

118TH CONGRESS  
1ST SESSION

**S.** \_\_\_\_\_

To amend the Federal Food, Drug, and Cosmetic Act to establish a time-limited provisional approval pathway, subject to specific obligations, for certain drugs and biological products, and for other purposes.

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IN THE SENATE OF THE UNITED STATES

Mr. BRAUN (for himself, Mrs. GILLIBRAND, Mr. WICKER, Mr. CRAMER, and Ms. MURKOWSKI) introduced the following bill; which was read twice and referred to the Committee on \_\_\_\_\_

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**A BILL**

To amend the Federal Food, Drug, and Cosmetic Act to establish a time-limited provisional approval pathway, subject to specific obligations, for certain drugs and biological products, and for other purposes.

1       *Be it enacted by the Senate and House of Representa-*  
2       *tives of the United States of America in Congress assembled,*

3       **SECTION 1. SHORT TITLE.**

4       This Act may be cited as the “Promising Pathway  
5       Act”.

1 **SEC. 2. PROVISIONAL APPROVAL OF NEW HUMAN DRUGS.**

2 (a) IN GENERAL.—Subchapter A of chapter V of the  
3 Federal Food, Drug, and Cosmetic Act (21 U.S.C. 351  
4 et seq.) is amended by adding at the end of the following:

5 **“SEC. 524C. PROVISIONAL APPROVAL OF NEW HUMAN**  
6 **DRUGS.**

7 “(a) PRIORITY REVIEW AND EVALUATION OF APPLI-  
8 CATIONS.—

9 “(1) IN GENERAL.—The Secretary shall estab-  
10 lish a priority review system to evaluate applications  
11 submitted under this section for provisional approval  
12 within 90 days of receipt of a completed application.

13 “(2) OTHER DESIGNATIONS.—If a drug sub-  
14 mitted for review under this section is eligible for a  
15 special designation by the Secretary under this Act,  
16 including as a drug for a rare disease or condition  
17 under section 526, all benefits of such other designa-  
18 tion shall be available for use under provisional ap-  
19 proval, including any tax credits and waiving of fees  
20 under chapter VII.

21 “(b) ELIGIBILITY.—A drug may be eligible for provi-  
22 sional approval under this section if the Secretary deter-  
23 mines that the drug is intended for the treatment, preven-  
24 tion, or medical diagnosis of a serious or life-threatening  
25 disease or condition for which there is a reasonable likeli-  
26 hood that premature death will occur without early med-

1 ical intervention for an individual contracting or being di-  
2 agnosed with such disease or condition.

3 “(c) STANDARD OF REVIEW FOR PROVISIONAL AP-  
4 PROVAL.—

5 “(1) REQUIREMENTS.—An application for pro-  
6 visional approval under this section may be approved  
7 only if the Secretary determines that—

8 “(A) there is substantial evidence of safety  
9 for the drug, such that there is evidence con-  
10 sisting of adequate and well-controlled inves-  
11 tigations, including clinical investigations, by  
12 experts qualified by scientific training and expe-  
13 rience to evaluate the safety of the drug in-  
14 volved, on the basis of which it could fairly and  
15 responsibly be concluded that the drug will have  
16 the effect it purports or is represented to have  
17 under the conditions of use prescribed, rec-  
18 ommended, or suggested in the labeling or pro-  
19 posed labeling; and

20 “(B) there is relevant early evidence based  
21 on adequate and well-controlled investigations,  
22 including early-stage clinical investigations, to  
23 establish that—

24 “(i) the drug provides a positive  
25 therapeutic outcome; and

1                   “(ii) the outcome of the drug is con-  
2                   sistent with or greater than currently mar-  
3                   keted on-label therapies, with equal or  
4                   fewer side effects, if there are currently  
5                   marketed on-label therapies.

6                   “(2) PROTOCOLS.—The Secretary shall promul-  
7                   gate rules that establish the appropriate protocols to  
8                   enable rolling, real-time, mid-trial submission while  
9                   preserving the integrity of the ongoing trial and  
10                  without penalizing the sponsor for seeking provi-  
11                  sional approval under this section.

12                  “(3) REAL WORLD EVIDENCE.—The Secretary  
13                  shall allow the use of real world evidence (as defined  
14                  in section 505F(b)), including real world data used  
15                  to generate real world evidence, to support an appli-  
16                  cation for provisional approval under this section,  
17                  and to fulfill the follow-up requirements and support  
18                  applications for approval under section 505 or sec-  
19                  tion 351 of the Public Health Service Act, as appli-  
20                  cable.

