



**National  
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Health**

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*Creative Health Benefits Solutions for Today, Strong Policy for Tomorrow*

February 3, 2011

The Honorable Herb Kohl  
U.S. Senate  
330 Hart SOB  
Washington, DC 20510

The Honorable Charles Grassley  
U.S. Senate  
135 Hart SOB  
Washington, DC 20510

Dear Senators Kohl and Grassley:

The National Business Group on Health writes to wholeheartedly support S. 27, the "Preserve Access to Affordable Generics Act", which would prohibit brand name drug companies from compensating generic drug companies to delay the entry of generic drugs into the marketplace. S.27 also allows an exception if companies can prove to the Federal Trade Commission (FTC) "by clear and convincing evidence" that the procompetitive benefits to consumers of the agreements outweigh the costs (anticompetitive effects, lack of available generics, higher prices, etc.). We believe that such agreements go against the market rules agreed to in the Hatch-Waxman legislation and the spirit of competition. As a result, patients, employers, insurers and the government pay a heavy price in dollars and some people may forego needed medications as a result.

The National Business Group on Health represents over 315 companies, including many of America's largest employers (65 of the Fortune 100) who voluntarily provide health benefits and other health programs to over 55 million American employees, retirees, and their families.

As you know, a FTC study found that such agreements delayed market entry of generic drugs an average of 17 months (approximately 1.5 years) and that prohibiting such agreements could save American consumers \$35 billion over 10 years.<sup>1</sup> The Congressional Budget Office (CBO) estimates that the federal government will save more than \$2.7 billion over 10 years from ending "pay to delay" deals in lower drug costs for Medicare, Medicaid, military and veterans' health programs.<sup>2</sup> Employer plans and employees too would greatly benefit from earlier access to lower cost generic drugs. Specifically, employees would see significant reductions to their out-of-pocket health care expenses for prescription drugs.

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<sup>1</sup> Federal Trade Commission. Pay-for-Delay. How Drug Companies Pay-Offs Cost Consumers Billions. January 2010. Available at: <http://www.ftc.gov/os/2010/01/100112payfordelayrpt.pdf>

<sup>2</sup> Congressional Budget Office. Cost estimate: S. 369, the Preserve Access to Affordable Generics Act, As Reported by the Senate Judiciary Committee on October 15, 2009. Available at: [http://www.cbo.gov/ftpdocs/115xx/doc11582/S369\\_updated\\_table.pdf](http://www.cbo.gov/ftpdocs/115xx/doc11582/S369_updated_table.pdf)

A number of brand and generic drug companies have faced steep fines for failing to inform the FTC of agreements to delay generic drug entry into the market. Since 2005, the FTC has sought to use antitrust enforcement to stop “pay to delay” payments. However, courts have treated such agreements leniently and the FTC has had little support from the Justice Department. Therefore, your legislation is critical to solving the problem.

“Pay to delay” deals arise because the original law that created a pathway for the Food and Drug Administration (FDA) to approve generic medications, the Hatch-Waxman law, grants the first to market generic manufacturer a six month market exclusivity period, which some companies trade away to the brand manufacturers for a price.

The National Business Group on Health strongly supports your efforts to eliminate the barriers to timely access to affordable, clinically effective generic drugs and to foster a more competitive prescription drug market while at the same time encouraging innovation. We look forward to continuing to working with you, the FTC and the Administration in making lower cost generic drugs more available to all Americans. Please contact me or Steven Wojcik, the National Business Group on Health’s Vice President of Public Policy, at (202) 558-3012, if you would like to discuss our comments in more detail.

Sincerely,



Helen Darling  
President

cc:

The Honorable Sherrod Brown, U.S. Senate  
The Honorable Susan M. Collins, U.S. Senate  
The Honorable Richard Durbin, U.S. Senate  
The Honorable Al Franken, U.S. Senate  
The Honorable Tim Johnson, U.S. Senate  
The Honorable Amy Klobucher, U.S. Senate  
The Honorable Bernard Sanders, U.S. Senate