COMMENTS

OF THE

GOVERNMENT OF THE UNITED STATES OF AMERICA

ON THE

GOVERNMENT OF SINGAPORE'S

DRAFT COMPETITION ACT 2004

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on the Government of Singapore's Draft Competition Act 2004

The Government of the United States of America (the United States) hereby respectfully submits these comments on the draft Bill of The Competition Act 2004 (the Act). The United States commends the Government of Singapore (Singapore) for seeking public comments on this important new legislation which, if implemented in accordance with sound economic principles, promises to bring benefits to Singapore's consumers, business community and the economy as a whole. As a general matter, we believe that the draft Competition Act represents a good effort to introduce a competition law that focuses on the core areas of anticompetitive business conduct and market failure normally addressed by competition laws -- agreements in restraint of trade, monopoly abuse, and anticompetitive mergers -- while seeking to minimize the economic and welfare costs of over-regulation by avoiding, for the most part, provisions aimed at protecting individual competitors and prohibiting conduct that would rarely, if ever, impede the competitive process.

We detail below a number of specific comments and recommendations on the Draft which we believe would strengthen the Act and enhance its benefits. We stand ready to provide further information or clarifications regarding these comments, and our experts would welcome the opportunity to discuss our recommendations further.

1. Introduction

In preparing these comments, the United States relied on its experience that an antitrust law that is likely to be most effective in promoting and protecting competition in the marketplace should have the following characteristics. First, it should be based on sound economic understanding about the operation of markets and the harm to economic welfare that comes from anticompetitive practices that impede the proper functioning of market mechanisms. This means that the goals of antitrust law should be clearly articulated and focus on the core antitrust objectives of enhancing consumer welfare and economic efficiency. Second, it should provide the competition enforcement agency with the resources and powers necessary to investigate and analyze anticompetitive conduct and engage in competition advocacy, and remedies adequate to effectively prohibit and deter conduct that is clearly harmful to consumers and the economy. Third, it should provide clarity to the business community and to consumers on the scope of acceptable and prohibited conduct, including transparency in the rationale for enforcement decisions, thereby minimizing the chilling of legitimate, pro-competitive conduct while maximizing the understanding of the harmful conduct that must be avoided.

Finally, governments should ensure that their antitrust enforcement agencies have the independence, expertise, and credibility, and provides the appropriate procedural safeguards, necessary to instill confidence by the business community and public that decisions under the antitrust law will be impartial and based on fundamentally sound and objective factors that are consistent with the goals of the antitrust law. To cultivate public confidence in the administration and enforcement of a competition law, competition regimes should be organized to maximize certainty, predictability and objectivity of decision-making and minimize actual or

perceived conflict of interests between the mission of the competition agency and other government policies.

II. General Comments

In addition to the specific comments below, we have two general comments on the Draft. First, we are concerned that the series of fairly extensive exemptions and exclusions to the three core substantive provisions of the Act threatens the effectiveness of the Act in preserving and promoting competitive markets within Singapore. In particular, we have concerns about the breadth of the schedules that provide exclusions for many categories of conduct, including exclusions for specific sectors, regulated sectors, services of general economic interest, mergers where potentially open-ended public interest considerations apply, and activities where the Minister decides, based on broad authority, that they should be exempted based on public policy.

All competition regimes around the world, including our own, contain some exclusions and exemptions, sometimes flowing from conflicting policy goals, sometimes from the unique political, economic or historical circumstances of particular countries. However, tilting the balance too much in the direction of exclusions and exemptions threatens to undermine the creation of a "culture of competition" so necessary for a new competition regime. We are concerned that the exclusions in the Draft are so numerous and broad that they might well have the effect of undermining the fundamental message that competition is good for the economy and that competition is the norm that should be followed in almost all circumstances.

Second, the Draft appears to provide the Minister with significant authority to influence and intervene in the workings of the Competition Commission (Commission). The Minister can appoint and dismiss members of the Commission and the Competition Appeals Board (the Board) at the Minister's discretion, approve or disallow individual items or portions of items in the Commission's budget, and direct the Commission in the performance of its functions and the exercise of its powers. The Minister also has the authority, as mentioned above, to grant exemptions to the Act based on broad public policy grounds, modify recommendations of the Commission for block exemptions, and act as the sole body of appeal from Commission decisions concerning individual exemptions.

Although many countries have established their competition authorities as independent agencies, it is not uncommon for competition agencies to be placed under the purview of an existing ministry or agency – for example, OFT in the UK, or indeed even our Antitrust Division, which is part of the Department of Justice. Nor can any competition agency be said to be completely independent, since all are subject to budget and policy review by their legislatures and exist within the political culture of their nations. However, we have found that the effectiveness and success of a competition regime is dependent in large part on whether the competition enforcement agency is viewed as objective, independent, and resistant to political pressures to protect producer interests at the cost of consumer welfare. While we believe that the Minister fully intends for the Commission to be objective and free from political pressure, the significant

authority given to the Minister in the Draft, combined with the possible perception of conflicts of interest with respect to sectors regulated by the Ministry of Trade and Industry (MTI) and government-linked companies (GLCs) that are owned by statutory boards that ultimately fall under the authority of MTI, risks undermining the credibility of the Commission.

