



June 21, 2011

Senator Jeff Bingaman
United States Senate – New Mexico
703 Hart Senate Office Building
Washington, DC 20510

Senator Tom Udall
United States Senate – New Mexico
110 Hart Senate Office Building
Washington, DC 20510

Representative Martin Heinrich
First District of New Mexico
336 Cannon House Office Building
Washington, DC 20515

Representative Steve Pearce
Second District of New Mexico
2432 Rayburn House Office Building
Washington, DC 20515

Representative Ben Ray Lujan
Third District of New Mexico
330 Cannon Office Building
Washington, DC 20515

Dear Senator/Representative :

I am writing on behalf of the New Mexico Biotechnology & Biomedical Association (NMBIO) to express our opposition to the America Invents Act of 2011 as set out in S. 23 and H. 1249. NMBIO is an industry organization that represents the interests of diverse biotechnology entities, which include companies in agricultural feedstock and chemicals, drugs and pharmaceuticals, medical devices & equipment, research testing and medical laboratories. These biotechnology entities include individual inventors, small start-ups, universities and national labs who collectively employ about 8,301 people with an average annual wage of \$67,717.

Between 2001-2008, 280 patents were issued to the NM biotechnology industry attracting over \$85 million to support biotechnology innovation. Further, technological innovation drives 80% of economic growth, and startup companies have been the source of virtually all net job creation in the United States for decades. Startup companies offering breakthrough technological innovation need to secure high-quality patents with greater speed and certainty to turn entrepreneurs' ideas into jobs.

Ending Fee Diversion

NMBIO supports ending fee diversion at the USPTO. Ending fee diversion is an issue that unites virtually all stakeholders on all sides of the patent debate. Allowing the USPTO to

keep patent fees will permit the USPTO to hire more examiners and reduce the backlog of over 700,000 patents to be examined. Trapped in that backlog is the potential of creating hundreds of thousands, if not millions, of new jobs. Allowing the USPTO to keep the fees they generate will allow the office to improve patent quality and reduce patent application pendency. This single change will do more to produce patent reform than all the other changes combined, with virtually no downside.

If Fee Diversion is removed from the bill, the bill cannot be considered Patent Reform and nothing remaining in the bill justifies the disruption and transition costs that will be inserted into the patenting process.

First to File

NMBIO opposes the change from our current first-to-invent system to a first-to-file system. The U.S. Constitution grants to **inventors** a monopoly on their inventions in exchange for placing the invention in the public's possession thereby encouraging exchange of information and discouraging trade secrets. The Supreme Court on June 6, 2011 in Stanford v. Roche stated that for over two centuries, our laws have honored the Constitution's mandate that the actual inventor of a discovery is the person entitled to a patent, not the first person to file for a patent.

Disclosure through patents helps innovation build on itself. The first-to-invent grace period patent system is at the heart of U.S. innovation. It guarantees that only carefully and well-developed inventions are patented and at much less expense to the applicant than in first-to-file countries. As Chief Justice Roberts stated in the Stanford opinion, "[a]lthough much in intellectual property has changed in the 220 years since the first Patent Act, the basic idea that inventors have the right to patent their inventions has not."

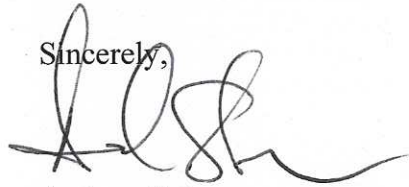
America's patent system has always focused on the needs of inventors, integrating the patent application process within their normal course of research and development. The countries that have a "first-to-file" system do not have a vibrant start-up market or independent inventor sector. Changing U.S. patent law to be like the less-successful patent systems of the rest of the world cannot be regarded as positive "reform" for the following reasons:

- 1) Establishing the filing date as the priority date will require applicants to file more frequently, at every stage of development, without perfecting their inventions.
- 2) The costs of increased filings—more frequent invention reviews, earlier and more frequent hiring of outside patent attorneys, and new patenting costs—will be felt most strongly by small businesses. This is especially true for small biotechnology start-up companies who often cannot know the significance of discoveries until years of experiments are completed.
- 3) Some small firms will lose their patent protection altogether, as they will be unable to afford a doubling of their application filing rate. In contrast, large firms and multinational companies often have on-staff patent attorneys who can file multiple applications at each stage of a company's invention process at substantially lower cost per patent than small businesses. Consequently, more often than not, an entrepreneurial startup inventor will lose the filing-date race to the patent office under the America Invents Act in H 1249.

Summary

Our member biotechnology and biomedical device companies face considerable challenges as they work toward the development of novel biotechnology products and medical devices with applications in healthcare and biotechnology, applications in alternative energy and agriculture. They do this in the face of a risk-averse investor climate and lengthy and costly research and development timelines. Despite these challenges, our membership still attracts considerable new investment each year based on the promise of their innovative and patented discoveries. S. 23 and H 1249 could have a far-reaching and negative impact by incentivizing infringement, weakening the enforceability of patent rights, increasing costs of the patent process and introducing unnecessary uncertainty as to patent rights unto the process. Weakened patent rights drive investment away from risky, capital intensive endeavors such as biotechnology research and development, and the public pays the price. We ask that you oppose the America Invents Act in its current form and urge that the concerns with the legislation be addressed prior to any decision to bring the bill to the House floor.

Sincerely,

A handwritten signature in black ink, appearing to read 'AS', with a long, sweeping underline that extends to the right.

Andrew Salazar

President

New Mexico Biotechnology & Biomedical Association