AMENDMENT NO. 297

Purpose: To amend the Public Health Service Act to establish a pathway for the licensure of biosimilar biological products, to promote innovation in the life sciences.

IN THE SENATE OF THE UNITED STATES—111th Cong., 1st Sess.

S. ___________

To make quality, affordable health care available to all Americans, reduce costs, improve health care quality, enhance disease prevention, and strengthen the health care workforce.

Referred to the Committee on ________________ and
ordered to be printed

Ordered to lie on the table and to be printed

AMENDMENT intended to be proposed by Mr. Enzi, Mr. Hatch

Viz: and Ms. Hagan

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2 On page 596, after line 17, insert the following:

3 SEC. 601. SHORT TITLE.

4 This subtitle may be cited as the “Biologics Price

5 Competition and Innovation Act of 2009”.

SEC. 602. APPROVAL PATHWAY FOR BIOSIMILAR BIOLOGICAL PRODUCTS.

(a) LICENSURE OF BIOLOGICAL PRODUCTS AS BIOSIMILAR OR INTERCHANGEABLE.—Section 351 of the Public Health Service Act (42 U.S.C. 262) is amended—

(1) in subsection (a)(1)(A), by inserting “under this subsection or subsection (k)” after “biologics license”; and

(2) by adding at the end the following:

“(k) LICENSURE OF BIOLOGICAL PRODUCTS AS BIOSIMILAR OR INTERCHANGEABLE.—

“(1) IN GENERAL.—Any person may submit an application for licensure of a biological product under this subsection.

“(2) CONTENT.—

“(A) IN GENERAL.—

“(i) REQUIRED INFORMATION.—An application submitted under this subsection shall include information demonstrating that—

“(I) the biological product is biosimilar to a reference product based upon data derived from—

“(aa) analytical studies that demonstrate that the biological product is highly similar to the
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reference product notwithstanding minor differences in clinically inactive components;

“(bb) animal studies (including the assessment of toxicity);

and

“(cc) a clinical study or studies (including the assessment of immunogenicity and pharmacokinetics or pharmacodynamics) that are sufficient to demonstrate safety, purity, and potency in 1 or more appropriate conditions of use for which the reference product is licensed and intended to be used and for which licensure is sought for the biological product;

“(II) the biological product and reference product utilize the same mechanism or mechanisms of action for the condition or conditions of use prescribed, recommended, or suggested in the proposed labeling, but only to the extent the mechanism or
mechanisms of action are known for the reference product;

"(III) the condition or conditions of use prescribed, recommended, or suggested in the labeling proposed for the biological product have been previously approved for the reference product;

"(IV) the route of administration, the dosage form, and the strength of the biological product are the same as those of the reference product; and

"(V) the facility in which the biological product is manufactured, processed, packed, or held meets standards designed to assure that the biological product continues to be safe, pure, and potent.

"(ii) Determination by Secretary.—The Secretary may determine, in the Secretary's discretion, that an element described in clause (i)(I) is unnecessary in an application submitted under this subsection.
"(iii) ADDITIONAL INFORMATION.—
An application submitted under this subsection—
"(I) shall include publicly-available information regarding the Secretary's previous determination that the reference product is safe, pure, and potent; and
"(II) may include any additional information in support of the application, including publicly-available information with respect to the reference product or another biological product.
"(B) INTERCHANGEABILITY.—An application (or a supplement to an application) submitted under this subsection may include information demonstrating that the biological product meets the standards described in paragraph (4).
"(3) EVALUATION BY SECRETARY.—Upon review of an application (or a supplement to an application) submitted under this subsection, the Secretary shall license the biological product under this subsection if—
“(A) the Secretary determines that the information submitted in the application (or the supplement) is sufficient to show that the biological product—

“(i) is biosimilar to the reference product; or

“(ii) meets the standards described in paragraph (4), and therefore is interchangeable with the reference product; and

“(B) the applicant (or other appropriate person) consents to the inspection of the facility that is the subject of the application, in accordance with subsection (c).

“(4) SAFETY STANDARDS FOR DETERMINING INTERCHANGEABILITY.—Upon review of an application submitted under this subsection or any supplement to such application, the Secretary shall determine the biological product to be interchangeable with the reference product if the Secretary determines that the information submitted in the application (or a supplement to such application) is sufficient to show that—

“(A) the biological product—

“(i) is biosimilar to the reference product; and
“(ii) can be expected to produce the same clinical result as the reference product in any given patient; and

“(B) for a biological product that is administered more than once to an individual, the risk in terms of safety or diminished efficacy of alternating or switching between use of the biological product and the reference product is not greater than the risk of using the reference product without such alternation or switch.

“(5) GENERAL RULES.—

“(A) ONE REFERENCE PRODUCT PER APPLICATION.—A biological product, in an application submitted under this subsection, may not be evaluated against more than 1 reference product.