21                  “(4) USE OF SCIENTIFICALLY SUBSTANTIATED  
22                  SURROGATES.—

23                  “(A) IN GENERAL.—The sponsor of an ap-  
24                  plication for provisional approval under this sec-

1           tion may use scientifically substantiated surro-  
2           gates to support such application.

3           “(B) DEFINITION.—In subparagraph (A),  
4           the term ‘scientifically substantiated surrogates’  
5           means surrogate endpoints to predict clinical  
6           benefit other than such endpoints previously  
7           validated by the Secretary, based on—

8                   “(i) epidemiologic, therapeutic, patho-  
9                   physiologic, or other evidence; or

10                   “(ii) an effect on a clinical endpoint  
11                   other than survival or irreversible mor-  
12                   bidity of interest.

13           “(d) TRANSPARENCY AND PATIENT MONITORING  
14           REQUIREMENTS.—

15                   “(1) REGISTRIES.—

16                           “(A) IN GENERAL.—The sponsor of a drug  
17                           provisionally approved under this section shall  
18                           require that all patients who use such drug par-  
19                           ticipate in an observational registry and consent  
20                           to the sponsor’s collection, and submission to  
21                           the registry, of data related to the patient’s use  
22                           of such drug until such drug receives approval  
23                           under section 505 or section 351 of the Public  
24                           Health Service Act, or the provisional approval  
25                           is rescinded.

1           “(B) REQUIREMENTS FOR REGISTRIES.—  
2           An observational registry described in subpara-  
3           graph (A) may be run by a third party, such as  
4           a government, for profit, or nonprofit organiza-  
5           tion, and shall track all patients who use the  
6           provisionally approved drug.

7           “(C) ACCESSIBILITY.—An observational  
8           registry described in subparagraph (A) shall be  
9           easily accessible for—

10                   “(i) all patients who are participating  
11                   in any registry related to a provisionally  
12                   approved drug that allows for easy, unre-  
13                   stricted (or transparent) access for such  
14                   patients to their patient data and related  
15                   information regarding their usage of the  
16                   provisionally approved drug; and

17                           “(ii) approved researchers and med-  
18                           ical professionals who may access data  
19                           maintained in the registry, which access  
20                           shall be for public health research and only  
21                           in a de-identified, aggregated manner.

22           “(2) FUNDING.—An observational registry  
23           under this subsection shall be maintained, as appli-  
24           cable—

1           “(A) by the sponsor of the drug provision-  
2           ally approved under this section that is the sub-  
3           ject of the registry; or

4           “(B) by a third party, such as a govern-  
5           ment, for profit, or nonprofit organization.

6           “(3) SPONSOR REQUIREMENTS.—

7           “(A) IN GENERAL.—For any drug applica-  
8           tion provisionally approved under this section,  
9           the Secretary shall notify the sponsor of the  
10          exact data such sponsor is required to submit  
11          to an observational registry.

12          “(B) ANNUAL REVIEW OF THE REGISTRY;  
13          PENALTIES.—The Secretary shall conduct an  
14          annual review of observational registries estab-  
15          lished under this subsection. If, at such an an-  
16          nual review, fewer than 90 percent of patients  
17          are participating in an observational registry  
18          with respect to a drug approved under this sec-  
19          tion, the Secretary shall issue to the sponsor of  
20          such drug a civil monetary penalty of not more  
21          than \$100,000. If a violation of this section is  
22          not corrected within the 30-day period following  
23          notification, the sponsor shall, in addition to  
24          any penalty under this subparagraph be subject  
25          to a civil monetary penalty of not more than

1           \$10,000 for each day of the violation after such  
2           period until the violation is corrected. If appli-  
3           cation patient participation in an observational  
4           registry is not at or above 90 percent within 6  
5           months of issuance of such penalty, the provi-  
6           sional approval shall be withdrawn.

7           “(4) ANNUAL REPORT TO CONGRESS.—The  
8           Secretary shall submit an annual report to Congress  
9           on all drugs granted provisional approval under this  
10          section. Such report shall include—

11                 “(A) the number of patients treated with  
12                 each such drug, and the number of patients  
13                 tracked in an observational registry with re-  
14                 spect to each such drug;

15                 “(B) a discussion of the minimum amount  
16                 of data required in the registries, including pa-  
17                 tient treatments and uses, length of use, side  
18                 effects encountered, relevant biomarkers or sci-  
19                 entifically substantiated surrogates, scan re-  
20                 sults, cause of death and how long the patient  
21                 lived, and adverse drug effects;

22                 “(C) a list of all such drugs for which an  
23                 application for approval under section 505 of  
24                 this Act or section 351 of the Public Health  
25                 Service Act, or an application for an extension



1 of provisional approval under this section, has  
2 been submitted; and

3 “(D) a list of all applications denied provi-  
4 sional approval under this section, together with  
5 an explanation for the decisions to deny each  
6 such application.