With these general comments in mind, we offer the following specific comments and suggestions on the Draft.

III. Comments on Part I – Preliminary

Key concepts in the competition law, particularly the types of agreements or practices that will be subject to prohibitions, should be clearly defined to promote public understanding of the law and foster certainty about what conduct is legal or illegal. We offer the following suggestions for improving this aspect of the Draft law.

Section 2 defines the term "merger" in terms of the acquisition or establishment of "control" over or "significant interest" in the whole or a part of a business of a "competitor, supplier, customer or other person." Control is defined in section 54(3) in terms of the ability to exercise "decisive influence" with regard to the activities of the enterprise. The present definition, however, does not explain the difference between "control" and "significant interest." Nor does section 54 refer to the acquisition of "significant interest;" it refers only to the acquisition of control. If the acquisition of a "significant interest" in an entity does not confer control, it is not clear why such transactions should be subjected to the Section 54 prohibition.

The definition of "merger" in section 2 also refers to the identify of the acquired entity -- a "competitor, supplier or customer or other person." This part of the definition might unduly limit the scope of section 54 by, for example, not recognizing the acquisition of a potential competitor as a covered acquired entity, a result that we do not believe was intended.
Recommendation: We recommend that the definition of "merger" be revised to include the acquisition of control over a business of "any person, including a competitor, supplier, customer or other person." We also suggest that the need for including in the definition of "merger" the acquisition of a "significant interest" in a business be reconsidered in light of the comments above.

In addition, there are terms in the Draft that are not currently defined, but whose definition would be helpful in clarifying the content of the Draft. These are addressed in the discussion below of the sections in which they appear.

IV. Comments on Part II – Competition Commission of Singapore

A. Constitution of Commission

Section 5 describes the composition of the Commission and refers to the First Schedule.

Paragraph 3 of the First Schedule provides that the term of Commissioners shall be determined by the Minister, not to exceed three years. In the United States, Federal Trade Commission (FTC) commissioners serve staggered, seven-year terms. We have found that the seven year term enables Commissioners to have a tenure sufficiently long to allow them to acquire expertise, and that staggering the terms ensures that there will be Commissioners with substantial experience and expertise on the Commission.
Recommendation: We suggest that Singapore consider lengthening the term of the Commissioners and staggering the terms in some way.

Paragraph 5 of the First Schedule authorizes the Minister to revoke the appointment of any Commissioner if "necessary in the interest of the effective and economical performance of the functions of the Commission . . . or in the public interest." This authority gives the Minister a great deal of discretion to remove Commissioners, and could be perceived as undermining the independence of the Commission. By contrast, in the United States, FTC Commissioners may only be removed from office for inefficiency, neglect of duty or malfeasance in office.
Recommendation: We suggest that Singapore consider including in the Draft specific limited bases for revoking the appointment of Commissioners.

B. Functions and Duties of the Commission

Section 6 sets out the functions and duties of the Commission. This section usefully establishes that the core mission of the Commission is to promote and maintain competition in the marketplace. The emphasis on maintaining and enhancing efficient market conduct and innovation is particularly noteworthy. However, section 6(2)(b) includes within the factors to be considered by the Commission in discharging its functions "the economic, industrial and commercial needs of Singapore." These considerations are not the type of factors that competition authorities are normally asked or well equipped to consider. While we recognize that Singapore has industrial policy goals, making such goals an explicit consideration for the Commission in the discharge of its duties threatens to focus its mission away from the fundamental goal of antitrust law – recognized by both our governments in the U.S.-Singapore FTA -- of promoting economic efficiency and consumer welfare. It is our experience and belief that such non-competition policy goals are best be addressed through laws and mechanisms other than the antitrust law.
Recommendation: We suggest that the reference to "the economic, industrial and commercial needs of Singapore" be dropped from section 6 of the Draft.

Section 6(1)(d) and (f) establish the promotion of a competitive culture in Singapore and the provision of advice on competition matters to the Government as core functions of the Commission. We commend the inclusion of these provisions, as we believe that competition advocacy is one of the key functions of an active and effective competition agency. We note that section 76 addresses cooperation between the Commission and other regulatory authorities on competition matters, and that paragraph 27.c of the Competition Bill Consultation Paper (CBCP) contemplates the issuance of guidelines on consultation and coordination between the

Commission and sectoral regulators.
Recommendation: We suggest that the Draft provide greater clarity on the authority of the Commission to provide advice to the Government and other public authorities on competition matters, and on the mechanisms for conveying this advice.

