

*Richard Blumenthal*  
S.L.C.  
5-22-12  
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AMENDMENT NO. \_\_\_\_\_ Calendar No. \_\_\_\_\_

Purpose: To prohibit market manipulation with respect to drugs during times of shortage.

IN THE SENATE OF THE UNITED STATES—112th Cong., 2d Sess.

**S. 3187**

To am	<b>AMENDMENT NO 2134</b>	to
re	By <i>Blumenthal</i>	on
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GPO: 2010 63-070 (mac)

AMENDMENT intended to be proposed by Mr. BLUMENTHAL

Viz:

1 At the end of title X, insert the following:

2 **SEC. 10\_\_ . MARKET MANIPULATION WITH RESPECT TO**

3 **DRUGS IN SHORTAGE.**

4 (a) DEFINITIONS.—In this section:

- 5 (1) DRUG.—The term “drug” has the meaning
- 6 given such term in section 201(g)(1) of the Federal
- 7 Food, Drug, and Cosmetic Act (21 U.S.C.
- 8 321(g)(1)) and is intended for human use.
- 9 (2) DRUG SHORTAGE.—The term “drug short-
- 10 age” or “shortage”, with respect to a drug defined

1 in section 506C(a) of the Federal Food Drug and  
2 Cosmetic Act (21 U.S.C. 356c(a)), means a period  
3 of time when the demand or projected demand for  
4 the drug within the United States exceeds the supply  
5 of the drug (as defined in section 506(c) of the Fed-  
6 eral Food Drug and Cosmetic Act (21 U.S.C.  
7 356(c)).

8 (b) PROHIBITION ON MARKET MANIPULATION.—It  
9 shall be unlawful for any person to directly or indirectly  
10 use any manipulative or deceptive device or contrivance,  
11 in connection with the purchase or sale of a drug in short-  
12 age, in contravention of rules or regulations the Federal  
13 Trade Commission may prescribe as necessary or appro-  
14 priate in the public interest or for the protection of United  
15 States citizens.

16 (c) PROHIBITION ON FALSE INFORMATION.—It shall  
17 be unlawful for any person to report or distribute informa-  
18 tion related to the purchase or sale of a prescription drug  
19 in shortage if the person knew the information to be false  
20 or misleading, in order to support activities described in  
21 subsection (b).

22 (d) ENFORCEMENT BY FEDERAL TRADE COMMIS-  
23 SION.—

24 (1) UNFAIR OR DECEPTIVE ACTS OR PRAC-  
25 TICES.—A violation of subsection (b) shall be treated

1 as an unfair and deceptive act or practice in viola-  
2 tion of a regulation under section 18(a)(1)(B) of the  
3 Federal Trade Commission Act (15 U.S.C.  
4 57a(a)(1)(B)) regarding unfair or deceptive acts or  
5 practices.

6 (2) POWERS OF COMMISSION.—

7 (A) IN GENERAL.—The Federal Trade  
8 Commission shall enforce this section in the  
9 same manner, by the same means, and with the  
10 same jurisdiction, powers, and duties as though  
11 all applicable terms and provisions of the Fed-  
12 eral Trade Commission Act (15 U.S.C. 41 et  
13 seq.) were incorporated into and made a part of  
14 this section.

15 (B) PRIVILEGES AND IMMUNITIES.—Any  
16 person who violates this section shall be subject  
17 to the penalties and entitled to the privileges  
18 and immunities provided in the Federal Trade  
19 Commission Act (15 U.S.C. 41 et seq.).

20 (e) ENFORCEMENT BY STATES.—

21 (1) IN GENERAL.—In any case in which the at-  
22 torney general of a State has reason to believe that  
23 an interest of the residents of the State has been or  
24 is threatened or adversely affected by the engage-  
25 ment of any person in an act that violates subsection

1 (b), the attorney general of the State may, as parens  
2 patriae, bring a civil action on behalf of the resi-  
3 dents of the State in an appropriate district court of  
4 the United States—

5 (A) to enjoin further violation of such sub-  
6 section by such person;

7 (B) to compel compliance with such sub-  
8 section;

9 (C) to obtain damages, restitution, or other  
10 compensation on behalf of such residents;

11 (D) to obtain such other relief as the court  
12 considers appropriate; or

13 (E) to obtain civil penalties in the amount  
14 determined under paragraph (2).

15 (2) CIVIL PENALTIES.—

16 (A) IN GENERAL.—In addition to any pen-  
17 alty applicable under the Federal Trade Com-  
18 mission Act (15 U.S.C. 41 et seq.), any person  
19 that violates subsection (b) or (c) shall be sub-  
20 ject to a civil penalty of not more than  
21 \$1,000,000.

22 (B) METHOD.—The civil penalty provided  
23 under subparagraph (A) shall be obtained in  
24 the same manner as civil penalties imposed

1 under section 5 of the Federal Trade Commis-  
2 sion Act (15 U.S.C. 45).

3 (C) MULTIPLE OFFENSES; OTHER CONSID-  
4 ERATIONS.—In assessing the civil penalty under  
5 this paragraph—

6 (i) each day of a continuing violation  
7 shall be considered a separate violation;  
8 and

9 (ii) the seriousness of the violation,  
10 and the efforts of the person committing  
11 the violation to remedy the harm caused by  
12 the violation shall be considered.