“(B) REVIEW.—An application submitted under this subsection shall be reviewed by the division within the Food and Drug Administration that is responsible for the review and approval of the application under which the reference product is licensed.

“(C) RISK EVALUATION AND MITIGATION STRATEGIES.—The authority of the Secretary with respect to risk evaluation and mitigation
strategies under the Federal Food, Drug, and Cosmetic Act shall apply to biological products licensed under this subsection in the same manner as such authority applies to biological products licensed under subsection (a).

"(6) EXCLUSIVITY FOR FIRST INTERCHANGEABLE BIOLOGICAL PRODUCT.—Upon review of an application submitted under this subsection relying on the same reference product for which a prior biological product has received a determination of interchangeability for any condition of use, the Secretary shall not make a determination under paragraph (4) that the second or subsequent biological product is interchangeable for any condition of use until the earlier of—

"(A) 1 year after the first commercial marketing of the first interchangeable biosimilar biological product to be approved as interchangeable for that reference product;

"(B) 18 months after—

"(i) a final court decision on all patients in suit in an action instituted under subsection (1)(6) against the applicant that submitted the application for the first ap-
proved interchangeable biosimilar biological product; or

“(ii) the dismissal with or without prejudice of an action instituted under subsection (1)(6) against the applicant that submitted the application for the first approved interchangeable biosimilar biological product; or

“(C)(i) 42 months after approval of the first interchangeable biosimilar biological product if the applicant that submitted such application has been sued under subsection (1)(6) and such litigation is still ongoing within such 42-month period; or

“(ii) 18 months after approval of the first interchangeable biosimilar biological product if the applicant that submitted such application has not been sued under subsection (1)(6).

For purposes of this paragraph, the term ‘final court decision’ means a final decision of a court from which no appeal (other than a petition to the United States Supreme Court for a writ of certiorari) has been or can be taken.

“(7) Exclusivity for reference product.—
“(A) EFFECTIVE DATE OF BIOSIMILAR APPLICATION APPROVAL.—Approval of an application under this subsection may not be made effective by the Secretary until the date that is 12 years after the date on which the reference product was first licensed under subsection (a).

“(B) FILING PERIOD.—An application under this subsection may not be submitted to the Secretary until the date that is 4 years after the date on which the reference product was first licensed under subsection (a).

“(C) FIRST LICENSURE.—Subparagraphs (A) and (B) shall not apply to a license for or approval of—

“(i) a supplement for the biological product that is the reference product; or

“(ii) a subsequent application filed by the same sponsor or manufacturer of the biological product that is the reference product (or a licensor, predecessor in interest, or other related entity) for—

“(I) a change (not including a modification to the structure of the biological product) that results in a new indication, route of administration,
dosing schedule, dosage form, delivery system, delivery device, or strength; or

"(II) a modification to the structure of the biological product that does not result in a change in safety, purity, or potency.

"(8) GUIDANCE DOCUMENTS.—

"(A) IN GENERAL.—The Secretary may, after opportunity for public comment, issue guidance in accordance, except as provided in subparagraph (B)(i), with section 701(h) of the Federal Food, Drug, and Cosmetic Act with respect to the licensure of a biological product under this subsection. Any such guidance may be general or specific.

"(B) PUBLIC COMMENT.—

"(i) IN GENERAL.—The Secretary shall provide the public an opportunity to comment on any proposed guidance issued under subparagraph (A) before issuing final guidance.

"(ii) INPUT REGARDING MOST VALUABLE GUIDANCE.—The Secretary shall establish a process through which the public
may provide the Secretary with input regarding priorities for issuing guidance.

“(C) NO REQUIREMENT FOR APPLICATION CONSIDERATION.—The issuance (or non-issuance) of guidance under subparagraph (A) shall not preclude the review of, or action on, an application submitted under this subsection.

“(D) REQUIREMENT FOR PRODUCT CLASS-SPECIFIC GUIDANCE.—If the Secretary issues product class-specific guidance under subparagraph (A), such guidance shall include a description of—

“(i) the criteria that the Secretary will use to determine whether a biological product is highly similar to a reference product in such product class; and

“(ii) the criteria, if available, that the Secretary will use to determine whether a biological product meets the standards described in paragraph (4).

“(E) CERTAIN PRODUCT CLASSES.—

“(i) GUIDANCE.—The Secretary may indicate in a guidance document that the science and experience, as of the date of such guidance, with respect to a product or
product class (not including any recombinant protein) does not allow approval of an application for a license as provided under this subsection for such product or product class.

"(ii) Modification or reversal.—

The Secretary may issue a subsequent guidance document under subparagraph (A) to modify or reverse a guidance document under clause (i).

