

116TH CONGRESS
1ST SESSION

S. 2519

To protect the public health by prohibiting non-tobacco e-cigarette flavors and ensuring electronic nicotine delivery systems are tamper-proof.

IN THE SENATE OF THE UNITED STATES

SEPTEMBER 19, 2019

Mr. ROMNEY (for himself and Mr. MERKLEY) introduced the following bill;
which was read twice and referred to the Committee on Finance

A BILL

To protect the public health by prohibiting non-tobacco e-cigarette flavors and ensuring electronic nicotine delivery systems are tamper-proof.

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 “Ending New Nicotine
5 Dependencies Act of 2019” or the “ENND Act”.

6 **SEC. 2. FINDINGS.**

7 Congress finds as follows:

8 (1) As of September 11, 2019, the Centers for
9 Disease Control and Prevention and the Food and
10 Drug Administration reported 380 confirmed and

1 probable cases of severe pulmonary disease cases as-
2 sociated with the widespread use of electronic ciga-
3 rettes (referred to in this section as “e-cigarettes”).

4 (2) As of September 17, 2019, States have re-
5 ported as many as 7 deaths nationwide associated
6 with the use of e-cigarettes.

7 (3) The American Medical Association has stat-
8 ed that e-cigarette-related lung illnesses “reaffirm[s]
9 our belief that the use of e-cigarettes and vaping is
10 an urgent public health epidemic that must be ad-
11 dressed”.

12 (4) The Surgeon General has warned that the
13 proliferation of e-cigarettes is “cause for great con-
14 cern”, and that the use of e-cigarettes has “become
15 an epidemic among our nation’s young people”.

16 (5) Since 2014, e-cigarettes have been the most
17 commonly used tobacco product among youth in the
18 United States.

19 (6) According to the Food and Drug Adminis-
20 tration, “youth consistently report product flavorings
21 as a leading reason for using tobacco products” and
22 “flavors may disguise the taste of tobacco”.

23 (7) In 2019, more than 1 in every 4 high school
24 students reported using e-cigarettes in the past 30
25 days.

1 (8) On September 9, 2019, the Food and Drug
2 Administration sent a warning letter to one of the
3 largest e-cigarette companies for violating Federal
4 regulations and utilizing illegal marketing tactics.

5 (9) E-cigarettes are not currently approved by
6 the Food and Drug Administration as a smoking
7 cessation aid.

8 (10) More research is needed to evaluate the
9 safety of e-cigarettes, including the risks associated
10 with tampering with and altering e-cigarettes and
11 the health implications of heating aerosolized to-
12 bacco products.

13 **SEC. 3. RESTRICTIONS ON FLAVORS IN TOBACCO PROD-**
14 **UCTS AND ON DEVICE DESIGN.**

15 (a) IN GENERAL.—Section 907(a) of the Federal
16 Food, Drug, and Cosmetic Act (21 U.S.C. 387g(a)) is
17 amended—

18 (1) in paragraph (1), by adding at the end the
19 following:

20 “(C) SPECIAL RULE FOR ELECTRONIC NIC-
21 OTINE DELIVERY SYSTEMS.—Beginning 90
22 days after the date of enactment of the ENND
23 Act, an electronic nicotine delivery system or
24 any of its components or parts (including e-liq-
25 uid) shall not contain, as a constituent (includ-

1 ing a smoke constituent) or additive, an artifi-
2 cial or natural flavor (other than tobacco) or an
3 herb or spice, including strawberry, grape, or-
4 ange, clove, cinnamon, pineapple, vanilla, coco-
5 nut, licorice, cocoa, chocolate, cherry, coffee,
6 menthol, or mint that is a characterizing flavor
7 of the electronic nicotine delivery system or e-
8 liquid. Nothing in this subparagraph shall be
9 construed to limit the Secretary's authority to
10 take action under this section or other sections
11 of this Act applicable to any artificial or natural
12 flavor, herb, or spice not specified in this sub-
13 paragraph.”; and

