



Ohio Legislative Service Commission

Bill Analysis

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Sub. S.B. 54*

131st General Assembly
(As Reported by H. Health and Aging)

Sens. Jones, Eklund, Patton, Manning, Lehner, Tavares, Brown, Skindell, Thomas, Hottinger, Uecker, LaRose, Bacon, Balderson, Beagle, Burke, Cafaro, Hite, Obhof, Peterson, Sawyer, Schiavoni, Widener, Yuko

Rep. Huffman

BILL SUMMARY

- Prohibits the retail sale of any liquid nicotine container to be used with an electronic cigarette unless the container satisfies certain child-resistant standards and establishes a civil penalty of not more than \$1,000 for each violation.
- In general, prohibits a child from consuming, possessing, using, purchasing, attempting to purchase, ordering, paying for, sharing the cost of, accepting, or receiving liquid nicotine.
- Prohibits a child from knowingly furnishing false identification to obtain liquid nicotine.
- Prohibits giving, selling, or otherwise distributing liquid nicotine to a child.
- Expands the offenses of "permitting children to use cigarettes, other tobacco products, or alternative nicotine products" and "illegal distribution of cigarettes, other tobacco products, or alternative nicotine products" to include liquid nicotine.
- Requires age verification before liquid nicotine can be sold or otherwise distributed over the Internet or through another remote method.

* This analysis was prepared before the report of the House Health and Aging Committee appeared in the House Journal. Note that the list of co-sponsors and the legislative history may be incomplete.

- Authorizes a seller to perform a transaction scan to check the validity of a driver's license or other identification card presented as a condition for selling or distributing liquid nicotine.
- Permits a seller to raise as an affirmative defense against a charge of distributing liquid nicotine to a child that such a transaction scan was performed, the scan indicated validity, and the scan was reasonably relied upon.

CONTENT AND OPERATION

Child-resistant standards for liquid nicotine containers

The bill prohibits a person from knowingly selling at retail any liquid nicotine container that does not satisfy either of the following:

(1) Child-resistant effectiveness standards for poison prevention established by the U.S. Consumer Product Safety Commission (CPSC) in federal regulations that are in effect on the bill's effective date. Under these regulations, special packaging must have a child-resistant effectiveness of not less than 85% without a demonstration and not less than 80% after a demonstration of the proper means of opening the special packaging. In the case of unit packaging, there must be a child-resistant effectiveness of not less than 80%.¹

(2) Child-resistant packaging standards for liquid nicotine containers established by the Ohio Department of Health (ODH). The bill requires ODH to adopt rules establishing the standards.²

Application and exceptions

Generally, the bill's prohibition applies to a bottle or other container of liquid that contains nicotine and is sold, marketed, or intended for use with an electronic cigarette.³ The prohibition, however, does not apply to any of the following:

(1) A liquid nicotine container that is prefilled and sealed by a manufacturer for use with an electronic cigarette, if the container is not intended to be opened by the consumer;

¹ R.C. 2927.28(B)(1)(a). *See also* 16 Code of Federal Regulations 1700.15(b).

² R.C. 2927.28(B)(1)(b) and (C).

³ R.C. 2929.28(A)(2).



(2) A liquid nicotine container that is sold at retail on or after the date the U.S. Food and Drug Administration, or another federal agency with jurisdiction, issues final regulations establishing child-resistant effectiveness standards for liquid nicotine containers.⁴

Delayed effective date

Under the bill, the prohibition on the sale of any liquid nicotine container not meeting child-resistant standards does not take effect until 180 days after the bill's effective date.⁵

Penalty

The bill authorizes a court of competent jurisdiction to impose on an offender a civil penalty of not more than \$1,000 for each violation. It requires the clerk of the court to transmit the amount collected from payment of the civil penalty to the county treasurer for deposit into the county treasury.⁶

Enforcement and investigation

The bill requires the Ohio Department of Public Safety (ODPS) to enforce both the bill's provisions and ODH rules relative to child-resistant standards for liquid nicotine containers.⁷ The bill also requires the ODPS investigative unit to conduct investigations and enforcement activity related to child-resistant standards and liquid nicotine containers.⁸

Federal law

On January 11, 2016, the 114th Congress enacted S. 142, the Child Nicotine Poisoning Prevention of 2015. It requires that any nicotine provided in a liquid nicotine container sold, offered for sale, manufactured for sale, distributed in commerce, or imported into the United States be packaged in accordance with CPSC standards and procedures for poison prevention and special packaging (described in "**Child resistant standards for liquid nicotine containers**" above).⁹

⁴ R.C. 2927.28(B)(2).

