competition agency's discretion to pursue new or additional theories of competitive harm that may emerge during the investigation.

Comment 2: Providing such an explanation has several beneficial effects. First, it promotes transparency and predictability of agency action. Second, it promotes efficiency and reduces transaction costs in the review process by allowing the merging parties to focus on issues identified as problematic, thereby facilitating resolution of these issues as quickly as possible. Third, it reduces the potential for unnecessary delay.

D. Where investigation periods are not subject to definitive deadlines, procedures should be adopted to ensure that the investigation is completed without undue delay.

WORKING GROUP COMMENTS
Original Comments (April 2004)

Comment 1: Where the investigation period is not subject to a definitive deadline, notional timetables (*e.g.,* service standards) for the general conduct of investigations should be issued and/or, in appropriate cases, "timing agreements" between the reviewing agency and the merging parties should be considered. Such agreements would set out a prospective plan and proposed schedule for the investigation of particular transactions. Where such an agreement is appropriate, examples of possible commitments include: (i) scheduled meeting dates between the competition agency and the merging parties; (ii) timetables for possible modification of and compliance with information requests; (iii) dates for depositions or interviews of company representatives; (iv) dates for exchange of economic information and theories; (v) dates for discussions among economists; (vi) dates by which the parties may submit briefing memoranda or other formal submissions; (vii) anticipated timing of recommendations to senior agency officials; (viii) a timetable for submission of, and reactions to, proposed remedies; and (ix) the date before which the parties commit not to close the transaction.

Comment 2: Where the investigation period is tolled or otherwise measured by reference to the merging parties' date of compliance with compulsory information requests, the competition agency should avoid issuing seriatim requests for information to the fullest extent practicable, to promote certainty as to the anticipated duration of the applicable review period and to avoid duplicative effort by and undue burden on the merging parties.

Comment 3: Investigation periods should not be tolled based upon the issuance or pendency of third-party information requests, given that third parties may have no incentive to facilitate timely review and may even be hostile to the transaction. However, third parties should be required to comply with compulsory information requests within a reasonable period of time to facilitate timely completion of the investigation. Competition agencies also should consider adopting specific measures to limit delay that target companies might otherwise cause in the context of non-consensual transactions, such as hostile tender offers.

Comment 4: The existence of specified investigation periods should not preclude the competition agency from closing its investigation prior to specified review deadlines once it concludes that a transaction -- either as originally proposed or as modified pursuant to commitments made by the merging parties -- does not raise material competitive concerns. Competition agencies should have procedures enabling them to grant early termination of applicable waiting periods under such circumstances.

E. Competition agencies should seek to avoid imposing unnecessary or unreasonable costs and burdens on merging parties and third parties in connection with merger investigations.

WORKING GROUP COMMENTS
Original Comments (April 2004)

Comment 1: Recognizing that merger analysis often requires substantial amounts of information, competition agencies should seek to avoid imposing unnecessary or unreasonable costs and burdens on merging parties and third parties in conducting merger investigations. Information requests should be reasonably tailored to obtain the information the competition agency needs to complete its investigation and to take any necessary enforcement actions. Such requests should be focused on the aspects of the proposed transaction that raise potential competitive concerns. Requests for information unrelated to such concerns should be avoided. Proposed formal information requests should be subject to appropriate internal review procedures prior to issuance.

Comment 2: Applicable laws and rules should permit the case team (*i.e.*, agency staff responsible for conducting the investigation) to modify information requests in an effort to avoid unnecessary or unreasonable costs and burdens. The case team should be willing to consider possible modifications proposed by the parties. Issues relating to proposed modifications should be resolved promptly to avoid delay and potentially unnecessary information-gathering.

Comment 3: To the extent it does not prejudice the conduct of the investigation, competition agencies should consider permitting the parties to submit information and documents in the manner in which the company maintains such information and documents in the ordinary course of business. Parties should not be required to supply information that is not in their custody or control or not reasonably accessible to them. Under such circumstances, parties may be required to submit a statement explaining why they are unable to supply requested information.

Comment 4: While recognizing that full-text translations of certain pre-existing foreign language documents may be necessary to permit the reviewing agency to conduct its investigation, competition agencies should be sensitive to the significant costs and burdens involved in providing full-text translations of voluminous documentary submissions and should be selective in imposing full-text translation requirements. Translations should, absent unusual circumstances, be required only for categories of documents that are relevant to legal or factual issues raised by the transaction under review. Where translation burdens will be substantial notwithstanding this general limitation, competition agencies should be willing to consider reasonable proposals by responding parties aimed at reducing these burdens, such as providing translations of relevant excerpts of voluminous documents, without prejudice to the competition agency's ability to subsequently require full translations where the agency determines that such translations are needed to complete its investigation, to initiate enforcement proceedings, or otherwise discharge its responsibilities.

