

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

July 22, 2015

- To: Subcommittee on Commerce, Manufacturing, and Trade Democratic Members and Staff**
- Fr: Committee on Energy and Commerce Democratic Staff**
- Re: Markup of H.R. 985, Concrete Masonry Products Research, Education, and Promotion Act of 2015, H.R. __, Child Nicotine Poisoning Prevention Act of 2015, and H.R. __, E-Warranty Act of 2015.**

On Thursday, July 23, 2015, at 1:00 p.m. in room 2123 of the Rayburn House Office Building, the Subcommittee on Commerce, Manufacturing, and Trade will meet in open markup on H.R. 985, the Concrete Masonry Products Research, Education, and Promotion Act of 2015, H.R. __, the Child Nicotine Poisoning Prevention Act of 2015, and H.R. __, the E-Warranty Act of 2015.

A legislative hearing on H.R. 985, the Concrete Masonry Products Research, Education, and Promotion Act of 2015 was held on July 10, 2015. For additional background, please see the memo from the July 10, 2015 hearing available [here](#). No hearings were held on either the Child Nicotine Poisoning Prevention Act of 2015 or the E-Warranty Act of 2015.

I. H.R. 985, THE CONCRETE MASONRY PRODUCTS RESEARCH, EDUCATION, AND PROMOTION ACT OF 2015

H.R. 985 would create a “check-off” program for the concrete masonry industry.

A. Establishment of the Concrete Masonry Products Board

The bill directs the Secretary of Commerce to prepare an order establishing a Concrete Masonry Products Board to carry out a program of generic promotion, research, and education relating to concrete masonry products. Promotion is defined as actions to advance the image and desirability of masonry products with the express intent of improving the competitive position of masonry products in the marketplace. Education is defined as programs to communicate any environmental benefits and advancements in concrete masonry technology and which are designed to generate increased demand for projects using concrete masonry products. Research

is defined as studies testing the effectiveness of the promotion efforts as well as studies relating to improvement of the products and testing the performance of the products.

The proposed order establishing the Board and check-off program will be open for public comment before the order is finalized. The final order will only become effective if it is approved by a simple majority of the votes cast in an industry referendum. The number of votes allowed for each manufacturer is based on the size of the manufacturer's operation, with each manufacturer entitled to one vote per mold it has actively available to make a single concrete block.¹

The Board, which may have up to 25 members, must be made up of concrete masonry manufacturers reflecting geographic and product diversity within the industry. Board members are appointed by the Secretary of Commerce from nominations submitted by manufacturers. Two nominees will be submitted for each available board position through a nomination procedure to be established by the order. Board members will not be paid for their service, but may receive reimbursement for travel expenses for occasions on which they are away from home to perform services for the Board.

B. Assessments on Check-off Program Members

H.R. 985 sets the initial rate of assessment for the check-off at \$0.01 per concrete masonry unit sold, but the rate may be changed by a two-thirds majority of voting members of the Board. The assessment rate under this program is capped at \$0.05 per unit sold. At least 50% of the assessments paid by a manufacturer must be spent on promotion, research, or education programs in that manufacturer's geographic area. In addition, the statute prohibits the use of assessment funds to influence legislation or governmental action. Beginning three years after the program's creation, administrative expenses cannot exceed 10% of the Board's income.

C. Oversight and Enforcement

The bill provides for oversight of the activities of the Board by the Secretary of Commerce. The Board's budget must be submitted to the Secretary of Commerce for approval at least once per year. At the end of each fiscal year, the Board's records must be audited by an independent auditor. All research, education, and promotion projects and all contacts entered into by the Board to carry out those projects must be approved by the Secretary.

The order, including the collection of assessments and all Board activities, may be suspended or terminated by a majority of all votes cast in an industry referendum, which may be conducted at least five years after the approval of the original order or at five-year intervals thereafter. Any such subsequent referenda will only occur at the request of 25 percent or more of the number of manufacturers eligible to vote.

¹ Concrete block machines may include more than one single-block mold, meaning that one machine can make more than one block at a time. Most manufacturers will get more than one vote, with larger companies getting a larger number of votes.

The bill allows any manufacturer subject to an order to petition for review of an order and requires the petitioner have an opportunity for a hearing on the petition. The petitioner may appeal the Secretary's ruling in U.S. district court. The Secretary must suspend or terminate any order or provision that obstructs or does not tend to effectuate the purposes of this Act.