Section 7 requires the Commission to provide information to the Minister on its activities, as the Minister may require. We note that section 78 imposes confidentiality requirements on the Commission and Competition Board of Appeals and its employees. We assume that it is intended that the Minister and Ministry officials abide by the same confidentiality requirements with regard to information received from the Commission.
Recommendation: We suggest that the Draft make clear that the confidentiality requirements extend to all Ministry officials, including the Minister.

Section 7 also provides that the Commission may exercise any of the powers enumerated in the Second Schedule. Paragraph 15 of that Schedule provides that the Commission may "receive donations and contributions from any source." We believe that the receipt of donations and contributions by the Commission could raise concerns about conflicts of interest or could raise questions as to the impartiality of the Commission that might undermine its credibility. Providing that the Commission's funds will come directly from the Government (or from appropriate user fees) would avoid this problem.
Recommendation: We suggest that Singapore consider deleting from the Draft the provisions allowing the Commission to accept donations and contributions.

Section 8 empowers the Minister to give directions to the Commission as to the exercise of its powers. While we understand that this language appears to be standard authority provided to Ministers with respect to many statutory boards, e.g. IE Singapore, Energy market Authority, this authority is written so broadly that it could be construed to include direction on what decisions to make or investigations to pursue. While we do not believe that is the intent of the Draft, the perception that the Minister might be involved in the core functions of the Commission could undermine the impartiality and credibility of the Commission. We note that, pursuant to the United Kingdom's Enterprise Act 2002, the Secretary of State's powers of direction over the Office of Fair Trading were repealed, and Ministerial authority in the decision-making process of the competition authorities was greatly reduced.
Recommendation: We recommend that the Draft be revised to make clear that the Minister does not have the power to give directions on matters involving the core functions of the Commission.

Sections 9(2) and (3) provides broad authority for the Commission to delegate its powers, duties and functions (other than those specifically excluded) to, among others, a committee composed of persons who are not members of the Commission or "any person." This authority to delegate the powers of the Commission seems to be very broad, and could seemingly include delegation to staff, or even interested persons outside the Commission of the Commission's core function of decision-making on violations and remedies. While we understand that this is language common to other legislation establishing statutory boards, e.g. the Standards, Productivity and Innovation

Board and the Intellectual Property Office, such broad delegation authority is very unusual for competition authorities and could undermine the credibility of the Commission and the Act. **Recommendation: We recommend that the scope of delegation authority be much more tightly circumscribed in the Draft.**

Section 13 provides that all monies collected or charged by the Commission be retained as assets of the Commission. While we recognize that such language may be found in legislation establishing other statutory boards, in the context of a competition agency such a provision raises conflict of interest concerns, in that decisions of the Commission could be influenced, or be perceived to be influenced, by the financial rewards that will accrue to the Commission by assessing a penalty.
Recommendation: We suggest that the Draft be revised to direct these funds to the general Treasury, thus eliminating the link to the Commission's budget, or to authorize the Commission to retain only monies collected for purely administrative functions, such as filing fees for requests for individual exemptions or for Commission examination of an agreement.

V. Comments on Part III –Competition

A. Agreements restricting competition

Division 2 addresses agreements preventing, restricting or distorting competition, a category of anticompetitive practices that is at the core of any sound competition law. Section 34 makes unlawful agreements among competitors (since vertical agreements are generally exempted under paragraph 8 of the Third Schedule) that have "as their object or effect the prevention, restriction or distortion of competition."

In the United States, by contrast, only hardcore restraints of trade, i.e. price-fixing, bid rigging and market allocation agreements among competitors, are deemed to be unlawful without regard to proof of actual anticompetitive effects. The Draft's approach opens the possibility that some efficiency-enhancing agreements -- for example, certain buying cooperatives or joint ventures -- might be outlawed by the section 34 prohibition, since they would have as one of their objects the restriction of competition between the participants.

The Draft's approach towards agreements restricting competition is similar to that taken previously by the EU and the UK, i.e. prohibiting all such agreements and then allowing for individual and block exemptions. One of the costs of such an approach is that it casts a net of legal uncertainty over a wide range of business conduct. Since all contracts, by definition, are agreements that exclude others from providing the goods or services that are the subject of the contract, all such agreements could be viewed as void as a matter of law unless covered by an individual or block exemption. As a result, the competition authorities are forced to expend a significant amount of resources to prevent commerce from coming to a halt by creating carve-outs (block exemptions) to the broad prohibitions, or responding to numerous requests for individual exemptions. The EC, after long-experience with individual exemptions and the heavy

resource commitment needed to make them work, has recently moved away from that approach, enabling them to focus on the most serious impediments to competition, especially hard core cartels.

