II

115TH CONGRESS
1ST SESSION

S. 124

To prohibit brand name drug companies from compensating generic drug companies to delay the entry of a generic drug into the market.

IN THE SENATE OF THE UNITED STATES

JANUARY 12, 2017

Ms. KLOBUCHAR (for herself and Mr. GRASSLEY) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

---

A BILL

To prohibit brand name drug companies from compensating generic drug companies to delay the entry of a generic drug into the market.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the ''Preserve Access to Affordable Generics Act''.

SEC. 2. CONGRESSIONAL FINDINGS AND DECLARATION OF PURPOSES.

(a) FINDINGS.—Congress finds the following:

(1) In 1984, the Drug Price Competition and Patent Term Restoration Act (Public Law 98–417)

(referred to in this Act as the ''1984 Act''), was enacted with the intent of facilitating the early entry of generic drugs while preserving incentives for innovation.

(2) Prescription drugs make up approximately 10 percent of the national health care spending.

(3) Initially, the 1984 Act was successful in facilitating generic competition to the benefit of consumers and health care payers, although 88 percent of all prescriptions dispensed in the United States are generic drugs, they account for only 28 percent of all expenditures.

(4) Generic drugs cost substantially less than brand name drugs, with discounts off the brand price averaging 80 to 85 percent.

(5) Federal dollars currently account for over 40 percent of the $325,000,000,000 spent on retail prescription drugs, and this share is expected to rise to 47 percent by 2025.

(6)(A) In recent years, the intent of the 1984 Act has been subverted by certain settlement agreements in which brand name companies transfer value to their potential generic competitors to settle claims that the generic company is infringing the branded company's patents.

(B) These ''reverse payment'' settlement agreements—

(i) allow a branded company to share its monopoly profits with the generic company as a way to protect the branded company's monopoly; and

(ii) have unduly delayed the marketing of low-cost generic drugs contrary to free competition, the interests of consumers, and the principles underlying antitrust law.

(C) Because of the price disparity between brand name and generic drugs, such agreements are more profitable for both the brand and generic manufacturers than competition and will become increasingly common unless prohibited.

(D) These agreements result in consumers losing the benefits that the 1984 Act was intended to provide.

(b) PURPOSES.—The purposes of this Act are—

(1) to enhance competition in the pharmaceutical market by stopping anticompetitive agreements between brand name and generic drug manufacturers that limit, delay, or otherwise prevent competition from generic drugs; and

(2) to support the purpose and intent of antitrust law by prohibiting anticompetitive practices in the pharmaceutical industry that harm consumers.

SEC. 3. UNLAWFUL COMPENSATION FOR DELAY.

(a) IN GENERAL.—The Federal Trade Commission Act (15 U.S.C. 44 et seq.) is amended by inserting after section 26 (15 U.S.C. 57c–2) the following:

"SEC. 27. PRESERVING ACCESS TO AFFORDABLE GENERICS.

''(a) IN GENERAL.—

''(1) ENFORCEMENT PROCEEDING.—The Commission may initiate a proceeding to enforce the provisions of this section against the parties to any agreement resolving or settling, on a final or interim basis, a patent infringement claim, in connection with the sale of a drug product.

''(2) PRESUMPTION AND VIOLATION.—

''(A) IN GENERAL.—Subject to subparagraph (B), in such a proceeding, an agreement shall be presumed to have anticompetitive effects and shall be a violation of this section if—

''(i) an ANDA filer receives anything of value, including an exclusive license; and

''(ii) the ANDA filer agrees to limit or forego research, development, manufac-

turing, marketing, or sales of the ANDA product for any period of time.

''(B) EXCEPTION.—Subparagraph (A) shall not apply if the parties to such agreement demonstrate by clear and convincing evidence that—

''(i) the value described in subparagraph (A)(i) is compensation solely for other goods or services that the ANDA filer has promised to provide; or

''(ii) the procompetitive benefits of the agreement outweigh the anticompetitive effects of the agreement.

''(b) LIMITATIONS.—In determining whether the settling parties have met their burden under subsection (a)(2)(B), the fact finder shall not presume—

''(1) that entry would not have occurred until the expiration of the relevant patent or statutory exclusivity; or

''(2) that the agreement's provision for entry of the ANDA product prior to the expiration of the relevant patent or statutory exclusivity means that the agreement is procompetitive.

''(c) EXCLUSIONS.—Nothing in this section shall prohibit a resolution or settlement of a patent infringement

claim in which the consideration granted by the NDA holder to the ANDA filer as part of the resolution or settlement includes only one or more of the following:

''(1) The right to market the ANDA product in the United States prior to the expiration of—

''(A) any patent that is the basis for the patent infringement claim; or

''(B) any patent right or other statutory exclusivity that would prevent the marketing of such drug.

''(2) A payment for reasonable litigation expenses not to exceed $7,500,000.

''(3) A covenant not to sue on any claim that the ANDA product infringes a United States patent.

