

**JOINT COMMENTS OF THE AMERICAN BAR ASSOCIATION
SECTION OF ANTITRUST LAW AND SECTION OF
INTERNATIONAL LAW ON THE PROPOSED UPDATE TO THE
U.S. DEPARTMENT OF JUSTICE AND FEDERAL TRADE
COMMISSION ANTITRUST GUIDELINES FOR INTERNATIONAL
ENFORCEMENT AND COOPERATION**

DECEMBER 1, 2016

The views stated in this submission are presented jointly on behalf of the Section of Antitrust Law and the Section of International Law. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and therefore should not be construed as representing the policy of the American Bar Association.

The Section of Antitrust Law and the Section of International Law (together, the “Sections”) of the American Bar Association (“ABA”) are pleased to submit these comments to a proposed update (“Proposed Update”) to the Antitrust Guidelines for International Enforcement and Cooperation (“International Enforcement Guidelines”) issued for public comment by the U.S. Department of Justice (“DOJ”) and the Federal Trade Commission (“FTC”) (collectively, the “Agencies”).¹ The Sections’ comments reflect the expertise and experience of their members with competition law enforcement in cross-border contexts around the world. The Sections are available to provide additional comments, or to participate in consultations with the Agencies, as the Agencies deem appropriate.

Executive Summary

The Sections strongly support the Agencies’ outstanding tradition of providing guidelines to explain important aspects of their approach to antitrust law enforcement, and of reviewing and updating the guidelines as appropriate. However, the Sections respectfully suggest that certain elements of the Proposed Update might be adjusted to improve their ultimate utility.

The Sections suggest revisions to Chapter 3 of the Proposed Update to clarify the application of the Foreign Trade Antitrust Improvements Act (“FTAIA”), namely, whether it is a substantive element of a claim or is an aspect of subject matter jurisdiction. If the FTAIA is a substantive element of a claim, then a defendant will, as a practical matter, be forced to bear the significant burden and expense of proving that challenged conduct is beyond the reach of the Sherman Act, and resolution of this important question may be delayed until the summary judgment phase of the litigation. More particularly, the Sections suggest clarifications in Section 3.1 and Illustrative Examples A and B regarding the import commerce exclusion of the FTAIA. The Sections would welcome clarification as to the difference

¹ U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, PROPOSED UPDATE OF ANTITRUST GUIDELINES FOR INTERNATIONAL ENFORCEMENT AND COOPERATION (Nov. 1, 2016), <https://www.justice.gov/atr/guidelines-and-policy-statements-0/antitrust-guidelines-international-enforcement-and-cooperation-update-2016>.

between Illustrative Example A and Illustrative Example C, particularly with respect to whether an arms'-length sale of the price-fixed component or product to a non-conspirator would render the import commerce exclusion inapplicable. The thresholds for the FTAIA effects exception should also be clarified in Section 3.2. The Sections also urge the Agencies to make clear that the "gives rise to" clause of the effects exception will be interpreted consistently with the Seventh Circuit's reasoning in *Motorola Mobility LLC v. AU Optronics*.² The Sections are concerned that Chapter 3 of the Proposed Update reflects an intention to displace the Supreme Court's longstanding standard in *Hartford Fire Co. v. California*³ by (i) embracing controversial notions of conspiracy jurisdiction and (ii) requiring that courts defer to the Agencies' determination of comity issues.

The Agencies' own determinations regarding comity should be carefully considered by the courts, but courts must decide comity concerns independently. The Sections suggest that Section 4.1 be revised accordingly, and adopt the balancing test of *Timberlane Lumber Co. v. Bank of America National Trust and Savings Ass'n*.⁴ Similarly, the Sections suggest that Section 4.2 be revised to adopt a standard for foreign sovereign compulsion that promotes consistency between antitrust law and other U.S. laws that may be applied extraterritorially. With respect to the Act of State doctrine, the Sections suggest revisions to more fully reflect the analysis of *W.S. Kirkpatrick & Co. v. Env'tl Tectonics Corp., Int'l*.⁵

As to Section 5.1.1 regarding investigative tools, the Sections suggest clarification that the Proposed Update is not intended to lessen the importance of voluntary disclosures and cooperation with foreign authorities in applying compulsory discovery. The Sections would welcome greater detail in Section 5.1.2 regarding the circumstances in which the Agencies may disclose confidential information. Similarly, the Sections suggest revisions in Section 5.1.4 to clarify the waiver of confidentiality process. The Sections recommend that Section 5.1.5 be revised to more fully recognize the concerns relating to extraterritorial remedies.

Finally, with respect to Section 5.2 on special considerations in criminal investigations, the Sections recommend that it be strengthened and expanded, to express a commitment to coordinate with foreign enforcement authorities to reduce unnecessary, wasteful, and avoidable demands on cooperating entities, and to explicitly address the risk of overlapping recovery in international cartel cases. The Sections suggest the addition of specific suggestions of ways that enforcement agencies can work together to minimize the burdens and expenses of investigations on cooperators, similar to what the DOJ has already proposed in the context of leniency applications. The Sections also recommend adding language acknowledging that enforcement authorities should collaborate to harmonize sanctions methodologies and reduce the risk of overlapping, duplicative, and inconsistent penalties in international cartel cases.

² 775 F.3d 816, 820-24 (7th Cir. 2014).

³ 509 U.S. 764 (1993).

⁴ 749 F.2d 1378 (9th Cir. 1984).

⁵ 493 U.S. 400, 409 (1990).

Introduction

The Sections strongly support the Agencies' consistent and long-established practice of providing guidelines to explain various aspects of their approach to antitrust law enforcement. The advantages of providing guidelines are substantial and widely appreciated: guidelines allow individuals and businesses (and their legal counsel) to anticipate correctly the legal consequences of their marketplace conduct, thereby enhancing compliance and conserving agency (and judicial) resources devoted to enforcement. It is especially helpful when both Agencies agree on a common set of guidelines regarding any specific subject matter, thus unifying the agencies' views and thereby mooting concerns often expressed regarding the existence of multiple antitrust enforcement agencies at the federal level with divergent enforcement approaches. Updating and reissuing existing guidelines also provide important benefits by ensuring that changes in enforcement approaches and priorities are effectively communicated in timely fashion.