Recommendation: We suggest that Singapore adopt an alternative approach, prohibiting only those agreements that "unreasonably" restrain competition, or that have, in the words of paragraph 6.b.i. of the Competition Bill Consultation Paper ("CBCP"), an "appreciable adverse effect" on competition. Such an approach would avoid making all agreements that are not covered by an exemption void on their face, but rather would prohibit and void only those agreements that are truly anticompetitive. The Draft, or subsequent regulations or guidelines, could also make clear that certain hardcore horizontal restraints, such as price fixing, bid rigging and market allocation agreements, would be presumed to be or (if a per se approach such as that used in the United States were adopted) would always be unreasonable. Block exemptions could still be used to clarify those agreements that would never be deemed to "unreasonably" restrain competition, and the request for guidance or decision system set out in sections 43 and 44 could serve to respond to individual cases.

Section 41 sets out the criteria for granting individual and block exemptions. The criteria in section 41(a), while potentially broad, appear to appropriately address agreements that provide production and distributional efficiencies. Similarly the criterion in section 41(b) concerning technical progress appears to usefully acknowledge the importance of promoting innovation as a means of strengthening the competitive process. The section 41(b) criterion of promoting "economic progress," by contrast, appears to be so broad as to permit exemptions for any "economic" policies, regardless of whether they would contribute to the promotion of the competitive process. It is not clear that weighing such factors would be within the actual or appropriate competence of the Commission.

Recommendation: We suggest that the promotion of "economic progress" be dropped from the section 41(b) criteria for granting individual and block exemptions.

It is also not clear whether the offsetting considerations provided for in section 41(i) and (ii) are the only grounds for denying applications for individual and block exemptions that meet the conditions in section 41(a) or (b). If indeed these are the only bases for refusing to grant such an exemption, the section 41(ii) standard appears to be unduly narrow, since it only applies where competition is "eliminated" in respect to a substantial part of the goods or services. This narrowly drafted standard might prevent the Commission from refusing to grant an exemption for conduct that substantially or unreasonably lessens competition, but that does not eliminate it completely.

Recommendation: We suggest that section 41 be revised to disqualify an exemption for conduct that "unreasonably" (or "unduly") restrains competition, thereby providing the Commission with more flexibility in balancing the procompetitive and anticompetitive effects of the conduct at issue.

Paragraph 34(5) states that the prohibitions of section 34 apply retroactively to agreements, etc.

implemented before the new law comes into effect. However, it does not seem equitable to impose penalties on conduct entered into and completed prior to enactment of the law.
Recommendation: We recommend that the Draft make clear that only past agreements that have continuing effects after the law comes into force would be subject to penalties, and provide a grace period for pre-existing agreements to be conformed with the Act or terminated.

B. Requests for Guidance

Section 43 provides a procedure for a party to an agreement to seek guidance from the Commission on whether the agreement is likely to infringe section 34. This procedure appears to be similar to the U.S. Antitrust Division's Business Review Letter (28 C.F.R §50.6) and the U.S. FTC's Advisory Opinion (16 CFR §11) procedures, with one important difference. Business Review Letters and FTC advisory opinions are generally only available for prospective conduct, i.e. not for conduct that has already been implemented. The FTC imposes further criteria, such that the request involves substantial or novel questions of fact or law, to limit the potential burden of responding to a large number of requests involving speculative or straightforward conduct. The United States has found that the antitrust agencies can usefully contribute to reducing business uncertainty about the antitrust risks of proposed conduct by providing a mechanism in which particular enterprises can ask for a statement of the enforcement intentions of the antitrust agencies regarding particular future conduct.
Recommendation: We suggest that section 43 be revised to provide that parties to proposed agreements or activities would also be eligible to seek guidance from the Commission, provided the content of the proposed activities is sufficiently clear to enable adequate examination by the Commission.

C. Abuse of dominant position

Section 47 of the Draft prohibits abuse of dominant position by one or more undertakings, a concept included in the competition regimes of the EU and UK, among others, although not in U.S. antitrust law. Section 2 of the Sherman Act, by contrast, prohibits monopolization or attempts to monopolize. While in many circumstances the concepts of abuse of dominant position and monopolization overlap, there is one fundamental difference -- U.S. antitrust law addresses conduct that can lead to harm to the competitive process, while some notions of abuse of dominance focus on the protection of individual competitors, rather than on the effects on competition. Since the primary goal of a competition law should be on maximizing consumer welfare and economic efficiency, we urge Singapore to apply the abuse of dominant position prohibition only to conduct that harms the competitive process, i.e., that is anticompetitive. Paragraph 8.b. of the CBCP appears to adopt the approach we are suggesting -- indicating that conduct will be prohibited only where it is "anticompetitive and . . . work[s] against long term economic efficiency." We support that approach.
Recommendation: We suggest that section 47(2) make clear that only conduct that is anticompetitive and works against long term economic efficiency is prohibited under that section.