⁵ R.C. 2927.28(B)(1).

⁶ R.C. 2927.28(E).

⁷ R.C. 2927.28(D) and 5502.01(L).

⁸ R.C. 5502.13.

⁹ See <<https://www.congress.gov/bill/114th-congress/senate-bill/142/text>>.



Prohibiting children from possessing, using, purchasing, or receiving liquid nicotine

The prohibitions

The bill prohibits a child from possessing, using, purchasing, or receiving liquid nicotine.¹⁰ It defines "liquid nicotine" as a liquid that consists of or contains nicotine and is sold, marketed, or intended for use with an electronic cigarette.¹¹ While existing law prohibits a child from possessing, using, purchasing, or receiving cigarettes, other tobacco products, alternative nicotine products, and cigarette papers, it does not expressly prohibit that conduct with respect to liquid nicotine. The bill extends those existing prohibitions and related exemptions and sanctions to liquid nicotine. Under the bill, no child may do any of the following unless accompanied by a parent, adult spouse, or legal guardian of the child: (1) use, consume, or possess liquid nicotine, (2) purchase or attempt to purchase liquid nicotine, (3) order, pay for, or share the cost of liquid nicotine, or (4) except when acting exclusively within the scope and requirements of the child's employment, accept or receive liquid nicotine.¹²

Under the bill, it is not a violation of any of the prohibitions described in the preceding paragraph if (1) the child possesses, purchases or attempts to purchase, orders, pays for, or shares the cost of, or accepts or receives, liquid nicotine while participating in an inspection or compliance check conducted by a federal, state, local, or corporate entity at a location at which liquid nicotine is sold or distributed or (2) the child accepts, receives, uses, consumes, or possesses liquid nicotine while participating in a research protocol under the following conditions:

(a) The child's parent, guardian, or legal custodian has consented in writing to the child participating in the research protocol;

(b) An institutional human subjects protection review board, or equivalent entity, has approved the research protocol;

(c) The child is participating in the research protocol at the facility or location specified in the research protocol.¹³

¹⁰ R.C. 2151.87.

¹¹ R.C. 2927.02.

¹² R.C. 2151.87(B).

¹³ R.C. 2151.87(E).



The bill additionally prohibits a child from knowingly furnishing false information concerning that child's name, age, or other identification for the purpose of obtaining liquid nicotine.¹⁴

The bill specifies that a child alleged or found to have violated either prohibition may not be detained under any provision of the Juvenile Law or any other provision of the Revised Code.¹⁵

Disposition of a child who violates any of the prohibitions

Under the bill, a child who is alleged to have violated any of the above prohibitions and that child's parent, guardian, or custodian, in lieu of appearing before the juvenile court, may sign a waiver of appearance before the clerk of the juvenile court and pay a fine of \$100. If the child and the child's parent, guardian, or custodian do not waive the court appearance, the court must proceed with an adjudicatory hearing.¹⁶

If a juvenile court finds that a child violated any of the prohibitions described under "**The prohibitions**," above, the court may do either or both of the following: (1) require the child to attend a youth smoking education program or other smoking treatment program approved by the court, if one is available, or (2) impose a fine of not more than \$100.¹⁷

If a child disobeys a juvenile court order described in the preceding paragraph, the court may do any or all of the following: (1) increase the fine imposed upon the child, (2) require the child to perform not more than 20 hours of community service, or (3) suspend for a period of 30 days the child's temporary instruction permit, probationary driver's license, or driver's license.

The bill prohibits a juvenile court from adjudicating a child a delinquent or unruly child for violating any of the prohibitions.¹⁸

Related changes

The bill also makes the following provisions of current law applicable to the prohibitions relating to liquid nicotine described in "**The prohibitions**," above:

¹⁴ R.C. 2151.87(C).

¹⁵ R.C. 2151.87(H).

¹⁶ R.C. 2151.28(C)(2), not in the bill.

¹⁷ R.C. 2151.87(F).

¹⁸ R.C. 2151.87(D).

(1) It grants a juvenile court exclusive original jurisdiction concerning any child who is alleged to have violated any of the prohibitions.

(2) It authorizes a person to file in juvenile court a complaint alleging a child to have violated any of the prohibitions.

(3) It excepts a child who violates any of the prohibitions or who violates a court order relating to the prohibitions from the definition of "unruly child" and from the definition of "delinquent child."

(4) It provides that the adjudicatory hearing for a child alleged to have committed any of the prohibitions must be held and may be continued in accordance with the Juvenile Rules.

