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VIA EMAIL to queries@phcc.gov.ph and ambalisacan@phcc.gov.ph

Arsenio M. Balisacan, PhD
Chairman
Philippine Competition Commission
6th Floor, DAP Building
San Miguel Avenue, Ortigas Center
Pasig City, 1600
Philippines

Dear Dr. Balisacan:

Re: Comments On PCA's IRR

We write on behalf of the Merger Streamlining Group (the "Group"), whose membership consists of multinational firms with a common interest in promoting the efficient and effective review of international merger transactions.[1] The Group works with competition agencies and governments to support the implementation of international best practices in merger control. In particular, the Group focuses on the *Recommended Practices for Merger Notification Procedures* ("*Recommended Practices*") of the International Competition Network ("ICN"),[2] of which the Government of the Philippines' Bureau of Trade, Regulation and Consumer Protection, and the Philippines Department of Justice, are members. The Group applauds the Philippine Competition Commission's ("PCC") commitment to the work of the ICN, as demonstrated by the sizeable contingent that attended the recent ICN meetings in Singapore.

The Group's work projects to date have included two major surveys on compliance with the *Recommended Practices*, as well as submissions to the European Commission, the U.S. Antitrust Modernization Commission, and competition agencies and governments in over twenty other jurisdictions (*e.g.*, Russia, China, Japan, Brazil, Chile, Peru,

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[1] The current members of the MSG include BHP Billiton, Chevron, Cisco Systems, Danaher, GE, Novartis, Oracle, Procter & Gamble, SAB Miller, Siemens, and United Technologies.

[2] International Competition Network, *Recommended Practices for Merger Notification Procedures*, available online at <http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf> [*Recommended Practices*].

South Korea, India, Germany and Spain), including a 2011 submission to the Government of the Philippines concerning proposals for the adoption of a merger control law.

The Group understands that the PCC has issued the draft Implementing Rules and Regulations ("IRR") to implement the provisions of Republic Act No. 10667 (*Philippine Competition Act*). The draft IRR includes a number of rules that implement a framework for merger control.

The Group commends the Philippines', and in particular the PCC's, ongoing efforts to modernize its competition laws and appreciates the opportunity to provide this submission in response to the draft IRR. We encourage the PCC to apply the *Recommended Practices* advocated by the ICN in further developing its merger control regime. The Group is providing this letter in the spirit of constructive engagement, based on our members' very substantial experience with multinational merger transactions. The *Recommended Practices* were developed by competition law agencies and play an important role in focusing scarce enforcement resources on the analysis of mergers that have the potential to result in significant local anti-competitive effects, while minimizing the expenditure of government resources on reviewing transactions that are unlikely to have such effects.

1. Notification Thresholds

a. Notification Thresholds Should Be Clear And Understandable

i. The Notifying Party

Recommended Practice II-A of the *Recommended Practices* provides that "*[n]otification thresholds should be clear and understandable*".

Rule 4, section 2(b), of the draft IRR provides that the obligation to file a notification is on the "*pre-acquisition ultimate parent entity*" (or any entity authorized by the ultimate parent entity to file the notification on its behalf) of each party to a notifiable transaction. "*Ultimate parent entity*" is defined as "*the entity that controls a party to the transaction and is not controlled by any other entity*". "*Control*" is defined as "*the ability to substantially influence or direct the actions or decisions of an entity, whether by contract, agency or otherwise*". "*Entity*" is defined as "*any person, natural or juridical, sole proprietorship, partnership, combination or association in any form, whether incorporated or not, domestic or foreign, including those owned or controlled by the government, engaged directly or indirectly in any economic activity*." The specific term *"pre-acquisition ultimate parent entity"* is not defined. As well, Rule 4, section 5(e)(1)(iii), of the draft IRR refers to the "*acquiring entity*" filing a complete form and the thresholds described in section 3 refer to "*acquiring*" and "*acquired*" entities. None of "*acquiring entity*", "*acquired entity*", "*acquiring ultimate parent entity*" or "*acquired ultimate parent entity*" are defined in the draft IRR.

