



September 6, 2009

# Bill Summary

*The Pew Prescription Project promotes consumer safety through reforms in the approval, manufacture, and marketing of prescription drugs*

*"FDA needs additional tools to move our oversight capabilities into the 21st century. FDA needs to access regulatory information quickly, hold all parties responsible for the quality of products in the supply chain, and have reasonable and reliable options for enforcement."  
(Principal Deputy Commissioner Joshua M. Sharfstein, 2010)*

*At least 80% of the active ingredients in U.S. prescription drugs now originate overseas.  
(US Government Accountability Office, 2007)*

*Regulatory demands placed on the Food and Drug Administration far exceed its ability to respond.  
(FDA Advisory Board, Subcommittee on Science and Technology, 2007)*

## The Pharmaceutical Market Access and Drug Safety Act of 2009

### S. 525/1232

*Introduced 3.4.09/6.10.09: Mr. Dorgan, Ms. Snowe. 29 other co-sponsors*

### H.R. 1289

*Introduced 3.4.09: Mr. Berry, Mrs. Emerson. 23 other co-sponsors*

### Amends FDCA

#### Sec. 3: Repeal of Certain Section Regarding Importation of Prescription Drugs

- Strikes FDCA Ch. VIII Sec. 804 – Importation of Prescription Drugs

#### Sec. 4: Importation of Prescription Drugs; Waiver of Certain Import Restrictions

- (a) Replaces current Sec. 804 with Sec. 804: Commercial and Personal Importation of Prescription Drugs.
- **"Sec. 804: Commercial and Personal Importation of Prescription Drugs**
  - **(a) Importation of Prescription Drugs**
  - Removes limitation on importation from entities other than manufacturers.
  - Qualifying drugs may be imported (1) by registered importers or (2) by individuals (not for resale) from a registered exporter.
  - A qualifying drug is a drug with a corresponding U.S. label drug. *Corresponding U.S. label drugs must:* have the same API as the qualifying drug; be manufactured by or for the manufacturer of the qualifying drug; be approved by FDA. *Corresponding U.S. label drugs must not:* be controlled substances or biological products; be referred to in two or more ANDAs; be certain other types of drugs with special administration<sup>i</sup>
  - Exporter: person exporting drugs to the U.S. from a permitted country.  
Permitted Country: Australia, Canada, EU member states,<sup>ii</sup> Japan, New Zealand, Switzerland, a country determined by the Secretary to have met certain requirements on drug regulation and safety<sup>iii</sup> and to have standards equivalent to the US and Canada on pharmacist training and practice, and protection of personal medical information.

- Importer: Pharmacy, group of pharmacists or wholesaler importing drugs into the U.S.
- **(b) Registration of Importers and Exporters**
- Exporters must report all places of business and warehouses that relate to qualifying drugs
- Importers must report all places of business (not to exceed 3) that initially receive qualifying drugs.
- Both Importers and Exporters must provide information to demonstrate compliance with following sub sections on drug sources, inspections, fees, compliance with 801(a), licensure, records and sampling.
- Both Importers and Exporters must submit agreements stating the registrant: will only import or export qualifying drugs; will notify the Secretary of recalls/withdrawals, will pay for returning the product to themselves, and will cease to import or export the drug until the Secretary has allowed it; will self-monitor compliance with these requirements; will have a plan for compliance; will enforce contracts with parties in the chain of custody; will notify the Secretary of any changes in the compliance plan.
- Exporters must submit: an agreement that the qualifying drug will only go to individuals for personal use or authorized importers; an agreement to post a bond for the lesser of the following: The value of drugs exported in a typical 4-week period or \$10,000; an agreement to comply with applicable law in the permitted country; an agreement to report total price and volume of drugs exported semiannually and annually.
- Importers must submit: an agreement to report total price and volume of drugs imported semiannually and annually.
- Secretary shall approve registrations within 90 days of submission, and shall publicly post a list of registered exporters with contact information. The Secretary may suspend or terminate registrations for noncompliance with registration conditions. Exporting a non-qualifying or non-compliant drug or failing to permit inspections will result in a defaulted exporter bond.
- **(c) Qualifying Drug Sources**
- Drugs exported or imported into the US must be manufactured in an establishment required to be registered under section 510 (h) or (i)<sup>iv</sup> and inspected either by the Secretary or by a permitted country with an equivalent regulatory system.
- The establishment must manufacture the drug for distribution in the US or in one or more permitted countries.
- The exporter or importer must obtain the drug directly from the establishment or from an entity contracting with the exporter or importer.  
*Contracting entities must:* provide a statement identifying each prior sale, purchase or trade; agree to allow the Secretary to inspect these statements and related records; agree to allow the secretary to inspect warehouses, facilities and records; and ensure, through contractual agreements, that the Secretary has these authorities for all entities in the chain of custody.
- Importers must import drugs from permitted countries. Exporters must export from permitted countries in which they are located. When not in control of the manufacturer, the drug may not enter a non-permitted country.
- **(d) Inspection of Facilities and Marking of Shipments**
- Exporters must permit the Secretary to inspect exporter places of business including warehouses and other facilities owned or operated for the exporter as well as records, financial records, and drug samples. Inspections must happen randomly but not less than 12 times annually.
- Exporters must mark product shipments in a manner that prevents these markings from begin affixed to unauthorized shipments. Markings must include anticounterfeiting or track and trace technologies “taking into account the economic and technical feasibility of those technologies”
- The Secretary must inspect exporter places of business randomly but not less than 12 times annually. During the inspections the Secretary must verify the chain of custody of a statistically significant sample of drug, accomplished/supplemented by use of anticounterfeiting or track and trace technology. (“...a drug that lacks such technologies from the point of manufacture shall not for that reason be excluded from importation by an exporter”.) The Secretary must randomly review records, monitor shipment markings, inspect as necessary other entities in the chain of custody.