"(iii) No effect on ability to deny license.—Clause (i) shall not be construed to require the Secretary to approve a product with respect to which the Secretary has not indicated in a guidance document that the science and experience, as described in clause (i), does not allow approval of such an application.

"(l) Patents.—

"(1) Confidential access to subsection (k) application.—

"(A) Application of paragraph.—Unless otherwise agreed to by a person that submits an application under subsection (k) (referred to in this subsection as the ‘subsection
(k) applicant') and the sponsor of the application for the reference product (referred to in this subsection as the 'reference product sponsor'), the provisions of this paragraph shall apply to the exchange of information described in this subsection.

"(B) IN GENERAL.—

"(i) Provision of confidential information.—When a subsection (k) applicant submits an application under subsection (k), such applicant shall provide to the persons described in clause (ii), subject to the terms of this paragraph, confidential access to the information required to be produced pursuant to paragraph (2) and any other information that the subsection (k) applicant determines, in its sole discretion, to be appropriate (referred to in this subsection as the 'confidential information').

"(ii) Recipients of information.—The persons described in this clause are the following:

"(I) Outside counsel.—One or more attorneys designated by the ref-
ference product sponsor who are employees of an entity other than the reference product sponsor (referred to in this paragraph as the 'outside counsel'), provided that such attorneys do not engage, formally or informally, in patent prosecution relevant or related to the reference product.

"(II) IN-HOUSE COUNSEL.—One attorney that represents the reference product sponsor who is an employee of the reference product sponsor, provided that such attorney does not engage, formally or informally, in patent prosecution relevant or related to the reference product.

"(iii) PATENT OWNER ACCESS.—A representative of the owner of a patent exclusively licensed to a reference product sponsor with respect to the reference product and who has retained a right to assert the patent or participate in litigation concerning the patent may be provided the confidential information, provided that the representative informs the reference prod-
uct sponsor and the subsection (k) applic-
licant of his or her agreement to be subject
to the confidentiality provisions set forth in
this paragraph, including those under
clause (ii).

“(C) LIMITATION ON DISCLOSURE.—No
person that receives confidential information
pursuant to subparagraph (B) shall disclose
any confidential information to any other per-
son or entity, including the reference product
sponsor employees, outside scientific consult-
ants, or other outside counsel retained by the
reference product sponsor, without the prior
written consent of the subsection (k) applicant,
which shall not be unreasonably withheld.

“(D) USE OF CONFIDENTIAL INFORMA-
tion.—Confidential information shall be used
for the sole and exclusive purpose of deter-
mining, with respect to each patent assigned to
or exclusively licensed by the reference product
sponsor, whether a claim of patent infringement
could reasonably be asserted if the subsection
(k) applicant engaged in the manufacture, use,
offering for sale, sale, or importation into the
United States of the biological product that is
the subject of the application under subsection (k).

"(E) OWNERSHIP OF CONFIDENTIAL INFORMATION.—The confidential information disclosed under this paragraph is, and shall remain, the property of the subsection (k) applicant. By providing the confidential information pursuant to this paragraph, the subsection (k) applicant does not provide the reference product sponsor or the outside counsel any interest in or license to use the confidential information, for purposes other than those specified in subparagraph (D).

"(F) EFFECT OF INFRINGEMENT ACTION.—In the event that the reference product sponsor files a patent infringement suit, the use of confidential information shall continue to be governed by the terms of this paragraph until such time as a court enters a protective order regarding the information. Upon entry of such order, the subsection (k) applicant may redesignate confidential information in accordance with the terms of that order. No confidential information shall be included in any publicly-available complaint or other pleading. In the
event that the reference product sponsor does not file an infringement action by the date specified in paragraph (6), the reference product sponsor shall return or destroy all confidential information received under this paragraph, provided that if the reference product sponsor opts to destroy such information, it will confirm destruction in writing to the subsection (k) applicant.

"(G) RULE OF CONSTRUCTION.—Nothing in this paragraph shall be construed—

"(i) as an admission by the subsection (k) applicant regarding the validity, enforceability, or infringement of any patent; or

"(ii) as an agreement or admission by the subsection (k) applicant with respect to the competency, relevance, or materiality of any confidential information.

"(H) EFFECT OF VIOLATION.—The disclosure of any confidential information in violation of this paragraph shall be deemed to cause the subsection (k) applicant to suffer irreparable harm for which there is no adequate legal remedy and the court shall consider immediate in-
junctive relief to be an appropriate and necessary remedy for any violation or threatened violation of this paragraph.

“(2) Subsection (k) Application Information.—Not later than 20 days after the Secretary notifies the subsection (k) applicant that the application has been accepted for review, the subsection (k) applicant—

“(A) shall provide to the reference product sponsor a copy of the application submitted to the Secretary under subsection (k), and such other information that describes the process or processes used to manufacture the biological product that is the subject of such application; and

“(B) may provide to the reference product sponsor additional information requested by or on behalf of the reference product sponsor.