Under these definitions and undefined terms, there may be many situations where it is unclear who has the obligation to file a notification. For example, in a situation where three shareholders together own and control a corporation involved in a notifiable transaction, and

each shareholder has the ability to "*substantially influence*" the actions of the corporation, it is not clear which party has the obligation to notify the transaction. Would each of the three shareholders, as well as the corporation, each separately be required to notify? While Rule 6 enumerates a number of factors that the PCC may consider in determining the control of an "entity", such factors are not determinative and questions of ultimate control will still remain.

In order to provide clarity to transacting parties, the Group recommends that that the obligation to notify be placed on the entities actually effecting the transaction. Any concerns about ownership or organizational structure can be handled via the notification form and through subsequent communications between the PCC and the merging parties.

ii. Notification Thresholds Should be Based on Material Local Nexus

Recommended Practice I-C describes the nature of the local nexus that should be required in notifiable transactions.[3] As noted in the commentary to *Recommended Practice* I-C, requiring significant local activities by each of at least two parties to the transaction "*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*."[4]

A meaningful jurisdictional nexus not only reduces the burden on merging parties, but also has the significant benefit of allowing competition agencies to allocate their enforcement resources efficiently. The review of transactions that are unlikely to raise material competitive concerns in the Philippines would put unnecessary pressure on the PCC's limited resources.[5]

Rule 4, section 3(b), of the draft IRR provides that the value of the transaction must exceed One Billion Pesos, with this threshold value relating to, (i) for asset transactions, the value of the assets in the Philippines being acquired or gross revenues generated in the Philippines by assets being acquired in the Philippines in the transaction; and (ii) for share transactions and similar transactions of non-corporate entities, for the value of assets or the gross revenues generated in the Philippines from the assets in the Philippines owned by the corporation or non-corporate entity being acquired.

Rule 4, section 3(a), of the draft IRR provides that the annual gross sales in, into, or from the Philippines, or the value of the assets in the Philippines of at least one of the acquiring or acquired entities exceeds One Billion Pesos. As Rule 4, section 3(b), already accounts for the local nexus to the Philippines of the acquired entity or entities, the MSG recommends that section 3(a) should be focused on the acquiring entity or entities.

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[3] *Recommended Practice* I-C.

[4] Comment 2 to *Recommended Practice* I-C.

[5] As noted in Comment 1 to *Recommended Practice* I-B, the use of thresholds that require the notification of transactions that are "*unlikely to result in appreciable competitive effects within [a country's] territory [...] imposes unnecessary transaction costs and commitment of competition agency resources without any corresponding enforcement benefit*." (emphasis added).

As well, the MSG recommends that gross sales "from" the Philippines should be excluded from the thresholds set in section 3(a) and in section 3(b)(2)(ii) as export sales could not be relevant to consumers or competition in the Philippines.

iii. Acquisitions of Shares or Voting Interests of Less than 50%

Rule 4, section 1, of the draft IRR describes that the PCC has the power to review "mergers" and "acquisitions". Rule 2 of the draft IRR defines an "acquisition" as the "*purchase, directly or indirectly of the beneficial ownership of securities or assets, through contract or other means, for the purpose of obtaining control...*". Rule 6, section 1, of the draft IRR expands on the meaning of "control". There is a presumption of control where there is ownership of more than 50% of the voting power of the entity being controlled. As well, control exists where there is power over more than 50% of voting rights of the other entity, where there is power to direct or govern financial and operating policies of the other entity, where there is power to appoint or remove the majority of the members of a board of directors or equivalent governing body of the other entity, where there is the power to cast the majority of votes at the meeting of a board of directors or equivalent governing body of the other entity, where there is ownership over the right to use all or a significant part of an entity's assets of the other entity, and where there exists rights or contracts that confer decisive influence over the other entity's decisions.

