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United States Senate

COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

March 1, 2002

The Honorable John Ashcroft
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

The Honorable Charles James
Assistant Attorney General for Antitrust
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

The Honorable Timothy Muris
Chairman, Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Gentlemen:

We write concerning the proposed agreement between the Justice Department and the Federal Trade Commission regarding the division of responsibility between the two agencies for other antitrust matters (what is commonly referred to as the "Clearance Procedure" for antitrust investigations).

We fully share with you the goal of enhancing the efficiency of the merger review process and reducing wasteful and potentially time-consuming bureaucratic contests regarding which agency reviews a particular merger or acquisition. The unique system under which both the Justice Department and FTC share responsibility for merger review and for antitrust enforcement generally makes the implementation of clear rules for quickly determining which agency is responsible for a specific matter of the highest importance.

The need for reform of the present Clearance Procedure is highlighted by your agencies' recent experience. Since the beginning of fiscal year 2000, it has taken an average of 17.8 business days to resolve the 136 matters in which both agencies asserted jurisdiction over the same transaction. We understand that, if the proposed new Clearance Procedure had been in effect, the agencies would have resolved an average of 90% of these matters within two days, and 100% of

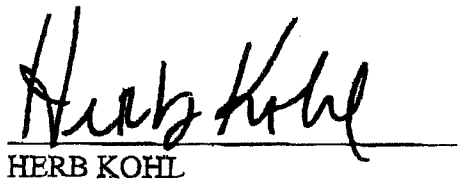
them within ten days.

Significant delays in deciding which agency is to review a matter can be harmful to antitrust enforcement, can impose unacceptable burdens on the parties affected, and can be contrary to the public interest. With respect to merger review, under the Hart-Scott-Rodino Act, either the Justice Department or FTC must decide within thirty days of a pre-merger filing whether to request additional information (the so-called "Second Request"). If the antitrust agencies do not submit their Second Request, the transaction may proceed to closing. Extended delays caused by clearance contests rob the agencies of crucial time for investigation during the initial 30-day period and create a environment in which flawed or hastily drafted Second Requests are made simply to preserve the agency's ability to investigate the transaction. Unresolved clearance disputes are also harmful in non-merger antitrust matters, where these quarrels cause uncertainty for the affected companies and harm consumers when they delay investigations of possible competitive problems.

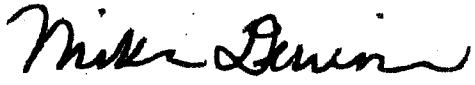
Your proposed agreement has the potential to greatly improve this situation. It is designed to streamline and clarify the clearance procedure and to provide strict time limits for the resolution of disputes between the two agencies. We realize that the proposed agreement's industry allocation has been a source of conflict – regarding whether it is based on an accurate assessment of agency expertise and whether some level of agency "competition" over these issues is healthy – but we fully support your goals and agree that it is in the public interest to reduce the potential for wasteful conflicts and bureaucratic infighting between the agencies.

Thank you for your attention to this matter.

Sincerely,



HERB KOHL
Chairman, Subcommittee on
Antitrust, Business Rights, and
Competition



MIKE DeWINE
Ranking Member, Subcommittee on
Antitrust, Business Rights, and
Competition