- Importers must give prior notice to the Secretary for all drug shipments including notice submitter and importer name and contact information, name, quantity and lot number of the drug, identity of manufacturer and manufacturing establishment, country of export, name and contact information of the shipper, anticipated arrival information, summary of the chain of custody from manufacturing establishment to the importer.
- Importers must, before wholesale distribution, unless drug already bears comparable, compatible markings from the manufacturer, mark each drug container in a manner that prevents these markings from begin affixed to unauthorized containers and include anticounterfeiting or track and trace technology.
- The Secretary must inspect importer places of business randomly but not less than 12 times annually, and must verify chain of custody as for exporters above. The Secretary must review notices of drug shipments and inspect as necessary other parties in the chain of custody.
- **(e) Importer Fees**
- Registration Fee: \$10,000
- Inspection Fee: Based on annual aggregate, solely for importer inspection expenses, review of shipment notices and shipment inspections. Will not exceed 2.5% of total price of drugs imported that year. If this should occur, Secretary shall provide a pro-rata fee reduction for the subsequent year. Individual importer fees shall be an amount proportional to the estimated semiannual share of drug importation volume. Unpaid fees will be treated as a claim.
- **(f) Exporter Fees**
- Registration Fee: \$10,000
- Inspection Fee: Based on annual aggregate, solely for exporter inspection expenses, review of shipment markings and shipment inspections. Will not exceed 2.5% of total price of drugs imported that year. If this should occur, Secretary shall provide a pro-rata fee reduction for the subsequent year. Individual exporter fees shall be an amount proportional to the estimated semiannual share of drug exportation volume. Unpaid fees will be treated as a claim.
- **(g) Compliance with 801(a)**
- **(1)** Qualifying drugs must be compliant with standards referenced in section 801(a) regarding admission of the drug<sup>v</sup> (subject to the following:)
- **(2) Approval Status**
- Drug must be compliant with conditions for NDAs in section 505(b)
- Manufacturers of a drug sold in a permitted country must submit a notice that describes the difference in the qualifying drug from a condition in the US label drug application beyond variations provided for in the application and labeling differences, or a statement that there is no difference.
- Where there is a difference, the notice must indicate the date of drug introduction in the permitted country and include an English translation of the drug approval application if necessary. The CEO and CMO of the manufacturer shall each certify that the notice is true and that a copy of the notice has been provided to the FTC and to the State attorneys general.
- If a notice includes a difference that would require the submission of a supplemental application if made as a change to the U.S. label drug, the same applicable fee will apply. Such a difference will be treated as a manufacturing change to the U.S. label drug, and Secretary shall review and approve if required under section 506A. If drug is not bioequivalent, this must be noted in labeling (see paragraph 3.)
- Secretary must review such differences within 120 days of submission of notice. If review requires establishment inspection the Secretary will have this authority, and may also rely on GMP inspections by permitted countries. Notices and Secretary responses will be made publicly available on an FDA website and through a toll-free number.
- If a notice includes a difference that would require prior approval of a supplemental application Drug may not be imported or exported until the Secretary has made such determination.
- If a notice includes a difference that would not require prior approval of a supplemental application, importation and exportation may continue until a determination as to whether a supplemental application would be approved has been made.