Section 47(2)(a) prohibits "predatory behavior towards competitors." Predatory behavior is not defined, although paragraph 8 of Annex A appears to consider predatory pricing to exist where "a dominant undertaking sets prices at such a low level to sacrifice profits in the short-run, in order to eliminate competition and raise prices and profits in the longer term." This definition is aimed in the proper direction, particularly the requirement that the purpose be to eliminate competition and raise prices in the long term. However, it does not make clear that the sales must be below cost or that the undertaking must be able to recoup the lost profits in the future.
Recommendation: We suggest that a definition of the term "predatory behavior," along the lines set out in Annex A but modified to incorporate requirements that sales be below cost and that there be a reasonable prospect of recoupment, be included in the Draft, or in subsequent guidelines.

Section 47(2)(b) includes within the list of abuses, the limiting of production to the prejudice of consumers. It is axiomatic that monopolies will exercise their market power by restricting production to the point where marginal revenue equals marginal cost, thereby increasing prices to their profit-maximizing monopoly level. Such monopoly pricing, by definition, prejudices consumers, but would not be considered to be unlawful in many jurisdictions. Both paragraph 8 of Annex A and paragraph 8.b. of the CBCP indicate that the possession of market power would not be prohibited. Since raising pricing to monopoly level is a normal profit-maximizing strategy for firms with market power, it appears that Singapore does not intend to prohibit such pricing, or the restriction of production necessary to raise prices to those levels.
Recommendation: We recommend that this provision be redrafted to clarify that monopoly exploitation of a monopoly position through output reductions is not intended to be prohibited.

Section 47(2)(c) makes it an abuse to discriminate between trading parties, where the discrimination places them at a competitive disadvantage. However, many forms of discriminatory treatment have efficiency or other pro-competitive justifications, even if they might disadvantage some trading partners over others. To focus on the competitive disadvantage to trading parties, rather than on the efficiency or consumer-welfare enhancing aspects of the behavior, would have the effect of using Singapore's competition law to protect individual competitors rather than to protect the competitive process.

Similarly, section 47(2)(d) prohibits including obligations in contracts that "have no connection with the subject of the contracts." This provision does not contain any requirement that the conduct have an anticompetitive effect, and therefore appears to be aimed at protecting small firms in their arm's length transactions with larger dominant firms. The use of competition laws to protect individual companies rather than the competitive process would have the effect of undermining the market mechanism, hurting the efficiency of companies operating in Singapore and impeding growth of the Singapore economy. In addition, if a small firm believes that it can sign a contract with a larger firm and then routinely obtain improved terms by complaining to the Commission, the predictability of contract enforcement in Singapore could be compromised.
Recommendation: We recommend that a requirement be added in both 47(2)(c) and (d)

providing that the practices are unlawful only if they injure competition, not simply because they disadvantage individual firms.

Section 47(3) defines dominant position to include a dominant position within Singapore or elsewhere. However, it is not clear why Singapore should be concerned about a firm that has a dominant position in some market outside of Singapore if it does not have a dominant position within Singapore. In other words, if a firm does not have market power in Singapore or in a geographic market that includes Singapore, it is not clear how it could use that market power to harm competition in that or a different Singapore market. Of course, a firm located outside of Singapore that sells into the Singapore market and has a dominant share of the Singapore market, would appropriately be viewed as having a dominant position within Singapore.
Recommendation: We suggest that section 47(3) (and section 33(1)(f)) be revised to make clear that the Draft covers foreign firms with dominant positions in Singapore but not firms with dominant positions in some overseas market, but not in the Singapore market.

Other than the reference in section 47(3), there is no definition of "dominant position" in the Draft. Inclusion of some limiting definition would greatly improve the Draft, providing clarity to the business community as to when they should be concerned about running afoul of the section 47 prohibition. As mentioned above, U.S. antitrust law is not drafted in terms of "dominant positions." However, in our experience, the defining feature of dominance is "market power, " i.e. the ability to maintain prices profitably above competitive levels for a significant period of time without inducing entry. We also note that section 47(1) applies where one "or more" undertakings engage in conduct that amounts to an abuse of dominant position, implying that the concept of "joint dominance" has been adopted in the Draft. Joint dominance is a concept that other jurisdictions have tended to flesh out in case law.
Recommendation: We suggest that the Draft include a definition of "dominant position" that incorporates notions of market power, in particular the requirement that an enterprise hold a significant share of a well-defined product market and that there be non-trivial barriers to entry by other firms into that market. We also suggest that the Draft, or subsequent guidelines, describe more clearly the situations in which more than one undertaking could contravene this section.

D. Mergers

Section 54 prohibits mergers that have or may be expected to substantially lessen competition in a market in Singapore. This is a commonly used and well-regarded merger standard worldwide, and is virtually identical to that used in the U.S., UK and Australia.

5. Enforcement

Section 68 provides the procedure to be followed by the Commission before making a decision that sections 34, 47 or 54 have been infringed, including providing written notice to the respondent and allowing an opportunity to make representations to the Commission before a final decision is made. However, there are no requirements as to the form of Commission decisions.