Permitting children to use liquid nicotine

The bill prohibits a manufacturer, producer, distributor, wholesaler, or retailer of liquid nicotine, an agent, employee, or representative of any such entity, or any other person from knowingly furnishing any false information regarding the name, age, or other identification of any child with purpose to obtain liquid nicotine for that child. Current law prohibits such individuals from furnishing false information regarding a child with purpose to obtain for that child cigarettes, other tobacco products, alternative nicotine products, or cigarette papers. Under the bill, whoever violates the prohibition is guilty of "permitting children to use cigarettes, other tobacco products, alternative nicotine products, or liquid nicotine," a misdemeanor of the fourth degree. If the offender previously has been convicted of a violation of that prohibition, the offense is a misdemeanor of the third degree.¹⁹

Illegal distribution of liquid nicotine

The bill extends to liquid nicotine many of the prohibitions governing the distribution of cigarettes, other tobacco products, alternative nicotine products, or cigarette papers to a child. Under the bill, no manufacturer, producer, distributor, wholesaler, or retailer of liquid nicotine, no agent, employee, or representative of any such entity, and no other person may do any of the following: (1) give, sell, or otherwise distribute liquid nicotine to any child, or (2) give away, sell, or distribute liquid nicotine in any place that does not have posted in a conspicuous place a sign stating that giving, selling, or otherwise distributing liquid nicotine to a person under 18 years of age is prohibited by law.²⁰

¹⁹ R.C. 2927.02(B)(3) and (F)(2).

²⁰ R.C. 2927.02(B).



The bill also prohibits a manufacturer, producer, distributor, wholesaler, or retailer of liquid nicotine, an agent, employee, or representative of any such entity, and any other person from giving, selling, or otherwise distributing liquid nicotine over the Internet or through another remote method without age verification.²¹ The act defines "age verification" as a service provided by an independent third party, other than a manufacturer, producer, distributor, wholesaler, or retailer of cigarettes, other tobacco products, alternative nicotine products, liquid nicotine, or papers used to roll cigarettes, that compares information available from a commercially available database, or aggregate of databases, that regularly are used by government and businesses for the purpose of age and identity verification to personal information provided during an Internet sale or other remote method of sale to establish that the purchaser is 18 years of age or older.²²

Additionally, under the bill, no person may sell or offer to sell liquid nicotine by or from a vending machine except in the following locations: (1) an area either: (a) within a factory, business, office, or other place not open to the general public, or (b) to which children are not generally permitted access, or (2) in any other place not identified in (1) above, upon all of the following conditions: (a) the vending machine is located within the immediate vicinity, plain view, and control of the person who owns or operates the place, or an employee of the person, so that all liquid nicotine purchases from the vending machine will be readily observed by the person who owned or operated the place or an employee of that person, and (b) the vending machine is inaccessible to the public when the place is closed. A vending machine located in any unmonitored area, including an unmonitored coatroom, restroom, hallway, or outer waiting area, is not considered to be located within the immediate vicinity, plain view, and control of the person who owns or operates the place, or an employee of that person.²³

A person who violates any of the above prohibitions is guilty of "illegal distribution of cigarettes, other tobacco products, alternative nicotine products, or liquid nicotine," a misdemeanor of the fourth degree. If the offender previously has been convicted of a violation of any of the above prohibitions, then the offense is a misdemeanor of the third degree.²⁴

²¹ R.C. 2927.02(B)(6).

²² R.C. 2927.02(A).

²³ R.C. 2927.02(C).

²⁴ R.C. 2927.02(F)(1).



Affirmative defenses and exemptions

The bill establishes affirmative defenses to and exempts certain conduct from the prohibitions described above relating to liquid nicotine. The following are affirmative defenses to a charge of giving, selling, or otherwise distributing liquid nicotine to a child: (1) the child was accompanied by the child's parent, adult spouse, or legal guardian, and (2) the person who gave, sold, or distributed liquid nicotine is the child's parent, adult spouse, or legal guardian. Also, it is not a violation for a person to give or otherwise distribute liquid nicotine to a child while the child is participating in a research protocol as described in "**The prohibitions**" above.²⁵

Under the bill, any liquid nicotine that is given, sold, or otherwise distributed to a child in violation of any of the above prohibitions and that is used, possessed, purchased, or received by a child in violation of the prohibitions described under "**Prohibiting children from possessing, using, purchasing, or receiving liquid nicotine**," above, are subject to seizure and forfeiture as contraband.²⁶

Authority to perform transaction scans to verify identity

The bill authorizes a seller of liquid nicotine, including the seller's agent or employee, to perform a transaction scan by means of a transaction scan device (see below) to check the validity of a driver's or commercial driver's license or identification card presented by a card holder as a condition for selling, giving away, or otherwise distributing liquid nicotine to the card holder.²⁷ Existing law permits the same individuals to perform transaction scans when selling or distributing cigarettes, other tobacco products, or alternative nicotine products.

