GSK U.S. Public Policy Position Paper:
Patent Litigation Reform

The Issue
Intellectual property reform affects a diverse array of innovators ranging from universities and non-profit foundations to start-ups and small businesses, manufacturing, technology, and pharmaceutical companies. The U.S. Commerce Department released a report in March 2012 that attributed almost 30 percent of U.S. jobs directly or indirectly to intellectual property intensive industries. The future of the U.S. economy, including domestic job growth and our competitive advantage in the global economy, depends on a strong patent system that incentivizes innovators to invent and protects innovation from unfair copying by others.

GSK Position
GSK supports targeted and measured reforms that address harmful patent enforcement practices, but we oppose legislation that would weaken the overall patent system and thereby diminish innovation and job creation. Without biomedical innovation, patients and providers would not have the vast array of cutting-edge treatments that are available today. From technologies to devices and therapies, this innovation presents one of the strongest opportunities to improve patient health, particularly for those with incurable or rare diseases and other unmet medical needs. Fully embracing biomedical innovation could improve lives and lower health care costs while also serving as a long-term catalyst for much-needed job creation nationwide. Patent protections are crucial to promoting innovation as they sustain the ability of innovators to rely on their patents for long-term business and investment decisions that lead to future innovation.

Key Points
GSK supports the spirit of patent litigation reform, but the reforms should be targeted toward abusive behaviors and not have unintended consequences for innovators.

Patent Litigation Pleading: Patent litigation claims should use the same notice pleading standard used for all other federal claims. The Supreme Court recently recommended abolishing the patent pleading requirement set forth in Form 18 in the Federal Rules of Civil Procedure. This will subject pleading in patent cases to the same requirements as other civil actions and impose a plausibility requirement (e.g., a complaint must plead “enough facts to state a claim to relief that is plausible on its face” where the facts “must be enough to raise a right to relief above the speculative level”) – the so-called Iqbal/Twombly standard. Current legislative proposals require specificity to a level that requires information that is burdensome and may not be in the possession of the patentee. It will cause delay and inefficiency in the litigation process, and will create satellite litigation at the pleading stage. It is not a targeted reform – it burdens abusers of the system equally as it burdens true innovators who rely upon the system.
Discovery Stay Provision: A discovery stay until after the claim construction process has been completed will introduce considerable delay, additional cost, and unnecessary inefficiency into the litigation process, and it should not be reduced to a per se rule. Claim construction often requires some factual development, and is often more appropriate after some discovery has taken place. While it may be suitable in some cases to narrow the issues, it is within the sound discretion of the judge to schedule claim construction early and delay fact discovery on a case-by-case basis. GSK strongly supports proportionality in discovery, which is an issue that has recently been taken up by the Judicial Conference in rulemaking for the Federal Rules of Civil Procedure, and fee shifting for discovery beyond core discovery. A more balanced approach may be to begin with the presumption that no stay is required and define conditions in which a stay is appropriate.

Transparency of Patent Ownership: GSK does not believe that lack of patent ownership information in litigation is a problem meriting legislative attention. The Federal Rules of Civil Procedure already require patent ownership information, and parties may obtain ownership information during the litigation process. vi Current reform proposals would broadly require disclosure of owners, licensees, and others with an interest in the patent or the right to receive royalties or damages. This is overly burdensome for manufacturing companies in which multiple affiliates wholly owned by a parent corporation may have interests. This would also complicate licensing transactions for entities that license their patents broadly. GSK would support initial disclosure of information that would include the disclosure of the ultimate parent corporation of any party having an ownership interest.

Fee Shifting: GSK does not oppose fee shifting in order to deter frivolous or abusive lawsuits. Since 1952, the Patent Act has provided that courts “in exceptional cases may award reasonable attorney fees to the prevailing party.” vii In April 2014, the U.S. Supreme Court lowered the bar for awarding fees and gave federal district courts more discretion to hold accountable those who engage in bad faith or abusive litigation. viii GSK does not support provisions that label a party submitting a motion to dismiss a non-prevailing party per se. Such a rule would discourage settlements and early resolution of cases.

Summary

When considering changes to the patent system, it is important to take into account that the purpose of the system is to promote innovation. Policymakers should bear in mind that, while the litigation reforms are intended to deter abusive non-practicing entities, the proposed reforms apply broadly to bona fide patentees that are entitled and encouraged to protect their innovations. To the extent that such legislative reforms deter innovators from enforcing their rights, such reforms will be a burden on innovation.