

ONE HUNDRED FOURTEENTH CONGRESS
Congress of the United States
House of Representatives
COMMITTEE ON ENERGY AND COMMERCE
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MEMORANDUM

September 28, 2015

To: Committee on Energy and Commerce Democratic Members and Staff

Fr: Committee on Energy and Commerce Democratic Staff

Re: Full Committee markup of H.R. 8, “North American Energy Security and Infrastructure Act of 2015;” H.R. 3242, “Child Nicotine Poisoning Prevention Act of 2015;” and Proposed Matters for Inclusion in Reconciliation Recommendations

On Tuesday, September 29, 2015, at 4:00 p.m. in room 2123 Rayburn House Office Building, the full Committee on Energy and Commerce will conduct opening statements for the markup of H.R. 8, “North American Energy Security and Infrastructure Act of 2015;” H.R. 3242, “Child Nicotine Poisoning Prevention Act of 2015;” and Proposed Matters for Inclusion in Reconciliation Recommendations. The Committee will reconvene on Wednesday, September 30, at 10:00 a.m. in 2123 Rayburn House Office Building.

This memo contains summaries and analyses of the major provisions contained in the above-referenced legislative measures.

I. H.R. 8, THE NORTH AMERICAN ENERGY SECURITY AND INFRASTRUCTURE ACT OF 2015

Throughout the 114th Congress, the Subcommittee on Energy and Power has held numerous hearings on legislative proposals related to the majority’s “Architecture of Abundance.” On July 22, 2015, the Subcommittee on Energy and Power approved, by voice vote, a draft bill.

The bill being marked up by the full committee is similar to text approved by the Subcommittee on Energy and Power on July 22, 2015, and represents a subset of those proposals

that have bipartisan support.¹ Democratic staff has been informed that additional provisions will be added by an amendment in the nature of a substitute (AINS). The provisions of the AINS will be summarized in a subsequent memo.

A. Section 1101: FERC Process Coordination

This section is intended to reform the siting review process for natural gas pipelines at the Federal Energy Regulatory Commission (FERC). The previous version of this section directed FERC to select which agencies are to participate in the review process, and establish deadlines for them in completing their consideration of pipeline applications.

Changes made by the Committee include:

- Directing FERC to notify, rather than formally invite, any agency that may consider an aspect of a natural gas pipeline application;
- Directing FERC to make recommendations on the appropriate scope of environmental review;
- Removing the provision related to issue resolution meetings; and
- Removing the provision allowing applicants to provide additional funding to aid FERC in the review of permit applications.

B. Section 1102: Resolving Environmental and Grid Reliability Conflicts

Section 1102 contains text identical to H.R. 1558, the “Resolving Environmental and Grid Reliability Conflicts Act of 2015,” which was introduced on March 24, 2015, by Representatives Olson, Green and Doyle. The House passed, by voice vote an identical version of this legislation on May 22, 2013.²

Section 1102 amends section 202(c) of the Federal Power Act (FPA)³ to direct the Department of Energy (DOE), in issuing an emergency order that may result in a conflict with a

¹ For additional background information regarding all the provisions from the various discussion drafts, please see the Democratic memos from the corresponding hearings: [Title II: 21st Century Workforce](#); [Hydropower Regulatory Modernization and FERC Process Coordination](#); [Energy Reliability and Security](#); [Energy Diplomacy](#); and [Title IV: Accountability](#).

² U.S. House of Representatives, Voice Vote on Agreeing to H.R. 271 (May 22, 2013); H.R. 271, the “Resolving Environmental and Grid Reliability Conflicts Act of 2013,” 113th Cong. (2013).

³ Section 202(c) of the Federal Power Act provides the Secretary of Energy with the authority to require the generation, transmission, or delivery of electricity, or the temporary connection of facilities when there is a war or other emergency situation that creates a sudden increase in the demand for electricity, a shortage of electricity or facilities for the generation or transmission of electricity, or a shortage of fuel or water for generating facilities. This emergency order authority has only been used on six occasions, only two of which involved ordering generation facilities to run.

requirement of any federal, state, or local environmental law or regulation, to ensure that the order limits the generation, delivery, or transmission of electricity to only those hours necessary to meet the emergency and serve the public interest. DOE also must ensure the order, to the maximum extent practicable, is consistent with any applicable federal, state, or local laws or regulations and minimizes any adverse environmental impacts that may result from such order.

C. Section 1103: Emergency Preparedness For Energy Supply Disruptions

Section 1103 authorizes the Secretary of Energy to develop and implement procedures to enhance emergency preparedness for natural disasters. In doing so, DOE is directed to collaborate with state and local governments, as well as the private sector. Actions to enhance emergency preparedness include improving lines of communication and cooperation during emergencies, facilitating engagement in developing state and local energy assurance plans, and establishing education and training programs for emergency response positions.

