

HEAD OF SENATE SUBCOMMITTEE ON ANTITRUST SOUNDS ALARM ON DRUG SHORTAGES

May 26, 2011

To Our Clients and Friends:

Senator Herb Kohl (D-Wis.), Chairman of the Senate Subcommittee on Antitrust, Competition Policy and Consumer Rights, has sent a letter to the Federal Trade Commission alerting the Commission to deficiencies in prescription drug availability and urging the Commission to consider those deficiencies in analyzing the effect of future pharmaceutical mergers on competition.

In his May 19, 2011 letter, Senator Kohl cited a *Washington Post* article reporting an unprecedented increase in drug shortages impacting a range of patients. This perceived trend of growing shortages occurs, in Senator Kohl's view, at a time of increased consolidation in the pharmaceutical industry. Senator Kohl reported that there have been at least nine major pharmaceutical mergers since 2000, most of which were valued in excess of \$40 billion each. Since 2009, there have been three major mergers of equal or greater value. Earlier this month, Cephalon, Inc. and Teva Pharmaceutical Industries Ltd. announced their intent to merge, in a transaction valued at \$6.8 billion.

This growing rate of consolidation has been linked to the reduced availability of prescription drugs. In 2009, the Government Accountability Office published a report claiming that “[f]ewer drug companies competing in a therapeutic class may lead to fewer prescription drugs being developed and sold within that class.” Similarly, the *Washington Post* article noted that drug company consolidation has resulted in fewer manufacturers of the less profitable drugs, so that when events occur disrupting manufacture, shortages are prone to result.

While Senator Kohl acknowledged that such shortages may be attributable to causes other than competition, he urged regulators to consider these shortages in evaluating prospective mergers of pharmaceutical companies in order to avoid exacerbating the issue of drug shortages. We expect increased antitrust scrutiny of such transactions, at least over the near term.

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Please do not hesitate to call us if you wish to discuss this subject in greater detail.

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