Comment 5: Disagreements between the case team and a merging party relating to whether a request is reasonable or unduly burdensome or whether the merging party has adequately complied with the request should be subject to timely review mechanisms. Although applicable review mechanisms in some jurisdictions include resort to an independent tribunal, resolution of such disputes may appropriately be handled through internal review procedures within the competition agency, for example, by permitting the merging party to raise disputed issues with senior agency officials. Appropriate review mechanisms relating to the reasonableness of compulsory information requests and adequate compliance with such requests should likewise be available to third parties subject to information requests.

F. Merger investigations should be conducted with due regard for applicable legal privileges and related confidentiality doctrines.

WORKING GROUP COMMENTS
Original Comments (April 2004)

Comment 1: In responding to information requests, parties should not be required to disclose materials and information that are subject to applicable legal privileges and related confidentiality doctrines (such as the attorney work-product doctrine) in the requesting jurisdiction. When information requests are directed to persons or facilities in other jurisdictions, competition agencies should give due consideration to similar legal privileges and doctrines applicable in those jurisdictions unless such consideration is precluded by applicable laws in the requesting jurisdiction or by the competition agency's responsibilities under those laws.

Comment 2: Parties may be required to identify and describe materials and information withheld on the basis of legal privilege and related confidentiality doctrines to permit the competition agency to assess the legitimacy of privilege claims. Procedures relating to the identification of materials and information withheld on the basis of legal privilege and related doctrines should not impose unreasonable burdens on the parties.

Comment 3: Competition agencies should also establish and maintain policies pertaining to the handling of privileged materials and information in connection with exchanges of such materials and information with other competition agencies, including any exchange pursuant to a voluntary waiver. Competition agencies should promote transparency with respect to their policies and practices relating to legal privileges and related confidentiality doctrines.

VII. Procedural Fairness

A. Procedural fairness should be afforded to merging parties and third parties with a legitimate interest in the merger under review.

WORKING GROUP COMMENTS
Original Comments (April 2004)

Comment 1: Procedural fairness should be a basic attribute of all merger review procedures. Procedural fairness comprises many factors, including elements of practices discussed elsewhere in these Recommended Practices (*e.g.,* transparency, timeliness of review, conduct of merger investigations). This Recommended Practice focuses on procedural fairness as it relates to providing the merging parties and third parties with a legitimate interest in the merger under review, as recognized under applicable laws in the reviewing jurisdiction (hereinafter "third parties"), with a meaningful opportunity to express their views.

Comment 2: Laws and practices regarding procedural fairness may provide for safeguards at different stages in the merger review process, depending on whether the jurisdiction uses a prosecutorial or administrative merger review system. In a prosecutorial system, the competition agency generally investigates the merger and decides whether to challenge it, but an independent judicial body decides whether to prohibit the transaction. In an administrative system, powers to investigate and to prohibit a merger are generally entrusted to a single authority or to two different administrative authorities, subject to the possibility of review by an independent adjudicative body.

Comment 3: Foreign firms should be treated no less favorably than domestic firms in like circumstances in all aspects of the merger review process, including with respect to procedural fairness.

B. Prior to a final adverse enforcement decision on the merits, merging parties should be provided with sufficient and timely information on the facts and the competitive concerns that form the basis for the proposed adverse decision and should have a meaningful opportunity to respond to such concerns.

WORKING GROUP COMMENTS
Original Comments (April 2004)

Comment 1: If a competition agency reviewing a merger identifies material competitive concerns arising from the transaction, it should provide the merging parties the opportunity to respond to these concerns prior to a final adverse enforcement decision on the merits - *i.e.,* in an administrative system, a decision to prohibit the transaction or to clear it subject to conditions or, in a prosecutorial system, a decision to institute a legal action to challenge or prohibit the transaction. Providing this opportunity serves the public interest in ensuring well-informed enforcement decisions, as well as the interests of the merging parties.

Comment 2: Merging parties should have sufficient information on the material competitive concerns raised by the transaction. Information disclosed to the merging parties should allow them to ascertain the legal, economic and factual bases on which the competitive concerns are founded. Such disclosure should be subject to reasonable confidentiality protections and any applicable legal privileges.

Comment 3: Merging parties should have information on the competitive concerns in a timely manner. Without compromising the effectiveness of an investigation or the outcome of enforcement proceedings, the competition agency should consider apprising merging parties of specific concerns as soon as feasible during the investigation, so the parties can express their views. In any event, the communication of such competitive concerns should be made in time for the merging parties to have an opportunity to respond to these concerns and to consider and propose remedies to address these concerns prior to the issuance of a final enforcement decision. Similarly, if merger laws allow the competition agency or a court to clear a transaction subject to conditions, the competition agency or court should afford the merging parties the opportunity to comment before imposing such remedies.

Comment 4: The timing of access to specific information gathered and relied on by the competition agency in arriving at a final adverse enforcement decision may vary among merger review systems. For example, in some systems, merging parties have the right to review the agency's investigation file prior to the adverse enforcement decision. In other systems, parties are entitled to such information only during court proceedings.