- If the Secretary determines a supplemental application would not be approved, the Secretary will order cessation of importation, will notify the permitted country, and will notify registered importers, exporters, the FTC and the State attorneys general of the determination.
- If the Secretary determines a supplemental application would be approved, the difference shall be considered to be a variation provided for in the approved application for the U.S. label drug.
- If a notice includes a difference *not requiring approval*, the difference shall be considered to be a variation provided for in the approved application for the U.S. label drug.
- If a manufacturer of a US approved drug makes a similar<sup>vi</sup> drug that does not have the same APIs, route of administration, dosage form or strength as another qualifying drug commercially distributed in permitted countries,<sup>vii</sup> then the manufacturer must submit an application for that similar drug under section 505(b). The additional application must include information submitted with application for approval in the permitted country, and include a right of reference.<sup>viii</sup>
- **(3) Labeling**
- Importation by registered importer: Labeling must include: A copy of the labeling for the US label drug, name and location of manufacturer, lot number, name, location and registration number of the importer, national drug code number (assigned to qualifying drug by secretary).  
Importation by individual: Labeling must comply with poison prevention act of 1970 and must include: direction for consumer use, lot number, name and registration number of the exporter, a copy of any special labeling that would accompany any US label drug dispensed by a US pharmacist, if required, an advisory noting the qualifying drug is safe and effective but not bioequivalent, if the inactive ingredients differ from the US label drug, a notice declaring this and a list of the inactive ingredients. Drugs packaged in unit-of-use containers shall not be repackaged.<sup>x</sup>
- Secretary shall provide: copy of the labeling to the registered importer or exporter upon request. Includes: Names of all APIs of qualifying drug (not to include the brand name of a US label drug), if required, an advisory noting the qualifying drug is safe and effective but not bioequivalent, if the inactive ingredients differ from the US label drug, a notice declaring this and a list of the inactive ingredients.
- **(4) Adulteration**
- Drugs shall be in compliance with section 510 on manufacturer registration if they are in compliance with subsection (c) on qualifying drug sources.
- **(5) Standards for Refusing Admission**: Drug is not a qualifying drug, required notices have not been submitted, secretary has ordered importation to cease or withdrawn approval of the drug, drug is improperly labeled or adulterated, shipping container is damaged, shipping labeling appears counterfeit or appears tampered-with, secretary becomes aware that the drug may be counterfeit, prepared under insanitary conditions, prepared under non-GMP conditions, manufacturer has submitted a recall.
- **(h) Exporter Licensure in Permitted Country**
- As a condition of registration, the exporter must be licensed in their permitted country and must employ persons licensed by that country to dispense prescription drugs.
- **(i) Importation by Individuals**
- These conditions must be met: the drug is accompanied by a valid prescription issued by an authorized practitioner and a copy of the documentation required by the permitted country to legally dispense the drug, the individual has provided a complete list of all other prescriptions used by them for review by the dispenser, drug quantity does not exceed a 90-day supply, the drug is not an ineligible subpart H drug.<sup>x</sup>
- **(j) Maintenance of Records and Samples**
- Importer or exporter must maintain records not less than, and samples of each lot not more than 2 years. Records shall be maintained at the main place of business for the importer, and the ultimate shipping facility for the exporter.
- **(k) Drug Recalls**
- Manufacturers of imported drugs must notify the Secretary of recalls, the reason, and how the drug may be identified. The Secretary must have an agreement with permitted countries to revive recall information, and must monitor recalls and notify importers, exporters and the public of recalls.