Recommendation: We suggest that the Draft make clear that final decisions of the Commission be in writing, set forth the reasons and facts that support the decision, and be made public, as is consistent with the general commitments on transparency in the U.S.-Singapore FTA.

Section 69 provides the Commission with powers to enforce its decisions. With respect to violations of section 54, section 69(c) authorizes the Commission to require the merged entity to enter into affirmative obligations to prevent or lessen the anticompetitive effects. However, this power is not specifically enumerated in paragraphs 69(a) or (b) with respect to violations of section 34 or 47, respectively.

Recommendation: We suggest that the Draft specifically authorize the Commission to impose affirmative obligations on violators of section 34 and 47 to lessen or eliminate the harmful effects of the anticompetitive conduct.

Section 69(4) sets the maximum penalty that the Commission may impose for violations of the law at 10% of turnover in Singapore, for a maximum of three years, unless revised by Ministerial order. Our experience with antitrust enforcement in the United States has demonstrated the importance of imposing penalties on hard-core cartel and bid rigging conspiracies that create a substantial deterrent to engaging in these economically harmful activities. Cartel and bid-rigging conspiracies are normally engaged in under cloak of secrecy, making them very difficult to uncover and successfully challenge. We have found that enterprises will weigh the likelihood of being discovered, and the penalties that will be imposed if discovered, and treat the risk as a cost of doing business. If the expected profits from engaging in the cartel activities exceed the likely penalty, discounted by the risk of getting caught, business enterprises may rationally engage in the unlawful conduct. We believe that the Draft's limitation of penalties to a maximum of three years of turnover will reward cartel participants who are able to maintain the existence of the cartel for more than three years.

Recommendation: We therefore recommend that the three-year cap on penalties be deleted.

VI. Comments on Part IV – Appeals

Section 71 sets out the rights of appeal from decisions of the Commission. Section 71(1) provides a right of appeal to the Competition Appeal Board (the Board) for persons subject to decisions of the Commission, with the exception of decisions on individual exemptions, which pursuant to section 71(2) are appealable to the Minister. Affected third party consumers do not appear to have standing to appeal decisions to the Board or to the Minister, although section 74 appears to permit any aggrieved person to appeal decisions of the Board to the High Court. However, third party consumers who are adversely affected by the grant of an individual exemption have no rights of appeal.

Recommendation: We recommend that appeal rights for consumers adversely affected by the grant of an individual exemption be considered. We also recommend that the Draft make clear that decisions of the Board will be in writing and made public. An important body of law as to the interpretation of the Act is likely to develop based on decisions by the

Board, and public disclosure of those written decisions will contribute to the understanding of the Act by the business community and consumers.

VII. Comments on Part VI – Miscellaneous Provisions

A. Cooperation with Foreign Competition Bodies

Section 77 authorizes the Commission, with the approval of the Minister, to enter into cooperation agreements with foreign competition authorities. This is a welcome inclusion in the Draft. We are concerned, however, about the requirement in section 77(2)(a) that the source of any information be consulted before that information is turned over to foreign authorities. Our experience is that such a condition could undermine sensitive investigations conducted by foreign authorities, and will seriously limit the willingness of foreign authorities to enter into cooperation agreements with Singapore.

Recommendation: We recommend that the Draft be revised to eliminate this condition, allowing the Commission to determine on a case-by-case basis, in light of the circumstances surrounding particular requests for assistance by foreign competition authorities, whether to consult with the source of the information.

B. Offenses for Obstruction of Investigations

Sections 80-83, and section 87(2), make it a criminal offense to engage in various forms of obstruction of Commission investigations. These offenses go to the heart of the Commission's credibility as a serious enforcement agency, and hence, should be punished severely. However the maximum penalty of $5,000 - $10,000 appears to be much too low to encourage compliance with Commission investigations and orders, particularly given the large financial implications that Commission findings of infringement of the Act may have on the enterprises concerned. The alternative sentence of up to one-year imprisonment will be a useful deterrent against obstruction of Commission investigations by individuals, but only if prosecutors seek, and the courts impose, substantial prison sentences for persons guilty of these offenses. On the other hand, a maximum criminal fine of $10,000 will have little deterrent effect on corporate offenders.

Recommendation: We recommend that maximum criminal fines for obstruction of investigations by individuals, and particularly by enterprises, be increased substantially.

VIII. Comments on Exemptions and Exclusions

A. General Exemptions and Exclusions

Section 33(4) excludes the Government, statutory bodies and persons carrying out activities on behalf of the Government from the substantive provisions of the Act. The Draft does not, by contrast, provide government officials, as a general matter, with the power to immunize private conduct. There is a risk that the exclusion from Part III prohibitions contained in section 33(4)(c) of persons carrying out activities "on behalf of the Government" could be read as immunizing conduct whenever a government official "authorizes" the conduct, even if the conduct is outside

the legislative mandate of the particular agency or the authorization is given informally, such as through "administrative guidance."
Recommendation: We suggest that a caveat be added to section 33(4)(c) that requires that the delegation of authority to private persons be pursuant to law or regulation.

