

111TH CONGRESS
1ST SESSION

H. R. 1706

To prohibit brand name drug companies from compensating generic drug companies to delay the entry of a generic drug into the market, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

MARCH 25, 2009

Mr. RUSH (for himself, Mr. WAXMAN, Mr. DINGELL, Mr. DOYLE, Mr. MARKEY of Massachusetts, Mr. STUPAK, Ms. SCHAKOWSKY, and Ms. DEGETTE) introduced the following bill; which was referred to the Committee on Energy and Commerce, and in addition to the Committee on the Judiciary, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

A BILL

To prohibit brand name drug companies from compensating generic drug companies to delay the entry of a generic drug into the market, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Protecting Consumer
5 Access to Generic Drugs Act of 2009”.

1 **SEC. 2. UNFAIR AND DECEPTIVE ACTS AND PRACTICES RE-**
2 **LATED TO NEW DRUG APPLICATIONS.**

3 (a) **CONDUCT PROHIBITED.**—It shall be unlawful for
4 any person to directly or indirectly be a party to any
5 agreement resolving or settling a patent infringement
6 claim in which—

7 (1) an ANDA filer receives anything of value;

8 and

9 (2) the ANDA filer agrees not to research, de-
10 velop, manufacture, market, or sell, for any period
11 of time, the drug that is to be manufactured under
12 the ANDA involved and is the subject of the patent
13 infringement claim.

14 (b) **EXCEPTIONS.**—Notwithstanding subsection
15 (a)(1), subsection (a) does not prohibit a resolution or set-
16 tlement of a patent infringement claim in which the value
17 received by the ANDA filer includes no more than—

18 (1) the right to market the drug that is to be
19 manufactured under the ANDA involved and is the
20 subject of the patent infringement claim, before the
21 expiration of—

22 (A) the patent that is the basis for the pat-
23 ent infringement claim; or

24 (B) any other statutory exclusivity that
25 would prevent the marketing of such drug; and

1 (2) the waiver of a patent infringement claim
2 for damages based on prior marketing of such drug.

3 (c) ENFORCEMENT.—A violation of subsection (a)
4 shall be treated as an unfair and deceptive act or practice
5 and an unfair method of competition in or affecting inter-
6 state commerce prohibited under section 5 of the Federal
7 Trade Commission Act (15 U.S.C. 45). The Federal Trade
8 Commission shall enforce this Act in the same manner,
9 by the same means, and with the same jurisdiction as
10 though all applicable terms and provisions of the Federal
11 Trade Commission Act were incorporated into and made
12 a part of this Act.

13 (d) DEFINITIONS.—In this section:

14 (1) AGREEMENT.—The term “agreement”
15 means anything that would constitute an agreement
16 for purposes of section 5 of the Federal Trade Com-
17 mission Act (15 U.S.C. 45).

18 (2) AGREEMENT RESOLVING OR SETTling.—
19 The term “agreement resolving or settling”, in ref-
20 erence to a patent infringement claim, includes any
21 agreement that is contingent upon, provides a con-
22 tingent condition for, or is otherwise related to the
23 resolution or settlement of the claim.

24 (3) ANDA.—The term “ANDA” means an ab-
25 breviated new drug application for the approval of a

1 new drug under section 505(j) of the Federal Food,
2 Drug, and Cosmetic Act (21 U.S.C. 355(j)).

3 (4) ANDA FILER.—The term “ANDA filer”
4 means a party that has filed an ANDA with the
5 Food and Drug Administration.

6 (5) PATENT INFRINGEMENT.—The term “pat-
7 ent infringement” means infringement of any patent
8 or of any filed patent application, extension, reissu-
9 ance, renewal, division, continuation, continuation in
10 part, reexamination, patent term restoration, patent
11 of addition, or extension thereof.

12 (6) PATENT INFRINGEMENT CLAIM.—The term
13 “patent infringement claim” means any allegation
14 made to an ANDA filer, whether or not included in
15 a complaint filed with a court of law, that its ANDA
16 or drug to be manufactured under such ANDA may
17 infringe any patent.

18 **SEC. 3. FTC RULEMAKING.**

19 The Federal Trade Commission may, by rule promul-
20 gated under section 553 of title 5, United States Code,
21 exempt certain agreements described in section 2 if the
22 Commission finds such agreements to be in furtherance
23 of market competition and for the benefit of consumers.
24 Consistent with the authority of the Commission, such
25 rules may include interpretive rules and general state-

1 ments of policy with respect to the practices prohibited
2 under section 2.

3 **SEC. 4. FORFEITURE OF 180-DAY EXCLUSIVITY PERIOD**
4 **UNDER THE FFDCA.**

5 Section 505(j)(5)(D)(i) of the Federal Food, Drug,
6 and Cosmetic Act (21 U.S.C. 355(j)(5)(D)(i)) is amend-
7 ed—

8 (1) in subclause (I)(bb)—

9 (A) by redesignating subitem (CC) as
10 subitem (EE); and

11 (B) by inserting after subitem (BB) the
12 following:

13 “(CC) In a declaratory
14 judgment action described in
15 subitem (AA), a court dis-
16 misses the action for lack of
17 subject matter jurisdiction,
18 either with or without preju-
19 dice.

20 “(DD) The applicant
21 files with the Secretary a
22 covenant by the patent
23 owner that the patent owner
24 will not sue the applicant for

1 infringement with respect to
2 the patent.”; and

3 (2) in subclause (V), by inserting “section 2 of
4 the Protecting Consumer Access to Generic Drugs
5 Act of 2009 or” after “that the agreement has vio-
6 lated”.

7 **SEC. 5. NOTICE AND CERTIFICATION OF AGREEMENTS.**

8 (a) NOTICE OF ALL AGREEMENTS.—Section
9 1112(c)(2) of the Medicare Prescription Drug, Improve-
10 ment, and Modernization Act of 2003 (21 U.S.C. 3155
11 note) is amended by—

12 (1) striking “the Commission the” and insert-
13 ing “the Commission (1) the”; and

14 (2) inserting before the period at the end the
15 following: “; and (2) a description of the subject
16 matter of any other agreement the parties enter into
17 within 30 days of an entering into an agreement
18 covered by subsection (a) or (b)”.

19 (b) CERTIFICATION OF AGREEMENTS.—Section 1112
20 of such Act is amended by adding at the end the following:

21 “(d) CERTIFICATION.—The Chief Executive Officer
22 or the company official responsible for negotiating any
23 agreement required to be filed under subsection (a), (b),
24 or (c) shall execute and file with the Assistant Attorney
25 General and the Commission a certification as follows: ‘I

1 declare under penalty of perjury that the following is true
2 and correct: The materials filed with the Federal Trade
3 Commission and the Department of Justice under section
4 1112 of subtitle B of title XI of the Medicare Prescription
5 Drug, Improvement, and Modernization Act of 2003, with
6 respect to the agreement referenced in this certification:
7 (1) represent the complete, final, and exclusive agreement
8 between the parties; (2) include any ancillary agreements
9 that are contingent upon, provide a contingent condition
10 for, or are otherwise related to, the referenced agreement;
11 and (3) include written descriptions of any oral agree-
12 ments, representations, commitments, or promises be-
13 tween the parties that are responsive to subsection (a) or
14 (b) of such section 1112 and have not been reduced to
15 writing.’.’.

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