

## Congress Should Not Adopt “No Generics” Proposals for Biologics

### *The Eshoo-Barton-Inslee and Hatch-Enzi-Hagan Approach to Biogenerics: Evergreening and the Creation of Perpetual Monopolies*

Congress is now considering proposals to establish a process for regulatory approval of generic versions of biotech medicines ("biologics"). Proposals passed by the Senate health committee and sponsored by Representatives Eshoo, Barton and Inslee, however, would establish prolonged delays before permitting price-lowering generic competition.

The HELP (Senate Health, Education, Labor and Pensions Committee) and Eshoo-Barton proposals would establish a 12-year marketing monopoly (known as “data exclusivity”) for brand-name biologics, a monopoly that is separate and distinct from the patent monopoly. During this period, generic competitors would be prohibited from relying on the safety and efficacy tests conducted by brand-name companies, effectively preventing them from coming to market. This excessively long period of monopoly protection (conventional drug makers get only five years) has no correlation with biologics' manufacturing or research and development (R&D) costs.

Even more worrisome, the HELP and Eshoo-Barton proposals would permit brand-name companies to pursue "evergreening" strategies that would enable them to obtain sequential 12-year marketing monopolies on biologics. The effect would be to prevent price-lowering generic competition for decades and to torpedo the objective of cost containment, which is central to current healthcare reform efforts.

### *Minor Tweaks to Old Biologics Will Create Perpetual Monopolies*

Under the Hatch-Enzi-Hagan proposal adopted by HELP as part of its healthcare reform bill and the Eshoo-Barton proposal they seek to have added to the House version of the bill via amendment, 12 years of data exclusivity are provided to a brand-name ("reference") product. Enzi-Hatch: New 42 USC 262 (k)(7)(A).

The HELP and Eshoo-Barton proposals then specify that additional periods of exclusivity are not available for modified versions of the original biologic product under certain circumstances. Enzi-Hatch: New 42 USC 262 (k)(7)(C).<sup>i</sup>

Except for these exceptions, however, *new* 12-year monopoly periods of exclusivity are available for modifications of the original product. With a minor tweak, brand-name companies will be able to gain another dozen years of monopoly protection for their modified product.

Modified products eligible for such repeat monopolies include:

- Combination products (putting together two or more products previously available separately);
- Changes in dosage (such as creating a once-a-day shot where the original product was a thrice-a-day product);
- Changes in delivery mechanism or dosage form (such as a pill or inhalant to replace a shot); and
- Changes to enable the body to absorb a product better.

These modifications of the original biologic product may offer small or significant patient benefits. But they are typically easy to design. Brand-name firms do not need the lure of protracted monopolies to make these minor modifications.

### ***How Minor Tweaks Will Create Perpetual Monopolies: The Case of Prilosec and Nexium***

Once the original period of data exclusivity has expired, generics will theoretically be able to enter the market for the older version of the drug. They will be prevented, however, from competing directly with the modified version for another dozen years.

Based on the experience with conventional drugs, there is very strong reason to believe that brand-name companies will be able to exert their marketing acumen to transition patients (and doctors) to the modified product, and away from cheaper, generic versions of the old product. Indeed, it is quite likely that in many or most cases this prospect will deter generic manufacturers from entering the biogenerics market at all.

A classic example of how the evergreening process works involves the acid-reflux drugs Prilosec and Nexium. With its best-selling Prilosec facing generic competition, AstraZeneca introduced Nexium, a slight chemical variant of Prilosec (similar what is often called a “me-too” drug, except in this case produced by the same company in order to preserve their market share just prior to generic competition instead of attempting to encroach on the market share of another company). AstraZeneca studies showed the new drug to have the slightest improved performance from Prilosec, not for heartburn, but for "erosive esophagitis," where burped-up stomach acid injures the esophagus. That slightly improved result enabled the company to launch a full-court press to get consumers to switch from the drug going off patent to the one just coming on. Nexium sells for about 5 times the price of Prilosec. Annual revenues for Nexium, on a global basis, top \$5 billion.<sup>ii</sup>

### ***Eshoo-Barton and HELP Proposals Will Make it Even Easier to Game the System for Biologics***

Under the HELP and Eshoo/Barton approaches, evergreening will be easier and more effective for biologics than it is for conventional drugs.

First, in many or most cases, generic versions of biologics will not be identical with the brand-name product. In these cases, the generic product will be treated as "biosimilar" and not "interchangeable," and will only be available to a patient upon specific prescription by a doctor. There will thus be a built-in bias in the system against switching to generic products -- and make it easier for the brand-name company to direct patients to their modified, monopoly-protected products.

Second, under the Eshoo-Barton approach, the Food and Drug Administration (FDA) will be required to give generic biologics unique names -- that is, they will not be able to use the same non-proprietary name as the brand-name product. This will further mitigate against switching to generic products.

Third, conventional drug evergreening involves efforts to obtain new patent protection. Patent protection is much less robust than data exclusivity; this is especially true for patents on modifications to products. Generic firms are commonly able to challenge successfully or work around modification patents. By contrast, while the bar for attaining data exclusivity is lower than obtaining patent protection (which requires a new, useful and non-obvious invention), the data monopoly is absolute: it is granted automatically upon FDA marketing approval and is not subject to workarounds.

**The bottom line is this: In many or most cases, the HELP and Eshoo-Barton approaches will offer only the illusion of generic competition. In these instances, brand-name companies will be able to game the system to obtain near perpetual monopolies, extending several decades beyond patent and original exclusivity expiration.**

### ***Avoidable problems: Waxman-Deal and Schumer-Brown proposals offer superior approach***

The biologic evergreening problem is solvable. The Waxman-Deal and Schumer-Brown-Collins-Martinez-Vitter biogenerics legislation (H.R. 1427/ S.726) establishes clear and precise standards for obtaining data

exclusivity, and specifies categorically and by example that minor modifications are not eligible for subsequent full exclusivity periods.

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<sup>i</sup> These include "supplements" Enzi/Hatch: New 42 USC 262 (k)(7)(C)(i); and new indications, route of administration, dosing schedule, dosage form, delivery system, delivery device or strength -- if these changes do not involve a modification of the structure biological product. Enzi/Hatch: New 42 USC 262 (k)(7)(C)(ii).

<sup>ii</sup> For more on the Prilosec and Nexium case, see, for example, Alex Berenson, "Where has all the Prilosec Gone?" *The New York Times*, March 2, 2005, at [www.nytimes.com/2005/03/02/business/02prilosec.html](http://www.nytimes.com/2005/03/02/business/02prilosec.html) and Maryann Napoli, "The Latest Heartburn Drug Dressed in Purple, But Just Another Knock-off," BNET Healthfacts, September 2001, at [http://findarticles.com/p/articles/mi\\_m0815/is\\_2001\\_Sept/ai\\_77823684/](http://findarticles.com/p/articles/mi_m0815/is_2001_Sept/ai_77823684/).