

essential action

Access to Medicines Project

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December 20, 2008

Federal Trade Commission
Office of the Secretary
Room H-135 (Annex F)
600 Pennsylvania Ave., NW
Washington, DC 20580
<http://secure.commentworks.com/ftc-healthcarecompetition>

Re: Emerging Health Care Competition and Consumer Issues – Comment, Project No. P083901

Dear Sir or Madam,

Thank-you for providing Essential Action the opportunity to submit comments on issues raised during the November 21, 2008 “FTC Roundtable on Follow-on Biologic Drugs: Framework for Competition and Continued Innovation.”

Essential Action is a non-profit organization involved in global access to medicines issues for more than a decade. We are strongly supportive of an efficient biogenerics approval process -- one that would ensure timely access to safe, effective and interchangeable products, yielding significant savings for individual consumers, government agencies and other healthcare payers, and making important medicines more widely available. Our Access to Medicines Project has been funded by the Ford Foundation and the Open Society Institute.

Comments on Key Issues Raised during the FTC Roundtable

Providing timely access to affordable, safe and effective products should be the central purpose of U.S. biogenerics legislation. Provisions that extend the monopoly protection period of brand-name companies, or otherwise make it unreasonably difficult to sell affordable biogenerics to patients as soon as possible after patent expiration, would therefore defeat the purpose of the new rules. To ensure that this purpose is met, new rules should:

- 1. Avoid Inappropriate Marketing Monopolies (Data Exclusivity)**
- 2. Ensure Timely Patent Dispute Resolution and Patent Disclosure**

1. Avoiding Inappropriate Marketing Monopolies (Data Exclusivity)

The primary rationale for data exclusivity is that drug development is expensive and risky. Data exclusivity, according to its proponents, is necessary both to provide an incentive for brand-name companies to undertake research and development (R&D) and to ensure that they are not placed at unfair disadvantage as against ‘free-riding’ generic firms.

We believe that provisions data exclusivity provisions should not be included in U.S. biogenerics legislation that amends the Public Health Services Act (PHSA), for the following reasons:

- A. Data exclusivity is not needed for brand-name biotech companies to re-coup their R&D Costs;
- B. Data exclusivity is a major barrier to generic competition;
- C. Data exclusivity overcompensates data originators; and,
- D. The cost-sharing approach to registration data is a more efficient, pro-competitive approach to rewarding innovation than data exclusivity.

A. Data Exclusivity is not needed for brand-name biotech companies to re-coup their R&D Costs

There is reason to challenge whether data exclusivity or any other form of compensation for registration data is needed to provide adequate incentive for biotech R&D. Brand-name biotech companies already have large incentives under the patent system to conduct R&D – patents are 20-year marketing monopolies that allow innovators to set a price that will allow them to recoup all of their costs plus earn substantial profits.

A related but distinct argument is whether data protection, including data exclusivity, is necessary to provide a fair return to the companies that conducted the clinical trials, which are but the final stage of the research and development process. There is an actual cost to conducting clinical trials, this argument runs; if generic competitors are able to rely on marketing approvals based on those trials in order to obtain their own marketing approval, they will unfairly free ride on the investment of the originator firm. This argument has less force for products for which companies benefit from patent protection, because free from competitive pressures they can set a price that allows them to earn profits, and not just re-coup their R&D costs.

It must be noted that the brand-name biotech industry is in fact asserting that the patent system does not adequately incentivize R&D, primarily in support of its claim that very extensive data exclusivity -- as much as fourteen years -- should be granted to biologic drugs approved under the PHSA. This exclusivity period is substantially longer than that five to eight years available to conventional drugs and biologics approved under the Food, Drug and Cosmetic Act (FDCA). BIO (the brand-name Biotechnology Industry Association) has argued that there is the “very real potential” patent protection will not provide the incentives needed for continued biologics innovation – and data exclusivity must step in to take patents’ place. In particular, BIO asserts that an extended data exclusivity period is necessary because patent protection might be narrower for many of these products. This might allow generics manufacturers to design around patent claims, producing products that are similar, but nevertheless, not infringing the innovator’s patents.¹

But that is not what BIO told U.S. Congress last year during debate over the patent reform bill. Then, BIO lobbied for strong patent protection, citing accomplishments in biotechnology and stating, “All of this innovation is possible because of the certainty and predictability provided by the U.S. patent system.”²

¹ See for example, Biotechnology Industry Organization (hereinafter BIO), “A Follow-On Biologics Regime Without Strong Data Exclusivity Will Stifle The Development of New Medicines,” Fact Sheet, May 3, 2007, available at <http://bio.org/healthcare/followonbkg/>