In contrast, Rule 4, sections 3(b)(2)(iii), of the draft IRR provides that where other asset or revenue based thresholds are met, "acquisitions" will be notifiable for the acquisition of 20% of the voting shares of a publicly traded corporation, 35% of the voting shares of non-publicly trade corporations, and 35% of the interest in profits of a non-corporate entity.

Where a party acquires less than a 50% interest, the transaction is unlikely to conform to the definitions of "acquisition" and "control" in the draft IRR and the transaction is much less likely to raise competition concerns. Establishing a pre-acquisition notification requirement for 20% or 35% investments would impose disproportionately high cost and delay burdens on the purchasers of such minority interests, and would require the PCC to devote resources to cases which are also unlikely to result in substantive competition concerns or remedies. As the *Recommended Practices* advise, reviewing transactions that are "*unlikely to result in appreciable competitive effects [...] imposes unnecessary transaction costs and commitment of competition agency resources without any corresponding enforcement benefit.*"[6] As a result, the MSG recommends that only transactions where the buyer acquires an interest in excess of 50% be notifiable.

iv. Thresholds For "Mergers"

Rule 4, section 1, of the draft IRR provides that the PCC has the power to review "*mergers*" and "*acquisitions*". The draft IRR's definition of "*acquisition*" includes three methods by which one or more entities may directly or indirectly acquire control over one or more other entities' securities or assets. In contrast, the term "*merger*" is defined to mean "*the*

[6] Comment 1 to *Recommended Practice* I-B (emphasis added).

joining of two (2) or more entities into an existing entity or to form a new entity, including joint ventures."

However, the thresholds for compulsory notification at rule 4, section 3, of the draft IRR lack clarity in respect of mergers. The language of the draft IRR repeatedly refers to "*acquisitions*" and the particular thresholds relate to the gross revenues and asset values of the "*acquiring*" and "*acquired*" entities or assets (as applicable). In a "*merger*", it is not evident which party should be treated as the "*acquiring*" entity and which party should be treated as the "*acquired*" entity. Thus, it would be difficult for parties involved in a "*merger*" transaction to determine if their transaction is notifiable in the Philippines.

v. Internal Reorganizations

The exemptions listed at Rule 4, section 10, of the draft IRR do not include any exemptions for internal reorganizations. The MSG is concerned that notification may be required in connection with transactions that will not result in a change in control. Transactions that do not result in a change of control over an entity would not be expected to have a material effect on competition, as the pre-transaction control dynamic would remain unchanged.[7]

The Group believes that including an exemption for internal reorganizations would help to ensure that the PCC does not receive a large number of notifications related to transactions that would not be expected to have any appreciable effect on competition in Philippines. Such an exemption would also align the scope of the merger regime in Philippines with the regimes in most other jurisdictions. As well, it would allow the PCC to focus its resources on those transactions (as well as cartel and other anti-competitive activities) that raise genuine competition concerns, rather than reviewing many transactions which do not. The Group therefore recommends that the PCC amend the draft IRR to include an exemption for mergers or acquisitions where the ultimate controlling entity remains unchanged.

2. Information to be Provided to the PCC

a. Information To Be Required In The Notification Form

Rule 4, section 5(a), of the draft IRR requires that the parties to a notifiable transaction submit a "*Notification Form*". We understand that the PCC has not yet finalized the contents of the required form. Our members' past experience has shown us that the requirement of a jurisdiction's notification can raise significant logistical (and occasionally substantive) issues. We therefore recommend that a draft form be circulated for public consultation before being adopted.

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[7] The ICN's Merger Working Group has noted that, although the *Recommended Practices* do not specifically address the types of transactions that should be subject to merger control, "*the definition of qualifying 'merger' transactions ... is a critical issue from an enforcement policy perspective.*" *See* ICN Merger Working Group, "Defining 'Merger' Transactions for Purposes of Merger Review", available at <www.internationalcompetitionnetwork.org>.

The ICN *Recommended Practices* contain two key principles related to the design of filing requirements:

- "*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*" (*Recommended Practice* V-A); and

- "*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*" (Recommended Practice V-B).