C. Third parties should be allowed to express their views during the merger review process.

WORKING GROUP COMMENTS
Original Comments (April 2004)

Comment 1: Competition agencies have used the following complementary methods, among others, to obtain views from third parties: (a) inviting third parties to express their views on the merger through publication, *e.g.*, in an official gazette or on a website; (b) contacting third parties likely to be affected by the merger, such as customers, suppliers, or competitors of the merging parties; (c) circulating information requests to third parties potentially affected by the transaction; (d) affording third parties an opportunity to comment on proposed remedies; and (e) permitting third parties to apply for formal admission to the proceedings.

D. The competition agency should manage the merger review process to ensure that the process is implemented fairly, efficiently, and consistently.

WORKING GROUP COMMENTS
Original Comments (April 2004)

Comment 1: The competition agency should make certain that there are safeguards, or "checks and balances," ensuring that merger reviews are handled in a fair, efficient, and consistent manner, procedurally and substantively. Consistent application of the merger review process is important to enhance the predictability, fairness, and acceptance of merger review.

Comment 2: Given the variety of merger review procedures among jurisdictions, different methods may be used to achieve these goals. Examples of safeguards that have been applied include: (a) assigning a particular unit to review the legality and consistency of proposed enforcement actions; (b) establishing an economics section within the competition authority to advise decision-makers on the merits of the case; (c) developing internal operational guidelines; (d) supervisory mechanisms to oversee the staff's handling of merger reviews; (e) ensuring a separate review of preliminary findings and/or the results of the in-depth investigation; (f) creating separate investigation and enforcement units; and (g) decision-making by a collegiate body.

E. Merger review systems should provide an opportunity for timely review by a separate adjudicative body of a competition agency's final adverse decision on the merits of a merger.

WORKING GROUP COMMENTS
Original Comments (April 2004)

Comment 1: Once an adverse decision has been taken with respect to a merger, it is often difficult for the transaction to remain viable. Accordingly, judicial review in merger cases should aim to permit resolution of the case within a time frame during which the merger remains viable. Competition agencies should take appropriate steps that are consistent with their respective enforcement responsibilities to facilitate such timely judicial review. Such steps may include cooperating in available procedures for expedited review or expedited evidence gathering.

VIII. <u>Transparency</u>

A. Merger control laws should be applied with a high level of transparency, subject to the appropriate protection of confidential information.

WORKING GROUP COMMENTS
Original Comments (June 2003)

Comment 1: "Transparency" refers to the ability of the public to see and understand the workings of the merger review process. Transparency is important to achieve consistency, predictability and, ultimately, fairness in applying merger control laws, thereby enhancing the credibility and effectiveness of merger control enforcement. Transparency also allows merging parties to better understand and predict the likely outcome of particular cases and the time and costs the review is likely to entail.

Comment 2: Transparent application of merger control laws entails making all relevant laws, regulations, and other materials relevant to merger control law, policy, and practice readily available to the public in a timely manner.

Comment 3: Transparency requirements are limited by the obligation to protect confidential information. When a competition agency or other institution makes information pertaining to a merger publicly available, it should provide for the protection of confidential information.

B. Merger control regimes should be transparent with respect to, at a minimum, the jurisdictional scope of the merger control law, the competition agency's decision-making procedures, and the principles and criteria the competition agency uses to apply the substantive review standard.

WORKING GROUP COMMENTS
Original Comments (June 2003)

Comment 1: With respect to the jurisdictional scope of the merger control law, publicly available materials should permit ready determination of: (i) the types of transactions to which the merger control law applies; (ii) any exemptions or exclusions from the merger control law; and (iii) the precise tests or thresholds that govern whether the parties must notify the transaction or whether the competition agency has jurisdiction over a transaction.

Comment 2: With respect to the procedures applicable to merger review, publicly available materials should permit ready determination of: (i) the identity and contact details of the competition agencies; (ii) any filing deadlines; (iii) notification procedures, including the information to be provided in the initial filing; (iv) any filing fees; (v) review periods; (vi) suspensive periods and any limits on implementing the transaction prior to clearance; (vii) investigative procedures; (viii) any deadlines that the merging parties, third parties, or the competition agencies must obey during the review period; (ix) procedures and deadlines for appealing adverse decisions or for challenging a merger; (x) procedural rights of merging and third parties; and (xi) enforcement procedures pertaining to violations of the merger control laws (*e.g.*, failure to notify) or merger review decisions (*e.g.*, breach of conditions or obligations); (xii) measures for protecting confidential information.

Comment 3: Merger control laws and regulations are often written in general terms, and the principles and criteria used to apply the substantive standard of review set forth in the basic legislation are often developed through administrative practice and case law. Accordingly, to achieve transparency, publicly available materials should include not only the basic legislation, but also the relevant case law, enforcement policies, and administrative practices that clarify and develop the basic legal framework. In particular, these supplemental materials should provide insight into the substantive principles and criteria (*i.e*., the analytical framework) that the competition agency uses in applying the law. If a jurisdiction's merger test includes consideration of non-competition factors, the way in which the competition and non-competition considerations interact should also be made transparent.