Section 33(4) is not clear as to the effect of excluding the Government and statutory bodies from the application of the Act on commercial undertakings owned or operated by the Government or by statutory boards. On the other hand, paragraph 10 of the CBCP indicates, consistent with Singapore's commitments in the U.S.-Singapore FTA, that the Act is intended to apply to all economic activities by private sector entities, even if Government-owned.
Recommendation: We recommend that the Draft clearly indicate that the Act applies to all entities owned or operated by the Government or by statutory bodies.

B. Third Schedule Exclusions from Sections 34 and 47

Paragraph 1 of the Third Schedule excludes undertakings entrusted with the operation of "services of general economic interest or having the character of a revenue-producing monopoly" with regard to the performance of tasks "assigned" to that undertaking. However, the Draft does not define "services of general economic interest" or undertakings "having the character of a revenue-producing monopoly." Moreover, it is not clear why this exclusion is necessary at all, given that it appears to apply only with respect to undertakings "entrusted" (presumably by the Government) with tasks "assigned" to it. These requirements appear to bring these undertakings within the section 33(4)(c) exclusion.
Recommendation: We recommend that the need for this exclusion be reconsidered in light of the section 33(4)(c) exclusion. If this exclusion is retained, we suggest that the Draft include a clear definition of the terms discussed above, or a specific list of undertakings covered by this paragraph. We also suggest, consistent with our comments on section 33(4) above, that the Draft require that the assignment of tasks be pursuant to law or regulation.

Paragraph 2 excludes agreements and conduct to the extent made or engaged in "in order to" comply with a legal requirement. This language focuses on the intent of the actor, rather than to what the law requires, and could therefore create an overly broad exemption from the Act.
Recommendation: We recommend that this exclusion apply to agreements or conduct only to the extent that the agreement or conduct is "necessary" to comply with a legal requirement.

Paragraph 4 authorizes the Minister to exclude agreements or conduct from the prohibitions of section 34 and 47 where there are exceptional and compelling reasons of public policy. This is an extremely broad grant of power to the Minister to exempt otherwise illegal agreements and conduct from the coverage of the Act, particularly since the Minister's order is unlikely to be appealable, and raises concerns that politically-powerful constituencies will believe that they can ignore the dictates of the Act because of the possibility of retroactive exclusion by the Minister. It also seems to have the potential to undermine the section 36 and section 38 individual and block exemption systems, as the paragraph 4 authority allows an applicant to avoid having to

meet the criteria set out in section 41.
Recommendation: We urge Singapore to reexamine the necessity and desirability of granting such an open-ended exemption authority to the Minister.

Paragraph 5 excludes agreements or conduct to the extent that another regulatory authority has jurisdiction in the matter pursuant to law. The idea that undertakings should not be faced with complying with two different competition standards is understandable. On the other hand, there can also be certain benefits and advantages to having an antitrust law apply to regulated sectors. For example, competition agencies often have better legal tools and more highly trained personnel for uncovering and investigating anticompetitive behavior than regulatory agencies. There may also be benefits from allowing the competition authority to act in cases where the regulatory agency does not have the ability or inclination to act vigorously to deal with anticompetitive practices.

Moreover, basing an exclusion on another agency's "jurisdiction" invites legal disputes and threatens to allow anticompetitive conduct to escape accountability under either the Act or the other regulatory regime in circumstances where the regulatory agency, while having theoretical jurisdiction, has never attempted to exercise that jurisdiction. For example, the securities regulator might have jurisdiction to regulate broker's fees, but has decided not to regulate, instead allowing securities brokers to compete on fee levels. If securities brokers formed a cartel to fix brokers fees, neither the Commission nor the securities regulator might be able to act against the cartel.
Recommendation: We recommend that the Draft be revised to limit the exclusion to, at most, only those situations where the conduct is actually being regulated in practice by another regulatory authority.

Paragraph 6 excludes specific activities in specific sectors – armed security services, supply of piped drinking water, supply of wastewater management services, supply of scheduled bus and rail services, and cargo terminal operations. We note that a number of these services are provided by GLCs, sometimes in competition with each other (e.g., PSA Corp. And Jurong Port) and sometimes in competition with private firms (e.g. bus and rail services.) In light of the paragraph 5 exclusion discussed above, it is not clear, however, why these specific exclusions are necessary. To the extent that these specific sectors are not subject to the paragraph 5 exclusion, i.e. another regulatory authority does not have jurisdiction or, as we suggest above, does not actually regulate the conduct at issue, then these sectors will be unrestrained in their ability to engage in anticompetitive practices, a situation that would not seem to be in the interest of the Singapore economy or its consumers (including the Government itself.)
Recommendation: We suggest that the need and desirability of these exemptions be reconsidered in the light of the paragraph 5 exclusion.