The bill also provides that a U.S. district court will have jurisdiction to enforce, prevent, and restrain any person from violating the Act or an order or regulation issued under the Act. And it authorizes the Secretary of Commerce to assess a fine of up to \$5,000 on a person for each willful violation of an order or regulation issued under the statute. The Secretary may conduct appropriate investigations necessary to administer this Act.

II. H.R. __, 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.² 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.³

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.⁴ Closed system cartridges are disposable and cannot be easily refilled.⁵ 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.⁶ Open systems are refillable and allow users to mix their own e-liquids, which come in a variety of flavors.⁷

² 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/).

³ 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).

⁴ Chesapeake Cigar & Tobacco Company, *Electronic/Vaping* (Mar. 27, 2014) (online at www.chesapeakecigar.com/?page_id=1787).

⁵ *Id.*

⁶ *Id.*

⁷ *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).

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 6.⁸ Children and toddlers who come in contact with ENDS or liquid nicotine have experienced nausea and vomiting, sometimes requiring emergency room visits.⁹ In December 2014, a one-year-old child died from liquid nicotine poisoning.¹⁰

Currently, ENDS and e-liquids are not subject to any federal regulation.¹¹ 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.¹² The law also gave FDA the ability to regulate additional tobacco products by “deeming” them through rulemaking.¹³ FDA has issued a proposed rule that would “deem” additional products, including e-cigarettes and e-cigarette cartridges.¹⁴ 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.¹⁵

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.¹⁶ 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.¹⁷ Tobacco and tobacco products are

⁸ 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).

⁹ *Id.*

¹⁰ *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)

¹¹ *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).

¹² 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).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ 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).

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

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

specifically excluded from the definition of hazardous substances.¹⁸ 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. ___, would require liquid nicotine containers to be designed with special packaging in accordance with the PPPA and associated regulations. This requirement would not apply to cartridges that are sealed, pre-filled and is 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. H.R. ___, THE E-WARRANTY ACT OF 2015

A. Background

A warranty is promise by a seller or manufacturer to stand behind its product.¹⁹ There are two basic kinds of warranties—express warranties and implied warranties.²⁰ Express warranties are not required by law, but if a manufacturer elects to provide a warranty, the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act requires that warranties be available for consumers to review before making a purchase.²¹

The Federal Trade Commission (FTC) has promulgated a rule, known as the Pre-Sale Availability Rule, that requires written warranties on consumer products costing more than \$15 be available to consumers before they buy the product.²² The rule specifies the obligations on sellers and manufacturers, including the obligations of manufacturers to ensure that sellers can meet their obligations.²³

¹⁸ 15 U.S.C. § 1261(f).

¹⁹ Federal Trade Commission, *Businessperson's Guide to Federal Warranty Law* (Dec. 2006) (online at www.ftc.gov/tips-advice/business-center/guidance/businesspersons-guide-federal-warranty-law#intro).

²⁰ *Id.*

²¹ 15 U.S.C. §2302; Federal Trade Commission, *Warranties* (Oct. 2001) (online at www.consumer.ftc.gov/articles/0252-warranties).

²² Federal Trade Commission, *Businessperson's Guide to Federal Warranty Law* (Dec. 2006) (online at www.ftc.gov/tips-advice/business-center/guidance/businesspersons-guide-federal-warranty-law#intro).

²³ *Id.*

S. 1359, the E-Warranty Act of 2015, was introduced in the Senate on May 14, 2015, by Senators Deb Fischer and Bill Nelson. The bill passed the Senate with a minor amendment by Unanimous Consent. The bill amends the Magnuson-Moss Warranty Act to allow the requirements for express, written warranties to be fulfilled by making warranty information available online. H.R. ____, the E-Warranty Act of 2015 is expected to be introduced today, July 22, 2015, by Reps. Mullen and Loeb sack.

B. Summary

The E-Warranty Act of 2015 requires the FTC to amend the Pre-Sale Availability Rule to allow manufacturers and sellers to satisfy their pre-sale warranty obligations by posting warranties online. Manufacturers would also have to provide the website and other non-Internet-based contact information for the manufacturer on the product or product packaging. The terms of written warranties must be made available to the consumer at the location of sale.

The bill gives the FTC one year from the date of enactment to revise the Pre-Sale Availability Rule, but allows the FTC to waive the statutory requirement in the Magnuson-Moss Act to give interested parties an opportunity for oral presentations if providing that opportunity for oral presentation delays the final passage of the revisions to the Rule.