C. Competition agencies should promote transparency by making information about the current state of merger control law, policy, and practice readily available to the public.

WORKING GROUP COMMENTS
Original Comments (June 2003)

Comment 1: There are many appropriate ways for competition agencies to promote transparency. These include, among others: publishing general guidelines and notices on substantive law and procedure; publishing individual enforcement and non-enforcement decisions; issuing press releases on important decisions; issuing statements explaining actions or non-actions that signify a change in enforcement policy; delivering speeches; and publishing informational materials. Methods can be combined for increased effectiveness.

Comment 2: A reasoned explanation should be provided for decisions to challenge, block or condition the clearance of a transaction, and for clearance decisions that set a precedent or represent a shift in enforcement policy or practice. Some competition agencies issue a reasoned decision at the end of each merger review, while others do so when enforcement action is taken. What matters is that the available information should allow the public to monitor consistency, predictability, and fairness in the application of the merger review process.

Comment 3: After acquiring sufficient experience, competition agencies may wish to consider publishing guidelines on merger analysis, procedure, and/or jurisdiction to assist interested parties in handling future merger cases. Many competition agencies find it useful to obtain public input prior to issuing such guidelines. To the extent that competition agencies formally rely on guidelines, policies, or precedents from other jurisdictions, the scope and nature of such reliance should be publicly disclosed. If such guidelines are issued, they should be reviewed periodically to reflect current practice.

Comment 4: Materials published to achieve transparency should be made available on a publicly accessible, dedicated website. They should be published in a timely manner and updated regularly to reflect the current state of law, policy, and practice.

Comment 5: To facilitate transparency for foreign firms, competition agencies are encouraged, to the extent permitted by available resources, to consider making available an English translation of basic merger laws, regulations, guidelines, and interpretive notices.

IX. Confidentiality

A. Business secrets and other confidential information received from merging parties and third parties in connection with the merger review process should be subject to appropriate confidentiality protections.

WORKING GROUP COMMENTS
Original Comments (April 2004)

Comment 1: Public disclosure of business secrets and other confidential information received by competition agencies in connection with the merger review process may prejudice important commercial interests and may have adverse effects on competition. The prospect of potential disclosure may also discourage parties from submitting all relevant information to and fully cooperating with the reviewing agency. Confidential information that merging parties and third parties submit in connection with the merger review process should therefore be subject to appropriate confidentiality protections. In the absence of statutory protection, competition agencies should establish policies and procedures to ensure that confidential information will be subject to appropriate confidentiality safeguards.

Comment 2: Confidentiality rules should strike an appropriate balance between commercial interests and other considerations, including the need to ensure procedural fairness for the merging parties, the public interest in protecting the decision-making process, and transparency of the merger review process.

Comment 3: Confidential information submitted by merging parties and third parties should not be used except in connection with the competition agency's review of the merger and other authorized law enforcement purposes. With respect to the use of such information for merger review purposes, it should not be disclosed outside the competition agency except for the purposes of allowing the agency to discharge its merger review mandate effectively (including the initiation and conduct of enforcement proceedings) and to provide merging parties with adequate procedural fairness. Such information may also be disclosed outside the competition agency for purposes of its merger review: (1) where authorized pursuant to international treaties, agreements, or protocols where reciprocal confidentiality protections are specified; (2) in response to requests for judicial assistance by other competition agencies pursuant to national legislation that authorizes such disclosure, provided that confidential treatment by the requesting agency is ensured; and (3) with the submitting party's consent – for example, disclosure to other competition agencies pursuant to a waiver.

Comment 4: To the extent that the competition agency is charged with deciding on requests for confidential treatment, submitting parties may be required to identify confidential information in their submissions and to demonstrate that the information meets applicable standards for confidentiality protection. Where the competition agency denies a request for confidential treatment, it should provide the requesting party with timely notice of the agency's determination and the reasons for the denial. Such notice may be formal or informal, but should be provided in a form that will permit the requesting party to take appropriate steps to contest the determination prior to disclosure.

B. Competition agencies should promote transparency of the confidentiality laws, policies, and practices applicable to their merger control procedures.

WORKING GROUP COMMENTS
Original Comments (April 2004)

Comment 1: As discussed more fully in Recommended Practice VIII, transparency can be achieved by various means including policy statements, guidance notes, notices, instructions to notification forms and information requests, rules of practice, published decisions, and other communications that are readily accessible to affected parties. Such communications might include summaries of the competition agency's confidentiality policies and practices (with references to applicable confidentiality laws and rules), including any steps that submitting parties must take to invoke confidentiality protections and exceptions to the competition agency's ability to preserve confidentiality, such as freedom of information laws, judicial proceedings, and legislative or administrative inquiries. The competition agency's practice regarding retaining, destroying, or returning confidential documents at the end of an investigation should also be publicly available.

Comment 2: Competition agencies should clearly explain the nature and extent of possible public disclosure involved in the merger review process, including any publication requirements and the general nature and scope of any potential disclosure of confidential information in connection with contacting third parties.