7 “(e) WITHDRAWAL OF PROVISIONAL APPROVAL.—

8 “(1) IN GENERAL.—The Secretary shall with-  
9 draw provisional approval under this section if there  
10 are a significant numbers of patients who experience  
11 serious adverse effects, compared to the other cur-  
12 rently marketed on-label therapies that are available  
13 for the applicable disease or condition.

14 “(2) EFFECT OF WITHDRAWAL.—If a provi-  
15 sional approval is withdrawn under this subsection,  
16 the sponsor may not make the drug available to any  
17 new patients, but may be allowed to continue to  
18 make such drug available to patients who started  
19 taking the drug prior to the date of withdrawal, for  
20 as long a period as dictated by patient need, as de-  
21 termined by the Secretary.

22 “(f) TRANSPARENCY.—Any scientific, medical, aca-  
23 demic, or health care journal publishing an article explain-  
24 ing, releasing, conveying, or announcing research findings  
25 which were funded by the Department of Health and

1 Human Services shall be prohibited from publishing such  
2 research unless—

3 “(1) such article conveying research findings is  
4 made publicly available on the journal’s internet  
5 website without a paywall or charge not later than  
6 3 months after the date on which such article was  
7 first provided to subscribers of such journal (or first  
8 made available for purchase); and

9 “(2) the article’s author or researcher or au-  
10 thor’s institution (or, in the case of multiple authors,  
11 researchers, or institutions, all such authors, re-  
12 searchers, or institutions) received less than 30 per-  
13 cent of funding for such research from the Depart-  
14 ment of Health and Human Services throughout the  
15 period of time the research was conducted.

16 “(g) INFORMED CONSENT.—Prior to receiving a drug  
17 provisionally approved under this section, the sponsor of  
18 the drug shall receive from each patient, or the patient’s  
19 representative, informed consent, through a signed in-  
20 formed consent form, acknowledging that such patient un-  
21 derstands that the drug did not undergo the usual process  
22 for approval of a drug by the Food and Drug Administra-  
23 tion, and that such patient is willing to accept the risks  
24 involved in taking such drug.

25 “(h) POSTMARKET CONTROLS AND LABELING.—

1           “(1) FDA ANNUAL REVIEW OF REGISTRY  
2 DATA.—The Secretary shall annually review the data  
3 made available through the observational registries  
4 under subsection (d) and make a determination re-  
5 garding whether the side effect profile of any drug  
6 provisionally approved under this section does not  
7 support the benefit provided, or the data shows the  
8 benefit is less than the benefits offered through  
9 other, fully approved drugs.

10           “(2) LABELING.—The sponsor of the provision-  
11 ally approved drug shall ensure that all labeling and  
12 promotional materials for the drug bear the state-  
13 ment ‘provisionally approved by the FDA pending a  
14 full demonstration of effectiveness under application  
15 number \_\_\_\_\_’ (specifying the application  
16 number assigned by the Secretary in place of the  
17 blank). All promotional, educational and marketing  
18 materials for provisionally approved products shall  
19 be reviewed and approved by the Secretary before  
20 such materials are distributed.

21           “(3) RESCISSION OF PROVISIONAL AP-  
22 PROVAL.—If the Secretary determines that the side  
23 effect profile of any drug included in such observa-  
24 tional registries does not support the benefit pro-  
25 vided by such drug, or that the data shows that the

1 benefit is less than the benefits offered through  
2 other, drugs approved under section 505 of this Act  
3 or section 351 of the Public Health Service Act, the  
4 Secretary shall rescind such provisional approval.

5 “(i) DURATION OF PROVISIONAL APPROVAL; RE-  
6 QUIREMENT TO BRING DRUG TO MARKET.—

7 “(1) DURATION; RENEWALS.—The provisional  
8 approval for a drug under this section is effective for  
9 a 2-year period. The sponsor may request renewal  
10 for provisional approval status for up to 3 subse-  
11 quent 2-year periods. Provisional approval status  
12 with respect to a drug shall not exceed a total of 8  
13 years from the initial date the sponsor was awarded  
14 provisional approval status.

15 “(2) MARKETING REQUIREMENT.—If any drug  
16 that receives provisional approval under this section  
17 is not brought to market within 180 days of the pro-  
18 visional approval, such provisional approval shall be  
19 rescinded.

