LAW OFFICES
HYMAN, PHELPS & MCNAMARA, P. C.
700 THIRTEENTH STREET, N. W.
SUITE 1200
WASHINGTON, D. C. 20005

JAMES R. PHELPS
PAUL M. HYMAN
ROBERT A. DORMER
ROBERT T. ANGAROLA
STEPHEN H. McNAMARA
ROGER C. THIES
THOMAS SCARLETT
JEFFREY N. GIBBS
BRIAN J. DONATO
FRANK J. SASINOWSKI
DIANE B. McCOLL
A. WES SIEGNER, JR.
SAMIA N. RODRIGUEZ
MARY BETH NERAAS
KATHLEEN H. TELFER
BRIAN L. PENDLETON*
SUZAN ONEL
* NOT ADMITTED IN D.C.

TELEPHONE
(202) 737-8600
FACSIMILE
(202) 737-9329

C. JOSEPH STETTLER
OF COUNSEL

HYMAN, PHELPS & McNAMARA
2803 MAIN STREET
TENTH FLOOR
IRVINE, CALIFORNIA 92714
TELEPHONE (714) 553-7400
FACSIMILE (714) 553-7433

DIRECT DIAL (202) 737-

PRESCRIPTION DRUG USER FEE ACT OF 1992

I. Summary

The House of Representatives and the Senate approved the Prescription Drug User Fee Act of 1992 ("the Act"), Title I of H.R. 6181, on October 5 and October 7, 1992, respectively. President Bush is expected to sign the bill in the near future.[1/] The Act requires pharmaceutical companies to pay a user fee for each human drug application submitted as well as an annual establishment fee and an annual product fee.

The Food and Drug Administration ("FDA") will assess an applicant in Fiscal Year 1993 (FY '93) a marketing application fee of $100,000 (which will rise to $233,000 in FY '97). Each foreign or domestic prescription drug establishment would be assessed an annual fee starting at $60,000 in FY '93, rising to $138,000 in FY '97. Annual product fees are set at $6,000 per product listing in FY '93; this will increase to $14,000 in FY '97.

The FDA will use the revenues generated exclusively to improve and expedite the drug-approval process to make drugs more quickly available in the United States. FDA may waive or reduce any or all of the fees in particular situations (for example, for small businesses).

1/ The references to "the Act" and to the bill's provisions as components of the Federal Food, Drug and Cosmetic Act ("FDC Act") are based on the presumption of enactment. A copy of the Act as printed in the Congressional Record is enclosed.

II. Overview

The Act allows the FDA, pursuant to authority granted to the Secretary of Health and Human Services and delegated to FDA, to impose upon pharmaceutical companies a variety of new fees to review new human prescription drugs. FDA expects to raise an estimated $300-$330 million over the next five years as a result of the Act. The fees will, most likely, not become due before February 1993.[2/] The Act expires September 30, 1997.

The agency will hire 600 new FDA personnel to improve and speed up the review process. FDA Commissioner David Kessler expects that this increase in personnel should reduce the approval time for a New Drug Application ("NDA") from 20 months to 12 months for most drugs and from 11 months to six months for "breakthrough" drugs such as those used to treat AIDS and cancer patients. Three hundred additional drug reviewers are to be hired by the first quarter of FY '95 (beginning October 1, 1994) and the rest by the end of FY '97. According to a Tufts University study, development costs currently average $275 million per drug. The Act's proponents believe that it should cut the review process period in half by 1997 and reduce development costs by as much as $65 million per drug. FDA will likely try to persuade the affected industries to support similar legislation to include user fees for medical devices, generic drugs and OTC drugs.[3/]

Currently, the Act does not include generic drugs (e.g., no user fee is required for an abbreviated new drug application ("ANDA")). The Act's definition of the term "human drug

---

2/ Before the user fee provisions will go into effect, the Congress will need to pass a supplemental appropriation for FDA for this fiscal year. Since the 102nd Congress has adjourned (and likely will not come back into session), this supplemental appropriation will likely be a task for the next Congress. FDA has an internal target date of April 1, 1993 for making this "operational," and for beginning to collect fees retroactively. FDA also currently plans to issue guidance to industry on user fees.