“(3) List and Description of Patents.—

“(A) List by Reference Product Sponsor.—Not later than 60 days after the receipt of the application and information under paragraph (2), the reference product sponsor shall provide to the subsection (k) applicant—
“(i) a list of patents for which the reference product sponsor believes a claim of patent infringement could reasonably be asserted by the reference product sponsor, or by a patent owner that has granted an exclusive license to the reference product sponsor with respect to the reference product, if a person not licensed by the reference product sponsor engaged in the making, using, offering to sell, selling, or importing into the United States of the biological product that is the subject of the subsection (k) application; and

“(ii) an identification of the patents on such list that the reference product sponsor would be prepared to license to the subsection (k) applicant.

“(B) LIST AND DESCRIPTION BY SUBSECTION (k) APPLICANT.—Not later than 60 days after receipt of the list under subparagraph (A), the subsection (k) applicant—

“(i) may provide to the reference product sponsor a list of patents to which the subsection (k) applicant believes a claim of patent infringement could reason-
ably be asserted by the reference product
sponsor if a person not licensed by the ref-
reference product sponsor engaged in the
making, using, offering to sell, selling, or
importing into the United States of the bi-
ological product that is the subject of the
subsection (k) application;

"(ii) shall provide to the reference
product sponsor, with respect to each pat-
ent listed by the reference product sponsor
under subparagraph (A) or listed by the
subsection (k) applicant under clause (i)—

"(I) a detailed statement that de-
scribes, on a claim by claim basis, the
factual and legal basis of the opinion
of the subsection (k) applicant that
such patent is invalid, unenforceable,
or will not be infringed by the com-
mercial marketing of the biological
product that is the subject of the sub-
section (k) application; or

"(II) a statement that the sub-
section (k) applicant does not intend
to begin commercial marketing of the
biological product before the date that
such patent expires; and

"(iii) shall provide to the reference
product sponsor a response regarding each
patent identified by the reference product
sponsor under subparagraph (A)(ii).

"(C) DESCRIPTION BY REFERENCE PROD-
DUCT SPONSOR.—Not later than 60 days after
receipt of the list and statement under subpara-
graph (B), the reference product sponsor shall
provide to the subsection (k) applicant a de-
tailed statement that describes, with respect to
each patent described in subparagraph
(B)(ii)(I), on a claim by claim basis, the factual
and legal basis of the opinion of the reference
product sponsor that such patent will be in-
fringed by the commercial marketing of the bio-
logical product that is the subject of the sub-
section (k) application and a response to the
statement concerning validity and enforceability
provided under subparagraph (B)(ii)(I).

"(4) PATENT RESOLUTION NEGOTIATIONS.—

"(A) IN GENERAL.—After receipt by the
subsection (k) applicant of the statement under
paragraph (3)(C), the reference product spon-
sor and the subsection (k) applicant shall en-

gage in good faith negotiations to agree on

which, if any, patents listed under paragraph

(3) by the subsection (k) applicant or the ref-

erence product sponsor shall be the subject of

an action for patent infringement under para-

graph (6).

“(B) FAILURE TO REACH AGREEMENT.—

If, within 15 days of beginning negotiations

under subparagraph (A), the subsection (k) ap-

plicant and the reference product sponsor fail to

agree on a final and complete list of which, if

any, patents listed under paragraph (3) by the

subsection (k) applicant or the reference prod-

uct sponsor shall be the subject of an action for

patent infringement under paragraph (6), the

provisions of paragraph (5) shall apply to the

parties.

“(5) PATENT RESOLUTION IF NO AGREE-

MENT.—

“(A) NUMBER OF PATENTS.—The sub-

section (k) applicant shall notify the reference

product sponsor of the number of patents that

such applicant will provide to the reference

product sponsor under subparagraph (B)(i)(I).
(B) Exchange of Patent Lists.—

(i) In General.—On a date agreed to by the subsection (k) applicant and the reference product sponsor, but in no case later than 5 days after the subsection (k) applicant notifies the reference product sponsor under subparagraph (A), the subsection (k) applicant and the reference product sponsor shall simultaneously exchange—

(I) the list of patents that the subsection (k) applicant believes should be the subject of an action for patent infringement under paragraph (6); and

(II) the list of patents, in accordance with clause (ii), that the reference product sponsor believes should be the subject of an action for patent infringement under paragraph (6).

(ii) Number of Patents Listed by Reference Product Sponsor.—

(I) In General.—Subject to subclause (II), the number of patents listed by the reference product spon-
sor under clause (i)(II) may not exceed the number of patents listed by the subsection (k) applicant under clause (i)(I).