It is clear, therefore, that the brand-name biotechnology industry believes patents do play a critical role in incentivizing innovation, while at the same time it seeks unprecedented levels of data exclusivity. But the only possible public justification for an extended period of data exclusivity is that the patent system will not work to reward innovators. The industry cannot have it both ways: either patents do or do not provide adequate incentive for research and development. Because the limits of patentability and patent claims are not being considered in the context of U.S. biogenerics legislation, no data exclusivity should be granted to brand-name companies, to ensure the industry does not receive a windfall at the public's expense.³

Additionally, even in the absence of data exclusivity or patent protection, brand-name firms enjoy both the same benefits as first entrants in conventional pharmaceutical markets (including building up brand-name identity and allegiance) but advantages unique to the biologics market. Biologics may enjoy a period of *de facto* exclusivity resulting from the difficulties inherent in producing them. As with brand-name companies, it will also take generic firms several years to develop FDA-approved manufacturing processes for biologics, and even with a streamlined regulatory pathway -- something which certainly remains politically contested -- this approval process will likely be considerably longer and more expensive in many cases than for conventional drugs. In some cases, biogeneric production may push the limits of cost-efficiency.

B. Data Exclusivity is a Major Barrier to Generic Competition

Providing data exclusivity in addition to patents to reward innovators is also not desirable because data exclusivity poses major barriers to generic entry. In general, if generic firms are unable to use or rely on originators' data, they will not enter the market until they are able to rely on the data. Redoing the tests conducted by brand-name companies is not only wasteful, it is frequently too time-consuming and expensive for the relatively low-capitalized generic industry to manage, not to mention unethical in the case of testing that involves humans. Thus data exclusivity confers an effective marketing monopoly for the term of the exclusivity period, potentially delaying the onset of generic competition, keeping medicine prices high for a longer period of time.

Where patent monopolies extend beyond the period of data exclusivity provided, data exclusivity may have little practical effect. But frequently data exclusivity will be of consequence. The provision of exclusive rights to registration data can provide patent-like protections in cases where the patent is found to be invalid, or for which the patent term has expired.

² BIO, "The Patent Reform Act of 2007 Will Weaken Patents and Jeopardize Continued Biotechnology Innovation," Press Release, June 6, 2007, available at: http://www.bio.org/news/newsitem.asp?id=2007_0606_02.

³ This may not be BIO's only inconsistent argument about patents and biogenerics. Gregory Mandel points out, "What is most striking about the pioneer industry's contention that equivalence cannot be established for generic biologics is that this argument actually (and apparently unintentionally) concedes that certain pioneer patent claims are not valid. To the extent that generic manufacturers cannot replicate pioneer biologics, the pioneer patents are not fully enabling; the patents do not allow a person having ordinary skill in the art to make the patented subject matter. This failure renders the patents invalid." Mandel, Gregory, "*The Generics Biologics Debate: Industry's Unintended Admission That Biotech Patents Fail Enablement*" 11 Va. J.L. & Tech. at 66. (2006).

If its patents are invalid, it is not clear that the brand name product contributes significantly to innovation, and it is not clear that the public should insulate the company from competition. Indeed, when a product lacks the innovative properties to qualify for patent protection, it is generally in the interest of innovation to promote competition, so that the next innovations – like another company’s improvement on an existing drug – are not held up by exclusive rights.

In the case of U.S. biogenerics legislation, the likelihood of extensive delays to price-lowering generic competition resulting from data exclusivity is a major concern because brand-name companies are advocating for an unprecedented exclusivity period of 14 years, which significantly longer than five to eight years granted to innovators of conventional and biologic drugs under Hatch-Waxman. The Hatch-Waxman history is replete with abuses of the exclusivity process, including elaborate and sophisticated evergreening strategies that game the system in order to extend monopoly protections beyond those envisioned by the statute. There is every reason to suspect similar strategies will be employed with a parallel system for biologics, so that exclusivity may in practice extend even beyond 14 years.

C. Data exclusivity overcompensates data originators

Data exclusivity is also economically inefficient, because an effective marketing monopoly is likely to provide overcompensation for data originators, enabling them to earn many times the cost of the clinical tests that produced the data.

There is also no evidence to support brand-name company arguments that a substantially lengthier exclusivity period is warranted for biologic products approved under the PHSA than is available for products approved under the FDCA. For example, the brand-name industry frequently cites published studies that report the cost of producing brand-name conventional drugs and biologic drugs is almost identical (\$1.2 billion versus 1.3 billion).⁴ If it doesn’t cost significantly more to develop biotech products, there is no objective justification for the brand-name industry’s proposal to increase the amount of data exclusivity granted to these products by almost 300 percent, from a minimum of five years guaranteed by Hatch-Waxman to fourteen years.