3/ The Act captures only a small fraction of OTC drugs (i.e., only Rx-to-OTC switch candidates reviewed in an NDA or supplement). These applicants will only be assessed an application fee but no establishment or product fees. The Act also provides for a study on whether to impose animal drug user fees. FDA shall present the results of this study to the House Energy and Commerce Committee and the Senate Labor and Human Resources Committee no later than January 4, 1994. H.R. 6181 102nd Cong., 2d Sess. § 108 (1992).

application" does not include any ANDAs under Section 505(j) or certain applications under Section 505(b)(2). FDC Act § 735(1). The Act exempts payment of establishment or product fees once a drug product is subject to generic competition. (See fuller discussion below under "Exceptions to the Fee Requirement.")

Consistent with the objective to exclude generic drugs from coverage, the Act does not affect large volume parenterals ("LVPs") approved before September 1, 1992, FDC Act § 735(3)(B), because the "prior approval process and regulatory status of previously approved LVP's is similar to generic drugs . . . [and b]ecause generic drugs are excluded from user fees." 138 Cong. Rec. S17236 (daily ed. Oct 7, 1992) (Statement of Sen. Kennedy).

III. Impact on Pharmaceutical Companies

A. Application Fee

Pharmaceutical companies will pay user fees according to an escalating schedule effective September 1, 1992. (See enclosed draft FDA Flow Diagram of Application User Fees, dated October 8, 1992.[4/]) The fee for a drug application for a product requiring clinical data for safety or effectiveness will be $100,000 in FY '93 (October 1, 1992 to September 30, 1993), $150,000 in FY '94, $208,000 in FY '95, $217,000 in FY '96 and $223,000 in FY '97. FDC Act § 736(b)(1). The application fee is cut in half for a human drug application not requiring clinical data for safety or effectiveness or for a supplement that does require such clinical data. FDC Act § 736(a)(1)(A)(i) and (ii); see also FDC Act § 736(b)(1). The Act's drug application fee is expected to generate total revenue of $12 million in FY '93, $18 million in FY '94, $25 million in FY '95, $26 million in FY '96, and $28 million in FY '97.

Half of the fee is due on the submission of the application or supplement. FDC Act § 736(a)(1)(B)(i). FDA will return 50 percent of this "filing" fee if the agency does not accept the filing of the application. FDC Act § 736(a)(1)(D). (For example, a "full" NDA submitted on November 1, 1992 would require a payment of $50,000 with the NDA; FDA would return $25,000 if the agency refused to file the NDA.) An applicant who fails to pay the required fee will have the application deemed incomplete, FDC Act § 736(e), with an attendant delay in the review process. In certain cases, FDA may waive or reduce the fee. (See discussion below of fee waivers.)

The remaining payment is due within 30 days from the date that (1) FDA sends the applicant a letter "designated" by

---

4/ Although this is a draft, it represents the FDA's current plans on implementing this type of user fee.

the agency as an "action letter" or (2) the applicant withdraws the application. FDC Act § 736(a)(1)(B)(ii). The Secretary may waive the fee entirely or in part if the agency did not spend substantial time or resources on the application before the applicant withdraws it. FDC Act § 736(a)(1)(B)(ii)(II). If an applicant (or licensee, assignee or successor) resubmits an application or supplement previously not approved or withdrawn, the application fee is waived. FDC Act § 736(a)(1)(C).