13 (D) ADJUSTMENT FOR INFLATION.—Be-  
14 ginning on the date on which the Bureau of  
15 Labor Statistics first publishes the Consumer  
16 Price Index after the date that is 1 year after  
17 the date of the enactment of this Act, and an-  
18 nually thereafter, the maximum amount speci-  
19 fied in subparagraph (A) shall be increased by  
20 the percentage increase in the Consumer Price  
21 Index published on that date from the Con-  
22 sumer Price Index published the previous year.

23 (3) RIGHTS OF FEDERAL TRADE COMMIS-  
24 SION.—

1 (A) NOTICE TO FEDERAL TRADE COMMIS-  
2 SION.—

3 (i) IN GENERAL.—Except as provided  
4 in clause (iii), the attorney general of a  
5 State shall notify the Federal Trade Com-  
6 mission in writing that the attorney gen-  
7 eral intends to bring a civil action under  
8 paragraph (1) before initiating the civil ac-  
9 tion.

10 (ii) CONTENTS.—The notification re-  
11 quired by clause (i) with respect to a civil  
12 action shall include a copy of the complaint  
13 to be filed to initiate the civil action.

14 (iii) EXCEPTION.—If it is not feasible  
15 for the attorney general of a State to pro-  
16 vide the notification required by clause (i)  
17 before initiating a civil action under para-  
18 graph (1), the attorney general shall notify  
19 the Federal Trade Commission imme-  
20 diately upon instituting the civil action.

21 (B) INTERVENTION BY FEDERAL TRADE  
22 COMMISSION.—The Federal Trade Commission  
23 may—

1 (i) intervene in any civil action  
2 brought by the attorney general of a State  
3 under paragraph (1); and

4 (ii) upon intervening—

5 (I) be heard on all matters arising  
6 in the civil action; and

7 (II) file petitions for appeal of a  
8 decision in the civil action.

9 (4) INVESTIGATORY POWERS.—Nothing in this  
10 subsection may be construed to prevent the attorney  
11 general of a State from exercising the powers conferred  
12 on the attorney general by the laws of the  
13 State to conduct investigations, to administer oaths  
14 or affirmations, or to compel the attendance of witnesses  
15 or the production of documentary or other  
16 evidence.

17 (5) PREEMPTIVE ACTION BY FEDERAL TRADE  
18 COMMISSION.—If the Federal Trade Commission institutes  
19 a civil action or an administrative action  
20 with respect to a violation of subsection (b), the attorney  
21 general of a State may not, during the pendency of such  
22 action, bring a civil action under paragraph (1) against  
23 any defendant named in the complaint of the Commission  
24 for the violation with re-

1 spect to which the Commission instituted such ac-  
2 tion.

3 (6) VENUE; SERVICE OF PROCESS.—

4 (A) VENUE.—Any action brought under  
5 paragraph (1) may be brought in—

6 (i) the district court of the United  
7 States that meets applicable requirements  
8 relating to venue under section 1391 of  
9 title 28, United States Code; or

10 (ii) another court of competent juris-  
11 diction.

12 (B) SERVICE OF PROCESS.—In an action  
13 brought under paragraph (1), process may be  
14 served in any district in which the defendant—

15 (i) is an inhabitant; or

16 (ii) may be found.

17 (7) ACTIONS BY OTHER STATE OFFICIALS.—

18 (A) IN GENERAL.—In addition to civil ac-  
19 tions brought by attorneys general under para-  
20 graph (1), any other officer of a State who is  
21 authorized by the State to do so may bring a  
22 civil action under paragraph (1), subject to the  
23 same requirements and limitations that apply  
24 under this subsection to civil actions brought by  
25 attorneys general.

1           (B) SAVINGS PROVISION.—Nothing in this  
2 subsection may be construed to prohibit an au-  
3 thorized official of a State from initiating or  
4 continuing any proceeding in a court of the  
5 State for a violation of any civil or criminal law  
6 of the State.

7           (f) REPORTING OF MARKET MANIPULATION WITH  
8 RESPECT TO DRUGS IN SHORTAGE, REFERRALS, AND  
9 EDUCATION AND OUTREACH.—

10           (1) LOGGING AND ACKNOWLEDGING COM-  
11 PLAINTS OF MARKET MANIPULATION.—Not later  
12 than 1 year after the date of the enactment of this  
13 Act, the Federal Trade Commission shall establish a  
14 process by which the Commission shall log and ac-  
15 knowledge the receipt by the Commission of each  
16 complaint submitted to the Commission by a person  
17 in which the person—

18           (A) complains of a violation of subsection  
19 (b) about which the person certifies a reason-  
20 able belief or knowledge of such violation; or

21           (B) claims to be a victim of a violation of  
22 such section.

23           (2) REFERRALS.—To the degree practicable,  
24 the Commission shall refer each person from whom

1 the Commission receives a complaint under para-  
2 graph (1) to an appropriate entity for—

3 (A) in the case of a victim of a violation  
4 of subsection (b), assistance in mitigating any  
5 damages caused by such violation; or

6 (B) enforcement of such subsection.

7 (3) PROGRAM OF EDUCATION AND OUT-  
8 REACH.—The Commission shall carry out a program  
9 of education and outreach whereby the Commission  
10 informs consumers of the following:

11 (A) The prohibition set forth in subsection  
12 (b).

13 (B) Commons ways in which such sub-  
14 section is violated and how consumers can pro-  
15 tect themselves from violations of such sub-  
16 section.

17 (C) The process established under para-  
18 graph (1).

19 (g) AUTHORIZATION OF APPROPRIATIONS.—There  
20 are authorized to be appropriated such sums as may be  
21 necessary to carry out this section.