"(II) Exception.—If a subsection (k) applicant does not list any patent under clause (i)(I), the reference product sponsor may list 1 patent under clause (i)(II).

"(6) Immediate Patent Infringement Action.—

"(A) Action if Agreement on Patent List.—If the subsection (k) applicant and the reference product sponsor agree on patents as described in paragraph (4), not later than 30 days after such agreement, the reference product sponsor shall bring an action for patent infringement with respect to each such patent.

"(B) Action if No Agreement on Patent List.—If the provisions of paragraph (5) apply to the parties as described in paragraph (4)(B), not later than 30 days after the exchange of lists under paragraph (5)(B), the reference product sponsor shall bring an action for
patent infringement with respect to each patent
that is included on such lists.

"(C) NOTIFICATION AND PUBLICATION OF
COMPLAINT.—

"(i) NOTIFICATION TO SECRETARY.—
Not later than 30 days after a complaint
is served to a subsection (k) applicant in
an action for patent infringement described
under this paragraph, the subsection (k)
applicant shall provide the Secretary with
notice and a copy of such complaint.

"(ii) PUBLICATION BY SECRETARY.—
The Secretary shall publish in the Federal
Register notice of a complaint received
under clause (i).

"(7) NEWLY ISSUED OR LICENSED PATENTS.—
In the case of a patent that—

"(A) is issued to, or exclusively licensed by,
the reference product sponsor after the date
that the reference product sponsor provided the
list to the subsection (k) applicant under para-
graph (3)(A); and

"(B) the reference product sponsor reason-
ably believes that, due to the issuance of such
patent, a claim of patent infringement could
reasonably be asserted by the reference product sponsor if a person not licensed by the reference product sponsor engaged in the making, using, offering to sell, selling, or importing into the United States of the biological product that is the subject of the subsection (k) application, not later than 30 days after such issuance or licensing, the reference product sponsor shall provide to the subsection (k) applicant a supplement to the list provided by the reference product sponsor under paragraph (3)(A) that includes such patent, not later than 30 days after such supplement is provided, the subsection (k) applicant shall provide a statement to the reference product sponsor in accordance with paragraph (3)(B), and such patent shall be subject to paragraph (8).

"(8) NOTICE OF COMMERCIAL MARKETING AND PRELIMINARY INJUNCTION.—

"(A) NOTICE OF COMMERCIAL MARKETING.—The subsection (k) applicant shall provide notice to the reference product sponsor not later than 180 days before the date of the first commercial marketing of the biological product licensed under subsection (k).
“(B) PRELIMINARY INJUNCTION.—After receiving the notice under subparagraph (A) and before such date of the first commercial marketing of such biological product, the reference product sponsor may seek a preliminary injunction prohibiting the subsection (k) applicant from engaging in the commercial manufacture or sale of such biological product until the court decides the issue of patent validity, enforcement, and infringement with respect to any patent that is—

“(i) included in the list provided by the reference product sponsor under paragraph (3)(A) or in the list provided by the subsection (k) applicant under paragraph (3)(B); and

“(ii) not included, as applicable, on—

“(I) the list of patents described in paragraph (4); or

“(II) the lists of patents described in paragraph (5)(B).

“(C) REASONABLE COOPERATION.—If the reference product sponsor has sought a preliminary injunction under subparagraph (B), the reference product sponsor and the subsection
(k) applicant shall reasonably cooperate to expedite such further discovery as is needed in connection with the preliminary injunction motion.

"(9) LIMITATION ON DECLARATORY JUDGMENT ACTION.—

"(A) SUBSECTION (k) APPLICATION PROVIDED.—If a subsection (k) applicant provides the application and information required under paragraph (2)(A), neither the reference product sponsor nor the subsection (k) applicant may, prior to the date notice is received under paragraph (8)(A), bring any action under section 2201 of title 28, United States Code, for a declaration of infringement, validity, or enforceability of any patent that is described in clauses (i) and (ii) of paragraph (8)(B).

"(B) SUBSEQUENT FAILURE TO ACT BY SUBSECTION (k) APPLICANT.—If a subsection (k) applicant fails to complete an action required of the subsection (k) applicant under paragraph (3)(B)(ii), paragraph (5), paragraph (6)(C)(i), paragraph (7), or paragraph (8)(A), the reference product sponsor, but not the subsection (k) applicant, may bring an action
under section 2201 of title 28, United States
Code, for a declaration of infringement, validity,
or enforceability of any patent included in the
list described in paragraph (3)(A), including as
provided under paragraph (7).

“(C) SUBSECTION (k) APPLICATION NOT
PROVIDED.—If a subsection (k) applicant fails
to provide the application and information re-
quired under paragraph (2)(A), the reference
product sponsor, but not the subsection (k) ap-
plicant, may bring an action under section 2201
of title 28, United States Code, for a declara-
tion of infringement, validity, or enforceability
of any patent that claims the biological product
or a use of the biological product.”.