Comment 3: Competition agencies should promote transparency with respect to policies or practices on exchanging merger-related information with other government agencies in the jurisdiction concerned and with other competition agencies in the context of interagency coordination.

C. Competition agencies should seek to defer contacts with third parties until the proposed transaction becomes public where such deferral would not adversely affect the reviewing agency's ability to conduct its investigation effectively or complete its review within applicable deadlines.

WORKING GROUP COMMENTS
Original Comments (April 2004)

Comment 1: Premature public disclosure of a pending transaction may have an adverse affect on the merging parties' commercial interests -- negotiations may be disrupted, employee morale may suffer, and commercial relationships may be jeopardized. The possibility that the competition agency will contact third parties prior to public announcement may also reduce the parties' willingness to initiate early discussions with the competition agency regarding proposed transactions. Accordingly, competition agencies should seek to defer contacts with third parties prior to public announcement of the transaction in cases in which such deferral will not adversely affect the reviewing agency's ability to conduct its investigation effectively or complete its review within applicable deadlines.

Comment 2: In many jurisdictions, upon receipt of a notification, the competition agency routinely publishes a notice of the fact of notification inviting third parties to submit comments. In such jurisdictions, because merging parties are on notice that notification is tantamount to public announcement, the practical import of this Recommended Practice is that the competition agency should normally defer marketplace contacts with third parties regarding non-public transactions until notification has, or should have, occurred. Where competition agencies in such jurisdictions contemplate contacting third parties regarding non-public transactions prior to notification, they should consider giving the merging parties advance notice of their intention to initiate such contacts and the agency should be willing to consider reasonable requests by merging parties to defer such contacts until notification has occurred or the transaction has otherwise become public.

Comment 3: In jurisdictions where the fact of notification is not made public, merging parties should be on notice that the competition agency may contact third parties following notification notwithstanding that the pending transaction has not been publicly disclosed. Consistent with the considerations set forth in *Comment 1*, however, competition agencies in such jurisdictions should be willing to consider reasonable requests by notifying parties to defer such contacts for a limited time for good cause, again provided that such deferral would not prejudice the competition agency's ability to conduct its investigation effectively or to timely complete its review.

D. Confidentiality rules should strike an appropriate balance between protecting the confidentiality of third-party submissions and procedural fairness considerations.

WORKING GROUP COMMENTS
Original Comments (April 2004)

Comment 1: Because limitations on the merging parties' ability to obtain access to third-party submissions may implicate procedural fairness considerations, confidentiality rules applicable to third-party submissions should strike an appropriate balance between these procedural fairness considerations and the need to protect confidential information contained in such submissions.

Comment 2: Mechanisms to facilitate access to such submissions might include requesting third parties to submit non-confidential versions of any submissions that may be subject to disclosure, with the understanding that such versions may be subject to disclosure for specified purposes, or requesting submitting parties to prepare non-confidential versions or otherwise make appropriate confidentiality designations prior to disclosure.

Comment 3: Additional safeguards may be necessary where a third party is willing to comment only on an anonymous basis or where the nature of the comment itself could serve to identify the party who has requested anonymity.

Comment 4: In jurisdictions where the competition agency challenges mergers through the judicial system, such that the merging parties will have an opportunity to seek access to confidential third-party submissions under applicable civil discovery rules, access to such submissions might be deferred until the initiation of judicial proceedings.

E. Competition agencies should avoid unnecessary public disclosure of confidential information in public announcements, court or administrative proceedings, decisions, and other communications respecting a pending transaction.

WORKING GROUP COMMENTS
Original Comments (April 2004)

Comment 1: Competition agencies should avoid unnecessary public disclosure of confidential information. Confidential information that is not relevant to the merger review should not be publicly disclosed. For example, non-public financial terms agreed between the merging parties would not normally be relevant to a competitive assessment of the transaction and, therefore, should not normally be publicly disclosed as part of the merger review process.

Comment 2: Where competition agency procedures provide for public and non-public versions of certain documents, parties should have an opportunity to review the public version prior to issuance to ensure that it does not include confidential information. Where parties do not have such an opportunity, competition agencies should consider other measures that would permit a submitting party to take appropriate steps to prevent or limit public disclosure of information that the submitting party has designated confidential where that party has not previously consented to the intended disclosure (for example, pursuant to a voluntary waiver). Such measures might include putting the submitting party on notice that public disclosure of such information is contemplated or, in prosecutorial systems, submitting filings that contain sensitive information under seal to enable the affected party to seek appropriate protective orders from the reviewing tribunal.

X. Interagency Coordination

A. Competition agencies should seek to coordinate their review of mergers that may raise competitive issues of common concern.

WORKING GROUP COMMENTS
Original Comments (April 2004)

Comment 1: Interagency coordination occurs in a number of contexts. This Recommended Practice concerns competition agencies' coordinated review of mergers that may raise competitive issues of common concern in their jurisdictions.