There have been several iterations of International Enforcement Guidelines over the years, and the Sections strongly support the Agencies in maintaining their practice of updating these and other guidelines. However, in the specific case of the Proposed Update, the Sections respectfully suggest that certain elements might be adjusted to improve their ultimate utility. The matters addressed by the International Enforcement Guidelines involve issues of great importance to the global business community. Although over 130 jurisdictions now have actively enforced antitrust or competition rules, the Agencies have key responsibilities in implementing what is still perhaps the world's most consequential single regime of competition law. The United States is the world's largest economy, and its antitrust enforcement system is justly renowned for its long history of aggressive criminal enforcement, characteristically resulting in substantial fines for guilty enterprises and substantial (and in recent years, lengthening) periods of incarceration for guilty individuals. The Agencies' enforcement policies also influence judicial approaches to the application of the antitrust laws in private litigation – which in the United States is itself a very formidable enforcement regime given the availability of class-action procedures, mandatory treble damages, no loser-pays rule and other unique litigation advantages that it provides to antitrust claimants. It is therefore important that businesses and individuals engaged in commerce anywhere in the world understand the circumstances in which they might become subject to antitrust enforcement by U.S. courts and the Agencies.

As highlighted in the announcement of the public consultation for the Proposed Update, the Proposed Update makes significant revisions to the International Enforcement Guidelines, including adding a new chapter on international cooperation.⁶ As a result, its potential impact – if adopted as written – could have a very significant influence on the actual and perceived international reach of U.S. antitrust law, which in turn can influence the policies of foreign competition law authorities regarding the international reach of their own competition laws.

⁶ <https://www.justice.gov/atr/guidelines-and-policy-statements-0/antitrust-guidelines-international-enforcement-and-cooperation-update-2016>.

Chapter 3: Agencies' Application of U.S. Antitrust Law to Conduct Involving Foreign Commerce

The Proposed Update notes that the federal appellate courts have reached conflicting conclusions as to whether the FTAIA is a substantive element of a plaintiff's claim or whether it goes to the court's subject matter jurisdiction, but does not take a direct position on the question even though the Agencies have previously advocated for the FTAIA to be interpreted as a jurisdictional limit.⁷

There is substantial evidence that Congress intended the FTAIA to be jurisdictional.⁸ Congress adopted the FTAIA in response to concerns from U.S. businesses that strict application of U.S. antitrust law to their foreign conduct would disadvantage them in competition against non-U.S. companies. Although the law has been criticized for its lack of clarity, it was clear in the legislative history and to those involved in consideration of the bill that the FTAIA was intended to create a jurisdictional limit, rather than an additional substantive element of a Sherman Act violation.⁹ Other potential bases for limiting the reach of U.S. antitrust – substantive law and comity – were explicitly excluded from FTAIA's intended scope. The Supreme Court has assumed – without deciding – that the FTAIA is a jurisdictional limit.¹⁰

More recently, however, several federal appellate courts have opined that FTAIA is substantive, not jurisdictional.¹¹ These opinions are based on a civil rights decision, *Arbaugh v. Y & H Corp.*¹² In that context, the Supreme Court adopted the simple rule that limitations placed on statutory rights would be regarded as substantive unless specifically declared jurisdictional by Congress. The Court did not, however, consider whether its opinion would or should have retroactive effect on the FTAIA's specific limitations on antitrust law. These post-*Arbaugh* appellate decisions do not address the FTAIA's

⁷ PROPOSED UPDATE, § 3, at 15 n.80; *see, e.g.*, Brief for the United States of America at 6-7, *United States of America v. AU Optronics Corp., et al.*, No. CR-09-0110 (Apr. 8, 2011) (“U.S. AUO Brief”).

⁸ *See, e.g.*, Abbott B. Lipsky, Jr. and Kory Wilmot, *The Foreign Trade Antitrust Improvements Act: Did Arbaugh Erase Decades of Consensus Building?*, ANTITRUST SOURCE, Aug. 2013, at 7-9 (“Lipsky & Wilmot”), www.americanbar.org/content/dam/aba/publishing/antitrust_source/aug13_lipsky_7_30f_authcheckdam.pdf.

⁹ *Id.*

¹⁰ *See F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 162, 167 (2004).

¹¹ *See, e.g.*, *United States v. Hsiung*, 778 F.3d 738, 751-53 (9th Cir. 2014); *Lotes Co. v. Hon Hai Precision Industry Co.*, 753 F.3d 395, 404-08 (2d Cir. 2014); *Minn-Chem, Inc. v. Agrium, Inc.*, 863 F.3d 645, 851-53 (7th Cir. 2012); *Animal Sci. Prods., Inc. v. China Minmetals Corp.*, 654 F.3d 462, 467-69 (3d Cir. 2011).

¹² 546 U.S. 500 (2006).

legislative history in light of the principles of construction applicable at the time of its enactment.¹³

Classifying the FTAIA as substantive shifts the question of extraterritorial reach from the early pleading stage to merits discovery, later pleading stages, and/or trial. Eliminating the possibility of early dismissal of antitrust claims against foreign parties and conduct subjects defendants to the well-recognized expense, burden, and delay characteristic of U.S. antitrust litigation, even with regard to claims falling outside U.S. jurisdiction.¹⁴ Such an outcome would be inconsistent with the U.S. Supreme Court's decision in *Bell Atlantic v. Twombly*,¹⁵ which acknowledged that defendants should not be required to bear the heavy burden and expense of discovery in response to complaints raising fatally flawed federal antitrust claims.

Following *Arbaugh*, and as recently as 2011, the Agencies have taken the position that the FTAIA is a jurisdictional limit.¹⁶ The Sections encourage the Agencies to revise the Proposed Update to express support for the treatment of the FTAIA as a limit on a court's subject matter jurisdiction, and, where appropriate, to advance this view through positions taken in litigation (including amicus briefing). The Sections also urge the Agencies to consider expressing support for legislation addressing this issue.

Section 3.1: Conduct Involving Import Commerce

Section 3.1 provides that the import commerce exclusion of the FTAIA may apply to "participants that do not act as importers." However, the Proposed Update does not provide any example of circumstances under which a participant that does not import the price-fixed product would fall within the import commerce exclusion. The Sections respectfully recommend that the Agencies clarify this statement by providing an example of a circumstance where the import commerce exclusion applies to a participant that does not act as an importer (that is, where a participant does not bring or ship the relevant product into the United States itself).

Section 3.1 also provides that "[a] firm cannot escape liability for unreasonably restraining or monopolizing import commerce by outsourcing delivery of its product." Further guidance is needed to understand the limits of the import commerce exclusion, particularly as it applies to products that are both manufactured and first sold abroad. In particular, it would be helpful to understand whether a product sold by a conspirator to an unaffiliated third party in an arms'-length sale and later imported into the United States by that or another third party would ever fall within the definition of import commerce. If the Agencies believe that any such transactions could fall within import commerce, the

¹³ See, *supra*, note 11.