(b) DEFINITIONS.—Section 351(i) of the Public
Health Service Act (42 U.S.C. 262(i)) is amended—

(1) by striking “In this section, the term ‘bio-
logical product’ means” and inserting the following:

“In this section:

“(1) The term ‘biological product’ means”;

(2) in paragraph (1), as so designated, by in-
serting “protein (except any chemically synthesized
polypeptide),” after “allergenic product,”; and

(3) by adding at the end the following:
“(2) The term ‘biosimilar’ or ‘biosimilarity’, in reference to a biological product that is the subject of an application under subsection (k), means—

“(A) that the biological product is highly similar to the reference product notwithstanding minor differences in clinically inactive components; and

“(B) there are no clinically meaningful differences between the biological product and the reference product in terms of the safety, purity, and potency of the product.

“(3) The term ‘interchangeable’ or ‘interchangeability’, in reference to a biological product that is shown to meet the standards described in subsection (k)(4), means that the biological product may be substituted for the reference product without the intervention of the health care provider who prescribed the reference product.

“(4) The term ‘reference product’ means the single biological product licensed under subsection (a) against which a biological product is evaluated in an application submitted under subsection (k).”.

(c) CONFORMING AMENDMENTS RELATING TO PATENTS—
(1) PATENTS.—Section 271(e) of title 35, United States Code, is amended—

(A) in paragraph (2)—

(i) in subparagraph (A), by striking “or” at the end;

(ii) in subparagraph (B), by adding “or” at the end; and

(iii) by inserting after subparagraph (B) the following:

“(C)(i) with respect to a patent that is identified in the list of patents described in section 351(l)(3) of the Public Health Service Act (including as provided under section 351(l)(7) of such Act), an application seeking approval of a biological product, or

“(ii) if the applicant for the application fails to provide the application and information required under section 351(l)(2)(A) of such Act, an application seeking approval of a biological product for a patent that could be identified pursuant to section 351(l)(3)(A)(i) of such Act,”; and

(iv) in the matter following subparagraph (C) (as added by clause (iii)), by striking “or veterinary biological product”
and inserting "a veterinary biological product, or biological product";

(B) in paragraph (4)—

(i) in subparagraph (B), by—

(I) striking "or veterinary biological product" and inserting "a veterinary biological product, or biological product"; and

(II) striking "and" at the end;

(ii) in subparagraph (C), by—

(I) striking "or veterinary biological product" and inserting "a veterinary biological product, or biological product"; and

(II) striking the period and inserting "; and";

(iii) by inserting after subparagraph (C) the following:

"(D) the court shall order a permanent injunction prohibiting any infringement of the patent by the biological product involved in the infringement until a date which is not earlier than the date of the expiration of the patent that has been infringed under paragraph (2)(C), provided the patent is the subject of a final court decision, as defined in sec-
tion 351(k)(6) of the Public Health Service Act, in an action for infringement of the patent under section 351(l)(6) of such Act, and the biological product has not yet been approved because of section 351(k)(7) of such Act."; and

(iv) in the matter following subpara-

graph (D) (as added by clause (iii)), by striking "and (C)" and inserting "(C), and

(D)"; and

(C) by adding at the end the following:

"(6)(A) Subparagraph (B) applies, in lieu of para-

graph (4), in the case of a patent—

"(i) that is identified, as applicable, in the list of patents described in section 351(l)(4) of the Pub-

lic Health Service Act or the lists of patents de-

described in section 351(l)(5)(B) of such Act with re-

spect to a biological product; and

"(ii) for which an action for infringement of the patent with respect to the biological product—

"(I) was brought after the expiration of the 30-day period described in subparagraph (A) or (B), as applicable, of section 351(l)(6) of such Act; or

"(II) was brought before the expiration of the 30-day period described in subclause (I),
but which was dismissed without prejudice or
was not prosecuted to judgment in good faith.

"(B) In an action for infringement of a patent de-
scribed in subparagraph (A), the sole and exclusive remedy
that may be granted by a court, upon a finding that the
making, using, offering to sell, selling, or importation into
the United States of the biological product that is the sub-
ject of the action infringed the patent, shall be a reason-
able royalty.

"(C) The owner of a patent that should have been
included in the list described in section 351(l)(3)(A) of
the Public Health Service Act, including as provided under
section 351(l)(7) of such Act for a biological product, but
was not timely included in such list, may not bring an
action under this section for infringement of the patent
with respect to the biological product."

(2) CONFORMING AMENDMENT UNDER TITLE
28.—Section 2201(b) of title 28, United States
Code, is amended by inserting before the period the
following: "", or section 351 of the Public Health
Service Act”.