D. Section 1104: Critical Energy Infrastructure Security

Section 1104 amends the Federal Power Act (FPA) to add a new section 215A, granting new federal authorities intended to protect grid reliability or defense critical electric infrastructure, against grid security emergencies.

This section is similar to a bipartisan bill that the committee considered and the House of Representatives passed in the 111th Congress.⁴ While the proposal provides some improvement over current law, it lacks a number of provisions that could undermine its effectiveness in ensuring grid security. For instance, acts or events that were previously considered to be threats or vulnerabilities, and thus covered by the regulatory authorities in the legislation, could no longer be addressed under the provisions of section 1104. Under this section, acts or events must pose an imminent danger to the grid in order to be considered, setting a much higher bar for regulatory action. Accordingly and importantly, neither DOE nor FERC would have additional authority to address vulnerabilities or threats to the grid besides emergencies.

This section does include provisions to reflect DOE's role in ensuring and protecting grid security, and allows FERC to address grid events that have actually occurred.

E. Section 1105: Strategic Transformer Reserve

Section 1105 requires the Secretary of Energy, in consultation with the Electric Reliability Organization, to prepare and submit to Congress a plan to establish a Strategic Transformer Reserve (STR). Under the STR plan, a sufficient number of spare large power transformers (LPTs) are to be stored at strategically located facilities to temporarily replace critically damaged LPTs and restore megawatt capacity in cases of physical attack, cyber-attack, electromagnetic pulse attack, geomagnetic disturbances, severe weather; or seismic events. The

⁴ U.S. House of Representatives, Voice Vote on Agreeing to H.R. 5026 (Jun. 9, 2010). The "Grid Reliability and Infrastructure Defense (GRID) Act," was originally introduced by Reps. Markey and Upton.

STR would be established six months after DOE's plan is submitted to Congress.

F. Section 1106: Cyber Sense

Section 1106 requires the Secretary of Energy to establish, in consultation with FERC and the National Institute of Standards and Technology (NIST), a voluntary Cyber Sense program to identify and promote cyber-secure products and technologies intended for use in the bulk-power system. The Cyber Sense certification process must identify and list cyber-secure products and technologies intended for use on the grid, including products relating to industrial control systems, such as supervisory control and data acquisition systems.

G. Section 1107: State Consideration of Resiliency and Advanced Energy Analytics Technologies and Baseload Generation

Section 1107 amends section 111 of the Public Utility Regulatory Policies Act (PURPA), which generally directs states to consider and make a determination whether or not to adopt certain federal standards.

Section 1107 establishes a new federal standard requiring each electric utility to develop plans for increased use of resiliency-related technologies and other approaches that would improve resilience and maintain the flow of power to facilities critical to public health, safety, and welfare. These plans should use “the most current data, metric, and frameworks related to current and future threats, including physical and cyber attacks, electromagnetic pulse attacks, geomagnetic disturbances, seismic events, and severe weather and other environmental stressors.” Also, “all types of distributed” generation has been added to the list of resiliency-related technologies. Each electric utility would be required to commence such consideration within one year of enactment and to complete the consideration within two years. Additionally, state regulatory authorities are directed to consider allowing rate recovery for procurement and deployment of resiliency related technologies.

Section 1107 also establishes a second federal standard requiring each electric utility to develop and implement a plan for deployment of advanced energy analytics technology. State regulatory authorities are directed to consider allowing rate recovery for the procurement, deployment, or the use of advanced energy analytics technology. Electric utilities shall commence such consideration within six months of enactment and complete the consideration within one year.

Under a third federal standard included in section 1107, electric utilities are directed to consider adoption or modification of policies to assure reliable generation in integrated resources plans of utilities. Operational characteristics of “reliable generation” include: “possession of adequate fuel onsite, the operational ability to generate electric energy from more than one fuel source or fuel certainty that ensures adequate fuel supply.” Electric utilities shall commence consideration within one year of enactment and complete consideration within two years.

H. Section 2101: 21st Century Workforce

The 21st Century Workforce directs the Secretary of Energy to establish a new program collaborating with schools, industry, unions, national labs, and workforce investment organizations to improve the education and training of women, minority, and veterans for energy and manufacturing-related jobs.

I. Section 3101: Energy Diplomacy, Sense of Congress

Section 3101 contains findings regarding America’s “energy abundance” and the desirability of promoting “greater stability and affordability of energy supplies for its allies and trading partners through a more integrated, secure and competitive North American energy system.”

