

Calendar No. 35

114TH CONGRESS }
1st Session }

SENATE

{ REPORT
114-12

CHILD NICOTINE POISONING PREVENTION
ACT OF 2015

R E P O R T

OF THE

COMMITTEE ON COMMERCE, SCIENCE, AND
TRANSPORTATION

ON

S. 142



APRIL 13, 2015—Ordered to be printed

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SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

ONE HUNDRED FOURTEENTH CONGRESS

FIRST SESSION

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CHILD NICOTINE POISONING PREVENTION ACT OF 2015

APRIL 13, 2015.—Ordered to be printed

Mr. THUNE, from the Committee on Commerce, Science, and
Transportation, submitted the following

R E P O R T

[To accompany S. 142]

The Committee on Commerce, Science, and Transportation, to which was referred the bill (S. 142) to require the Consumer Product Safety Commission to promulgate a rule to require child safety packaging for liquid nicotine containers, and for other purposes, having considered the same, reports favorably thereon with an amendment (in the nature of a substitute) and recommends that the bill (as amended) do pass.

PURPOSE OF THE BILL

The purpose of S. 142, the Child Nicotine Poisoning Prevention Act of 2015, is to provide the Consumer Product Safety Commission (CPSC) with statutory authority to regulate liquid nicotine containers normally used by consumers as a consumer product. The bill would further direct the CPSC to promulgate a safety rule requiring such products be packaged in a manner that would make them significantly difficult for a child under the age of five to open the container or otherwise access its liquid content.

BACKGROUND AND NEEDS

Liquid nicotine is a highly toxic substance. According to the American Academy of Pediatrics, a 15-milliliter dropper bottle filled with commercially available liquid nicotine is capable of kill-

ing four small children.¹ A very small amount of the substance splashed on the skin of a child can render him or her very ill.

The rapid rise in the popularity of electronic cigarettes (e-cigarettes) has concomitantly ushered in a rapid rise in dangerous exposures to liquid nicotine. The American Association of Poison Control Centers (AAPCC) says the number of reported liquid nicotine exposures (from liquid nicotine delivery devices or containers) skyrocketed 213 percent from 2012 to 2013.² Between January 1, 2014, to December, 31, 2014, AAPCC reports that local poison-control centers have received 3,808 calls for liquid nicotine exposure.³

The CPSC implements and enforces the Poison Prevention Packaging Act (PPPA),⁴ which, among other things, provides the CPSC with the authority to promulgate rules requiring “special packaging” for products that pose a poisoning hazard to children. When the CPSC designates consumer products for special packaging, such products must be “designed or constructed to be significantly difficult for children under five years of age to open or obtain a toxic or harmful amount of the substance contained therein within a reasonable time frame and not difficult for normal adults to use properly.”⁵ Under the PPPA, the CPSC has promulgated child-proof packaging for numerous consumer products, including over-the-counter medication and household cleaning supplies.

The CPSC currently lacks authority under the PPPA to require similar special packaging requirements for liquid nicotine because most liquid nicotine is derived from tobacco and is, consequently, a “tobacco product,” which is exclusively regulated by the Food and Drug Administration (FDA).⁶ A small percentage of liquid nicotine on the market is synthetically manufactured and, thus, already considered a “consumer product” under the Consumer Product Safety Act⁷ and subject to CPSC authority.

SUMMARY OF PROVISIONS

S. 142 would provide the CPSC with statutory authority to regulate liquid nicotine containers as a consumer product under the PPPA and would further direct the CPSC to promulgate a safety rule requiring such products be packaged in a manner that would make them significantly difficult for a child under the age of five to open the container or otherwise access its liquid contents. S. 142 would contain a savings clause to preserve all of the authority of the FDA.

LEGISLATIVE HISTORY

In the 113th Congress, the Committee held a hearing on June 18, 2014, entitled, “Aggressive E-Cigarette Marketing and Potential Consequences for Youth.” Senator Nelson introduced S. 2581, the

¹ Senate Committee on Commerce, Science, and Transportation, Testimony of Dr. Susan Tanski on behalf of the American Academy of Pediatrics, Aggressive E-Cigarette Marketing and Potential Consequences for Youth, 113th Cong. (June 18, 2014) (online at www.commerce.senate.gov/public/?a=Files.Serve&File_id=408415ee-8f64-4127-8887-62d90b34ff70).

² American Association of Poison Control Centers, E-Cigarette Devices and Liquid Nicotine (online at www.aapcc.org/alerts/e-cigarettes/).

³ *Ibid.*

⁴ 15 U.S.C. 1471 et seq.

⁵ 15 U.S.C. §1471.

⁶ 26 U.S.C. §5702

⁷ 15 U.S.C. 2051 et seq.

Child Nicotine Poisoning Prevention Act of 2014, which was reported favorably by the Committee on September 18, 2014. The report accompanying S. 2581 (Report No. 113–311) was filed by Senator Rockefeller on December 12, 2014.

In the 114th Congress, Senator Nelson introduced S. 142 on January 8, 2015. The bill has 14 cosponsors, including 5 Members of the Committee: Senators Ayotte, Blumenthal, Klobuchar, Markey, and Schatz.

On February 26, 2015, the Committee held an Executive Session at which S. 142 was considered. The bill was approved unanimously by voice vote and was ordered reported with an amendment in the nature of a substitute. The Committee approved a substitute amendment by Senator Nelson that would further clarify the definition of “liquid nicotine container” and would impose reporting requirements on the CPSC.