Comment 2: The goals of interagency coordination include fostering efficient merger review, effective merger enforcement, and consistent, or at least non-conflicting, outcomes in the coordinating jurisdictions as well as reducing duplication and unnecessary burdens for parties and agencies.

Comment 3: Convergence toward recognized best practices in merger review can help to facilitate effective interagency coordination, for example, through more consistent timetables and procedural rules.

Comment 4: Interagency coordination is voluntary; competition agencies that are requested to coordinate merger reviews are generally encouraged, but are not obligated, to do so. Competition agencies that agree to coordinate their reviews remain free to make their own independent decisions. An agency's agreement to coordinate a review does not imply that it should consider competitive effects that may occur outside the jurisdiction.

B. Interagency coordination should be conducted in accordance with applicable laws and other legal instruments and doctrines.

WORKING GROUP COMMENTS
Original Comments (April 2004)

Comment 1: Interagency coordination should be conducted in accordance with applicable national laws, including rules regarding the treatment of confidential information and privileged communications, and applicable cooperation treaties and agreements.

Comment 2: Where two or more competition agencies engage in coordinated merger reviews on a recurring basis, it may be useful for them to develop formal agreements, memoranda of understanding, or other protocols for coordinating their merger reviews. The formation of regional associations of competition agencies may also be useful for the development of these instruments. In the absence of such instruments, international cooperation treaties, agreements, memoranda, and recommendations that have been developed between other jurisdictions or in multinational organizations may provide useful guidance.

C. Interagency coordination should be tailored to the particular transaction under review and the needs of the competition agencies conducting the merger investigations.

WORKING GROUP COMMENTS
Original Comments (April 2004)

Comment 1: The scope and depth of interagency coordination will depend on the facts and issues raised in the transaction under review. Accordingly, interagency coordination should be sufficiently flexible to accommodate different types of investigations.

Comment 2: When a competition agency becomes aware that a merger appears likely to raise competitive issues of common concern as to which coordination might be appropriate, that agency should contact other relevant competition agencies as soon as practicable. Before competition agencies coordinate, they should assess whether the transaction appears to raise competitive issues of common concern.

Comment 3: Depending on the complexity of the merger review, the applicable legal framework, and the competitive issues of common concern identified, competition agencies may coordinate by, among other methods: identifying case team liaisons; discussing prior relevant decisions; coordinating the timing of reviews; coordinating information requests; sharing analyses; and, as appropriate, conducting joint interviews of merging parties and third parties and coordinating site visits.

Comment 4: A competition agency should not delay its merger decision based on reviews pending in other jurisdictions, except where continued coordination is warranted to address common substantive or remedial issues.

D. Competition agencies should encourage and facilitate the merging parties' cooperation in the merger coordination process.

WORKING GROUP COMMENTS
Original Comments (April 2004)

Comment 1: Cooperation of the merging parties helps to facilitate effective interagency coordination. Examples of such cooperation include timing of notification in coordinating jurisdictions and granting confidentiality waivers. To encourage such cooperation, competition agencies should seek to further the transparency of the coordination process by informing parties of the benefits of coordination and addressing concerns raised by the exchange of information pursuant to voluntary waivers. For example, a competition agency may consider publishing a brief description of its coordination policies and practices, including the categories of information that would likely be exchanged pursuant to a voluntary confidentiality waiver, or consider informing merging parties of the basic form of cooperation that may take place in their case. Competition agencies should seek to develop a basic waiver model that may be modified to suit specific circumstances.

Comment 2: Where coordination would be facilitated by the discussion of confidential information, the competition agency should encourage voluntary confidentiality waivers, but should not pressure parties to provide waivers.

E. Reviewing agencies should seek remedies tailored to cure domestic competitive concerns and endeavor to avoid inconsistency with remedies in other reviewing jurisdictions.

WORKING GROUP COMMENTS
Original Comments (April 2004)

Comment 1: To the extent consistent with their respective law enforcement responsibilities, coordinating agencies should strive to ensure that the remedies they accept to cure domestic competitive concerns do not impose inconsistent obligations on the merging parties. Remedies offered by the merging parties may not be identical in each jurisdiction, *e.g.*, because a transaction may have different competitive effects in the various jurisdictions in which it is reviewed. However, because a remedy accepted in one jurisdiction may have an impact in another jurisdiction, the competition agencies should invite the merging parties to consider coordinating the timing and substance of their remedy proposals. Competition agencies should be prepared to discuss with the merging parties any cross-border implications of remedies under consideration.

Comment 2: Interagency coordination on remedies may avoid unnecessary costs and burdens resulting from duplicative remedies. Subject to relevant confidentiality and nondisclosure rules, coordinating agencies should keep one another informed as to remedies under consideration to the extent that they may affect the other competition agency's review and/or consideration of remedies.

Comment 3: Where possible, coordinating agencies should seek to coordinate administrative aspects of proposed remedies of common interest to avoid unnecessarily duplicative requirements and unnecessary costs and burdens. Such aspects might include, for example, arranging common timetables for compliance with undertakings, appointing common trustees to effectuate required divestitures, and harmonizing reporting requirements.