¹⁴ Lipsky & Wilmot, *supra* note 8, at 1-2.

¹⁵ 550 U.S. 544 (2007).

¹⁶ See, e.g., U.S. AUO Brief, *supra* note 7.

Sections suggest that the Agencies clarify the difference between Illustrative Example A and Illustrative Example C. The Sections respectfully submit that there is no principled distinction between (a) the overseas sale of a price-fixed component that is integrated into a finished good before being imported into the U.S. by a non-conspirator, and (b) the overseas sale of a price-fixed product that is not integrated into another product before it is imported into the U.S. by a non-conspirator. The Sections believe that both scenarios would be subject to analysis under the effects exception, and not the import commerce exclusion.¹⁷

The Sections are also concerned about the potential implications of the last sentence of footnote 78. That sentence implies that where the suspect conduct took place completely outside the United States, except for one act by one co-conspirator that may have taken place in the United States, neither the FTAIA nor the *Hartford Fire*¹⁸ test would apply, because all of the activities of all of the co-conspirators would now be viewed as domestic conduct under the theory that the acts of one co-conspirator are imputed to all. The Sections are concerned that such a position by the Agencies, without consideration of the significance of the act that took place in the United States, could lead to an unwarranted extension of the reach of the U.S. antitrust laws without a showing of any intended and substantial effect in the United States.

Illustrative Example A

Courts have previously considered whether the participants intended or knew that the price-fixed product would be delivered to the United States.¹⁹ The Proposed Update seems to suggest that intent is irrelevant to the import commerce exclusion, which is inconsistent with federal appellate precedent.²⁰ In the absence of evidence that the participants “specifically identified” sales into the United States, some other evidence showing that they intended, or otherwise expected, their conduct to affect the U.S. market would be necessary.

The Sections respectfully suggest that the Proposed Update be revised to state that in cases where the import commerce “constitutes a relatively small portion of the worldwide commerce involved in the anticompetitive conduct,”²¹ as a matter of

¹⁷ See, e.g., *Motorola Mobility*, 775 F.3d at 818.

¹⁸ *Hartford Fire Ins. Co. v. California*, 509 U.S. 764.

¹⁹ See, e.g., *Animal Sci. Prods.*, 654 F.3d at 479 (holding “the import trade or commerce exception requires that the defendants’ conduct target import goods or services”); *Kruman v. Christie’s Int’l PLC*, 284 F.3d 384, 395 (2d Cir. 2002) (relevant inquiry is whether defendants’ alleged anticompetitive conduct “was directed at an import market”).

²⁰ See, e.g., *Animal Sci. Prods.*, 654 F.3d at 479; *Kruman*, 284 F.3d at 395.

²¹ PROPOSED UPDATE § 3.1, at 16.

prosecutorial discretion, the United States may not pursue such conduct for resource reasons as well as comity, particularly if other jurisdictions are investigating such conduct.

Finally, Illustrative Example A misses a crucial step in the analysis. Once conduct is determined to be import commerce, that merely takes the analysis out of the FTAIA. The Agencies would still need to show that the conduct has a substantial and intended effect in the United States, as required by *Hartford Fire*,²² before concluding that the conduct was within the reach of the Sherman Act.

Illustrative Example B

The Sections note that Illustrative Example B appears to expand the import commerce exclusion by characterizing conduct that affects services “closely connected to the importation of goods” as import commerce. For instance, Example B suggests that a price-fixing agreement among foreign shipping companies would constitute import commerce even if consumers in the United States were not purchasing those shipping services or even if there was no evidence that U.S. consumers paid higher prices for the imported goods shipped through those shipping companies as a result of the international shipping services cartel agreement. Thus, this example appears to take a more far-reaching position on the meaning of import commerce than the DOJ took in its air cargo and freight forwarder cases. The Sections respectfully suggest that, in the absence of such evidence, such conduct should be analyzed as foreign commerce under the FTAIA and be deemed to fall within the Sherman Act’s reach only if it has a “direct, substantial, and reasonably foreseeable effect” on U.S. commerce, and thus that it should be evaluated under the FTAIA’s so-called “effects exception.”²³

Section 3.2: Conduct Involving Non-Import Foreign Commerce

The Proposed Update’s interpretation of the “gives rise to” clause of the FTAIA’s effects exception does not address the Seventh Circuit’s recent decision in *Motorola*, the most recent federal appellate decision addressing the FTAIA, which held that injuries suffered by an indirect purchaser (Motorola) that are derivative of a foreign injury suffered by direct purchasers (Motorola’s foreign subsidiaries) did not “give rise to” a claim under the Clayton Act.²⁴ As the *Motorola* court recognized, the fact that private claimants may be barred from bringing such suits would not affect the Agencies’ abilities to obtain criminal and injunctive remedies against the same defendants.²⁵ The Sections strongly encourage the Agencies to acknowledge the *Motorola* court’s ruling in the Proposed Update. The *Motorola* court indicated that the FTAIA should be interpreted consistently

²² The Court in *Hartford Fire* in 1993 applied its analysis without regard to the applicability of the FTAIA that was enacted in 1982.

²³ 15 U.S.C. § 6a; PROPOSED UPDATE § 3.2, at 18.

²⁴ 775 F.3d at 820-24.

²⁵ *Motorola Mobility*, 775 F.3d at 825.

with the Supreme Court’s decision in *Illinois Brick Co. v. Illinois*,²⁶ and that private claims based on derivative injuries typically does not “give rise” to a claim under federal antitrust law.²⁷ At least one recent statement from a DOJ official has called for an “exception” to *Illinois Brick*’s bar against indirect purchaser damages claims where the direct purchaser’s claim would be barred by the FTAIA.²⁸ This interpretation conflicts with long-standing Supreme Court and federal appellate authority, including *Illinois Brick* and *Motorola*. As the *Motorola* court noted, interpreting the FTAIA consistently with *Illinois Brick* also furthers principles of international comity,²⁹ especially given the recent proliferation of private damages actions in many jurisdictions across the globe. Corporations that choose to do business abroad through a foreign subsidiary should expect “to seek remedy in the courts of the country in which they choose to incorporate.”³⁰

In addition, the Agencies’ statement that a damages action may be brought under the antitrust laws where the adverse effect “proximately causes” the plaintiff’s antitrust injury is vague, as the proximate cause standard has not been applied consistently in the antitrust context. The Sections suggest that the Agencies affirmatively adopt the standard articulated by the Second Circuit in *Lotes Co. v. Hon Hai Precision Industry Co.*, which would help to promote consistency of application:³¹

Proximate causation is thus “shorthand for a concept: Injuries have countless causes, and not all should give rise to legal liability.” The doctrine of proximate causation provides the legal vocabulary for drawing this line – courts ask, for example, “whether the injury that resulted was within the scope of the risk created by the defendant’s [wrongful] act; whether the injury was a natural or probable consequence of the [conduct]; whether there was a superseding or intervening cause; whether the [conduct] was anything more than an antecedent event without which the harm would not have occurred.”³²

²⁶ 431 U.S. 720 (1977).