D. The Cost-sharing approach to registration data is a more efficient, pro-competitive approach than data exclusivity

If policymakers wish to create an additional incentive specifically for the cost of clinical trials, there are approaches -- such as sharing the cost of clinical trials -- that satisfy the public policy rationale for providing data exclusivity to innovators, at a much lower cost and while avoiding data exclusivity-conferred marketing monopolies that undermine access to medicines and other public health objectives. If a policy decision is made that innovator companies need investment protections beyond those afforded by the patent system, the cost-sharing approach would be an efficient and pro-public health alternative to the data exclusivity approach. This approach gives generic firms an automatic right to use originators’ data, but requires them to pay a share of the documented costs of generating the data, proportionate to the size of the markets in which they are selling their product.⁵

⁴ DiMasi JA, Grabowski HG. “*The cost of biopharmaceutical R&D: Is biotech different.*” *Managerial & Decision Economics*. 2007 28:469-479

⁵ Weissman, Robert. “*Public health-friendly options for protecting pharmaceutical registration data.*” *International Journal of Intellectual Property Management*. 2006 Vol 1, Nos 1/2: 113-130; Love James, Rius Sanjuan, Judit, and Weissman Robert. “*A cost-sharing model to protect investments in pharmaceutical test data.*” *CPTech Policy Brief*

The cost-sharing approach gives generic competitors an automatic right to rely on the registration data generated by originator companies, or marketing approval authorizations based on that data. But it requires the generic entrants to pay for use of the data (or for relying on marketing approvals based on the data). Under the cost-sharing approach, the amount generic competitors pay for using or relying on the data is based on the actual costs of generating the data and the proportionate global market share obtained by the generic competitor.

The key features of such a system are:

- The originator of the data must disclose and document the actual costs incurred in generating the data
- The generic competitor pays a proportionate share of cost.

To avoid overcompensation for data, or double compensation for originators of data, caps and limits on payment should be applied under this approach:

- If a product is covered by a patent, no registration data compensation is paid;
- When the company that originated the data earns from sales a certain multiple (we propose 20 times) of its cost in generating registration data, it loses its right to data compensation from generic competitors;
- The right to compensation expires five years after marketing approval has been granted to data originators.

Here's how the system would work in practice: Innovator A receives marketing approval for biologic pharmaceutical P in 2010. Generic company G1 gains marketing approval in 2012 and immediately gains a 50 percent market share. Stipulate that P is sold only in the United States. A documents clinical testing costs of \$100 million. G1 must pay \$10 million to A at the end of 2012, at the end of 2013 and the end of 2014.

Now assume another generic entrant, G2 enters the market in 2013. A, G1 and G2 each have a 33 percent market share. G1 and G2 must each pay \$6.67 million to A in 2013 and 2014.

This system would be administratively manageable. A version is already in effect for U.S. approval of agricultural chemicals, although the agricultural cost-sharing scheme follows only after grant of an initial marketing monopoly.

The cost-sharing approach acknowledges that there are genuine and significant costs associated with conducting clinical trials to obtain marketing approval for biologics. By providing compensation to companies that originate registration data, the cost-sharing approach deals directly with the claim by brand-name companies that "free-riding" by generic entrants will undermine R&D incentives or unfairly situate the originators of registration data.

The cost-sharing approach also narrowly tailors the reward offered to data originators. It provides direct compensation based on the actual cost of data used to obtain marketing approval, ensuring that data originators obtain proportionate compensation for others' use of the results of the originators' investment.

This approach contrasts sharply to the data exclusivity approach, which rewards data originators with effective marketing monopolies. The cost-sharing approach considers an effective marketing monopoly as likely to provide overcompensation for data originators, enabling them to earn many times the cost of their investments, with monopoly rewards unrelated to the size of their investment. The cost-sharing approach also rejects the idea of marketing monopoly as appropriate for an investment-based compensatory scheme – one that is trying to avoid uses of the fruits of originators’ investment that may be considered "unfair," but is not trying to reward creative genius in the fashion of patents.

2. Timely Patent Dispute Resolution and Patent Disclosure

The patent resolution system in U.S. biogenerics legislation should aim for clear disclosure of patents claimed by first registrants, and rapid resolution of potential patent claims. We believe that key features should be:

- A. Initial registrants should be required to disclose claimed patents as a condition of enforcement;
- B. Second entrants should be able to seek resolution of patent claims at any point after the reference product registration;
- C. There should be no requirement for second entrants to share confidential information in advance of any litigation process; this objective can be achieved by placing responsibility for initiating a patent resolution process on the second entrant; and
- D. Second entrants should have the option to bypass the early patent resolution system.