B. Drug Establishment Fees

In addition to the application and supplement fees, an annual prescription drug establishment fee is due from each person (including a corporation) that owns a prescription drug establishment where it manufactures a drug that is not subject to generic competition and which has pending, after September 1, 1992, a human drug application or supplement.[5/] FDC Act § 736(a)(2). (See enclosed draft FDA Flow Diagram of Establishment Fee Determination, dated Oct. 8, 1992.) The establishment fee provision was amended during House consideration of the bill to exclude a contract manufacturer from this fee if the contract manufacturer is not listed as the applicant in a marketing application (i.e., NDA or product license application ("PLA")) for a prescription drug product as the term is defined in this Act.

The Congress added the requirement that a person have an application or supplement pending after September 1, 1992 to meet the concerns of the House Ways and Means Committee that, without such a test, this fee may amount to a "tax" rather than a "fee for service." However, note that any type of supplement (even a minor manufacturing process change) would trigger this fee. This explains the difference between the broad definition of

---

5/ A "prescription drug establishment" is defined as foreign or domestic place of business which is --

(A) at one general physical location consisting of one or more buildings all of which are within 5 miles of each other, at which one or more prescription drug products are manufactured in final dosage form, and

(B) under the management of a person that is listed as the applicant in a human drug application for a prescription drug product with respect to at least one such product.

FDC Act § 735(5).

"supplement" in FDC Act § 735(2) and the more narrow use of the term in FDC Act § 736(a)(1)(A)(ii).

A drug company that files an application or supplement between September 1, 1992 and September 30, 1993 would pay a $60,000 fee for each establishment. For FY '94, this fee increases to $88,000, $126,000 for FY '95, $131,000 for FY '96 and $138,000 for FY '97. FDC Act § 736(b)(1). Multiple establishments owned by one company would be assessed the corresponding number of establishment fees.

The Act requires the applicant to pay the fee on or before January 31 of each year. FDC Act § 736(b)(1). The Act's sponsors estimate that the establishment fee revenues in FY '93 will equal the $12 million raised from the drug application fees.

C. Drug Product Fee

The Act imposes an annual prescription drug product fee on any applicant for each prescription drug that is not subject to generic competition and that is listed with the FDA as long as the applicant has pending a human drug application or supplement after September 1, 1992.[6] FDC Act § 736(a)(3). (See enclosed

---

6/ "Listing" in this case refers to those drugs listed under section 510 of the FDC Act.

> Each person who registers with [FDA] under this section shall report to [FDA] once during the month of June of each year and once during the month of December of each year the following information:
>
> > (A) A list of each drug or device introduced by the registrant for commercial distribution which has not been included in any list previously filed by him with [FDA] under this subparagraph or paragraph (1) of this subsection. A list under this subparagraph shall list a drug or device by its established name (as defined in section 502(e)) and by any proprietary name it may have and shall be accompanied by other information required by paragraph (1).

FDC Act § 510(j)(2)(A). In addition,

> [FDA] may also require each registrant under this section to submit a list of each drug which (A) the registrant is manufacturing, preparing, propagating, compounding, or processing for

(continued...)

draft of FDA Flow Diagram of Product Fee Determination, dated Oct. 8, 1992.) The applicant pays the fee at the time of the first listing of the product by the applicant in each calendar year.[7] The fee is payable only once a year, regardless of the number of times the drug is listed during that year. FDC Act § 736(a)(3). Therefore, an applicant would not be required to pay an additional fee each time that the applicant updates that product listing in that same year. Similarly, a single strength product in multiple package sizes would only be assessed a single fee even though each package size would be separately listed.

The fee is $6,000 for each listed drug for this fiscal year, $9,000 for FY '94, $12,500 for FY '95, $13,000 for FY '96 and $14,000 for FY '97. FDC Act § 736(b)(1). It is estimated that the product fees will generate $12 million in FY '93, the same amount raised by the drug application and establishment fees.

D. Exceptions to the Fee Requirement

There are two notable exceptions to the fees otherwise required.