²⁷ *Motorola Mobility*, 775 F.3d at 818.

²⁸ See, Kristen Limarzi, Appellate Section Chief, U.S. Dep’t. of Justice, Antitrust Div., Comments at the American Antitrust Institute’s 10th Annual Private Enforcement Conference (Nov. 9., 2016).

²⁹ *Motorola Mobility*, 775 F.3d at 825-27.

³⁰ *Motorola Mobility*, 775 F.3d at 827.

³¹ *Lotes*, 753 F.3d 395.

³² *Id.* at 412 (citation omitted).

Just as tort law excludes recovery for injuries that are too remote from their cause, the FTAIA should similarly exclude from antitrust liability activities that are too removed from their actual effects on U.S. commerce.³³

The Proposed Update also states that the “substantiality requirement does not provide a minimum pecuniary threshold, nor does it require that the effects be quantified,” but does not provide any direct support for this assertion.³⁴ In Illustrative Example C, the Proposed Update further defines “substantial” in part by stating that “[s]o long as the effect on import commerce was not insignificant, even if smaller than the effect outside the United States, it is substantial.”³⁵ This definition of “substantial” to mean “not insignificant” is unsupported by any citations or examples, and the Sections are unaware of appellate decisions interpreting the meaning of “substantial.”³⁶ The Sections respectfully suggest that the Agencies should not unilaterally adopt an interpretation of “substantiality” absent precedential support for their position.

Finally, the Sections suggest deleting the statement: “[w]hether an alleged effect on such commerce is direct, substantial, and reasonably foreseeable is a question for the fact-finder.” The statement appears to imply that defendants may not move to dismiss claims based on purely foreign conduct, on the basis that plaintiffs have not properly pled a “direct effect”, under either Federal Rule of Civil Procedure 12(b)(1) or Rule 12(b)(6). The Sections are further concerned that this statement may also be construed to preclude summary judgment in any case where at least a portion of the underlying foreign conduct arguably had a direct effect on domestic commerce. Such a rule would deprive courts of the flexibility to utilize the FTAIA to streamline antitrust cases before trial.

³³ See *Minn-Chem*, 863 F.3d at 857.

³⁴ PROPOSED UPDATE § 3.2, at 18. Neither of the cases cited in footnote 91 of the Proposed Update addressed when an effect was “substantial” within the meaning of the FTAIA’s effects exception.

³⁵ *Id.* at 19.

³⁶ See Diane P. Wood, “7th Circuit Chief Judge Deconstructs the FTAIA”, *Competition Law* 360, Jan. 15, 2016 (noting that “substantiality has yet to be a central issue” in any case). The Ninth Circuit’s decision in the *LCD* case does not directly address the substantiality prong of the direct effects test. In that case, defendants had not contested whether sales of LCD-containing finished products constituted a substantial effect on U.S. domestic commerce; rather, assuming such an effect, defendants contested whether foreign sales of a price-fixed component should be deemed a substantial effect on domestic commerce. The Ninth Circuit found such a substantial effect: “To begin, the TFT-LCDs are a substantial cost component of the finished products – 70-80 percent in the case of monitors and 30-40 percent for notebook computers. One of the trial witnesses explained the correlation: ‘[I]f the panel price goes up, then it will directly impact the monitor set price.’” *United States v. Hsiung*, 778 F.3d at 759. *Hsiung* therefore stands for the unremarkable proposition that where a price-fixed input constitutes a significant percentage of the cost of production, sales of the finished products containing that input may be challenged under U.S. antitrust law. Cf. *In re Sugar Industry Antitrust Litigation*, 579 F.2d 13, 18 (3d Cir. 1978) (allowing claims against vertically integrated candy manufacturers to proceed for price fixing of sugar because “just as the sugar sweetened the candy, the price-fixing enhanced the profits of the candy manufacturers”).

Illustrative Example C

By placing Illustrative Example C under Section 3.2 (“Conduct Involving Non-Import Commerce”), the Proposed Update implies that cases involving component price-fixing do not necessarily involve “import commerce.” If this is correct, the Sections respectfully suggest that the Agencies make this point explicitly (e.g., by distinguishing between Illustrative Example A and Illustrative Example C),³⁷ and also expressly adopt the *Motorola* court’s ruling on this issue.³⁸ Further clarification would be helpful, especially in light of the fact that some readers may be confused by the fact that Illustrative Example C refers to “import commerce” in its analysis under the effects exception.

The Sections commend the Agencies for recognizing that the cost of the component as a percentage of the finished electronic product “may be relevant” to the effects analysis in some circumstances.³⁹ The Sections suggest revising this sentence to read “is relevant,” since the cost will always be relevant to the effects analysis (although it will not always be dispositive). The Proposed Update also states that a component that accounts for a small fraction of the cost of the finished product may still have a sufficiently substantial direct effect if it “is closely tied to input costs due to market conditions or contractual arrangements, or for other reasons,” but it is unclear what this means.⁴⁰ The Sections respectfully recommend that the Agencies provide examples or further explanation of such instances. The Sections also recommend that the Agencies refrain from introducing another new definition of “substantial effects” and delete the “have a meaningful effect” language in the last sentence of the paragraph on the cost of components.

The Proposed Update also states that evidence “that the conspirators actually expected their conduct to cause an effect on import commerce in the finished products would help to show that a direct, substantial, and reasonably foreseeable effect existed.”⁴¹ This reference to the conspirators’ subjective expectations could be confusing – i.e., evidence of the intent could be conflated with evidence of a direct effect.

Finally, the Sections suggest that the Agencies consider including examples of instances in which the effect was not “direct” and/or “substantial” enough to bring the conduct within the scope of the effects exception.

Illustrative Example D

It is not immediately apparent why the effect on prices in the United States would be “direct” or “reasonably foreseeable,” particularly when the price effect in the United

³⁷ See *supra* at 5-7 (discussing Section 3.1 and Illustrative Example A).

