

# State of South Dakota

SEVENTY-THIRD SESSION  
LEGISLATIVE ASSEMBLY, 1998

454B0133

## HOUSE BILL NO. 1304

Introduced by: Representatives Chicoine, Collier, Moore, and Weber and Senators Kloucek and Hutmacher

1 FOR AN ACT ENTITLED, An Act to prohibit discriminatory pricing of drugs by manufacturers  
2 and to establish a penalty.

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

4 Section 1. Terms used in this Act mean:

- 5 (1) "Charitable health care provider," any health care provider exempt from federal  
6 taxation as provided by section 501(c)(3) of the Internal Revenue Code and which  
7 provides health care services to the public, a substantial portion of which are provided  
8 free or at a reduced fee based on the patient's ability to pay;
- 9 (2) "Drug," any substance subject to section 503(b) of the Federal Food, Drug, and  
10 Cosmetic Act as in effect on January 1, 1998;
- 11 (3) "For own use," that definition given to this term in the Federal Non-Profit Institutions  
12 Act, 15 U.S.C. § 13c and as interpreted by United States courts prior to January 1,  
13 1998. In construing this definition, the courts of this state shall use interpretations  
14 given this term by federal courts. However, take-home medication for inpatients,  
15 outpatients, and emergency room patients not exceeding fourteen days supply or units

1 of issue is deemed to be a reasonable and limited time, unless medical necessity  
2 indicates otherwise;

3 (4) "Manufacturer," any person, other than a wholesaler, who trades in drugs for resale  
4 to purchasers or sale to consumers either directly or through a wholesaler;

5 (5) "Purchaser," any person who sells or dispenses drugs to consumers;

6 (6) "Wholesaler," any person, other than a manufacturer, who sells drugs to purchasers.

7 Section 2. No manufacturer may sell drugs to any wholesaler or purchaser in this state on less  
8 favorable terms and conditions than those contemporaneously accorded to the manufacturer's  
9 most favored wholesaler, purchaser, or consumer in the state, including any transaction in which  
10 a manufacturer sells to a purchaser through a contractual arrangement implemented by one or  
11 more wholesalers. Terms and conditions include:

12 (1) Purchase prices for similar or blended volume purchases;

13 (2) Rebates;

14 (3) Free merchandise;

15 (4) Payment terms; and

16 (5) Related trade concessions.

17 Section 3. No manufacturer is prohibited from offering or providing discounts to wholesalers  
18 or purchasers related to volume purchases if the discount is made available to all wholesalers or  
19 purchasers on proportionally equal terms. Discounts are authorized if:

20 (1) Justified by the economies or efficiencies resulting from volume purchases;

21 (2) The discount represents reasonable value to the manufacturer for actual marketing  
22 functions;

23 (3) The discount meets in good faith the equally low prices or terms of a competitor;

24 (4) Provided for prompt payment;

25 (5) Provided for prompt delivery;

1       (6)    Provided for opportunities available to all purchasers or wholesalers on equal terms  
2            through market share movement agreements; or

3       (7)    Provided for placement of drugs on a formulary.

4       Section 4. No manufacturer may provide discounts to any purchaser or wholesaler based on  
5       the class of trade to which the purchaser or wholesaler belongs.

6       Section 5. This Act applies to any purchase of drugs delivered to a purchaser or purchaser's  
7       facility located in this state. Ownership of a wholesaler by a manufacturer does not circumvent  
8       any provision of this Act.

9       Section 6. No agency of government or political subdivision is a wholesaler or purchaser  
10       under this Act. No manufacturer of drugs is prohibited from according any governmental agency  
11       or political subdivision pricing or related arrangements which are not made available to other  
12       purchasers or wholesalers in this state. This Act does not apply to drugs purchased by a hospital  
13       for own use. This Act does not apply to discounts required by federal law or rebates authorized  
14       by federal law. This Act does not apply to drugs purchased by charitable health care providers  
15       other than hospitals, except those which commercially issue, offer, or administer a health  
16       insurance policy or an employee benefit plan.

17       Section 7. Any purchaser or wholesaler damaged by violation of any provision of this Act  
18       may bring an action against a manufacturer to recover treble damages sustained because of the  
19       violation and for court costs and reasonable attorney's fees. Damages of less than one thousand  
20       dollars may not be recovered by process of law. Proof of price discrimination is prima facie  
21       evidence of damage to a disfavored purchaser.

22       Section 8. No agency of the state may purchase drugs from a manufacturer that violates the  
23       provisions of this Act.

24       Section 9. A manufacturer who violates the Act or an order or injunction to cease and desist  
25       from such violations shall pay a civil penalty of not less than one thousand dollars or more than

1 fifty thousand dollars for each violation.