A "transaction scan device" is any commercial device or combination of devices used at a point of sale that is capable of deciphering in an electronically readable format the information encoded on the magnetic strip or bar code of a driver's or commercial driver's license or an identification card. If information deciphered by a transaction scan fails to match information printed on the driver's or commercial driver's license or identification card presented by the card holder, or if the transaction scan indicates that information printed is false or fraudulent, the seller may not sell, give away, or otherwise distribute liquid nicotine to the card holder.

²⁵ R.C. 2927.02(D) and (E).

²⁶ R.C. 2927.02(G).

²⁷ R.C. 2927.021.



Current law unchanged by the bill prohibits a seller from electronically or mechanically recording or maintaining any information derived from a transaction scan, except for the following:

(1) The name and date of birth of the person listed on the card presented by the card holder;

(2) The expiration date and identification number of the card presented by the card holder.

Current law unchanged by the bill also forbids a seller from using, selling, or disseminating information derived from a transaction scan.

Penalties

Under the bill, a person who violates any requirement governing a liquid nicotine transaction scan is guilty of engaging in an illegal transaction scan. The court may impose a civil penalty of up to \$1,000 for each violation.²⁸

Transaction scan a defense to illegal distribution

Under the bill a seller may not be found guilty of "illegal distribution of cigarettes, other tobacco products, alternative nicotine products, or liquid nicotine" or "permitting children to use cigarettes, other tobacco products, alternative nicotine products, or liquid nicotine" when the age of the purchaser or other recipient is an element of the offense if all of the following are the case:

(1) The person attempting to purchase or receive liquid nicotine presented a driver's or commercial driver's license or an identification card;

(2) A transaction scan of the license or card presented indicated that it is valid;

(3) The liquid nicotine was sold, given away, or otherwise distributed to the person in reasonable reliance upon the identification presented and the completed transaction scan.

In determining whether a seller has met these requirements, the trier of fact must consider any written policy that the seller has adopted and implemented and that is intended to prevent the offenses. The trier of fact must also consider that reasonable reliance on the identification presented and the completed transaction scan may require a seller to exercise reasonable diligence to determine the following:

²⁸ R.C. 2927.021(F).



(1) Whether a person to whom the seller sells, gives away, or otherwise distributes liquid nicotine is age 18 years or older;

(2) Whether the description and picture appearing on the license or card presented by the card holder is that of the card holder.²⁹

Electronic cigarettes – background

The bill defines "electronic cigarette" as any electronic product or device that produces a vapor that delivers nicotine or any other substance to the person inhaling from the device to simulate smoking and that is likely to be offered to or purchased by consumers as an electronic cigarette, electronic cigar, electronic cigarillo, or electronic pipe.³⁰

According to the U.S. Food and Drug Administration, an electronic cigarette is a battery-operated product designed to deliver nicotine, flavor, and other chemicals to the user.³¹ Most electronic cigarettes consist of the following components: (1) a cartridge or tank holding a liquid solution that contains varying amounts of nicotine, flavorings, and other chemicals, (2) a heating device or vaporizer, and (3) a power source, usually a battery. In many electronic cigarettes, puffing activates the battery-powered heating device, which vaporizes the liquid in the cartridge. The resulting aerosol is then inhaled (commonly called "vaping").³²

HISTORY

| ACTION | DATE |
|---|----------|
| Introduced | 02-12-15 |
| Reported, S. Transportation, Commerce & Labor | 06-10-15 |
| Passed Senate (32-1) | 06-16-15 |
| Reported, H. Health & Aging | --- |

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²⁹ R.C. 2927.022.

³⁰ R.C. 2927.02 and 2927.28(A).

³¹ U.S. Food and Drug Administration, News & Events, Public Health Focus, Electronic Cigarettes, available at <<http://www.fda.gov/newsevents/publichealthfocus/ucm172906.htm>>.

³² National Institute on Drug Abuse, Drug Facts: Electronic Cigarettes, available at <<http://www.drugabuse.gov/publications/drugfacts/electronic-cigarettes-e-cigarettes>>.