J. Section 3102: Energy Security Valuation

Section 3102 directs the Secretary of Energy, in consultation with the Secretary of State, to develop a report on a new valuation of energy security, taking into account a number of recommendations outlined in the Quadrennial Energy Review.

K. Section 3103: North American Energy Security Plan

Section 3103 directs the Secretary of Energy, in consultation with the Secretary of State, to develop and send to Congress a plan to “improve planning and coordination with Canada and Mexico to enhance energy integration, strengthen North American energy security, and promote efficiencies in the exploration, production storage, supply marketing, pricing and regulation of North American energy resources.” This section also requires the plan to include consideration of improvements to U.S. collaboration with Caribbean and Central American partners.

L. Section 3104: Collective Energy Security

Section 3104 directs the Secretary of Energy and the Secretary of state to “collaborate to strengthen domestic energy security and the energy security of the allies and trading partners of the United States.” This section also requires DOE and the Department of State to convene two international energy forums to promote U.S. energy security and that of its allies.

M. Section 3105: SPR Mission Readiness Plan

Section 3105 requires the Secretary of Energy, within 180 days of enactment, to conduct a strategic review of the strategic petroleum reserve (SPR), including identification of near and long-term roles for the SPR. Among other things, the Secretary is also required to develop and submit a plan to “achieve the optimal”: 1) capacity, location and composition of petroleum products in the SPR; and, 2) storage and distributional capabilities of the SPR. This section also requires the plan to estimate the (financial) resources necessary for the SPR’s “long-term sustainability and operational effectiveness.”

N. Section 4111-4112: Energy Efficient and Energy Saving Information Technologies, and Energy Efficient Data Centers

Sections 4111 and 4112 contain the provisions of H.R. 1268, the “Energy Efficient Technology Act,” sponsored by Rep. Eshoo. The language amends the Energy Independence and Security Act of 2007 (EISA) to require federal agencies to coordinate with the Office of Management and Budget (OMB), DOE and the Environmental Protection Agency (EPA) in the development of an implementation strategy for the maintenance, purchase, and use of energy-efficient and energy-saving information technologies. The provision also sets out specific items for consideration in developing an implementation strategy and requires the establishment of performance goals for evaluating the agencies’ efforts.

Section 4112 also would amend EISA to require DOE and EPA to collaborate with stakeholders in the implementation of the data center energy efficiency program and other measures to improve data center energy efficiency. Among other things, the provision requires DOE to update a 2007 report to Congress on server and data center efficiency, as well as maintain a program to certify specialists in evaluating energy usage and efficiency opportunities in data centers. The section also addresses public availability of Federal data center energy usage and efforts to harmonize global standards and metrics for data center efficiency.

O. Section 4113: Report on Energy and Water Savings Potential from Thermal Insulation

Section 4113 contains the provisions of H.R. 568, the “Thermal Insulation Efficiency Improvement Act,” introduced by Reps. Kinzinger and McNerney. The provision requires the Secretary of Energy to report within one year on the impact of thermal insulation on both energy and water use systems for potable hot and chilled water in federal buildings and on the return on investment of installing the insulation.

P. Section 4114: Federal Purchase Requirement

Section 4114 includes multiple changes to the definition of “renewable energy” within the federal renewable energy purchase requirements established in section 203 of EPCACT 2005. The first change expands the definition beyond electric energy to allow certain “thermal energy” projects to qualify as renewable energy that can be purchased to meet the federal renewable purchase requirements. Further, the language adds the term “qualified waste heat resource” to the definition of renewable energy and defines the term to include exhaust heat, gas that would otherwise be flared, incinerated or vented, and “a pressure drop in any gas for industrial or commercial process.” The provision also narrows the definition of municipal solid waste eligible for satisfying renewable purchase requirements by excluding segregated recyclable paper. This section also alters the definition of recyclable paper to be excluded from energy generated using municipal solid waste as a fuel.

Q. Section 4121: Inclusion of Smart Grid Capability on Energy Guide labels

Section 4121 contains provisions of section 4 of H.R. 2685, the “Smart Grid Advancement Act of 2013,” sponsored by Rep. McNerney in the 113th Congress. This section would facilitate the development of labels to inform consumers of the capabilities and limitations of products for “smart grid” use.

R. Section 4122: Voluntary Verification Programs for Air Conditioning, Furnace, Boiler, Heat Pump, and Water Heater Products

Section 4122 directs DOE to start a negotiated rulemaking process to establish standards for the testing and verification of products, and directs the Secretary to recognize voluntary verification programs.

