97TH CONGRESS
1ST SESSION

S. 255

To amend the patent law to restore the term of the patent grant for the period of time that nonpatent regulatory requirements prevent the marketing of a patented product.

IN THE SENATE OF THE UNITED STATES

JANUARY 27 (legislative day, JANUARY 5), 1981

Mr. MATHIAS (for himself, Mr. ROBERT C. BYRD, Mr. THURMOND, Mr. PERCY, and Mr. DECONCINI) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To amend the patent law to restore the term of the patent grant for the period of time that nonpatent regulatory requirements prevent the marketing of a patented product.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Patent Term Restoration Act of 1981".

SECTION 1. Title 35 of the United States Code, entitled "Patents" is amended by adding the following new section immediately after section 154:

"**§ 155. Restoration of patent term**

"(a)(1) Except as provided in paragraph (2), the term of a patent which encompasses within its scope a product, or a method for using a product, subject to a regulatory review period shall be extended by the amount of time equal to the regulatory review period for such product or method if—

"(A) the owner of record of the patent gives notice to the Commission in compliance with the provisions of subsection (b)(1);

"(B) the product or method has been subjected to a regulatory review period pursuant to statute or regulation prior to its commercial marketing or use; and

"(C) the patent to be extended has not expired prior to notice to the Commissioner under subsection (b)(1).

The rights derived from any claim or claims of any patent so extended shall be limited in scope during the period of any extension to the product or method subject to the regulatory review period and to the statutory use for which regulatory review was required.

"(2) In no event shall the term of any patent be extended for more than seven years.

"(b)(1) Within ninety days after termination of a regulatory review period, the owner of record of the patent shall notify the Commissioner under oath that the regulatory

review period has ended. Such notification shall be in writing and shall:

"(A) identify the Federal statute or regulation under which regulatory review occurred;

"(B) state the dates on which the regulatory review period commenced and ended;

"(C) identify the product and the statutory use for which regulatory review was required;

"(D) state that the regulatory review referred to in subsection (a)(1)(B) has been satisfied; and

"(E) identify the claim or claims of the patent to which the extension is applicable and the length of time of the regulatory review period for which the term of such patent is to be extended.

"(2) Upon receipt of the notice required by paragraph (1), the Commissioner shall promptly (A) publish the information noticed in the Official Gazette of the Patent and Trademark Office, and (B) issue to the owner of record of the patent a certificate of extension, under seal, stating the fact and length of the extension and identifying the product and the statutory use and the claim or claims to which such extension is applicable. Such certificate shall be recorded in the official file of each patent extended and such certificate shall be considered as part of the original patent.

"(c) As used in this section:

"(1) The term 'product or a method for using a product' means any machine, manufacture, composition of matter or any specific method of use thereof for which United States Letters Patent can be granted and includes the following or any specific method of use thereof:

"(A) any new drug, antibiotic drug, new animal drug, device, food additive, or color additive subject to regulation under the Federal Food, Drug, and Cosmetic Act;

"(B) any human or veterinary biological product subject to regulation under section 351 of the Public Health Service Act or under the virus, serum, toxin, and analogous products provisions of the Act of Congress of March 4, 1913;

"(C) any pesticide subject to regulation under the Federal Insecticide, Fungicide, and Rodenticide Act; and

"(D) any chemical substance or mixture subject to regulation under the Toxic Substances Control Act.

"(2) The term 'major health or environmental effects test' means an experiment to determine or evaluate health or environmental effects which requires at

least six months to conduct, not including any period for analysis or conclusions.

"(3) The term 'statutory use' means all uses regulated under the statutes identified in sections (c)(4)(A)–(D) for which regulatory review occurred for the product involved.

"(4) The term 'regulatory review period' means—

"(A) with respect to a food additive, color additive, new animal drug, veterinary biological product, device, new drug, antibiotic drug, or human biological product, a period commencing on the earliest of the date the patentee, his assignee, or his licensee (i) initiated a major health or environmental effects test on such product or a method for using such product, (ii) claims an exemption for investigation or requests authority to prepare an experimental product with respect to such product or a method for using such product under the Federal Food, Drug, and Cosmetic Act, the Public Health Service Act, or the Act of Congress of March 4, 1913, or (iii) submits an application or petition with respect to such product or a method for using such product under such statutes, and ending on the date such application or petition with respect to such product or a method

for using such product is approved or licensed under such statutes or, if objections are filed to such approval or license, ending on the date such objections are resolved and commercial marketing is permitted or, if commercial marketing is initially permitted and later revoked pending further proceedings as a result of such objections, ending on the date such proceedings are finally resolved and commercial marketing is permitted;

"(B) with respect to a pesticide, a period commencing on the earliest of the date the patentee, his assignee, or his licensee (i) initiates a major health or environmental effects test on such pesticide, the data from which is submitted in a request for registration of such pesticide under section 3 of the Federal Insecticide, Fungicide, and Rodenticide Act, (ii) requests the grant of an experimental use permit under section 5 of such Act, or (iii) submits an application for registration of such pesticide pursuant to section 3 of such Act, and ending on the date such pesticide is first registered, either conditionally or fully;

"(C) with respect to a chemical substance or mixture for which notification is required under

section 5(a) of the Toxic Substances Control Act—

"(i) which is subject to a rule requiring testing under section 4(a) of such Act, a period commencing on the date the patentee, his assignee, or his licensee has initiated the testing required in such rule and ending on the expiration of the premanufacture notification period for such chemical substance or mixture, or if an order or injunction is issued under section 5(e) or 5(f) of such Act, the date on which such order or injunction is dissolved or set aside;

"(ii) which is not subject to a testing rule under section 4 of such Act, a period commencing on the earlier of the date the patentee, his assignee, or his licensee—

"(I) submits a premanufacture notice, or

"(II) initiates a major health or environmental effects test on such substance, the data from which is included in the premanufacture notice for such substance,

and ending on the expiration of the premanufacture notification period for such substance or if an order or injunction is issued under section 5(e) or 5(f) of such Act, the date on which such order or such injunction is dissolved or set aside;

"(D) with respect to any other product or method of using a product that has been subjected to Federal premarketing regulatory review, a period commencing on the date when the patentee, his assignee, or his licensee initiates actions pursuant to a Federal statute or regulation to obtain such review prior to the initial commercial marketing in interstate commerce of such product and ending on the date when such review is completed,

except that the regulatory review period shall not be deemed to have commenced until a patent has been granted for the product or the method of use of such product subject to the regulatory review period. In the event the regulatory review period has commenced prior to the effective date of this section, then the period of patent extension for such product or a method of using such product shall be measured from the effective date of this section.".

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