1. Generic Competition

The establishment and product fees do not apply to products facing generic competition. Specifically, an applicant does not have to pay the establishment or product fees if the drug product in question is the "same as" a product approved under an application filed under section 505(b)(2) or 505(j) of the Federal Food, Drug, and Cosmetic Act. See, e.g., FDC Act §§ 736(a)(2)(A) and (3)(B). Also, the Act does not apply to applications filed under sections 505(j), and applies to 505(b)(2) applications only if they are for a new molecular entity or a new indication (e.g., a so-called 505(b)(2) NDA for a new dosage form or route of administration would be exempt). FDC Act §§ 735(1) and 736(a)(1)(A).

6/(...continued)

> commercial distribution, and (B) contains a particular ingredient. [FDA] may not require the submission of such a list unless he has made a finding that the submission of such a list is necessary to carry out the purposes of this Act.

FDC Act § 510(j)(3); 21 C.F.R. § 207.20.

7/ Although the language of section 736(a)(3) is unclear, the listing of a product by a private-label distributor or other entity would apparently not affect the timing of this payment.

It is unclear what standard FDA will use to determine whether a product is the "same as" one previously approved. Knowledgeable FDA officials have indicated to us that the FDA intends to interpret this so that only "pharmaceutical equivalents" are "the same as" another product. This interpretation would force companies to pay fees even when their products are subject to generic competition (e.g., a slightly different strength or dosage form such as the difference between 50 mg and 45 mg strengths or between tablets and capsules). FDA may be persuaded to adopt a different standard in lieu of its initial interpretation. For example, FDA could elect instead to determine that the fees would be inapplicable to any product that is referenced, without a right of reference, in another approved product's application under FDC Act §§ 505(j) or 505(b)(2). However, FDA would "lose revenue" under this interpretation because this would exempt from fees even products that are significantly different (e.g., a novel transdermal form of a previously approved solid, oral dosage form product).

2. Small Businesses

The Act allows small businesses (less than 500 employees) that do not have a prescription drug product in interstate commerce to pay only half the application fee (they must pay the entire amount for supplements). FDC Act § 736(b)(2).[8/] To accommodate start-up biotechnology companies, the Act defers for one year the payment of this reduced application fee. Id.

8/ The "small business exception" applies to:

> Any business which has fewer than 500 employees, including employees of affiliates, and which does not have a prescription drug product introduced or delivered for introduction into interstate commerce. . . . For purposes of this paragraph, one business is an affiliate of another business when, directly or indirectly, one business controls, or has the power to control, the other business or a third party controls, or has the power to control, both businesses.

FDC Act § 736(b)(2).

E. Fee Waiver or Reduction

FDA shall grant fee waivers or reductions where FDA finds that:

1) such a waiver or reduction is necessary to protect the public health;

2) the assessment would present "a significant barrier to innovation because of limited resources available to such person or other circumstances;"

3) the fees imposed would exceed the actual costs incurred by FDA in the review process; or

4) the assessment would be "inequitable because an application for a product containing the same active ingredient filed by another person under section 505(b)(2) could not be assessed fees."