XI. <u>Remedies</u>

A. A remedy should address the identified competitive harm arising from the proposed transaction.

WORKING GROUP COMMENTS
Original Comments (June 2005)

Comment 1: The object of a remedy should be to restore or maintain competition, thereby preventing competitive harm that the transaction would otherwise cause. A remedy should be considered only if the agency has a sound basis to believe that the proposed transaction, if implemented, would contravene the applicable merger review law. The remedy should adequately address the potential competitive harm identified, but should not have the objective of improving premerger competition.

Comment 2: There are instances in which only an outright prohibition can address the competitive concerns. The merging parties should be permitted, however, to propose alternative resolutions that permit the transaction to proceed with appropriate modifications, conditions, and/or obligations that restore or maintain competition, consistent with the applicable merger review law. Before pursuing or adopting an outright prohibition, agencies should consider such alternative resolutions. In addition, the agency may take the initiative to propose alternative resolutions.

Comment 3: The proposal, discussion, and adoption of remedies should be conducted in a manner consistent with other Recommended Practices, particularly those on Conduct of Merger Investigations, Procedural Fairness, Transparency, and Interagency Coordination.

B. The merger review system should provide a transparent framework for the proposal, discussion, and adoption of remedies.

WORKING GROUP COMMENTS
Original Comments (June 2005)

Comment 1: Information on the jurisdiction's procedures for proposing, discussing, and adopting remedies should be readily available to those involved in merger review proceedings. Such information may include, as applicable, when, how and to whom remedies should be proposed, the types of remedies that the agency generally prefers and in which instances, and any standard terms or implementation provisions the remedy should include.

Comment 2: In the event the competition agency identifies competitive concerns, the agency should provide the merging parties with timely information on those concerns so the parties can consider and propose remedies to address the concerns at least prior to the final enforcement decision. Merger review procedures should provide means to ensure that the competition agency and the merging parties have adequate time to discuss and evaluate suitable remedies. The competition agency should consult appropriate third parties on the effectiveness of the remedy.

C. Procedures and practices should be established to ensure that remedies are effective and easily administrable.

WORKING GROUP COMMENTS
Original Comments (June 2005)

Comment 1: Remedies should be effective in restoring or maintaining competition and easily administrable. Remedies should not require significant administrative intervention by the agency after the transaction is consummated.

Comment 2: Remedies can take two basic forms: (a) structural remedies, which involve a change in the market structure (such as commitments to divest assets), and (b) behavioral remedies, which involve constraints on the future conduct of the merged entity (such as commitments with respect to certain contractual clauses). Certain remedies, such as commitments involving licensing of intellectual property rights or access to facilities, may be characterized as structural or behavioral, depending on the circumstances. Remedies adopted in respect of a proposed transaction may consist of structural and/or behavioral components. Structural remedies are easier to administer than behavioral remedies because they do not require medium or long-term monitoring to ensure compliance.

Comment 3: To be effective, and to enhance administrability, a remedy should define the parties' compliance requirements clearly and precisely. For example, it should define the businesses or assets covered by a remedy as well as the terms under which the divestiture is to be carried out, the specific characteristics of a suitable buyer, and any applicable deadlines.

Comment 4: The remedy's effectiveness may also depend on the identity of the prospective purchaser of the assets to be divested. For a remedy to be effective, it should enable the prospective purchaser to be a viable and long-term competitor in the market in which the competitive harm was identified. Therefore, the agency should retain the authority and have appropriate procedures to approve a prospective purchaser.

Comment 5: Remedies should be implemented in a timely manner. In some transactions it may be appropriate for the remedy to be implemented no later than upon consummation of the main transaction, for example, where a rapid divestiture would prevent asset dissipation or where it is not certain that a suitable buyer may be found.

D. Appropriate means should be provided to ensure implementation, monitoring of compliance, and enforcement of the remedy.

WORKING GROUP COMMENTS
Original Comments (June 2005)

Comment 1: The terms of a remedy should identify and bind the entities that are to implement it. The terms should be sufficiently clear and precise to provide the parties adequate guidance in implementing the remedy and to enable the agency to verify whether the remedy has been implemented properly. The remedy should contain adequate means of ensuring its implementation and/or monitoring compliance.

Comment 2: Appropriate preservation and hold separate measures should normally be included to maintain the competitive potential of the assets to be divested. It may also be appropriate to include terms on agency approval of one or more trustees who are independent of the parties.

Comment 3: The competition agency should have the means to investigate compliance, such as the ability to inspect and copy records or conduct reviews and/or to require periodic or one-time reporting obligations by the parties and/or the trustee(s) on the implementation of one or more components of the remedy.

Comment 4: A mechanism should be provided for the adjustment of the remedy in the event of unforeseen and material changes of circumstances.