³⁸ *Motorola*, 775 F.3d at 818.

³⁹ PROPOSED UPDATE § 3.2, at 19.

⁴⁰ *Id.*

⁴¹ *Id.*

States would depend on whether Company 3 has sufficient excess capacity to make up for the reduced output by Companies 1 and 2. The Agencies may wish to provide further explanation or detail to help clarify this. The Sections also recommend that footnote 63 of the International Enforcement Guidelines (“One would need to show more than indirect price effects resulting from legitimate export effort to support an antitrust challenge.”) be restored in the Proposed Update.

Chapter 4: Agencies’ Consideration of Foreign Jurisdictions

Section 4.1: Comity

The Sections strongly support the principles of international comity. As the Seventh Circuit recognized in *Motorola*, “rampant extraterritorial application of U.S. law ‘creates a serious risk of interference with a foreign nation’s ability to independently regulate its own commercial affairs.’”⁴² The requirement of giving due attention to international comity serves a variety of purposes, including the fostering of reciprocal respect.⁴³

The Sections respectfully disagree with the Agencies’ position stated in Section 4.1 of the Proposed Update, that their determination of comity considerations is entitled to judicial deference. Comity principles, of course, should inform the Agencies’ decision to investigate or bring an enforcement action in cases where the interests of a foreign sovereign are implicated, but comity principles also play an independent role in a judicial setting. Indeed, the comity balancing test recognizes both factors that consider executive branch functions (*e.g.*, “possible effects upon foreign relations if the court exercises jurisdiction and grants relief”) and traditional judiciary branch concerns (*e.g.*, “whether the court can make its order effective”).⁴⁴

The principle of separation of powers forms the basis of U.S. democracy; to the extent that the Proposed Update suggests that the Agencies should unilaterally determine questions involving conflicts of laws, that position is unwarranted. As the U.S. Supreme Court has explained:

[It] is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance. Our cases in this field seem invariably to show a discriminating analysis of the particular question posed, in terms of the history of its management by the political branches,

⁴² 775 F.3d at 824, quoting *Empagran*, 542 U.S. at 165.

⁴³ *Daimler AG v. Bauman*, 571 U.S. ___, 134 S. Ct. 746, 763 (2014).

⁴⁴ *In re Vitamin C Antitrust Litigation*, 837 F.3d 175, 193 (2d. Cir. 2016) (citing *Timberlane Lumber Co. v. Bank of Am., N.T. & S.A.*, 549 F.2d 597, 614-15 (9th Cir. 1976), and *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1297-98 (3d Cir. 1979)).

of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action.⁴⁵

Similarly, lower courts have explained that although “courts must take care not to impinge upon the prerogatives and responsibilities of the political branches in ... foreign affairs...Mechanical or overbroad rules of thumb are of little value; what is required is a careful balancing of the interests involved and a precise understanding of the facts and circumstances of the particular case.”⁴⁶

Recent cases highlight the separate and independent role that courts play in deciding questions that touch upon foreign policy. As the Second Circuit noted in *In re Vitamin C Antitrust Litigation*,⁴⁷ comity “is a principle under which judicial decisions reflect the systemic value of reciprocal tolerance and goodwill.” For this reason, just as the Executive Branch must consider comity in determining whether to exercise its investigatory and prosecutorial powers,⁴⁸ courts must also consider comity in determining whether to exercise jurisdiction.⁴⁹ The question of whether to assert jurisdiction should be addressed de novo by the courts. The Agencies’ views on how international comity factors should be balanced in the particular circumstances of the case, of course, should be given careful consideration by the courts especially in private actions involving conduct where the Agencies have declined to investigate or bring an enforcement action for reasons of comity.⁵⁰ The Sections therefore recommend deleting the reference to judicial deference to Agency determinations from the comity analysis of the Proposed Update.

The Sections are concerned that, when read in conjunction with footnote 78 of the Proposed Update, in which the Agencies suggest that the substantive provisions of the FTAIA replace the *Hartford Fire* “substantial and intended effect” standard, Section 4.1 of the Proposed Update constitutes an effort to undermine the well-established standard for applying U.S. antitrust law to conduct taking place outside of the United States. As the

⁴⁵ *Baker v. Carr*, 369 U.S. 186, 211-212 (1962).

⁴⁶ *United States v. First National City Bank*, 396 F.2d 897, 901 (2d Cir. 1968); see also *Holmes v. Laird*, 459 F.2d 1211, 1215 (D.C. Cir. 1972); *Drinan v. Nixon*, 364 F. Supp. 854, 856 (D. Mass. 1973).

⁴⁷ 875 F.3d at 183 (quoting *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court of S. Dist. of Iowa*, 482 U.S. 522, 555 (1987)).

⁴⁸ In any event, the FTC, as an independent agency, has little basis to argue that its comity evaluations reflect the foreign policy conclusions of the Executive Branch.

⁴⁹ *Vitamin C Antitrust Litigation*, 875 F.3d 175.

⁵⁰ For example, federal courts have repeatedly rejected the position that Executive Branch determinations of what constitute “acts of state” are binding on the courts. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964); see also *Doe v. Qi*, 349 F. Supp. 2d 1258, 96-98 (N.D. Cal. 2004) (government views as to what constitutes an act of state are “not conclusive” but entitled to “respectful consideration” and given “serious weight” in appropriate cases, generally where the government argues in favor of abstention).

Supreme Court held in *Hartford Fire Co.*,⁵¹ to apply U.S. antitrust law extraterritorially, (i) the Agencies must prove that the foreign commerce in question had an intended and substantial effect on U.S. markets and (ii) the court must independently determine that its exercise of jurisdiction would be reasonable in light of international comity concerns. The Sections endorse continued application of the *Hartford Fire* standard in all cases where the Agencies challenge foreign conduct. The Sections do not agree that the *Hartford Fire* test can be, in effect, abrogated by a statute enacted 14 years earlier.

Finally, the Agencies' proposed analysis does not fully adopt the balancing test set forth in the Ninth Circuit's seminal *Timberlane* decision,⁵² which was recently endorsed by the Second Circuit in *Vitamin C*.⁵³ As presently drafted, the Proposed Update omits most of the *Timberlane* factors while improperly conflating the comity doctrine with the defense of sovereign compulsion.⁵⁴ The Sections recommend that the Agencies focus, in conducting their comity analysis, on balancing the rights and interests of the U.S. government with those of the relevant foreign sovereign, following the approach of the Second, Third and Ninth Circuits. The Sections recommend that the Agencies further clarify their position to adopt all of the *Timberlane* factors, delete references to sovereign "encouragement or discouragement" from the comity analysis, and to note that "where a true conflict of law exists, however, comity will generally counsel in favor of declining enforcement."