(d) CONFORMING AMENDMENTS UNDER THE FED-
ERAL FOOD, DRUG, AND COSMETIC ACT.—

(1) CONTENT AND REVIEW OF APPLIC-
TIONS.—Section 505(b)(5)(B) of the Federal Food,
Drug, and Cosmetic Act (21 U.S.C. 355(b)(5)(B)) is amended by inserting before the period at the end of the first sentence the following: "or, with respect to an applicant for approval of a biological product under section 351(k) of the Public Health Service Act, any necessary clinical study or studies".

(2) NEW ACTIVE INGREDIENT.—Section 505B of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355e) is amended by adding at the end the following:

"(n) NEW ACTIVE INGREDIENT.—"

"(1) NON-INTERCHANGEABLE BIOSIMILAR BIOLOGICAL PRODUCT.—A biological product that is biosimilar to a reference product under section 351 of the Public Health Service Act, and that the Secretary has not determined to meet the standards described in subsection (k)(4) of such section for interchangeability with the reference product, shall be considered to have a new active ingredient under this section.

"(2) INTERCHANGEABLE BIOSIMILAR BIOLOGICAL PRODUCT.—A biological product that is interchangeable with a reference product under section 351 of the Public Health Service Act shall not be
considered to have a new active ingredient under this section.”.

(e) PRODUCTS PREVIOUSLY APPROVED UNDER SECTION 505.—

(1) REQUIREMENT TO FOLLOW SECTION 351.—

Except as provided in paragraph (2), an application for a biological product shall be submitted under section 351 of the Public Health Service Act (42 U.S.C. 262) (as amended by this Act).

(2) EXCEPTION.—An application for a biological product may be submitted under section 505 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355) if—

(A) such biological product is in a product class for which a biological product in such product class is the subject of an application approved under such section 505 not later than the date of enactment of this Act; and

(B) such application—

(i) has been submitted to the Secretary of Health and Human Services (referred to in this Act as the “Secretary”) before the date of enactment of this Act; or
(ii) is submitted to the Secretary not later than the date that is 10 years after the date of enactment of this Act.

(3) LIMITATION.—Notwithstanding paragraph (2), an application for a biological product may not be submitted under section 505 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355) if there is another biological product approved under subsection (a) of section 351 of the Public Health Service Act that could be a reference product with respect to such application (within the meaning of such section 351) if such application were submitted under subsection (k) of such section 351.

(4) DEEMED APPROVED UNDER SECTION 351.—An approved application for a biological product under section 505 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355) shall be deemed to be a license for the biological product under such section 351 on the date that is 10 years after the date of enactment of this Act.

(5) DEFINITIONS.—For purposes of this subsection, the term "biological product" has the meaning given such term under section 351 of the Public Health Service Act (42 U.S.C. 262) (as amended by this Act).
(f) FOLLOW-ON BILOGICS USER FEES.—

(1) DEVELOPMENT OF USER FEES FOR BIOSIMILAR BIOLOGICAL PRODUCTS.—

(A) IN GENERAL.—Beginning not later than October 1, 2010, the Secretary shall develop recommendations to present to Congress with respect to the goals, and plans for meeting the goals, for the process for the review of biosimilar biological product applications submitted under section 351(k) of the Public Health Service Act (as added by this Act) for the first 5 fiscal years after fiscal year 2012. In developing such recommendations, the Secretary shall consult with—

(i) the Committee on Health, Education, Labor, and Pensions of the Senate;

(ii) the Committee on Energy and Commerce of the House of Representatives;

(iii) scientific and academic experts;

(iv) health care professionals;

(v) representatives of patient and consumer advocacy groups; and

(vi) the regulated industry.
(B) PUBLIC REVIEW OF RECOMMENDATIONS.—After negotiations with the regulated industry, the Secretary shall—

(i) present the recommendations developed under subparagraph (A) to the Congressional committees specified in such subparagraph;

(ii) publish such recommendations in the Federal Register;

(iii) provide for a period of 30 days for the public to provide written comments on such recommendations;

(iv) hold a meeting at which the public may present its views on such recommendations; and

(v) after consideration of such public views and comments, revise such recommendations as necessary.

(C) TRANSMITTAL OF RECOMMENDATIONS.—Not later than January 15, 2012, the Secretary shall transmit to Congress the revised recommendations under subparagraph (B), a summary of the views and comments received under such subparagraph, and any changes
made to the recommendations in response to such views and comments.

(2) ESTABLISHMENT OF USER FEE PROGRAM.—It is the sense of the Senate that, based on the recommendations transmitted to Congress by the Secretary pursuant to paragraph (1)(C), Congress should authorize a program, effective on October 1, 2012, for the collection of user fees relating to the submission of biosimilar biological product applications under section 351(k) of the Public Health Service Act (as added by this Act).