''(d) ENFORCEMENT.—

''(1) ENFORCEMENT.—A violation of this section shall be treated as a violation of section 5.

''(2) JUDICIAL REVIEW.—

''(A) IN GENERAL.—Any party that is subject to a final order of the Commission, issued in an administrative adjudicative proceeding under the authority of subsection (a)(1), may, within 30 days of the issuance of such order, petition for review of such order in—

"(i) the United States Court of Appeals for the District of Columbia Circuit;

"(ii) the United States Court of Appeals for the circuit in which the ultimate parent entity, as defined in section 801.1(a)(3) of title 16, Code of Federal Regulations, or any successor thereto, of the NDA holder is incorporated as of the date that the NDA is filed with the Commissioner of Food and Drugs; or

"(iii) the United States Court of Appeals for the circuit in which the ultimate parent entity of the ANDA filer is incorporated as of the date that the ANDA is filed with the Commissioner of Food and Drugs.

"(B) TREATMENT OF FINDINGS.—In a proceeding for judicial review of a final order of the Commission, the findings of the Commission as to the facts, if supported by evidence, shall be conclusive.

"(e) ANTITRUST LAWS.—Nothing in this section shall modify, impair, limit, or supersede the applicability of the antitrust laws as defined in subsection (a) of the first section of the Clayton Act (15 U.S.C. 12(a)), and

of section 5 of this Act to the extent that section 5 applies to unfair methods of competition. Nothing in this section shall modify, impair, limit, or supersede the right of an ANDA filer to assert claims or counterclaims against any person, under the antitrust laws or other laws relating to unfair competition.

''(f) PENALTIES.—

''(1) FORFEITURE.—Each party that violates or assists in the violation of this section shall forfeit and pay to the United States a civil penalty sufficient to deter violations of this section, but in no event greater than 3 times the value received by the party that is reasonably attributable to the violation of this section. If no such value has been received by the NDA holder, the penalty to the NDA holder shall be sufficient to deter violations, but in no event greater than 3 times the value given to the ANDA filer reasonably attributable to the violation of this section. Such penalty shall accrue to the United States and may be recovered in a civil action brought by the Commission, in its own name by any of its attorneys designated by it for such purpose, in a district court of the United States against any party that violates this section. In such actions, the United States district courts are empowered to grant

mandatory injunctions and such other and further equitable relief as they deem appropriate.

"(2) CEASE AND DESIST.—

"(A) IN GENERAL.—If the Commission has issued a cease and desist order with respect to a party in an administrative adjudicative proceeding under the authority of subsection (a)(1), an action brought pursuant to paragraph (1) may be commenced against such party at any time before the expiration of 1 year after such order becomes final pursuant to section 5(g).

"(B) EXCEPTION.—In an action under subparagraph (A), the findings of the Commission as to the material facts in the administrative adjudicative proceeding with respect to the violation of this section by a party shall be conclusive unless—

"(i) the terms of such cease and desist order expressly provide that the Commission's findings shall not be conclusive; or

"(ii) the order became final by reason of section 5(g)(1), in which case such find-

ing shall be conclusive if supported by evidence.

''(3) CIVIL PENALTY.—In determining the amount of the civil penalty described in this section, the court shall take into account—

''(A) the nature, circumstances, extent, and gravity of the violation;

''(B) with respect to the violator, the degree of culpability, any history of violations, the ability to pay, any effect on the ability to continue doing business, profits earned by the NDA holder, compensation received by the ANDA filer, and the amount of commerce affected; and

''(C) other matters that justice requires.

''(4) REMEDIES IN ADDITION.—Remedies provided in this subsection are in addition to, and not in lieu of, any other remedy provided by Federal law. Nothing in this paragraph shall be construed to affect any authority of the Commission under any other provision of law.

''(g) DEFINITIONS.—In this section:

''(1) AGREEMENT.—The term 'agreement' means anything that would constitute an agreement

under section 1 of the Sherman Act (15 U.S.C. 1) or section 5 of this Act.

''(2) AGREEMENT RESOLVING OR SETTLING A PATENT INFRINGEMENT CLAIM.—The term 'agreement resolving or settling a patent infringement claim' includes any agreement that is entered into within 30 days of the resolution or the settlement of the claim, or any other agreement that is contingent upon, provides a contingent condition for, or is otherwise related to the resolution or settlement of the claim.

''(3) ANDA.—The term 'ANDA' means an abbreviated new drug application filed under section 505(j) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355(j)) or a new drug application filed under section 505(b)(2) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355(b)(2)).

''(4) ANDA FILER.—The term 'ANDA filer' means a party that owns or controls an ANDA filed with the Commission of Food and Drugs or has the exclusive rights under such ANDA to distribute the ANDA product.

''(5) ANDA PRODUCT.—The term 'ANDA product' means the product to be manufactured

under the ANDA that is the subject of the patent infringement claim.

''(6) DRUG PRODUCT.—The term 'drug product' has the meaning given such term in section 314.3(b) of title 21, Code of Federal Regulations (or any successor regulation).