14 (2) by adding at the end the following:

15 “(7) ELECTRONIC NICOTINE DELIVERY SYSTEM
16 STANDARDS.—Not later than 1 year after the date
17 of enactment of the ENND Act, the Secretary shall
18 promulgate regulations setting forth standards on
19 the permissible design of electronic nicotine delivery
20 systems, and issue guidance for manufacturers to
21 implement such standards. Such standards, at a
22 minimum, shall—

23 “(A) prohibit refillable components or
24 parts;

“(B) prohibit any electronic nicotine delivery system designed to look like combustible cigarettes or commonplace, nonmedical devices, such as pens or USB flash drives; and

“(C) require each electronic nicotine delivery system and its components and parts to be tamper-proof.”.

(b) DEFINITIONS.—

(1) IN GENERAL.—Section 900 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 387) is amended—

(A) by redesignating paragraphs (8) through (22) as paragraphs (10) through (24); and

(B) by inserting after paragraph (7) the following:

“(8) ELECTRONIC NICOTINE DELIVERY SYSTEM.—

“(A) IN GENERAL.—The term ‘electronic nicotine delivery system’—

“(i) means noncombustible tobacco products, including vapes, vaporizers, vape pens, hookah pens, electronic cigarettes (also known as ‘e-cigarettes’ or ‘e-cigs’), and e-pipes that deliver an aerosolized e-

1 liquid that may contain nicotine, as well as
 2 varying compositions of flavorings, pro-
 3 pylene glycol, vegetable glycerin, and other
 4 ingredients; and

5 “(ii) includes components and parts,
 6 such as e-liquids, tanks, cartridges, pods,
 7 wicks, and atomizers.

8 “(B) COMPONENTS AND PARTS.—The
 9 term ‘components and parts’, with respect to an
 10 electronic nicotine delivery system, means the
 11 objects intended or reasonably expected to be
 12 used with, or for, the human consumption of a
 13 tobacco product that are not accessories.

14 “(9) E-LIQUID.—The term ‘e-liquid’ means liq-
 15 uid nicotine, nicotine containing liquids (including
 16 liquid nicotine combined with colorings, flavorings,
 17 or other ingredients), and liquids that do not contain
 18 nicotine or other material made or derived from to-
 19 bacco, but that are intended or reasonably expected
 20 to be used with or for the human consumption of a
 21 tobacco product.”.

22 (2) CONFORMING AMENDMENT.—Section 9(1)
 23 of the Comprehensive Smokeless Tobacco Health
 24 Education Act of 1986 (15 U.S.C. 4408(1)) is

1 amended by striking “section 900(18)” and insert-
 2 ing “section 900(20)”.

3 **SEC. 4. MONITORING OF PUBLIC HEALTH RISKS OF TO-**
 4 **BACCO USE.**

5 Not later than 1 year after the date of enactment
 6 of this Act and annually thereafter, the Secretary of
 7 Health and Human Services, in consultation with the Di-
 8 rector of the National Institutes of Health, the Commis-
 9 sioner of Food and Drugs, the Director of the Centers for
 10 Disease Control and Prevention, and other heads of appro-
 11 priate agencies, as the Secretary of Health and Human
 12 Services determines appropriate, shall submit to the Com-
 13 mittee on Health, Education, Labor, and Pensions and the
 14 Committee on Appropriations of the Senate and the Com-
 15 mittee on Energy and Commerce and the Committee on
 16 Appropriations of the House of Representatives, and pub-
 17 licly post on an internet website, a report on the public
 18 health risks of tobacco use that includes—

- 19 (1) the public health implications of the use of
 20 tobacco products, with a focus on electronic nicotine
 21 delivery systems and other alternative tobacco prod-
 22 ucts;
- 23 (2) emerging trends in tobacco use, including
 24 the use of tobacco flavors and new tobacco products;

- 1 (3) updates on the public health awareness
 2 campaign authorized by section 6; and
 3 (4) recommendations for Congress.

