COMMENTS OF THE AMERICAN BAR ASSOCIATION
SECTION OF ANTITRUST LAW AND SECTION OF INTERNATIONAL LAW
on the

DRAFT GUIDANCE DOCUMENT ON THE CMA'S INVESTIGATION PROCEDURES IN COMPETITION ACT 1998 CASES (CONSULTATION DOCUMENT)

JULY 30, 2018

The views stated in this submission are presented on behalf of the Section of Antitrust Law and the Section of International Law of the American Bar Association. 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of International Law of the American Bar Association ("the Sections") respectfully submit these Comments on the *Draft Guidance Document on the CMA's Investigation Procedures in Competition Act 1998 Cases (Consultation Document)* in the hope that they will assist the Competition & Markets Authority (CMA) to further refine the Guidance Document. The Sections are available to provide additional comments or to participate in consultations with the CMA as it may deem appropriate.

Chapter 3: Complaint Handling

The Sections commend the CMA's efforts to protect the anonymity of complainants that fear retaliation should their identity be revealed. In some cases, however, simply disclosing the substance of what the complainant has reported is sufficient to reveal the identity of even an anonymized complainant. While the CMA's ethic of disclosure is important, in cases where a complainant can demonstrate a reasonable threat of retaliation, the Sections respectfully submit that the CMA should seek to limit its disclosures in the file as necessary to protect the complainant's identity. Such a policy likely would encourage more parties to come forward, leading to more robust enforcement.

Chapter 4: Information Handling

These comments address the "Information Handling" discussion in Chapter 4 of the Consultation Document, as further delineated in Sections 7.6-7.16 and 11.17-11.31 of the Guidance Document as revised. Access to the authority's file is critically important to enable investigated entities to understand the potential allegations of infringement that the authority is considering asserting and to prepare a thorough response to such allegations.[1] Although the Sections recognize and appreciate the CMA's efforts to expedite its processes and remove unnecessary burdens on all parties, the Sections suggest that the CMA consider the following suggestions.

First, with respect to adopting a "key" versus "non-key" approach to providing the documents in the CMA file, again the Sections appreciate that in practice not all parts of the CMA file are equally significant. Nevertheless, so long as CMA staff retains some discretion to include references to particular documents in the Statement of Objections (thus controlling which documents are considered "key" or not), the CMA should be cautious not to create disincentives or burdens for parties to gain

[1] See *Best Practices for Antitrust Procedure, Report of the ABA Section of Antitrust Law International Task Force* (May 22, 2015) at I(E) & (G), reprinted at www.antitrustsource.com (Dec. 2015) at 5-6.

access to documents that may turn out to be important for their defense. In this light, it is unclear why parties should be required to provide justification for "why [additional] document(s) are being requested" from a schedule detailing all the documents in the CMA file. *See* §11.22 of the Guidance Document. Not only would such a requirement potentially infringe on the privileged nature of the party's preparation of its defense, but it is likely that a party may not be able to articulate fully the relevance of and need for a particular document from its listing alone, until the party sees the complete document. This requirement is also in tension with other statements in the Consultation Document and the Guidance Document affirming the party's right to full access to the CMA file.[2]

The Sections suggest that Section 11.22 be amended to confirm a party's right to a reasonable opportunity to inspect additional documents listed in the schedule "upon request," without need for an explanation of why the documents are being requested. If the CMA is concerned about blanket requests for an entire file, parties already have adequate reasons to be strategic in their requests to avoid burden, cost, and potential future discovery obligations to third parties.

The Sections concur with the CMA's consideration of use of data rooms and confidentiality rings to expedite access to confidential information.

With respect to the designation of confidential material, once again the Sections appreciate the elimination of a requirement to provide non-confidential versions of all documents at the time they are submitted, which can be extremely burdensome. The Sections also agree that deadlines should be approached with some flexibility in light of the circumstances of particular cases. The Guidance Document could perhaps be further clarified, however, to make clear how the CMA and the parties will communicate on this subject. Section 7.8, for example, merely provides that the "CMA may request confidentiality representation on the documents held on its file," without specifying whether this would include all or a large part of the documents in its file, or the circumstances under which the CMA would be making this request. One reading of the revisions in Sections 7.8-7.15 of the Guidance is that the CMA will approach the party that produced a specific document *when the CMA wishes to make that document public*, and ask the party to identify any parts (or all) of that document that require confidential treatment and to substantiate that claim. This procedure would be consistent with practice in other jurisdictions.[3]

Finally, the Sections submit that Section 7.15 should acknowledge that, if a dispute is not resolved by the CMA, the producing party also should be given a reasonable opportunity to seek judicial intervention before material that is subject to a claim of confidentiality is made public.