S. Section 4123: Residential Non-Weatherized Gas Furnaces and Mobile Home Furnaces

Section 4123 reflects a compromise reached by numerous stakeholders, including: furnace manufacturers, natural gas utilities, home builders, energy efficiency, environmental, and consumer advocates. Section 4123 requires DOE to publish a supplemental notice of proposed rulemaking no later than October 31, 2015, which would provide an opportunity for comment by stakeholders. Then, “[I]nterested persons that are fairly representative of relevant points of view” would be expected to submit joint comments to DOE with recommended standards for non-weatherized gas furnaces and mobile home gas furnaces no later than January 1, 2016. DOE would subsequently publish a final rule on July 31, 2015, which would apply to products manufactured on or after any dates jointly recommended.

T. Section 4124: Future of Industry Program

Section 4124 establishes the Future of Industry Program. This section would reform and reorient DOE’s existing industrial research and assessment centers (IACs), a higher education-based partnership that allows university teams around the country to partner with manufacturers to identify opportunities to improve productivity, reduce waste, and save energy. This section would improve IAC coordination and partnership with the Manufacturing Extension Partnership Centers of the National Institute of Standards and Technology, the DOE Building Technologies Program, and the DOE national laboratories, as well as with energy service providers. This section would also help improve outreach to small- and medium-sized manufacturers and technology providers, and directs the Small Business Administration to expedite consideration of applications from eligible small businesses to implement recommendations of the IACs.

U. Section 4131: Use of Energy and Water Efficiency Measures in Federal Buildings

Section 4131, contains the provisions of H.R. 1629, the “Energy Savings Through Public-Private Partnerships Act,” sponsored by Reps. Kinzinger and Welch. This section makes several clarifying improvements to the implementations of Energy Savings Performance Contracts

(ESPCs). ESPCs allow the federal government to contract for energy-saving and water-saving improvements in federal buildings that are paid for with the resulting energy and water savings over the life of the contract.

V. Section 4141: Coordination Of Energy Retrofitting Assistance For Schools

Section 4141 contains the provisions of H.R. 756, the “Streamlining Energy Efficiency for Schools Act” sponsored by Reps. Cartwright and Welch, which passed the House in the 113th Congress.⁵ This section directs DOE to establish a clearinghouse to disseminate information regarding available programs and financing mechanisms that may be used to help initiate, develop, and finance energy efficiency, distributed generation, and energy retrofitting projects for schools. The language requires DOE to consult with appropriate agencies to develop a list of programs and financing mechanisms that are, or may be, used for the projects. It also requires the Office to coordinate with appropriate agencies to develop a collaborative education and outreach effort to streamline communications and promote the programs and financing mechanisms.

W. Section 4211: FERC Office of Compliance Assistance and Public Participation

Section 4211 replaces an existing FPA authorization for an Office of Public Participation that has never been funded, with new language creating an “Office of Compliance Assistance and Public Participation.”

The most important concerns raised by Democrats about the initial draft have been addressed in H.R. 8. First, the provision no longer requires the Director to be “selected by, and report solely to, the Commission,” which would have given the position a unique and difficult status within the Commission. Second, the bill drops language dictating the office’s staffing level and source, which would have taxed the ability of FERC to perform more essential regulatory functions. Finally, the provision drops the requirement for “real-time” compliance guidance, a nearly impossible task given the scope and complexity of most regulatory proceedings. The included provision requires the Director to engage in a number of activities to “promote improved compliance” with Commission rules and orders.” These activities include making recommendations regarding consumer protection, market integrity and consistent application of rules and orders; providing regulated entities compliance guidance; and informing the Commission and Congress with respect to energy policy matters in FERC’s jurisdiction.

X. Section 4221: GAO Study on Wholesale Electricity Markets

Section 4221 directs GAO to conduct a study of the current market rules, practices and structures of each FERC- approved regional transmission entity to evaluate if and how such market rules, practices and structures meet specific criteria.

⁵ U.S. House of Representatives, Voice Vote on Agreeing to H.R. 4092 (June 23, 2014); H.R. 4092, the “Streamlining Energy Efficiency for Schools Act of 2014,” 113th Cong. (2014).

II. H.R. 3242, THE CHILD NICOTINE POISONING PREVENTION ACT OF 2015

A. Background

Electronic Nicotine Delivery Systems (ENDs), also known as electronic cigarettes, e-cigarettes and vape pens, are battery-operated products designed to deliver nicotine, flavor and other chemicals.⁶ These products use a heat source, usually powered by a battery, to turn “e-liquid,” a liquid that usually contains nicotine from tobacco and flavorings, into an aerosol that is inhaled by the user.⁷

ENDs come in two forms: closed systems or open systems. Closed systems, which often look like regular cigarettes, use a sealed cartridge that is pre-filled with e-liquid that is attached to an associated, and often proprietary, battery.⁸ Closed system cartridges are disposable and cannot be easily refilled.⁹ Open systems allow the user to fill an empty tank, or “cartomizer,” with e-liquid. The cartomizer is attached to a battery, vaporizer, and mouthpiece.¹⁰ Open systems are refillable and allow users to mix their own e-liquids, which come in a variety of flavors.¹¹