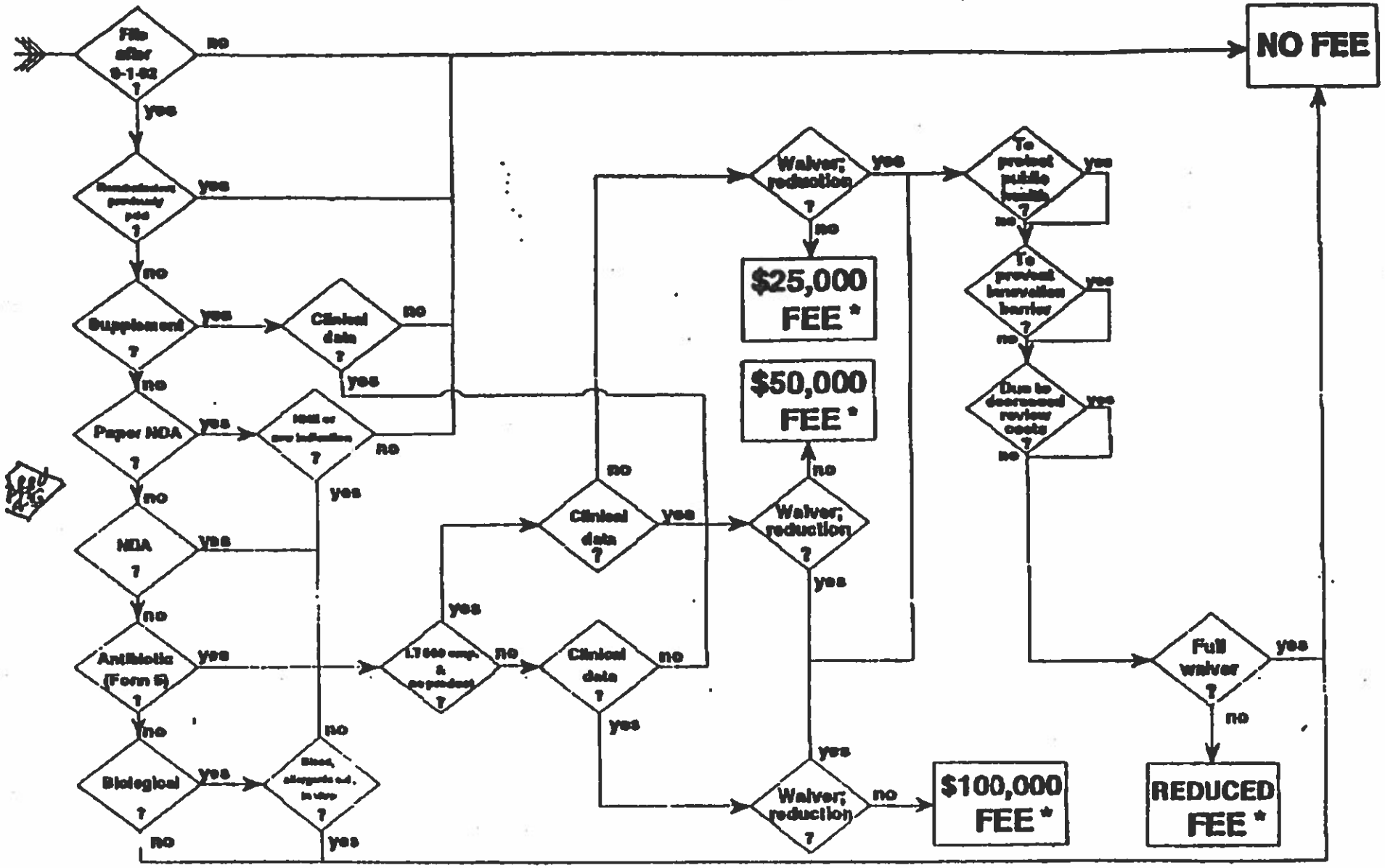
FDC Act § 736(d).

Our firm played a part in clarifying these waivers. For instance, the House Committee Report memorializes FDA's promise to apply both the "public health" and the "significant barrier to innovation" waivers in determining whether any fee should be assessed against an orphan drug. See, e.g., House Comm. on Energy and Commerce, Prescription Drug User Fee Act of 1992, H.R. Rep. No. ___, 102nd Cong., 2d Sess. 12 (1992).