- **(l) Drug Labeling and Packing**
- Pharmacists dispensing imported drugs must ensure that the labeling complies with the above regulations, and shall include with other labeling provided to individuals the following: lot number, importer name and registration number, if required, statements about bioequivalence or list of differing inactive ingredients. Drugs in unit-of-use containers shall not be repackaged<sup>xi</sup>
- **(m) Charitable Contributions**
- This section does not authorize the importation of donated or nominally priced drugs to charitable orgs including the UN and affiliates.
- **(n) Unfair and Discriminatory Acts and Practices**
- Manufacturers may not discriminate by: charging a higher price to exporters in a permitted country than to others in the permitted country; charging a higher price to importers in the US than to others in the US; denying or restricting supplies of a drug to an importer or importer; refusing to do business with an importer or exporter; knowingly fails to submit or falsely submits required notices, knowingly fails to submit or falsely submits required applications (for similar but non-identical drugs); cause there to be a difference in a drug marketed in the US and marketed in other permitted countries; refuse inspection; fail to conform with GMPs; become party to a licensing agreement that fails to provide for compliance with this section; enter into a contract that restricts or prohibits the importation of qualifying drugs
- Manufacturers shall present an affirmative defense that the differential treatment is not based on the person exporting, importing, distributing or selling imported drugs, that the drug was made different due to permitted country regulations or was not caused for the purpose of restricting importation.
- This subsection shall not prevent a manufacturer from providing discounts to an insurer or PBM, prevent a manufacturer from providing drugs at nominal cost to charitable institutions.
- The FTC shall enforce this subsection under the same authorities of the Federal Trade Commission Act, including seeking monetary relief for damages.
- Attorneys general may bring civil action on behalf of the residents of a state to enforce compliance and obtain damages.
- Definition of manufacturer: any entity, or affiliate or licensee of that entity that is engaged in the production, preparation, compounding, conversion or processing of a prescription drug, by means of natural extraction, chemical synthesis, or both, or any such entity involved in the packaging, repackaging, labeling relabeling or distribution of a prescription drug.
- **(b) Prohibited Acts**
- Pharmacists may not sell imported drugs except when dispensing the drug to a customer at retail or selling the drug to another pharmacy or wholesaler registered to import drugs.
- Individuals importing drugs for personal use may not sell those drugs
- Manufacturers may not make false notices
- Importers and exporters may not import drugs if in violation of registration or other requirements in section 804.
- Any person that knowingly violates section 804 or section 301(i) (counterfeiting) shall be imprisoned not more than 10 years, or fined in accordance with title 18, US Code, or both.
- **(c) Amendment of Certain Provisions**
- Individuals importing drugs for personal use shall be notified by the Secretary if their drug is refused at the border, and the Secretary shall also provide information on registered exporters.
- **(d) Exhaustion**
- **(e) Effect of Section 804**
- Importation of qualifying drugs permitted by registered exporters 90 days post-enactment, and by registered importers 1 year post-enactment. Secretary may limit number of registered importers and exporters each year, but minimum growth is required. Canadian exporters will get expedited registration review.

- Manufacturers of qualifying drugs either within the top 100 highest dollar volume of sales in the US or that bear no difference with the US label drug (as stated in a required notice) must submit their notices (declaring similarity or differences with US label drugs) no later than 30 days post-enactment for drugs sold in Canada, and 180 days post-enactment for drugs sold in other countries.
- The Secretary shall set dates for the submission of other notices to prioritize review of drugs with higher dollar volume of sales in the US.
- For the first fiscal year the act is in effect, the limit on the aggregate user fee amount for importers and exporters (normally 2.5% of the estimated cost of prescription drugs imported that fiscal year) will be 2.5% of \$1 billion times the % of days of that first fiscal year the law is in effect. During the second fiscal year, the limit on the aggregate user fee for importers will be 2.5% of \$3 billion.
- Secretary may prohibit importation and exportation for entities that fail to pay user fees.
- Secretary shall submit a report to congress on the notice review process, and on the implementation of user fees
- **(f) Implementation of Section 804**
- **(g) Consumer Education**
- The Secretary shall inform consumers: how to verify the registration of exporters, that drugs from unregistered exporters may be seized, when exporter registrations are revoked, availability of imported drugs at domestic pharmacies.
- **(h) Effect on Administration Practices**
- **(i) Report to Congress**
- The FTC shall report to congress any enforcement actions taken

**Sec. 5: Disposition of Certain Drugs Denied Admission into United States**

- Secretary of Homeland Security shall deliver drugs denied admission for improper labeling or at the Secretary's request to the Secretary of HHS.
- Secretary has the authority to destroy, without notice, shipments of drugs valued under \$10,000 when in violation of section 804(g)(5)<sup>xii</sup> or, for the case of unregistered exporters, drugs in violation of 810(a) or 801(d)(1)<sup>xiii</sup>