Comment 5: In the event of an implementing party's failure to comply with a remedy, the terms of the remedy should be enforceable by the competition agency directly or through the courts.

Comment 6: The terms and means of implementation, monitoring, or enforcement should be specified in generally available statutes or rules or in the remedy agreement or order.

XII. <u>Competition Agency Powers</u>

A. Competition agencies should have the authority and tools necessary for effective enforcement of applicable merger review laws.

WORKING GROUP COMMENTS
Original Comments (June 2005)

Comment 1: Merger review is fact-intensive; competition agencies therefore require the ability to obtain information relevant to their review of proposed transactions. Competition agencies should be provided with appropriate investigative tools and mechanisms by which the agency can compel merging and third parties to produce relevant information, for example, by providing the competition agency with the ability to seek effective sanctions for non-compliance with formal requests for documents, testimony and other information.

Comment 2: For the merger review process to operate effectively, the competition agency must have the ability to initiate enforcement actions against proposed mergers and to seek sanctions for non-compliance with applicable legal requirements and agency decisions and orders. Competition agencies should therefore have the enforcement tools needed to achieve these objectives.

Comment 3: Competition agencies should have the authority to permit proposed transactions to proceed subject to conditions that address perceived competitive concerns in the jurisdiction concerned. Where conditional clearance is authorized, the agency should also have effective means to ensure compliance with specified conditions and to seek sanctions for non-compliance.

Comment 4: The merger review process should be subject to appropriate procedural safeguards to govern competition agencies in the exercise of their investigative authority and enforcement powers.

B. Competition agencies should have sufficient staffing and expertise to discharge their enforcement responsibilities effectively.

WORKING GROUP COMMENTS
Original Comments (June 2005)

Comment 1: Competition agencies should have funding, staffing and expertise commensurate with their merger enforcement responsibilities, including detecting anticompetitive transactions, bringing appropriate enforcement actions, and avoiding unnecessary costs and delay with respect to transactions that do not contravene applicable legal prohibitions.

Comment 2: In order to employ a sufficient number of qualified personnel and to fund investigations and other enforcement activities necessary to discharge their enforcement responsibilities efficiently and effectively, competition agencies require adequate financial resources. Competition agencies should seek to optimize their use of available resources by prioritizing their merger enforcement based on the transaction's potential competitive impact in the jurisdiction.

Comment 3: Agency staff should include professionals with training and experience in competition law and economics, including merger analysis. Subject to applicable confidentiality safeguards, competition agencies should also be able to consult with independent industry, legal, and economic experts in other agencies and the private sector.

Comment 4: Competition agencies should encourage continuing legal and economic training of their professional personnel. This may be accomplished through in-house and inter-agency training programs, as well as through academic institutions and training activities sponsored by private sector organizations (such as bar associations and legal societies).

C. Competition agencies should have sufficient independence to ensure the objective application and enforcement of merger review laws.

WORKING GROUP COMMENTS
Original Comments (June 2005)

Comment 1: The objective application of competition standards in merger enforcement promotes consistency, predictability, and legal certainty. Lack of objectivity -- or even a perceived lack of objectivity -- tends to frustrate these objectives and, moreover, may undermine public confidence in the competition agency and the merger review process. Enabling legislation and governmental policies and practices should ensure that competition agencies have sufficient independence to discharge their enforcement responsibilities based solely on an objective application of relevant legislation and judicial precedents.

Comment 2: Competition agencies should also seek to avoid any perception that their enforcement activities are motivated by considerations other than those in the relevant merger review legislation. Means of achieving this objective include transparency in the merger review process and providing an opportunity for timely review of the competition agency's final decision on the merits by a separate adjudicative body.

XIII. Review of Merger Control Provisions

A. Jurisdictions should periodically review their merger control provisions to seek continual improvement in the merger review process.

WORKING GROUP COMMENTS
Original Comments (June 2003)

Comment 1: Merger control laws and procedures should be reviewed periodically in an effort to seek continual improvement in the merger review process. Such reviews should include all substantive and procedural aspects of the merger review process, including notification thresholds, notification procedures, and enforcement practices. The frequency and nature of the review may depend on its subject matter.

Comment 2: In certain jurisdictions, periodic review of the merger control process is expressly required by the relevant legislation itself, for example, by requiring the competition agency to conduct and publish periodic evaluations of the efficacy of existing laws and procedures. In some jurisdictions, monetary notification thresholds are periodically adjusted by operation of law based on relevant inflation or other economic indices. Such automatic indexing is particularly useful in jurisdictions where the local currency value is subject to significant inflationary fluctuation.

B. Jurisdictions should consider reforms to their merger control laws and procedures that promote convergence towards recognized best practices.

WORKING GROUP COMMENTS
Original Comments (June 2003)

Comment 1: Convergence of merger control regimes towards recognized best practices will promote international cooperation, efficiency, and the elimination of unnecessary transaction costs in the multi-jurisdictional merger review process. Jurisdictions should therefore seek to enact reforms of their merger control laws and procedures that promote convergence towards recognized best practices.