ESTIMATED COSTS

In accordance with paragraph 11(a) of rule XXVI of the Standing Rules of the Senate and section 403 of the Congressional Budget Act of 1974, the Committee provides the following cost estimate, prepared by the Congressional Budget Office:

S. 142—Child Nicotine Poisoning Prevention Act of 2015

S. 142 would direct the Consumer Product Safety Commission (CPSC) to develop regulations requiring special packaging for liquid nicotine containers. CBO estimates that implementing the bill would cost about \$1 million over the 2016–2020 period, assuming the availability of appropriated funds. Enacting S. 142 would not affect direct spending or revenues; therefore pay-as-you-go procedures do not apply.

Under the bill, the CPSC would require liquid nicotine containers to be packaged in a way that would make it difficult for children younger than five years to open or to obtain a harmful amount of the enclosed substance. The CPSC would report to the Congress within three years on the regulations established under the legislation and any enforcement action undertaken. Based on information from the agency, CBO estimates that the cost of developing the regulation and conducting compliance testing would total about \$1 million over the next five years.

S. 142 contains an intergovernmental mandate as defined in the Unfunded Mandates Reform Act (UMRA) because it would preempt state laws governing packaging for containers holding liquid nicotine. While the mandate would limit the application of state laws, it would impose no duty on states that would result in additional spending. Therefore, CBO estimates that the cost of the mandate would fall below the threshold established in UMRA for intergovernmental mandates (\$77 million in 2015, adjusted annually for inflation).

The legislation would impose a private-sector mandate, as defined in UMRA, on manufacturers of consumer products containing liquid nicotine. The bill would require those manufacturers to use special packaging for such products to make them child resistant. The cost of this mandate would be the incremental cost of using packaging that would comply with the standard established by the CPSC. Based on data provided by the CPSC and representatives of

affected manufacturers, CBO estimates that the cost of the mandate would fall below the annual threshold established in UMRA for private-sector mandates (\$154 million in 2015, adjusted annually for inflation).

The CBO staff contacts for this estimate are Daniel Hoople (for federal costs), J'nell Blanco Suchy (for intergovernmental effects), and Amy Petz (for private-sector effects). The estimate was approved by Holly Harvey, Deputy Assistant Director for Budget Analysis.

REGULATORY IMPACT

In accordance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee provides the following evaluation of the regulatory impact of the legislation, as reported:

NUMBER OF PERSONS COVERED

The legislation would provide the CPSC with statutory authority to regulate liquid nicotine containers as a consumer product and would further direct the CPSC to promulgate a safety rule requiring such products be packaged in a manner that would make them significantly difficult for a child under the age of five to open the container or otherwise access its liquid content.

ECONOMIC IMPACT

This legislation is not expected to have an adverse economic impact on the Nation.

PRIVACY

The legislation would not have a negative impact on the personal privacy of individuals.

PAPERWORK

The legislation would create a new reporting requirement for the CPSC. The CPSC would be directed to submit a report to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Energy and Commerce of the House of Representatives detailing the rule and requirements promulgated under the Act and any enforcement actions taken thereunder.

CONGRESSIONALLY DIRECTED SPENDING

In compliance with paragraph 4(b) of rule XLIV of the Standing Rules of the Senate, the Committee provides that no provisions contained in the bill, as reported, meet the definition of congressionally directed spending under this rule.

SECTION-BY-SECTION ANALYSIS

Section 1. Short title.

Section 1 would establish the title of the bill as the “Child Nicotine Poisoning Prevention Act of 2015.”

Section 2. Child safety packaging for liquid nicotine containers.

Subsection (a) of this section would define a “liquid nicotine container” as a “consumer product” as defined by the CPSA. This definition effectively would grant the CPSC the authority to regulate all liquid nicotine products, including non-synthesized liquid nicotine derived from tobacco. The definition would limit liquid nicotine containers to products in which the liquid nicotine can be accessed through openings by consumers through “normal and foreseeable use.” As such, the definition would eliminate large commercial barrels of liquid nicotine from the scope of the bill and the ambit of CPSC authority.

Under subsection (a), “liquid nicotine container” would also not include nicotine in a solution or other form in a sealed, pre-filled, disposable containers inserted directly into an electronic cigarette or other similar device, so long as the nicotine in the container is inaccessible or cannot flow freely out of such container or electronic cigarette or other similar device through normal and foreseeable use by a consumer. As such, the definition would eliminate nicotine cartridges associated with closed-system electronic cigarettes.

Furthermore, subsection (a) would define “special packaging” in accordance with the PPPA, which authorizes the CPSC to promulgate rules requiring child-proofing for products that pose a poisonous hazard to children. Specifically, as noted above, products subject to “special packaging” requirements must be designed or constructed in a manner that makes it significantly difficult for a child under the age of five to open the container or to otherwise access the poisonous substance inside the container.

Subsection (b) of this section would direct the CPSC to promulgate a rule requiring special packaging for liquid nicotine products. The CPSC would promulgate such rules under section 553 of title 5, United States Code (commonly known as the Administrative Procedure Act) and not be required to follow the more burdensome rulemaking processes under the CPSA, the PPPA, or the Federal Hazardous Substances Act.⁸

Subsection (b) also contains a savings clause preserving all of the authority of the FDA.

Subsection (c) of this section would direct the CPSC, not later than 3 years after the date of enactment of the bill, to submit a report detailing the rule and requirements promulgated under the bill, and any enforcement actions taken thereunder to the Committee on Commerce, Science, and Transportation of the Senate and to the Energy and Commerce Committee of the House of Representatives.

⁸ 15 U.S.C. 1261 et seq.

CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, the Committee states that the bill as reported would make no change to existing law.

