From: John Berthoud
To: Microsoft ATR
Date: 1/14/02 9:05pm
Subject: Microsoft settlement

Attached please find our letter commenting on the settlement of the Microsoft case.

We are also sending it via fax.

Thank you for considering our input.

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January 14, 2002

Ms. Renata B. Hesse
Antitrust Division
U.S. Department of Justice
601 D Street NW, Suite 1200
Washington, DC 20530
VIA FAX # 202-307-1454

Dear Ms. Hesse:

On behalf of the 335,000 members of the National Taxpayers Union, I am writing to comment on the Proposed Final Judgment in *United States v. Microsoft*.

As you may know, it is our position that this case was brought to protect Microsoft's competitors – not competition itself. Furthermore, we remain concerned that many state Attorneys General continue to push the suit forward for ideological and political reasons.

We are, however, pleased to see that after four years the parties are prepared to settle a case that has produced many unfortunate results. Taxpayers have been forced to underwrite the litigation to the tune of at least $35 million. Microsoft was compelled to shift considerable resources into the legal battle that would normally have been spent on product innovation, and also faces a tangle of private antitrust-spawned litigation. And as NTU Foundation research has shown, the government litigation has imposed billions of dollars worth of stock market losses on millions of American investors.

The Proposed Final Judgment contains many references to "consumers." Indeed, the antitrust authorities have insisted from the beginning that this case was about consumer welfare. Yet the original purpose of the suit against Microsoft was to enjoin the company from including Internet Explorer as part of its Windows operating system, which the plaintiffs deemed to be a grievous threat to Netscape (later purchased for $5 billion by Internet giant AOL, a Microsoft competitor). In a suit supposedly brought on behalf of consumers, we remain puzzled as to how it would have helped consumers to make them pay for an Internet browser they could otherwise get for free.

Consumers place a high value on the ability to use a standardized, integrated operating system. In fact, public opinion polls taken throughout the Microsoft antitrust trial showed that sizable majorities of the public viewed Microsoft and its products favorably.

The Proposed Final Judgment's emphasis on "network effects" as a "barrier to entry" for Microsoft competitors in many senses disregards consumers' demonstrated preference for standardized software. The government's suit was premised upon a fundamental misunderstanding of the way in which consumer markets operate: Microsoft did not build up its

large market share through anti-competitive practices; instead Microsoft became the nation's largest software company by providing consumers with the products they prefer.

Several state Attorneys General are refusing to sign the Proposed Final Judgment on the grounds that it is not strong enough. However, the agreement appears to provide the plaintiffs with exactly the type of relief they were seeking.

The settlement gives each of the settling states and the Department of Justice the power to enforce the decree and to seek a broad range of remedies in the event of a violation. An independent Technical Committee that reports to the plaintiffs would be afforded full access to Microsoft's facilities, employees, records, and even the Windows source code. And the settlement binds Microsoft to provide information to its competitors so that their programs will be Windows-compatible. Based on the strength of these remedies and the fast pace at which the software industry is evolving, we believe that the five-year duration of the decree – as opposed to the customary ten-year period – is appropriate.

The antitrust laws do not exist to preserve specific products or specific competitors. They exist to preserve competition itself, and we believe that consumers freely chose Microsoft's products – which provided a standardized, integrated operating system that revolutionized personal computer use. The results included a huge jump in desktop computer usage, much-improved efficiency, and robust growth in the software industry throughout the 1990s. Thus, we believe that this case constituted unnecessary, and harmful, government interference with the private sector. Rather than a victory for competition, we believe the Microsoft case represents a defeat for taxpayers, consumers, and investors.

With the economy in recession, Americans simply cannot keep paying the high price of governmental attempts to dictate winners and losers in the marketplace. We welcome settlement of this regrettable case.

Sincerely,

John Berthoud
President