Poison control centers are reporting an increase in the number of calls about exposures to ENDs and liquid nicotine; most of these exposures have occurred in children under the age of 6.¹² Children and toddlers who come in contact with ENDs or liquid nicotine have experienced nausea and vomiting, sometimes requiring emergency room visits.¹³ In December 2014, a one-year-old child died from liquid nicotine poisoning.¹⁴

⁶ U.S. Food and Drug Administration, *Electronic Cigarettes (e-Cigarettes)* (July 7, 2015) (online at www.fda.gov/NewsEvents/PublicHealthFocus/ucm172906.htm); World Health Organization, *Electronic cigarettes (e-cigarettes) or electronic nicotine delivery systems* (Mar. 30, 2015) (online at www.who.int/tobacco/communications/statements/electronic_cigarettes/en/).

⁷ U.S. Food and Drug Administration, *Recognize Tobacco in its Many Forms* (July 20, 2015) (online at www.fda.gov/ForConsumers/ConsumerUpdates/ucm392735.htm#e-cigarettes).

⁸ Chesapeake Cigar & Tobacco Company, *Electronic/Vaping* (Mar. 27, 2014) (online at www.chesapeakecigar.com/?page_id=1787).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Special Report: When It Comes to E-Cigs, Big Tobacco is Concerned for Your Health*, Reuters (Mar. 23, 2015) (online at www.reuters.com/article/2015/03/23/us-ecigarettes-regulations-specialreport-idUSKBN0MJ0GN20150323).

¹² American Association of Poison Control Centers, *E-Cigarette Devices and Liquid Nicotine* (online at www.aapcc.org/alerts/e-cigarettes/) (accessed on July 20, 2015).

¹³ *Id.*

¹⁴ *First Child's Death From Liquid Nicotine Reported as 'Vaping' Gains Popularity*, ABC News (Dec. 12, 2014) (online at abcnews.go.com/Health/childs-death-liquid-nicotine-reported-vaping-gains-popularity/story?id=27563788)

Currently, ENDS and e-liquids are not subject to any federal regulation.¹⁵ Under the Family Smoking Prevention and Tobacco Control Act (Tobacco Control Act), the Food and Drug Administration currently regulates cigarettes, cigarette tobacco, roll-your-own tobacco, and smokeless tobacco products.¹⁶ The law also gave FDA the ability to regulate additional tobacco products by “deeming” them through rulemaking.¹⁷ FDA has issued a proposed rule that would “deem” additional products, including e-cigarettes and e-cigarette cartridges.¹⁸ On June 26, 2015, FDA issued an advanced notice of proposed rulemaking to obtain information regarding nicotine exposure warnings and child-resistant packaging for liquid nicotine and nicotine-containing e-liquids, and potentially for other tobacco products including novel tobacco products such as dissolvables, lotions, gels, and drinks.¹⁹

The Consumer Product Safety Commission (CPSC) enforces the Poison Prevention Packaging Act (PPPA), which requires child-resistant packaging for hazardous substances; food, drugs, and cosmetics; and substances intended as fuel.²⁰ The PPPA requires special packaging for those products that would be difficult for children under five years of age to open or otherwise obtain a toxic amount within a reasonable time.²¹ Tobacco and tobacco products are specifically excluded from the definition of hazardous substances.²² Therefore, CPSC does not currently have authority to regulate e-cigarettes, e-liquid, or related products.

On March 16, 2015, Rep. Esty introduced H.R. 1375, also called the Child Nicotine Poisoning Prevention Act of 2015, which directs the CPSC to issue a rule requiring special packaging for liquid nicotine containers. Rep. Esty introduced similar legislation last Congress.

B. Summary

H.R. 3242, the Child Nicotine Poisoning Prevention Act of 2015, was introduced on July 28, 2015, by Representatives Brooks and Esty. While H.R. 1375 required CPSC to issue a

¹⁵ Selling a Poison by the Barrel: Liquid Nicotine for E-Cigarettes, New York Times (March 23, 2014) (online at www.nytimes.com/2014/03/24/business/selling-a-poison-by-the-barrel-liquid-nicotine-for-e-cigarettes.html).

¹⁶ U.S. Food and Drug Administration, Issue Snapshot on Deeming: Regulating Additional Tobacco Products (Jan. 2015) (online at www.fda.gov/downloads/TobaccoProducts/NewsEvents/UCM397724.pdf).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ U.S. Food and Drug Administration, *Nicotine Exposure Warnings and Child-Resistant Packaging for Liquid Nicotine, Nicotine-Containing E-Liquid(s), and Other Tobacco Products*, 80 FR 37555 (July 1, 2015) (advance notice of proposed rulemaking).