Paragraph 8 excludes vertical agreements from the scope of section 34, except where the Minister has issued an order explicitly applying section 34 to specific types of vertical agreements. However, the paragraph 8 exclusion does not appear to apply to many intellectual property licenses between parties in a vertical relationship. It is not clear why intellectual property

licensing should be treated differently than other types of contracts between parties in a vertical relationship. If the basis for such differential treatment is an assumption that IP rights convey market power, that basis would not be supportable, since vigorous competition may still be present in areas where IP rights are common. Annex C, paragraph 5, states that undertakings may abuse their IPR for "unfair commercial advantage" that is detrimental to overall market efficiency. However, protecting against "unfair commercial advantage" is not a proper concern of competition law, since it implies the protection of competitors rather than competition. And again, it is not apparent why the exploitation of market power through IPR licensing should be of greater concern than the exploitation of market power through other forms of vertical agreements.

Annex B appears to reflect a bias that IP laws and competition laws are often in tension with each other. This is not a view that we share. IP rights, by creating incentives for would-be innovators to make the investments necessary for new discoveries and the development of new products, stimulates competition and benefits consumers through the introduction of new technologies and the expansion of product choice. In today's technological world, it is often innovation that allows new competitors to enter and successfully compete against incumbent dominant firms. The Draft's view of the cost/benefit tradeoff of IPR licensing is unnecessarily pessimistic. On the positive side, we commend Singapore's intention, as reflected in paragraph 9 of Annex B, that the Commission will adopt a "rule of reason" approach when analyzing IPR-related agreements.

Recommendation: We urge that the Draft be revised to treat vertical IPR licensing agreements no differently than other types of vertical agreements.

C. Fourth Schedule Exclusions from Section 54

Paragraph 1 excludes mergers from the section 54 prohibition where the Commission, with approval from the Minister, exempts them on grounds of public interest considerations. "Public interest consideration" is defined in section 2 of the Draft as "national or public security, defence and such other considerations as may be prescribed."[emphasis added].

Recommendation: We suggest that the Draft be revised to specify the procedure for prescribing other considerations, and ensure that the procedure is transparent and is not susceptible to arbitrary accommodations to individual transactions.

Paragraph 2 excludes mergers approved under any law or code of practice pursuant to law relating to competition. This provision assumes that other regulatory authorities will evaluate the competitive effects of a merger, which may not always be the case, and that even where they do look at the competitive effects, they will have a level of expertise equivalent to that of the Commission. In the United States, mergers in regulated sectors are generally reviewed by both the antitrust authorities and by the regulatory authorities, with the latter using a different statutory standard and examining a broader range of issues than just competitive effects. Mergers may be challenged by either the antitrust authorities or the regulatory authorities – generally, anticompetitive mergers are not permitted even if there are broader policy considerations that weigh in favor of approval.

Recommendation: We suggest that Singapore reexamine its approach in this area. In any

event, we recommend that step be taken to ensure that the competition analysis undertaken by regulatory authorities is consistent with the merger analysis approach of the Commission. Commission guidelines on the consultation process between the Commission and the sectoral regulators provide one means for ensuring consistency in decision-making in this regard.

Paragraph 3 excludes mergers in the specified sectors defined in paragraph 6(2) of the Third Schedule. It is not clear why this exclusion is necessary, in light of the paragraph 2 exclusion. If regulatory agencies do not approve a merger in circumstances that qualify for the paragraph 2 exclusion, then it would appear that sufficient scrutiny of the competitive effects of the merger has not been made by the regulatory agency, and the merger should therefore be subject to review by the Commission.
Recommendation: We suggest that the necessity and desirability of this exclusion be reconsidered in light of the paragraph 2 exclusion.

Section 92 provides that the Minister may amend the Third and Fourth Schedules by order. However, no procedures for ensuring transparency in this process are specified.
Recommendation: We recommend that the Draft specify that a mechanism for public comment on proposed amendments to the Schedules should be adopted.

IX. Conclusion

The United States appreciates having the opportunity to comment on Singapore's draft Competition Bill. We stand ready to provide Singapore with additional information concerning these comments or about other aspects of sound competition policy, and our experts would welcome the opportunity to discuss our comments and recommendations further, perhaps through a video conference. Please feel free to contact Stuart Chemtob, Special Counsel for International Trade, Antitrust Division, U.S. Department of Justice, tel: (1)(202) 514-2523; e-mail: stuart.chemtob@usdoj.gov; or Deirdre Shanahan, Counsel for Asia-Pacific, Bureau of Competition, Federal Trade Commission, tel: (1)(202) 326-2951; e-mail: dshanahan@ftc.gov.