4 **SEC. 5. APPLICATION OF TOBACCO EXCISE TAX TO ELEC-**
 5 **TRONIC NICOTINE DELIVERY SYSTEMS.**

6 (a) IMPOSITION, RATE, AND ATTACHMENT OF
 7 TAX.—Section 5701 of the Internal Revenue Code of 1986
 8 is amended—

9 (1) by redesignating subsection (h) as sub-
 10 section (i); and

11 (2) by inserting after subsection (g) the fol-
 12 lowing new subsection:

13 “(h) ELECTRONIC NICOTINE DELIVERY.—

14 “(1) ELECTRONIC NICOTINE DELIVERY SYS-
 15 TEMS.—

16 “(A) IN GENERAL.—On electronic nicotine
 17 delivery systems (as defined in section 900(8)
 18 of the Federal Food, Drug, and Cosmetic Act
 19 (21 U.S.C. 387(8))), manufactured in or im-
 20 ported into the United States, there shall be
 21 imposed a tax equal to \$1.01 per electronic nic-
 22 otine delivery system.

23 “(B) EXCEPTION.—This paragraph shall
 24 not apply to any single-use electronic nicotine
 25 delivery system.

1 “(2) E-LIQUID.—On e-liquids (as defined in
2 section 900(9) of such Act) or single-use electronic
3 nicotine delivery systems, manufactured in or im-
4 ported into the United States, there shall be imposed
5 a tax equal to—

6 “(A) in the case of a product which con-
7 tains less than 5 percent nicotine by volume,
8 \$1.01, and

9 “(B) in the case of the product which con-
10 tains a percentage of nicotine by volume which
11 is equal to or greater than 5 percent, an
12 amount equal to the sum of—

13 “(i) \$1.01, plus,

14 “(ii) for each percentage point of nico-
15 tine by volume contained in such product
16 which is in excess of 5 percent, 20.2 cents
17 (and a proportionate amount at the like
18 rate on any such percentage which is not
19 a whole number).”.

20 (b) DEFINITIONS.—Section 5702 of the Internal Rev-
21 enue Code of 1986 is amended—

22 (1) in subsection (c), by striking “and roll-your-
23 own tobacco” and inserting “roll-your-own tobacco,
24 electronic nicotine delivery systems, and e-liquids”;
25 and

1 (2) in subsection (d), by striking “or roll-your-
 2 own tobacco” each place it appears and inserting
 3 “roll-your-own tobacco, electronic nicotine delivery
 4 systems, and e-liquids”.

5 (c) EFFECTIVE DATE.—The amendments made by
 6 this section shall apply to articles removed after the date
 7 which is 90 days after the date of enactment of this Act.

8 **SEC. 6. PUBLIC AWARENESS CAMPAIGN.**

9 (a) IN GENERAL.—The Secretary of Health and
 10 Human Services (referred to in this section as the “Sec-
 11 retary”) shall conduct a public awareness campaign to
 12 educate the public about the public health implications of
 13 using electronic nicotine delivery systems (as defined in
 14 section 900 of the Federal Food, Drug, and Cosmetic Act
 15 (21 U.S.C. 387), as amended by section 3).

16 (b) FUNDING.—To carry out subsection (a), for each
 17 of fiscal years 2021 through 2024, there shall be trans-
 18 ferred to the Secretary, from the General Fund of the
 19 Treasury, the lesser of—

20 (1) the amount equal to the amount collected
 21 under 5701(h) of the Internal Revenue Code of
 22 1986 during the previous fiscal year; or

23 (2) \$115,000,000.