²⁰ 15 U.S. Code § 1471(2); 15 U.S. Code § 1472(a).

²¹ 15 U.S. Code § 1471(4); 15 U.S. Code § 1472(a).

²² 15 U.S.C. § 1261(f).

rulemaking, H.R. 3242 requires liquid nicotine containers to be designed with special packaging but it does not give CPSC new rulemaking authority to implement the Act. This special packaging under the bill would be in accordance with the PPPA and associated regulations. The requirement for special packaging would not apply to cartridges that are sealed, pre-filled and inserted directly into an ENDS if the liquid nicotine is inaccessible through normal and foreseeable use, including foreseeable contact by children.

The bill does not affect the authority of the FDA to regulate tobacco products. The FDA is required to consult with the CPSC if the FDA establishes any packaging requirements for liquid nicotine containers. The Act would take effect within 180 days of enactment.

III. PROPOSED MATTERS FOR INCLUSION IN RECONCILIATION RECOMMENDATIONS

A. Section 1 of Reconciliation Instructions

The Reconciliation Instructions would repeal the Prevention and Public Health Fund (Prevention Fund) created by the Affordable Care Act (ACA) and eliminate any unobligated amounts. That means the \$15.5 billion for the period FY 2016 through FY 2025 (not taking into account any sequestration requirements) would be rescinded.

1. Overview of the Prevention Fund

The Prevention Fund is the federal government's only dedicated investment in prevention and the nation's largest single investment in prevention.²³ The Prevention Fund was enacted in response to overwhelmingly bipartisan support for prevention efforts and recognition of the lack of a targeted and sustained federal initiative to address chronic and costly illnesses. The Prevention Fund is intended to provide resources to address the perpetual underfunding of prevention activities.

Most Prevention Fund dollars have gone directly to states, communities, and tribal and community organizations to improve the health and wellness of Americans.²⁴ Indeed, the Prevention Fund has supported efforts to reduce tobacco use, increase physical activity, expand mental health and injury prevention, improve nutrition, and increase immunization.²⁵ The President's FY 2016 Budget includes similar investments.

²³ Trust for America's Health, *The Prevention and Public Health Fund: Preventing Chronic Disease and Reducing Long-Term Health Costs* (Feb. 2015) (online at <http://healthyamericans.org/health-issues/wp-content/uploads/2015/06/Fund-Backgrounder-June-2015-Update.pdf>).

²⁴ Trust for America's Health, *The Prevention and Public Health Fund at Work in New Jersey* (Aug. 2015) (online <http://healthyamericans.org/health-issues/wp-content/uploads/2015/08/NJ-Fund-at-Work.pdf>).

²⁵ *Id.*

Chronic disease accounts for 86 percent of U.S. health care costs.²⁶ A Trust for America’s Health report concluded that investments in proven community-based interventions increase physical activity, improve nutrition, and prevent smoking – the very programs supported by the Prevention Fund – generate a return of \$5.60 for every \$1 spent.²⁷ Another Trust for America’s Health report found that a reduction of body mass index rates nationwide by 5 percent would save over \$158 billion in 10 years and almost \$612 billion in 20 years.²⁸

2. Mandatory Funding for the Prevention Fund

The Prevention Fund was created through the ACA “to provide for expanded and sustained national investment in prevention and public health programs to improve health and help restrain the rate of growth in private and public sector health care costs.”²⁹ This funding was intended to supplement and not supplant the pre-existing federal funding levels for public health programs. The ACA requires the Secretary of the Department of Health and Human Services (HHS) to transfer amounts in the Prevention Fund to accounts within HHS to increase funding over the FY 2008 level, for prevention, wellness, and public health activities.

The ACA initially provided \$500 million for the Prevention Fund in FY 2010 and steadily increased the funding until it reached \$2 billion in FY 2015 and each fiscal year thereafter.³⁰ Thus the ACA provided \$5 billion in mandatory funding for these activities over the period FY 2010 through FY 2014 and \$2 billion in mandatory funding each fiscal year thereafter (for a total of \$15 billion for FY 2010 through 2019, and \$20 billion for FY 2015 through 2024).³¹

However, subsequent legislation reduced funding for the Prevention Fund. The Middle Class Tax Relief and Job Creation Act of 2012, reduced the mandatory funding levels by \$6.25 billion for FY 2012 through FY 2021.³² This was achieved by slowing the increase in funding such that the \$2 billion in annual funding would not be reached until FY 2022. The Budget Control Act of 2011, which applied sequestration to the Prevention Fund, among other programs, resulted in a reduction in funding of \$196 million in FY 2013 through FY 2015.³³ Under current

²⁶ Centers for Disease Control and Prevention, *Chronic Disease Prevention and Health Promotion*, (online at <http://www.cdc.gov/chronicdisease/>) (accessed Sept. 28, 2015).