A. Patent Disclosure Should be Mandatory

The patent system is premised on public disclosure. Not only is the basic fact of a patent claim supposed to be public knowledge, but the very provision of a patent is supposed to embody a trade-off whereby the means to make the underlying invention is publicized in exchange for grant of the patent monopoly. Moreover, to perform their property-delineating function effectively, patents must provide effective notice to the public and potential industry competitors.

Given the essential public component and notice functions of the patent system, there is no legitimate public policy rationale in patent claims on medicines being treated as proprietary or subjected to industry gamesmanship.

Routine patent disclosure should therefore be the norm for medicines. For conventional drugs registered under the Food, Drug and Cosmetic Act, this routine disclosure is achieved through Orange Book listings. This is a problematic approach because of the linkage system, but it does at least achieve the disclosure objective. We believe a sound public policy approach would require disclosure of claimed patents as a condition of enforcement, and believe this regime should be adopted for biologics registered under the Public Health Service Act.

Thus, initial registrants should be required at the time of application to indicate any granted or filed patents that they believe apply to the biologic for which they seek marketing approval. This should include both patents granted to the registrant or which have been licensed to them. They should be required to update this list for any new patent filings, within a statutorily defined period, perhaps 30 days. Failure to disclose should forfeit the right to enforce.

B. The Patent Resolution Process Should Be Available at Any Point After Initial Registration

Given the centrality of patents to pharmaceutical manufacture, and the considerable up-front costs of undertaking tests to determine generic substitutability (or comparability, or therapeutic equivalence, or similarity), it is often impractical for generic manufacturers to introduce a product onto the market without ascertaining that they can do so without infringing the patents held or licensed by the registrant of the reference product. For biologics, the expected greater cost of achieving and demonstrating substitutability, comparability, equivalence, or similarity will likely deter in many cases pre-marketing investments unless there is certainty about the patent landscape. It is thus vital that there be a system for pre-marketing resolution of the validity and applicability of reference product patents to a subsequent generic or similar product.

The objective of such a system should be to clear patent claims so that a) invalid patents do not delay investment in, or introduction of, generic or similar products; b) non-applicable patents do not delay investment in, or introduction of, generic or similar products; and c) all potential patent claims are resolved in advance of any applicable marketing exclusivities.

The originators have a legitimate interest in protecting and enforcing their patents. They do not have a legitimate interest in enforcing invalid patents, however, or delaying second entrant entry by brandishing patents that do not apply to the second entrant's product.

Delays in starting the process of pre-marketing patent resolution serve only to enable invalid or non-applicable patents to delay second entrant investment or marketing. If a pre-marketing patent resolution process leads to a finding that a patent is valid and/or applicable to a second entrant, then the originator will be able to obtain full protection for that patent, no matter when the process is originated.

We thus believe that potential second entrants should be free to initiate patent resolution processes at any point following approval of an originator product.

With such a system, there may be cases in which a second entrant initiating a patent resolution process does so before developing its process to make its version of the reference product. In such a case, it might not be able to obtain clarity on process patents. This would be a risk borne by the second entrant. It would retain the right to initiate a patent resolution process for potentially applicable process patents at a later date.

C. The Second Entrant Should Not Be Required to Share Confidential Information During the Administrative Process

Some legislative proposals for early patent resolution require the second entrant to share confidential information with the maker of the reference product. Statutory promises of protection notwithstanding, it is hard to imagine such information remaining confidential and not being shared with scientists employed by the originator company. Such a requirement to share confidential information is notably discordant with the confidentiality protections afforded to originators.

Second entrants should not be required to share confidential information with reference product makers, at least until a court proceeding is underway.

This problem can be avoided by placing responsibility for initiating a patent resolution process on to the second entrant. If the second entrant identifies claimed patents that it believes to be invalid or not to cover its product, then those disputes can be litigated or resolved through an appropriate process, without any pre-screening of second entrant confidential information by the originator.

The originator company would reserve the right to enforce at a later date any patent not addressed through the pre-marketing patent resolution process.

D. Second Entrants Should Have the Right to Opt Out of the Early Patent Resolution System

Second entrants should reserve the right to bypass the early patent resolution system. It is especially important to preserve this right if the early patent resolution system requires the second entrant to share confidential information.

There is no diminution of the patent holders' rights if a second entrant chooses to bypass a pre-marketing patent resolution process.

Because there are significant business risks in doing so, it is unlikely that most second entrants would exercise this option. But it should remain open. It may be the preferred choice for second entrants in particular cases, or because the pre-marketing patent resolution process evolves in such a fashion as to constitute a barrier to investment and marketing

Conclusion

Essential Action appreciates the opportunity to comment on issues raised in the FTC roundtable on developing a regulatory pathway for biogenerics. We would be happy to provide further input or clarification on our comments, as needed.

Sincerely,

Robert Weissman,
Director

Sarah Rimmington,
Attorney