(3) TRANSITIONAL PROVISIONS FOR USER FEES FOR BIOSIMILAR BIOLOGICAL PRODUCTS.—

(A) APPLICATION OF THE PRESCRIPTION DRUG USER FEE PROVISIONS.—Section 735(1)(B) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 379g(1)(B)) is amended by striking "section 351" and inserting "sub-section (a) or (k) of section 351".

(B) EVALUATION OF COSTS OF REVIEWING BIOSIMILAR BIOLOGICAL PRODUCT APPLICATIONS.—During the period beginning on the date of enactment of this Act and ending on October 1, 2010, the Secretary shall collect and evaluate data regarding the costs of reviewing
applications for biological products submitted under section 351(k) of the Public Health Service Act (as added by this Act) during such period.

(C) AUDIT.—

(i) In general.—On the date that is 2 years after first receiving a user fee applicable to an application for a biological product under section 351(k) of the Public Health Service Act (as added by this Act), and on a biennial basis thereafter until October 1, 2013, the Secretary shall perform an audit of the costs of reviewing such applications under such section 351(k). Such an audit shall compare—

(I) the costs of reviewing such applications under such section 351(k) to the amount of the user fee applicable to such applications; and

(II)(aa) such ratio determined under subclause (I); to

(bb) the ratio of the costs of reviewing applications for biological products under section 351(a) of such Act (as amended by this Act) to the
amount of the user fee applicable to such applications under such section 351(a).

(ii) ALTERATION OF USER FEE.—If the audit performed under clause (i) indicates that the ratios compared under sub-clause (II) of such clause differ by more than 5 percent, then the Secretary shall alter the user fee applicable to applications submitted under such section 351(k) to more appropriately account for the costs of reviewing such applications.

(iii) ACCOUNTING STANDARDS.—The Secretary shall perform an audit under clause (i) in conformance with the accounting principles, standards, and requirements prescribed by the Comptroller General of the United States under section 3511 of title 31, United State Code, to ensure the validity of any potential variability.

(4) AUTHORIZATION OF APPROPRIATIONS.—There is authorized to be appropriated to carry out this subsection such sums as may be necessary for each of fiscal years 2010 through 2012.
(g) ALLOCATION OF SAVINGS; SPECIAL RESERVE FUND.—

(1) DETERMINATION OF SAVINGS.—The Secretary of the Treasury, in consultation with the Secretary, shall for each fiscal year determine the amount of the savings to the Federal Government as a result of the enactment of this Act and shall transfer such amount to the Fund established under paragraph (2) pursuant to a relevant appropriations Act.

(2) SPECIAL RESERVE FUND.—

(A) IN GENERAL.—There is established in the Treasury of the United States a fund to be designated as the "Biological Product Savings Fund" to be made available to the Secretary without fiscal year limitation.

(B) USE OF FUND.—The amounts made available to the Secretary through the Fund under subparagraph (A) shall be expended on activities authorized under the Public Health Service Act.

(3) AUTHORIZATION OF APPROPRIATIONS.—There is authorized to be appropriated for each fiscal year to the Fund established under paragraph
(2), the amount of the savings determined for such
fiscal year under paragraph (1).
(h) GOVERNMENT ACCOUNTABILITY OFFICE
STUDY.—

(1) IN GENERAL.—Not later than 3 years after
the date of enactment of this Act, the Comptroller
General of the United States shall study and report
to Congress regarding—

(A) the extent to which pediatric studies of
biological products are being required under the
Federal Food, Drug, and Cosmetic Act (21
U.S.C. 301 et seq.); and

(B) any pediatric needs not being met
under existing authority.

(2) CONTENT OF STUDY.—The study under
paragraph (1) shall review and assess—

(A) the extent to which pediatric studies of
biological products are required under sub-
sections (a) and (b) of section 505B of the Fed-
eral Food, Drug and Cosmetic Act (21 U.S.C.
355c);

(B) the extent to which pediatric studies of
biological products are required as part of risk
evaluation and mitigation strategies under such
Act;
(C) the number, importance, and prioritization of any biological products that are not being tested for pediatric use; and

(D) recommendations for ensuring pediatric testing of products identified in subparagraph (C), including the consideration of any incentives, such as those provided under the Best Pharmaceuticals for Children Act.

(i) ORPHAN PRODUCTS.—If a reference product, as defined in section 351 of the Public Health Service Act (42 U.S.C. 262) (as amended by this Act) has been designated under section 526 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 360bb) for a rare disease or condition, a biological product seeking approval for such disease or condition under subsection (k) of such section 351 as biosimilar to, or interchangeable with, such reference product may be licensed by the Secretary only after the expiration for such reference product of the later of—

(1) the 7-year period described in section 527(a) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 360cc(a)); and

(2) the 12-year period described in subsection (k)(7) of such section 351.