²⁷ Trust for America’s Health, *Prevention for a Healthier America: Investments in Disease Prevention Yield Significant Savings, Stronger Communities*, (Feb. 2009) (online at <http://healthyamericans.org/reports/prevention08/Prevention08.pdf>).

²⁸ Trust for America’s Health, *Bending the Obesity Cost Curve*, (Feb. 2012) (online at <http://healthyamericans.org/report/93/>).

²⁹ Patient Protection and Affordable Care Act, Public Law No. 111-148.

³⁰ *Id.*

³¹ *Id.*

³² Middle Class Tax Relief and Job Creation Act of 2012, Public Law No. 112-96.

³³ *Supra* note 23. *See* Budget Control Act of 2011, P.L. No. 112-25.

law, funding from the Prevention Fund would be reduced by \$68 million in FY 2016 – from \$1 billion down to \$932 million – due to a 6.8 percent sequestration reduction.³⁴

3. Transparency and Control of Funding Allocation for the Prevention Fund

As discussed above, the ACA requires the Secretary to transfer funds from the Prevention Fund to accounts within HHS. Additionally, the Consolidated Appropriations Act of 2012 required HHS to establish a website to report the uses of funds made available through the Prevention Fund and the Consolidated and Further Continuing Appropriations Act of 2015 required HHS to provide information on activities and programs supported by the Prevention Fund. The website, www.hhs.gov/open/prevention, provides an overview of the funding distribution of the Prevention Fund for FY 2012 through FY 2015 as well as includes a database that provides information on funding opportunity announcements, requests for proposals, other funding solicitations, and awards for activities funded from the Prevention Fund.

The ACA also granted the House and Senate Appropriations Committees transfer authority to determine the distribution of Prevention Funds for prevention, wellness, and public health activities. Beginning in FY 2014, the House and Senate Appropriations Committee have used that authority to direct the funding allocation of the Prevention Fund. The FY 2014 and FY 2015 Omnibus appropriations bills include bill language to allocate PPH funding “to the accounts specified, in the amounts specified, and for the activities specified” in a table in the accompanying explanatory statement. Furthermore, the appropriations bills specify that “the Secretary may not further transfer these amounts.”

In addition, both the House and Senate FY 2016 Labor, HHS, Education, and Related Agencies funding bills allocate every dollar from the Prevention Fund. Any suggestion that the Prevention Fund is a “slush fund” for the HHS Secretary is inaccurate.

B. Section 2 of Reconciliation Instructions

The Reconciliation Instructions limits for one year Medicaid reimbursements payments for States through any public health program, including any existing and approved Medicaid family planning waivers, or Medicaid waivers more broadly, to reimburse a “prohibited entity”. The bill defines “prohibited entity” as a 501(c)3 organization that is “primarily engaged in family planning, reproductive health services and related medical care” and provides abortions. The language specifies that such an entity includes those receiving more than \$350 million in federal reimbursement nationwide over the course of a year.

In an attempt to define “prohibited entities” the bill uses the definition of essential community providers (ECPs) and could technically impact other family planning ECPs down the

³⁴ Office of Management and Budget, *OMB Report to the Congress on the Joint Committee Reductions for Fiscal Year 2016*, (online at https://www.whitehouse.gov/sites/default/files/omb/assets/legislative_reports/sequestration/2016_jc_sequestration_report_speaker.pdf).

line. As a result of the limit on certain ECPs, it is possible that other ECPs pick up the Medicaid revenue and then be swept in under this definition of “prohibited entity” and also be limited from receiving Medicaid payments.

Essentially, the bill would cut off funding for Planned Parenthood Medicaid reimbursements but also could incentivize providers down the line to make a choice between being a Medicaid provider that cares for low-income women and providing abortion services. In addition, the language would immediately interrupt all currently approved Medicaid waivers, in all state Medicaid programs.

1. Overview of Family Planning In Medicaid

Access to family planning services has long held special status in the Medicaid program. In 1972, Congress added family planning to the short list of mandatory benefits states must provide, and, as a further incentive to expand family planning benefits, established a special federal matching rate of 90 percent.³⁵ Through passage of the Affordable Care Act, Congress again reinforced family planning access when it required coverage of family planning services for the Medicaid expansion population.³⁶ This means that for family planning, Congress consistently has held high priority for beneficiary access; indeed, the 90 percent rate is a clear incentive for all states to ensure family planning access to eligible beneficiaries.