24 **SEC. 7. IMPLEMENTATION OF EXCISE TAX.**

25 (a) TRANSITIONAL RULE.—Any person who—

1 (1) on the date of the enactment of this Act, is
2 engaged in business as a manufacturer of electronic
3 nicotine delivery systems or e-liquids; and

4 (2) before the applicable date, submits an appli-
5 cation under subchapter B of chapter 52 of the In-
6 ternal Revenue Code of 1986 to engage in such busi-
7 ness,
8 may, notwithstanding such subchapter B, continue to en-
9 gage in such business pending final action on such applica-
10 tion. Pending such final action, all provisions of chapter
11 52 of such Code shall apply to such applicant in the same
12 manner and to the same extent as if such applicant were
13 a holder of a permit to manufacture electronic nicotine
14 delivery systems or e-liquids under such chapter 52.

15 (b) FLOOR STOCKS TAXES.—

16 (1) IMPOSITION OF TAX.—On electronic nico-
17 tine delivery systems or e-liquids manufactured in or
18 imported into the United States which are removed
19 before the applicable date and held on such date for
20 sale by any person, there is hereby imposed a tax in
21 an amount equal to the tax which would be imposed
22 under section 5701 of the Internal Revenue Code of
23 1986 on the article if the article had been removed
24 on such applicable date.

1 (2) LIABILITY FOR TAX AND METHOD OF PAY-
2 MENT.—

3 (A) LIABILITY FOR TAX.—A person hold-
4 ing electronic nicotine delivery systems or e-liq-
5 uids on the applicable date to which any tax im-
6 posed by paragraph (1) applies shall be liable
7 for such tax.

8 (B) METHOD OF PAYMENT.—The tax im-
9 posed by paragraph (1) shall be paid in such
10 manner as the Secretary shall prescribe by reg-
11 ulations.

12 (C) TIME FOR PAYMENT.—The tax im-
13 posed by paragraph (1) shall be paid on or be-
14 fore the date that is 120 days after the applica-
15 ble date.

16 (3) ARTICLES IN FOREIGN TRADE ZONES.—
17 Notwithstanding the Act of June 18, 1934 (com-
18 monly known as the Foreign Trade Zone Act, 48
19 Stat. 998, 19 U.S.C. 81a et seq.), or any other pro-
20 vision of law, any article which is located in a for-
21 eign trade zone on any tax increase date shall be
22 subject to the tax imposed by paragraph (1) if—

23 (A) internal revenue taxes have been deter-
24 mined, or customs duties liquidated, with re-
25 spect to such article before such date pursuant

1 to a request made under the 1st proviso of sec-
2 tion 3(a) of such Act; or

3 (B) such article is held on such date under
4 the supervision of an officer of the United
5 States Customs and Border Protection of the
6 Department of Homeland Security pursuant to
7 the 2d proviso of such section 3(a).

8 (4) CONTROLLED GROUPS.—Rules similar to
9 the rules of section 5061(e)(3) of the Internal Rev-
10 enue Code of 1986 shall apply for purposes of this
11 subsection.

12 (5) OTHER LAWS APPLICABLE.—All provisions
13 of law, including penalties, applicable with respect to
14 the taxes imposed by section 5701 of the Internal
15 Revenue Code of 1986 shall, insofar as applicable
16 and not inconsistent with the provisions of this sub-
17 section, apply to the floor stocks taxes imposed by
18 paragraph (1), to the same extent as if such taxes
19 were imposed by such section 5701. The Secretary
20 may treat any person who bore the ultimate burden
21 of the tax imposed by paragraph (1) as the person
22 to whom a credit or refund under such provisions
23 may be allowed or made.

24 (c) DEFINITIONS.—For purposes of this section—

1 (1) IN GENERAL.—Any term used in this sec-
2 tion which is also used in section 5701 or 5702 of
3 the Internal Revenue Code of 1986 shall have the
4 same meaning as such term has in such section.

5 (2) APPLICABLE DATE.—The term “applicable
6 date” means the day after the date which is 90 days
7 after the date of enactment of this Act.

8 (3) SECRETARY.—The term “Secretary” means
9 the Secretary of the Treasury or the Secretary’s del-
10 egate.

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