

FOR IMMEDIATE RELEASE:

Contact: Joe Bonfiglio

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Phone: (202) 224-5364

Kohl: FTC Should Consider Drug Production Capacity, Potential Shortages in Merger Review

WASHINGTON – Today U.S. Senator Herb Kohl sent a letter to Federal Trade Commission (FTC) Chairman Jonathan Leibowitz urging the FTC to consider the impact pharmaceutical company consolidation has on the nation’s limited drug supply. Prompted by recent news reports that doctors and hospitals are struggling with an “unprecedented surge in drug shortages in the United States,” Kohl suggested that the industry’s capacity to produce vital medicines might have been hampered by a decade of industry consolidation. Kohl serves as Chairman of the Senate Committee on the Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights, which has oversight authority over the FTC.

In his letter to Leibowitz, Kohl writes: “Maintaining a competitive pharmaceutical market is the highest priority...While I recognize that often shortages are likely to have causes not related to these competition issues, antitrust enforcers – particularly when reviewing drug company mergers – must be cognizant of these shortages when applying antitrust law to the drug industry.”

According to a May 2, Washington Post [article](http://www.washingtonpost.com/national/shortages-of-key-drugs-endanger-patients/2011/04/26/AF1aJJVF_story.html) (http://www.washingtonpost.com/national/shortages-of-key-drugs-endanger-patients/2011/04/26/AF1aJJVF_story.html), “[a] record 211 medications became scarce in 2010 — triple the number in 2006 — and at least 89 new shortages have been recorded through the end of March...”

Kohl also cites a 2009 prescription drug pricing [study](http://www.gao.gov/new.items/d10201.pdf) (<http://www.gao.gov/new.items/d10201.pdf>), authored by the Government Accountability Office (GAO), which contends “[f]ewer drug companies competing in a therapeutic class may lead to fewer prescription drugs being developed and sold within that class.”

Full text of the letter attached and copied below.

The Honorable Jonathan Leibowitz
Chairman
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Dear Chairman Leibowitz,

I am writing with respect to the issue of shortages of prescription drugs vital to the treatment of many patients with serious medical conditions.

As you know, pharmaceutical industry consolidation in recent years has left fewer manufacturers for both branded and generic drugs. There have been at least nine major pharmaceutical mergers since 2000, most of them valued at over \$ 40 billion each. Just two years ago, in 2009, for example, there were three major mergers – the \$ 68 billion Pfizer/Wyeth merger, the \$ 41 billion Merck/Schering Plough merger, and the \$ 47 billion Roche/Genetech merger. And just a few weeks ago, two of the

leading generic drug companies, Teva and Cephalon, announced their intention to merge, a transaction valued at \$ 7.5 billion. The impact of this consolidation may be having a serious effect on the availability of prescription drugs.

Recently, the Washington Post reported that “[d]octors, hospitals and federal negotiators are struggling to cope with an unprecedented surge in drug shortages in the United States that is endangering cancer patients, heart attack victims, accident survivors and a host of other ill people.” The article reported that a record 211 medications suffered shortages in 2010, triple the number in 2006. Rob Stein, “U.S. drug shortages threatening those whose lives depend on crucial remedies,” Washington Post, May 2, 2011, p. A10.

As the article points out, this problem may be caused in part because of consolidation resulting from drug company mergers. As the number of drug manufacturers decline, there are fewer and fewer manufacturers of older and less profitable products, “meaning that when raw material runs short, equipment breaks down or government regulators crack down, the snags can quickly spiral into shortages.” Id.

I recognize that the pharmaceutical industry, as the FTC has noted, has undergone dramatic alterations in recent decades due to new legislation, drug substitution laws and an evolving health care field. Nonetheless, the mega mergers of the past decade may be contributing to these critical drug deficiencies. In a 2009 prescription drug pricing study, the GAO claims “[f]ewer drug companies competing in a therapeutic class may lead to fewer prescription drugs being developed and sold within that class.”^[1]

I therefore recommend that the FTC consider this issue when considering future drug company mergers, and take care to examine such mergers so that this problem is not exacerbated. The FTC should also examine any drug shortages to insure that they are not in any way created by any anticompetitive practices.

Maintaining a competitive pharmaceutical market is the highest priority, and these reports of drug shortages are very troubling to me. While I recognize that often shortages are likely to have causes not related to these competition issues, antitrust enforcers – particularly when reviewing drug company mergers – must be cognizant of these shortages when applying antitrust law to the drug industry.

Thank you for your attention to this matter.

Sincerely,

HERB KOHL
Chairman, Subcommittee on
Antitrust, Competition Policy, and
Consumer Rights

^[1] GAO Report, “Brand-name prescription drug pricing: Lack of Therapeutically Equivalent Drugs and Limited Competition May Contribute to Extraordinary Price Increases,” December 2009, p. 18. Available at <http://www.gao.gov/new.items/d10201.pdf>