Under federal law Medicaid beneficiaries may obtain medical services "from any institution, agency, community pharmacy, or person, qualified to perform the service or services required... who undertakes to provide him such services."³⁷ This provision is often referred to as the "any willing provider" or "free choice of provider" provision. Federal Medicaid funding of abortion services is not permitted under federal law except in extraordinary circumstances (in cases of rape, incest, or when the life of the woman would be in danger). At the same time, Medicaid programs may not exclude qualified health care providers—whether an individual provider, a physician group, an outpatient clinic, or a hospital—from providing services under the program because they separately provide abortion (not funded by federal Medicaid dollars, consistent with the federal prohibition) as part of their scope of practice.³⁸ This provision is implemented in the Center for Medicare and Medicaid Services’ (CMS) “free choice of provider” regulation, which also explicitly states that under no circumstance can the “free choice of provider” protection be compromised with respect to providers of family planning services.³⁹ This strong patient access protection has remained constant despite significant changes in the flexibility of the Medicaid program through both Democratic and Republican administrations. In short, it is an essential guarantee that state Medicaid programs will provide beneficiaries with the

³⁵ Social Security Act, § 1905(a)(4)(C), codified at 42 U.S.C. § 1396a(a)(4)(C).

³⁶ 42 U.S.C. §§ 1396u-7(b)(7) (as added by ACA § 2303(c)), 1396u-7(b)(5) (as added by ACA § 2001(c)).

³⁷ Social Security Act, §1902(a)(23)).

³⁸ *Id.*

³⁹ Free Choice of Providers, 42 C.F.R. § 431.51(a)(3).

same basic opportunity and rights to choose and receive covered health care services from any qualified provider the same way that any member of the general population seeking health care services.

C. Section 3 of Reconciliation Instructions

The Reconciliation Instructions would provide \$470 million in additional funding for the Community Health Center Fund (CHC Fund). The purpose of this proposal is to allocate the \$235 million in funding that the Congressional Budget Office (CBO) estimates would be saved from FY 2016 through FY 2025 if Planned Parenthood was prohibited from receiving federal funding for one year.⁴⁰ However, the language in the Committee Print text strikes the funding amount for the CHC Fund in the Medicare Access and CHIP Reauthorization Act of 2015 (MACRA) and replaces it, without regard for the fact that the CHC Fund is for two years in current law.⁴¹

1. Overview of CHC Fund

The ACA created a 5-year CHC Fund “to provide for expanded and sustained national investment in community health centers.”⁴² The purpose of this fund was to supplement and not supplant funding for community health centers. The fund provided a total \$9.5 million to enhance operations and \$1.5 million for the construction and renovation of community health centers over the period from FY 2011 through FY 2015. That funding has been used for such purposes as new access points, expanded services, behavioral health integration, and patient-centered medical homes.⁴³

2. Extension of CHC Fund in Medicare Access and CHIP Reauthorization Act of 2015

While the CHC Fund was intended to supplement federal support, it was used to partially supplant annual appropriations since its existence.⁴⁴ From FY 2011 to FY 2015, the CHC Fund consumed an increasing percentage of federal funding for community health centers, increasing from 40 percent to 72 percent over that time frame.⁴⁵ Since a growing percentage of federal funding for community health centers came from the CHC Fund, the end of the 5-year fund

⁴⁰ See Congressional Budget Office, *Cost Estimate for H.R. 3134 Defund Planned Parenthood Act*, (online at <https://www.cbo.gov/sites/default/files/114th-congress-2015-2016/costestimate/hr3134.pdf>).

⁴¹ Medicare Access and CHIP Reauthorization Act of 2015, Sec. 221(a), Pub. Law. No. 114-110.

⁴² *Infra* note 44.

⁴³ Congressional Research Service, *The Community Health Center Fund: In Brief*, Apr. 24, 2015) (online at <http://www.crs.gov/Reports/R43911?source=search>).

⁴⁴ *Id.*

⁴⁵ *Id.*

threatened to leave more than 7 million patients without access to their health care provider at their local community health center within the first year.⁴⁶

To prevent that reduction in access, Congress included a two year extension of the CHC Fund as part of MACRA. MACRA provided a total \$7.2 billion to support health center operations in FY 2016 and FY 2017 (\$3.6 billion each fiscal year).⁴⁷

⁴⁶ National Association of Community Health Centers, *Community Health Centers Past, Present, and Future: Building on 50 Years of Success*, (March 2015) (online at http://nachc.com/client/PI_50th.pdf).

⁴⁷ Medicare Access and CHIP Reauthorization Act of 2015, Public Law No. 114-10.