The commentary to *Recommended Practice* V-A notes that "*[b]ecause 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*."[8]

In the absence of a draft form on which to comment, the Group can only highlight the general principles described above and encourage the PCC to adopt a notification form that is consistent with the *Recommended Practices*. The Group recommends that the information requirements of the form not exceed that information which is required for the PCC to make an initial assessment as to whether a transaction merits detailed further investigation. Based on the Group's experience in other jurisdictions, it is likely that the vast majority of transactions notified to the PCC will not raise any competitive concerns in the Philippines and, therefore, extensive information about markets should not be required for all notifiable transactions *ex ante*.

Rather, the PCC should consider amending the IRR to allow the PCC to request additional information from merging parties during the Phase I review, where necessary to assess the competitive effects of a transaction. Reducing the initial information required by the notification form, while allowing the PCC to request additional information for those limited number of potentially problematic transactions, would effectively balance the legitimate interest of the PCC in obtaining the information required to review transactions with the legitimate interest of merging parties in avoiding unnecessary burdens in preparing merger notifications.

b. Confidentiality Of Information Provided By Parties In The Merger Review Process

Rule 4, section 13(a), of the draft IRR indicates that "*[i]nformation, including documents*" provided to the PCC by parties to a notifiable transaction "*shall not be communicated or made accessible by the Commission, insofar as it contains trade secrets or other confidential information the disclosure of which is not considered necessary by the Commission for the purpose of the review*." However, Rule 4, section 13(b), of the draft IRR requires that "*[a]ny person or party that supplies information, including documents, to the*

[8] Comment 1 to *Recommended Practice* V-A.

Commission, shall clearly identify any material that it considers to be confidential, provide a justification for the request of confidential treatment of the information supplied and the time period within which confidentiality is requested, and provide a separate non-confidential version by the date set by the Commission." This requirement, that merging parties must identify and provide a justification for confidential treatment of all confidential information or documents, as well as the requirement to supply non-confidential versions of all such documents, will impose considerable burdens on the parties with no corresponding enforcement benefits to the PCC.

The ICN *Recommended Practices* identify several key principles relating to the treatment of confidential information, including:

- "*Competition agencies should seek to avoid imposing unnecessary or unreasonable costs and burdens on merging parties and third parties in connection with merger investigations*" (*Recommended Practice* VI-E);
- "*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*" (*Recommended Practice* IX-A); and
- "*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*" (*Recommended Practice* IX-E).

The commentary to *Recommended Practice* IX-A further elaborates that "*[c]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*."[9] Internal, non-public documents or information that merging parties are required to provide to the PCC should be presumptively treated by the PCC as confidential — there should not be a reverse onus placed on merging parties justify the confidentiality of internal business information or documents that they treat as sensitive, non-public information. Moreover, the requirements that merging parties specify a time period for the confidential treatment of their documents or information, as well as the requirement that parties provide the PCC with non-confidential versions of documents (along with the originals), will impose significant burdens on merging parties with, in the Group's view, no enforcement benefit to the PCC.

Rule 4, section 13(d), of the draft IRR provides that where the PCC "*deems*" that the justification for confidential treatment provided by the parties is "*insufficient*" or "*not grounded*", it must inform the interested party of its decision to make the information accessible. Respectfully, we note that this proposed process would be contrary to the commentary to

[9] Comment 2 to *Recommended Practice* IX-A.

Recommended Practice IX-A, which provides that "*[w]here 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*."[10] Notably, the draft IRR does not explicitly provide that PCC must furnish the interested party with reasons for the denial, nor does it provide a means for interested party to contest the PCC's determination prior to the disclosure of the alleged confidential information.

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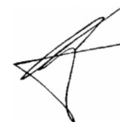
Thank you very much for considering the Group's views. We would be pleased to discuss this submission with you or your colleagues further, at your convenience.

Yours very truly,



A. Neil Campbell   Casey W. Halladay

Copy to: Members of the Merger Streamlining Group
Joshua Chad, McMillan LLP

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[10] Comment 4 to *Recommended Practice* IX-A.