**Sec. 6: Wholesale Distribution of Drugs; Statements Regarding Prior Sale, Purchase, Trade**

- FDCA amended so that all those exporting drugs outside of the US shall still be required to provide a statement (described in FDCA) detailing prior sales, purchases and trades to the recipient of the drugs. The Secretary shall be authorized to establish new criteria by 2012 for the statement that supersede current FDCA language to better identify the chain of custody. This may include anti-counterfeiting or track and trace technologies.
- Effective January 2012
- Notwithstanding any other section, no later than 18 months after enactment, the Secretary must require drug packaging incorporates a standardized numerical identifier (if not originally from, then linked to manufacturer's numerical identifier) and counterfeit-resistant technologies. These technologies shall be incorporated into at least one additional element of the drug packaging to deter counterfeiters.

**Sec. 7: Internet Sales of Prescription Drugs**

- Prescription drugs may be purchased through the internet if: the site provides licensing and contact information (name of seller, each state where so authorized, address and telephone of all such businesses, name of each pharmacist).; the purchaser has a valid prescription written by a practitioner with a qualifying medical relationship.  
 Qualifying medical relationship: practitioner or covering practitioner has conducted at least one in-person medical evaluation  
 Covering Practitioner: medical evaluation at the request of the practitioner who has conducted at least on in-person evaluation

- States shall enforce, and Secretary shall contract the review of internet sites for violations. Appropriations for this grant are \$100,00 for each of first 3 fiscal years.

#### **Sec. 8: Prohibiting Payments to Unregistered Foreign Pharmacies**

- Transferring payment for an imported prescription drug from and unregistered exporter is prohibited. The Board of Governors for the Federal Reserve System must establish policies to prevent restricted transactions.

#### **Sec. 9: Importation Exemption under Controlled Substances Import and Export Act**

#### **Sec. 10: Severability**

- If any provision of this Act is named unconstitutional, other provisions shall not be affected thereby.

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<sup>i</sup> Infused drugs, injected drugs, drugs inhaled during surgery, sterile ophthalmic drugs.

<sup>ii</sup> Does not include EU member state where the country's Annex to the Treaty of Accession to the EU includes a transitional measure for the regulation of human pharmaceutical products that has not expired or the Secretary determines the country has not met certain requirements (see next footnote.)

<sup>iii</sup> The country requires review and approval of drugs for safety and effectiveness, high standard manufacturing and processing facilities, adverse reaction reporting and approval withdrawal, appropriate labeling requirements, and valid marketing authorization systems.

<sup>iv</sup> Domestic and foreign establishments "engaged in the manufacture, propagation, compounding, or processing" of drugs or devices must be inspected. FCDA 510 subsections (h) and (i)

<sup>v</sup> Standards in 801(a) prompting refusal of admission: manufacturing, processing or packing under unsanitary conditions, forbidden or restricted sale in the country of production or exportation, adulteration or misbranding, prohibition of introduction into interstate commerce under section 301 (FDCA prohibited acts.)

<sup>vi</sup> A similar drug to an approved US drug must have related active ingredients, which may be identical or may be different salts, esters or complexes of the same moiety.

<sup>vii</sup> Must be in countries where combined populations equal at least 50% of total population of all permitted countries

<sup>viii</sup> The ability to use investigations, including raw data, in approvals process.

<sup>ix</sup> Except if the package is not compliant with the Poison Prevention Packaging Act of 1970 and the consumer does not consent to waive the requirements of that act.

<sup>x</sup> Subpart H drug approval is normally reserved for drugs that treat severe or life-threatening illnesses. Subpart H approvals generally require a special "restricted distribution" approval process.

<sup>xi</sup> See footnote ix

<sup>xii</sup> Standards for Refusing Admission: Drug is not a qualifying drug, required notices have not been submitted, secretary has ordered importation to cease or withdrawn approval of the drug, drug is improperly labeled or adulterated, shipping container is damaged, shipping labeling appears counterfeit or appears tampered-with, secretary becomes aware that the drug may be counterfeit, prepared under insanitary conditions, prepared under non-GMP conditions, manufacturer has submitted a recall.

<sup>xiii</sup> Insulin products may only be reimported by the manufacturer