Section 4.2.2: Sovereign Compulsion

The Sections also disagree with the Agencies' standard for sovereign compulsion. The Proposed Update suggests in Section 4.2.2 that the sovereign compulsion defense may only be given effect where a refusal to comply with a government's command would result in "the imposition of penal or other severe sanctions." Although some courts have embraced a similar standard in antitrust cases, most courts have adopted a standard that focuses more on the government's action and less on the punitive consequences for the defendant.⁵⁵

⁵¹ 509 U.S. 764.

⁵² 749 F.2d 1378.

⁵³ 875 F.3d at 184 (referring to ten-factor test adopted by *Timberlane* and *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d at 1297-98).

⁵⁴ See Proposed Update at Section 4.1 ("In determining whether to investigate or bring an enforcement action . . . the Agencies consider the extent to which a foreign sovereign encourages or discourages certain course of conduct or leaves parties free to choose among different course of conduct."); see also *Vitamin C*, 875 F.3d at 192 ("the district court made a conceptual error about the potential difference between foreign compulsion and a true conflict . . . compulsion is not required for us to find a true conflict between the laws of the two sovereigns. It is sufficient if compliance with the laws of both countries is impossible.").

⁵⁵ See *U.S. v. Brodie*, 174 F. Supp. 2d 294, 300 (E.D. Pa. 2001) (to state a defense of sovereign compulsion, a party must show that (i) the challenged conduct was actually compelled by the foreign government and (ii) the foreign order was "basic and fundamental" to the challenged conduct) (citing

Section 4.2.3: Act of State

The Sections appreciate the discussion in Section 4.2.3 of the possible application of the Act of State doctrine to the investigation and bringing of antitrust enforcement actions. The doctrine is rooted in several legal doctrines that have been applied in an ambiguous and occasionally conflicting manner by the Supreme Court. This is an area where reasonable commentators and courts have disagreed.⁵⁶ It is therefore essential that the position of the Agencies be as clear and accurate as possible. In order to clarify the Proposed Update on this topic, the Sections suggest the following changes to Section 4.2.3.

First, the Sections suggest that the final sentence in the first paragraph be revised to note expressly that the doctrine is rooted in considerations of “conflicts of law,” as well as international comity, and the separation of powers. The conflicts of law aspects are already referred to, but only implicitly, in the first two sentences of the paragraph, and *W.S. Kirkpatrick & Co. v. Env’tl Tectonics Corp., Int’l*⁵⁷ is cited in footnotes 123 and 124 of the Proposed Update. That aspect of the Act of State doctrine should be explicitly identified along with the other roots of the doctrine in the final sentence.

For the same reasons, the Sections suggest that the final paragraph of Section 4.2.3 also be amended to reflect more accurately the core teachings of the *Kirkpatrick* case. As the Proposed Update quotes from *Kirkpatrick* in footnote 124: “Act of state issues only arise when a court *must decide* – that is, when the outcome of the case turns upon – the effect of official action by a foreign sovereign. When that question is not in the case, neither is the act of state doctrine.”⁵⁸ The Act of State doctrine only applies when the court would be required to declare that the foreign sovereign has acted unlawfully under its own or international law. If the U.S. court could decide the U.S. legal consequences of the act, while accepting the legality of the foreign sovereign’s act, then the Act of State is inapplicable. However, the final paragraph states the Agencies “may” refrain from bringing an enforcement action “when a restraint on competition arises from the act of a foreign sovereign, such as a grant of a license, award of a contract, or expropriation of property....” This overstates the holding of *Kirkpatrick*. The Sections suggest amending the final sentence of this paragraph to read:

More specifically, the Agencies ~~may exercise enforcement discretion and~~ will decline to challenge foreign acts of state if the facts and circumstances indicate that: (1) the specific conduct complained of is a public act of the sovereign, (2) the act was taken within the territorial jurisdiction of the

Mannington Mills, 595 F.2d at 1293-94); see also Stephen M. Flanagan, “Construction and Application of the Foreign Sovereign Compulsion Defense,” 86 A.L.R. Fed.2d 1 (2014).

⁵⁶ See, e.g., ABA Section of Antitrust Law, ANTITRUST LAW DEVELOPMENTS (7th ed. 2012) 1181-90.

⁵⁷ 493 U.S. at 409.

⁵⁸ *Id.* at 406 (emphasis in original).

sovereign, ~~and~~ (3) the conduct relates to a matter that is governmental, rather than commercial, and (4) where the enforcement action would require the court to hold that the foreign government acted unlawfully in order to decide the antitrust claim; and the Agencies may exercise enforcement discretion and decline to challenge foreign acts of state if only the first three factors are present.

Finally, the Sections believe that it would be helpful to state, perhaps in a footnote, that a majority of the Supreme Court in *First National City Bank v. Banco Nacional de Cuba*⁵⁹ stated that the Act of State doctrine may be applied where appropriate by the courts, regardless of the position of the parties in the case. If the Agencies do not believe for any reason that the doctrine should be applied in a government enforcement action, that too should be stated in the interests of transparency.

Chapter 5: International Cooperation

The Sections welcome the addition of Chapter 5 in the Proposed Update. The International Competition Network (“ICN”) Merger Working Group has highlighted that effective international cooperation depends on mutual understanding of frameworks, timetables, procedures and confidentiality rules and investigative processes between jurisdictions.⁶⁰ The Agencies could consider also referring in the Proposed Update to the importance of ensuring that such mutual understanding exists.

Section 5.1.1: Investigative Tools

The greater detail of Section 5.1.1 of the Proposed Update, compared to Section 4.2 of the International Enforcement Guidelines, is welcome given the importance of providing guidance on the investigative tools that may be used by the Agencies when dealing with cross-border cases. The Sections suggest two points for clarification: (1) requests for voluntary cooperation will continue to be considered before resort to compulsory measures; and (2) the Agencies will continue to seek to work with foreign authorities in use of compulsory measures.

Section 5.1.1 states that “[w]hen practical and consistent with enforcement objectives, the Agencies may request that parties and third parties voluntarily: provide documents; ...”⁶¹ In contrast, Section 4.2 of the International Enforcement Guidelines states that “[i]n conducting investigations that require documents ... or contacts with persons located outside the United States, the Agencies first consider requests for voluntary

⁵⁹ 406 U.S. 759 (1972).