* * * *

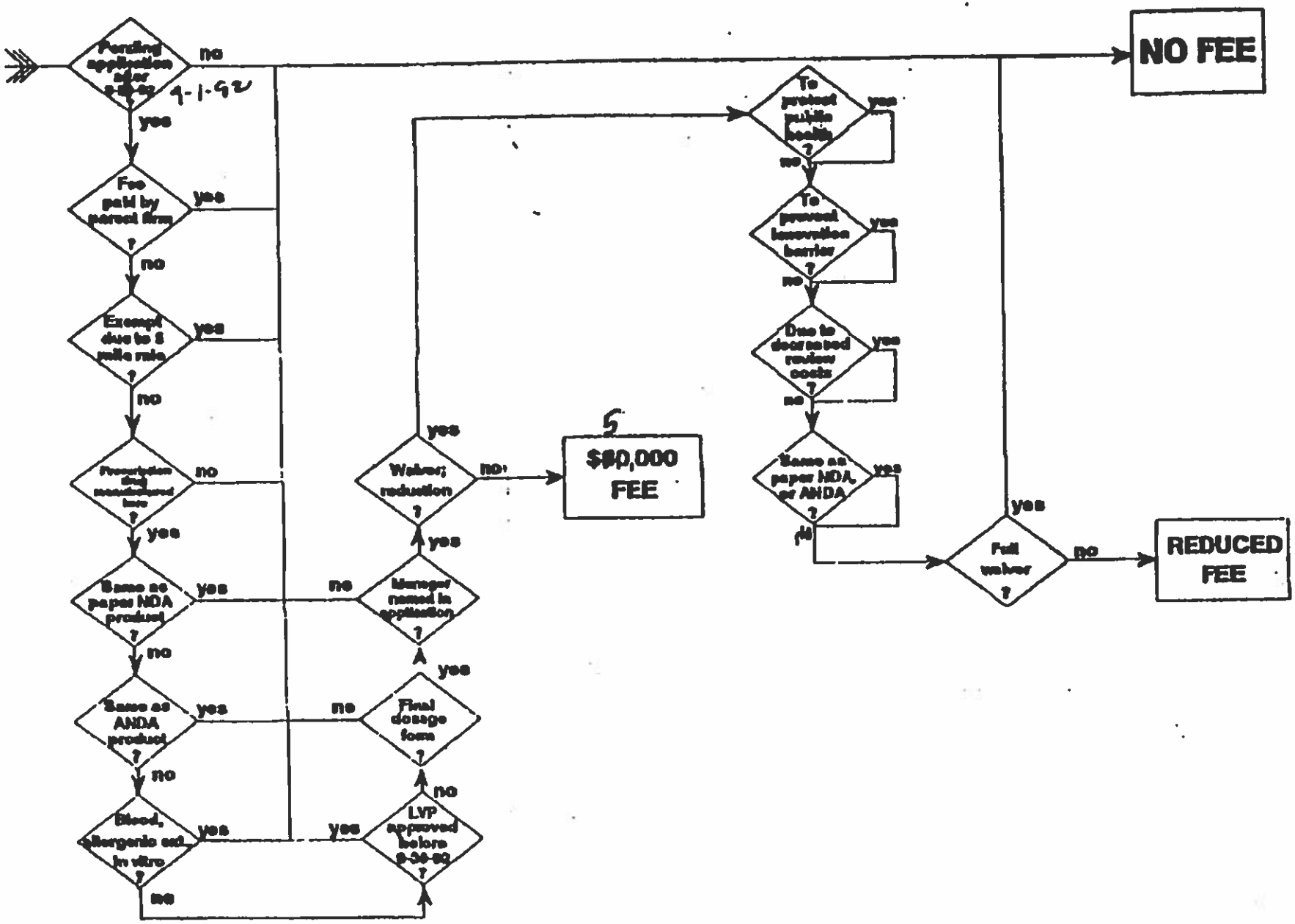
Should you be interested, we can provide you with copies of the relevant legislative materials including the excerpts from the Congressional Record of September 22, 1992 (House consideration of H.R. 5952), October 5, and October 7, 1992, and the House Committee Report on H.R. 5952, the predecessor to H.R. 6181.

FLOW DIAGRAM OF APPLICATION USER FEES



* If application is not accepted for filing (Refused to File), 1/4 of total fee (1/2 of filing fee) will be refunded.

FLOW DIAGRAM OF ESTABLISHMENT FEE DETERMINATION



DRAFT OCT - 8 1992

FLOW DIAGRAM OF PRODUCT FEE DETERMINATION