Chapter 5: Interim Measures

The Sections commend the new requirement for parties seeking interim measures to be required to certify the truth, accuracy, and completeness of the information they maintain justifies the imposition

[2] *See, e.g.,* Consultation Document at 5 and §4.6; Guidance Document §§11.1, 11.20.
[3] *See, e.g.* U.S. Federal Trade Commission Operating Manual, Chapter 15 "Confidentiality" at §§ .5.1, .6.2 (discussing compliance with 16 C.F.R. §§4.10, 4.11 and Section 21 of the FTC Act), *available at* https://www.ftc.gov/sites/default/files/attachments/ftc-administrative-staff-manuals/ch15confidentialityandaccess_0.pdf

of such measures (see para 8.5 of the Guidance Document). This imposes a minimal burden on those requesting such measures, and to the extent that in the past the CMA has had to spend time investigating facts to determine whether they are true, accurate or complete, it avoids putting the burden on the CMA to do so.

In urgent situations, a complaint may be accompanied by a request for interim measures, and the draft Guidance Document helpfully clarifies the procedures for requesting interim measures where no investigation currently exists.

Paragraph 8.9 of the Guidance Document clarifies the approach to disclosure in the same streamlined manner used generally in the Guidance Document (disclosure of documents upon which the CMA intends to rely, along with a schedule of the other documents in the file). Our general views of this procedure (see comments on Chapter 4: Information Handling, above) apply in the context of interim measures as well.

Paragraph 8.13 of the Guidance Document acknowledges the duty of those requesting interim measures to mitigate their damages. Given the expedited nature of the procedures governing requests for interim measures, the Sections believe they should be imposed only when there is real need to do so in order to avoid causing serious harm. If the requester has other reasonable means to protect itself that would avoid the harm, the Sections submit that they should be preferred to the imposition of interim measures.

All references to the enforcement of interim measures by court order have been removed from the introductory paragraphs of this chapter. The Sections recommend retaining a reference to this possibility in the introductory section, as it is critical to the enforcement and legitimacy of any measures that the CMA itself may impose.

Chapter 6: Engagement with the Parties

The Guidance Document suggests the CMA would prefer to do away with oral hearings on draft penalty statements. If such statements were issued at the same time as an SO, however, the hearings could be combined. Since the Guidance Document states that such Penalty Statements will be issued shortly after the SO, perhaps the two could be combined if an addressee wishes to address the penalty statement in an oral hearing.

Paragraph 6.13 (Deadlines for Responding) states that requests for extensions should be made "as soon as possible." Paragraph 12.3, however, says that requests for extensions to responses to SOs "should be communicated...at the time the deadline is set..." It is not uncommon for circumstances to arise during the course of preparing a response to an SO that necessitate requesting an extension. The Sections recommend that the general approach from paragraph 6.13 should be used as well in paragraph 12.3, along with the statement that, where possible, requests are expected to be made at the time the deadline is set. This would provide needed flexibility to react to emerging situations, while making clear that all requests for extensions are to be submitted as soon as possible.

Paragraph 12.28 of the Guidance Document states that the CMA will limit third party consultations on Supplementary SOs to those parties, if any, who had previously been consulted on the SO. If the Supplementary SO raises new facts and alleged infringements, and additional third parties

meet the CMA's criteria for consultation, the Sections suggest that such additional third parties should be consulted and the Guidance Document revised to reflect this.

Paragraph 9.9 of the Guidance (State of Play Meetings) alters the CMA's prior position that it "will also generally share its provisional thinking on a case" to stating that the CMA "may also share the case team's provisional thinking on a case." It is not clear when or why a case team would refrain from sharing its provisional thinking on a case at a state of play meeting. Given the utility to those under investigation of being informed of the case team's provisional views as early as possible, the Sections would ask the CMA to reconsider whether this change is necessary and would advocate retaining the prior practice unless there are compelling reasons to change it. If so, the Sections suggest that the Guidance Document explain the reasons behind the change and what factors will influence whether the case team will share its views.

The Sections' general comments on Chapter 4: Information Handling also apply to disclosure and confidentiality claims as discussed in Chapter 6.

Chapter 7: Commitments

The Sections appreciate the CMA's efforts to provide more transparency in its Guidance Document on commitments, and largely concurs with the revisions. The Sections emphasize the importance of effective remedies that resolve harms to competition. In particular, the Sections concur with the CMA's decision to provide more clarity on when the CMA will accept commitments in Sections 10.16 and 10.20. The Sections suggest, however, that the CMA consider whether Section 10.16, which discusses the types of commitments the CMA will accept, should be expanded to provide more clarity on when and why the CMA will accept a behavioral commitment. This would assist parties under investigation in assessing whether the CMA would be receptive to behavioral commitments and make them less likely to propose commitments that the CMA would not be inclined to accept.

The Sections also concur with the CMA's decision to provide more transparency on the types of complainants to be consulted before closing an investigation, and implicitly the types of complainants that the CMA finds most credible. The Sections also concur with the clarification that the CMA has discretion to inform complainants only of the CMA's "principal reasons for not taking forward the investigation" (Section 10.3) or "provide a non-confidential version of" a proposed "no grounds for action" decision (Section 10.14) "where it considers it appropriate."

Finally, the Sections concur with the CMA's decision to provide more guidance on the procedures followed after the CMA has accepted commitments in Section 10.26-10.29.

The Sections appreciate this opportunity to provide their views on the draft revised Guidance Document and are available for any further consultation that the CMA may deem appropriate.