⁶⁰ See ICN Merger Working Group Practical Guide to International Enforcement Cooperation in Mergers (2015), paragraph 11, <http://www.internationalcompetitionnetwork.org/uploads/library/doc1031.pdf>.

⁶¹ The Sections suggest that the phrase “parties and third parties” be replaced by the phrase “any person or entity” to be more consistent with the second paragraph of Section 5.1.1, providing for compulsory discovery measures against any “individual or entity”.

cooperation when practical and consistent with enforcement objectives.” The Proposed Update seems to imply that requests for voluntary cooperation may no longer be considered first, before resorting to compulsory measures.

Similarly, the last paragraph of Section 5.1.1 provides that “the Agencies use compulsory measures after carefully considering the importance of the documents or information to the investigation or prosecution and the availability of other means to obtain them. When such compulsory measures are warranted, the Agencies may seek to work with the foreign authority involved as appropriate” (footnote omitted). The International Enforcement Guidelines provide in Section 4.2 that “[w]hen compulsory measures are needed, they seek whenever possible to work with the foreign government involved.” Section 5.1.1 of the Proposed Update would seem to imply that the Agencies are less likely than before to seek to work with the foreign authority, which seems inconsistent with the goal of greater cooperation.

Section 5.1.2: Confidentiality

The Sections commend the Agencies for describing the statutes that set forth confidentiality rules. The Sections would encourage the Agencies to provide greater detail on the circumstances in which the Agencies may disclose confidential information for specific use so as to enhance transparency and legal certainty.

Section 5.1.4: Types of Information Exchanged and Waivers of Confidentiality

The Sections recognize the Agencies’ efforts to provide clarity on the scope of the confidentiality waivers and offer the following comments with the purpose of further enhancing clarity.

Section 5.1.4 of the Proposed Update describes the Agencies’ model waiver of confidentiality and might be construed to mean that waivers of confidentiality can only be made through use of that form. However, as the Frequently Asked Questions to that model waiver note, “[i]n certain instances, a more limited waiver may be appropriate, but will be possible only after review by DOJ or FTC management.”⁶² The Sections suggest that Section 5.1.4 be revised as follows to prevent any misunderstanding and to ensure adequate and effective protection of confidential information:

The Agencies issued a joint model waiver of confidentiality for use in civil matters, which serves to streamline the waiver process and published explanatory materials that provide further details on waivers of

⁶² U.S. Dep’t of Justice & Fed. Trade Comm’n, Model Waiver of Confidentiality for Use in Civil Matters Involving Non-U.S. Competition Auths. Frequently Asked Questions (2015), www.justice.gov/sites/default/files/atr/legacy/2015/05/11/300916.pdf.

confidentiality, applicable confidentiality rules, and the process for providing a waiver of confidentiality, including more limited waivers.⁶³

Furthermore, the Sections suggest that to more clearly indicate that minimum standards on treatment of confidential information will be met before confidential information will be provided to a foreign authority, Section 5.1.4 also be revised as follows:

Similarly, the Agencies will provide information to foreign authorities pursuant to a waiver when they have concluded, based on the reached~~an~~ understandings reached with the recipient agency, that the foreign authority~~#~~ will adequately maintain the confidentiality of such information consistent with its laws and rules.⁶⁴

Section 5.1.5: Remedies

The Proposed Update states that, in imposing remedies, the Agencies will “attempt[] to avoid conflicts with remedies contemplated by their foreign counterparts,” but then state that an Agency will seek “a remedy involving conduct or assets outside the United States if it deems that doing so is necessary to ensure the remedy’s effectiveness and is consistent with the Agency’s international comity analysis.”⁶⁵ The Sections encourage the Agencies to strike the last sentence. The Sections do not question the Agencies’ power to reach conduct outside the United States that falls within the scope of the antitrust laws and the jurisdiction of the courts. However, this statement may be viewed as inconsistent with the Agencies’ commitment to endeavor to “avoid possible conflicting approaches and outcomes . . . including remedies,” and “[c]oordinate[] the design and implementation of remedies to address anticompetitive concerns identified by competition authorities in different” jurisdictions.⁶⁶ It may also be cited by foreign competition authorities as justification for imposition of extraterritorial remedies that are inconsistent with fundamental international comity considerations. Extraterritorial remedies also pose especially significant comity concerns in cases involving intellectual property rights (“IPR”), particularly where a remedy with global impact affects the enforceability in another jurisdiction of a patent or other IPR issued by that country under a different set of laws.

The Sections recommend that the Agencies address these important concerns in the Proposed Update by noting that the Agencies have rarely, if ever, imposed a worldwide remedy on a party that was unwilling to accept that remedy. The Sections also suggest that the Agencies note the important distinction between cases resolved by consent decree or

⁶³ PROPOSED UPDATE § 5.1.4, at 36 (footnotes omitted).

⁶⁴ PROPOSED UPDATE § 5.1.4, at 37.

⁶⁵ PROPOSED UPDATE § 5.1.5, at 38.

⁶⁶ Recommendation of the OECD Council Concerning International Co-operation on Competition Investigations and Proceedings, Sept. 16, 2014, <http://www.oecd.org/daf/competition/2014-rec-international-coop-competition.pdf>.

otherwise settled, and cases that were not. If an entity under investigation voluntarily agrees to a consent decree with worldwide scope, there is good reason to assume the order will not create conflicts for the entity in other jurisdictions. No such assumption can be made about remedies that are imposed upon parties without their consent.

Section 5.2: Special Considerations in Criminal Investigations

The Proposed Update states that in cartel matters the DOJ and other authorities “may . . . coordinate on logistical aspects of their parallel investigations to help minimize overlapping and inconsistent demands placed on cooperating individuals and firms,” a practice that “has the benefit of decreasing the cost to cooperators and increasing the pace of the investigations.”⁶⁷ This provision is laudable, but the Sections believe it should be strengthened and expanded.

The OECD has pointed out that if enforcement agencies fail to cooperate effectively in investigating cartels “multiple jurisdictions may repeat the same investigative steps, resulting in extra costs related to the investigations for business and costs to competition authorities from unnecessary duplication.”⁶⁸ And the DOJ has recognized that in an “increasingly complicated and crowded investigative environment . . . enforcement agencies can and should do more to coordinate not just our dawn raids and searches but other logistical aspects of our investigations.”⁶⁹ Of course, it is impossible for different jurisdictions to eliminate all overlapping and inconsistent demands. But the DOJ should commit unequivocally to making every effort to coordinate with foreign enforcement authorities to reduce unnecessary, wasteful, and avoidable demands on cooperating entities. The Sections recommend that the word “may” in this sentence be changed to a phrase such as “should, to the greatest extent practicable, . . . coordinate.”