''(7) NDA.—The term 'NDA' means a new drug application filed under section 505(b) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355(b)).

''(8) NDA HOLDER.—The term 'NDA holder' means—

''(A) the holder of an approved NDA application for a drug product;

''(B) a person owning or controlling enforcement of the patent listed in the Approved Drug Products With Therapeutic Equivalence Evaluations (commonly known as the 'FDA Orange Book') in connection with the NDA; or

''(C) the predecessors, subsidiaries, divisions, groups, and affiliates controlled by, controlling, or under common control with any of the entities described in subparagraphs (A) and (B) (such control to be presumed by direct or indirect share ownership of 50 percent or great-

er), as well as the licensees, licensors, successors, and assigns of each of the entities.

''(9) PARTY.—The term 'party' means any person, partnership, corporation, or other legal entity.

''(10) PATENT INFRINGEMENT.—The term 'patent infringement' means infringement of any patent or of any filed patent application, extension, reissue, renewal, division, continuation, continuation in part, reexamination, patent term restoration, patents of addition, and extensions thereof.

''(11) PATENT INFRINGEMENT CLAIM.—The term 'patent infringement claim' means any allegation made to an ANDA filer, whether or not included in a complaint filed with a court of law, that its ANDA or ANDA product may infringe any patent held by, or exclusively licensed to, the NDA holder of the drug product.

''(12) STATUTORY EXCLUSIVITY.—The term 'statutory exclusivity' means those prohibitions on the approval of drug applications under clauses (ii) through (iv) of section 505(c)(3)(E) (5- and 3-year data exclusivity), section 527 (orphan drug exclusivity), or section 505A (pediatric exclusivity) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355(c)(3)(E), 360cc, 355a).''.

(b) EFFECTIVE DATE.—Section 27 of the Federal Trade Commission Act, as added by this section, shall apply to all agreements described in section 27(a)(1) of that Act entered into after June 17, 2013. Section 27(f) of the Federal Trade Commission Act, as added by this section, shall apply to agreements entered into on or after the date of enactment of this Act.

SEC. 4. NOTICE AND CERTIFICATION OF AGREEMENTS.

(a) NOTICE OF ALL AGREEMENTS.—Section 1112(c)(2) of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (21 U.S.C. 355 note) is amended by—

(1) striking ''the Commission the'' and inserting the following: ''the Commission—

''(A) the'';

(2) striking the period and inserting ''; and''; and

(3) inserting at the end the following:

''(B) any other agreement the parties enter into within 30 days of entering into an agreement covered by subsection (a) or (b).''.

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

''(d) CERTIFICATION.—The Chief Executive Officer or the company official responsible for negotiating any

agreement under subsection (a) or (b) that is required to be filed under subsection (c) shall execute and file with the Assistant Attorney General and the Commission a certification as follows: 'I declare that the following is true, correct, and complete to the best of my knowledge: The materials filed with the Federal Trade Commission and the Department of Justice under section 1112 of subtitle B of title XI of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003, with respect to the agreement referenced in this certification—

"'(1) represent the complete, final, and exclusive agreement between the parties;

"'(2) include any ancillary agreements that are contingent upon, provide a contingent condition for, or are otherwise related to, the referenced agreement; and

"'(3) include written descriptions of any oral agreements, representations, commitments, or promises between the parties that are responsive to subsection (a) or (b) of such section 1112 and have not been reduced to writing.'.".

SEC. 5. FORFEITURE OF 180-DAY EXCLUSIVITY PERIOD.

Section 505(j)(5)(D)(i)(V) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355(j)(5)(D)(i)(V)) is amended by inserting "section 27 of the Federal Trade

Commission Act or'' after ''that the agreement has violated''.

SEC. 6. COMMISSION LITIGATION AUTHORITY.

Section 16(a)(2) of the Federal Trade Commission Act (15 U.S.C. 56(a)(2)) is amended—

(1) in subparagraph (D), by striking ''or'' after the semicolon;

(2) in subparagraph (E), by inserting ''or'' after the semicolon; and

(3) inserting after subparagraph (E) the following:

''(F) under section 27;''.

SEC. 7. STATUTE OF LIMITATIONS.

The Federal Trade Commission shall commence any enforcement proceeding described in section 27 of the Federal Trade Commission Act, as added by section 3, except for an action described in section 27(f)(2) of the Federal Trade Commission Act, not later than 6 years after the date on which the parties to the agreement file the Notice of Agreement as provided by section 1112(c)(2) and (d) of the Medicare Prescription Drug Improvement and Modernization Act of 2003 (21 U.S.C. 355 note).

SEC. 8. SEVERABILITY.

If any provision of this Act, an amendment made by this Act, or the application of such provision or amend-

ment to any person or circumstance is held to be unconstitutional, the remainder of this Act, the amendments made by this Act, and the application of the provisions of such Act or amendments to any person or circumstance shall not be affected.

○