20 “(j) LIMITATION ON LIABILITY.—With respect to any  
21 claim under State law alleging that a drug sold or other-  
22 wise made available pursuant to a grant of provisional ap-  
23 proval under this section is unsafe or ineffective, no liabil-  
24 ity in a cause of action shall lie against a sponsor or manu-  
25 facturer, unless the relevant conduct constitutes reckless

1 or willful misconduct, gross negligence, or an intentional  
2 tort under any applicable State law.

3 “(k) RIGHT TO PETITION AN ADVISORY COMMITTEE  
4 FOR APPROVAL.—

5 “(1) IN GENERAL.—The sponsor of a drug  
6 granted provisional approval pursuant to this section  
7 may request, at any time after provisional approval  
8 is granted under this section, a meeting with the ap-  
9 propriate advisory committee (or advisory commit-  
10 tees) to present safety and efficacy data for the pur-  
11 poses of receiving a recommendation from such an  
12 advisory committee for approval under section 505  
13 of this Act or section 351 of the Public Health Serv-  
14 ice Act of the provisionally approved drug. Such a  
15 requested meeting shall be granted not later than 90  
16 days after a request is made. Nothing in this para-  
17 graph shall be construed to alter the processes and  
18 timeframes for recommendation for approval by such  
19 an advisory committee of the provisionally approved  
20 drug or for approval of the provisionally approved  
21 drug under section 505 of this Act or section 351  
22 of the Public Health Service Act.

23 “(2) WAIVER OF ADEQUATE AND WELL-CON-  
24 TROLLED STUDY REQUIREMENTS.—

1           “(A) IN GENERAL.—In considering wheth-  
2           er to recommend a drug that was provisionally  
3           approved under this section for approval under  
4           section 505, the Director of the Center for  
5           Drug Evaluation and Research shall consider  
6           the option to waive requirements for adequate  
7           and well-controlled studies in accordance with  
8           the process described in section 314.126(c) of  
9           title 21, Code of Federal Regulations (or suc-  
10          cessor regulations).

11          “(B) BIOLOGICAL PRODUCTS.—In consid-  
12          ering whether to recommend a biological prod-  
13          uct that was provisionally approved under this  
14          section for licensure under section 351 of the  
15          Public Health Service Act, the Director of the  
16          Center for Biologics Evaluation and Research  
17          may, and shall consider the option to, waive re-  
18          quirements, as applicable, for adequate and  
19          well-controlled studies for such biological prod-  
20          uct in accordance with the process described in  
21          section 314.126(c) of title 21, Code of Federal  
22          Regulations (or successor regulations).”.

23          (b) CONFORMING AMENDMENT.—Section 505(a) of  
24          the Federal Food, Drug, and Cosmetic Act (21 U.S.C.  
25          355(a)) is amended by inserting “, or there is in effect

1 a provisional approval under section 524C with respect to  
2 such drug” before the period.

3 (c) REIMBURSEMENT.—

4 (1) PRIVATE HEALTH INSURERS.—Section  
5 2719A of the Public Health Service Act (42 U.S.C.  
6 300gg–19a) is amended by adding at the end the  
7 following:

8 “(f) TREATMENT OF CERTAIN DRUGS.—A group  
9 health plan or health insurance issuer of group or indi-  
10 vidual health insurance coverage shall not deny coverage  
11 of any drug provisionally approved under section 524C of  
12 the Federal Food, Drug, and Cosmetic Act on the basis  
13 of such drug being experimental. In determining coverage  
14 under the applicable plan or coverage, a group health plan  
15 or health insurance issuer shall treat a drug provisionally  
16 approved under such section in the same manner as such  
17 plan or coverage would treat a drug approved under sec-  
18 tion 505 of the Federal Food, Drug, and Cosmetic Act  
19 or section 351 of this Act. Nothing in this subsection shall  
20 be construed to require a group health plan or health in-  
21 surance issuer to cover any specific drug provisionally ap-  
22 proved under such section 524C.”.

23 (2) FEDERAL HEALTH CARE PROGRAMS.—The  
24 requirement under subsection (f) of section 2719A  
25 of the Public Health Service Act (as added by para-

1 graph (1)) shall apply with respect to coverage de-  
2 terminations under a Federal health care program  
3 (as defined in section 1128B(f) of the Social Secu-  
4 rity Act (42 U.S.C. 1320a-7b(f))) in the same man-  
5 ner such requirement applies under such subsection  
6 (f).

7 (3) CONFORMING AMENDMENT.—Section  
8 1927(k)(2)(A)(i) of the Social Security Act (42  
9 U.S.C. 1396r-8(k)(2)(A)(i)) is amended—

10 (A) by striking “or which” and inserting “,  
11 which”; and

12 (B) by inserting “, or which is provision-  
13 ally approved under section 524C of such Act”  
14 before the semicolon.