In addition, the Proposed Update should expand on this point by including specific suggestions of ways that enforcement agencies can work together to minimize the burdens and expenses of investigations on cooperators. In fact, the DOJ has made such proposals in addressing the need to reduce burdens on leniency applicants.⁷⁰ These suggestions apply equally to all cooperating entities. As the DOJ has suggested, enforcement officials could:

⁶⁷ PROPOSED UPDATE § 5.2 at 40.

⁶⁸ OECD, *Challenges of International Co-Operation in Competition Law Enforcement* (2014) at p. 46 (“OECD Challenges”), <http://www.oecd.org/daf/competition/Challenges-Competition-Internat-Coop-2014.pdf>.

⁶⁹ See Brent Snyder, Deputy Asst. Att’y Gen., U.S. Department of Justice, Antitrust Division, Remarks for the Sixth Annual Chicago Forum on International Antitrust at p. 2 (June 8, 2015) (“Snyder”), <https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-brent-snyder-delivers-remarks-sixth-annual-chicago>.

⁷⁰ *Id.*

- Coordinate on deadlines and timetables for key tasks and witness interviews, so that cooperators are not forced to choose whose deadlines to meet and not meet;
- Focus each authority’s respective investigation on the conduct and effect in its jurisdiction, rather than exploring aspects of the cartel that are far removed from its borders and do not affect its citizens;
- Be more strategic in the document demands placed on cooperators. Extremely broad document demands are enormously time-consuming and expensive for cooperators and can do more to impede than advance an investigation. Competition authorities should be more open to techniques like predictive coding which would produce benefits to cooperating entities and enforcement agencies alike; and
- Look for ways to be more efficient in scheduling witness interviews (which perhaps impose the greatest demands and cause the greatest disruption to a cooperating company’s business operations).⁷¹

The Sections recommend that the Proposed Update include a list of specific examples such as these to the discussion of cooperation among enforcement authorities.

Moreover, the Proposed Update does not explicitly address the risk of overlapping penalties in international cartel cases, particularly with respect to cartels involving component goods. The Sections believe that the Agencies should acknowledge this risk, and address it, including by providing more transparency into volume-of-commerce determinations and cooperating with other competition authorities in making volume of commerce determinations.

Section 5.2 of the Proposed Update should address the need for enforcement authorities to work together to prevent imposition of duplicative and excessive sanctions in international cartel cases. In discussing remedies in civil cases, Section 5.1.5 states that the Agencies may cooperate with other authorities to “facilitate obtaining effective and non-conflicting remedies.” It also says that cooperation may result in development of “a proposed remedies package that comprehensively addresses the concerns of multiple authorities” or result in one authority closing an investigation without remedies after considering another authority’s remedies. In contrast, the discussion in Section 5.2 of criminal investigations makes no mention of cooperation on effective and non-conflicting remedies.

⁷¹ *Id.*

Today, roughly 130 jurisdictions have antitrust laws, most of which prohibit cartel conduct.⁷² In 2014, at least nineteen different jurisdictions imposed criminal fines or administrative penalties aggregating more than \$6.5 billion on cartel conduct.⁷³ One study has found that jurisdictions other than the U.S., EC, and EU national competition authorities have secured fines totaling more than \$1 billion against international cartels in every year between 2009 and 2015 except one.⁷⁴ And reportedly these jurisdictions' share of all fines imposed on international cartels has risen from 3.7 percent between 2000 and 2004 to 24.9 percent between 2010 and 2014, a sevenfold increase.⁷⁵ Today, a company that has engaged in international cartel activity may face a phalanx of enforcement authorities, all seeking redress for perceived harm done to their economies and consumers. One prominent example is the air cargo matter in which enforcement authorities of at least 10 jurisdictions took enforcement actions and the fines imposed added up to close to \$1 billion for one defendant.⁷⁶

The OECD has recognized that cooperating companies in cartel investigations face the “notable risk” of “excessive enforcement” in such instances as the following:

- multiple jurisdictions might base their fines for cartel violations on worldwide, as opposed to domestic, revenues in the relevant product line; or
- multiple jurisdictions might ultimately put executives in jail for the same violations, without crediting time served in prison by violators in other jurisdictions.⁷⁷

The DOJ has stated that there is no credible evidence that cartels are being over deterred, and that each jurisdiction must be able to impose penalties that reflect the harm to its consumers.⁷⁸ But the DOJ has also recognized the potential benefits of engagement and coordination among enforcers in penalizing cartel conduct: “greater discussion among

⁷² See Bill Baer, Asst. Att’y General, Antitrust Div., Cooperation, Convergence, and the Challenges Ahead in Competition Enforcement at 2, Speech at the Global Antitrust Enforcement Symposium, Georgetown University Law Center (Sept. 29, 2015), <http://www.justice.gov/opa/file/782361/download>.

⁷³ *Id.*

⁷⁴ See John M. Connor, The Rise of Anti-Cartel Enforcement in Africa, Asia, and Latin America (Jan. 2016) at 7, www.competitionpolicyinternational.com/the-rise-of-row-anti-cartel-enforcement/.

⁷⁵ *Id.*

⁷⁶ See, e.g., John Terzaken and Pieter Huizing, How Much is Too Much? A Call for Global Principles to Guide the Punishment of International Cartels, *Antitrust Magazine* at 53 (Spring 2013), http://www.americanbar.org/content/dam/aba/publications/antitrust_magazine/spring13_3-26.authcheckdam.pdf.

⁷⁷ OECD Challenges, *supra* note 68, at 47.

⁷⁸ Snyder, *supra* note 69, at 3.

enforcers about our fine methodologies in specific investigations will help us minimize the risk of inconsistent approaches and overlapping fines.”⁷⁹

The Sections recommend adding language to Proposed Update Section 5.2 acknowledging that enforcement authorities should collaborate to harmonize sanctions methodologies and reduce the risk of overlapping, duplicative, and inconsistent penalties in international cartel cases. At a minimum, Section 5.2’s discussion of criminal enforcement should include language comparable to the Proposed Update’s broad endorsement in the civil context of cooperation among enforcement authorities to promote “effective” and “non-conflicting” remedies.⁸⁰

Conclusion

The Sections appreciate the Agencies’ consideration of these comments on the Proposed Update.

⁷⁹ *Id.*

⁸⁰ See PROPOSED UPDATE § 5.1.5.