

NONMAILABILITY OF CERTAIN TOBACCO PRODUCTS

JUNE 12, 2008.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. WAXMAN, from the Committee on Oversight and Government Reform, submitted the following

R E P O R T

together with

MINORITY VIEWS

[To accompany H.R. 5912]

[Including cost estimate of the Congressional Budget Office]

The Committee on Oversight and Government, to whom was referred the bill (H.R. 5912) to amend title 39, United States Code, to make cigarettes and certain other tobacco products nonmailable, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

CONTENTS

	Page
Purpose and Summary	3
Background and Need for Legislation	3
Legislative History	4
Section-by-Section	5
Explanation of Amendments	6
Committee Consideration	7
Rollcall Votes	8
Application of Law to the Legislative Branch	10
Statement of Oversight Findings and Recommendations of the Committee	10
Statement of General Performance Goals and Objectives	10
Constitutional Authority Statement	10
Federal Advisory Committee Act	10
Unfunded Mandate Statement	10
Earmark Identification	10
Committee Estimate	10
Budget Authority and Congressional Budget Office Cost Estimate	11
Changes in Existing Law Made by the Bill, as Reported	12
Minority Views	17

The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. NONMAILABILITY OF CERTAIN TOBACCO PRODUCTS.

(a) IN GENERAL.—Chapter 30 of title 39, United States Code, is amended by inserting after section 3002a the following:

“§ 3002b. Nonmailability of certain tobacco products

“(a) IN GENERAL.—Cigarettes, smokeless tobacco, and roll-your-own-tobacco—

“(1) are nonmailable matter;

“(2) shall not be—

“(A) deposited in the mails; or

“(B) carried or delivered through the mails; and

“(3) shall be disposed of as the Postal Service directs.

“(b) CIVIL PENALTY.—

“(1) IN GENERAL.—Any person who violates subsection (a)(2)(A) shall be liable to the United States for a civil penalty in an amount not to exceed \$100,000 for each violation.

“(2) HEARINGS.—

“(A) IN GENERAL.—The Postal Service may determine that a person has violated subsection (a)(2)(A) only after notice and an opportunity for a hearing. Proceedings under this paragraph shall be conducted in accordance with section 3001(m).

“(B) PENALTY CONSIDERATIONS.—In determining the amount of a civil penalty under this paragraph, the Postal Service shall consider—

“(i) the nature, circumstances, extent, and gravity of the violation;

“(ii) with respect to the violator, the degree of culpability, ability to pay, and any history of prior violations; and

“(iii) such other matters as justice may require.

“(3) CIVIL ACTIONS TO COLLECT.—The Postal Service may bring a civil action in an appropriate district court of the United States, in accordance with section 409(g)(2), to collect a civil penalty under this section.

“(4) DISPOSITION OF AMOUNTS.—Amounts received in payment of any civil penalties under this subsection shall be deposited as miscellaneous receipts in the Treasury of the United States.

“(c) ORDERS.—Upon evidence satisfactory to the Postal Service that any person is, for commercial or money-making purposes, engaged in the sending of mail matter which is nonmailable under this section, the Postal Service may issue an order which—

“(1) directs any postmaster, to whom any mailing originating with such person or his representative is tendered for transmission through the mails (other than a mailing that consists only of one or more sealed letters), to refuse to accept any such mailing, unless such person or his representative first establishes to the satisfaction of the postmaster that the mailing does not contain any matter which is nonmailable under this section; and

“(2) requires the person or his representative to cease and desist from mailing any mail matter which is nonmailable under this section.

“(d) PRIMA FACIE EVIDENCE OF PURPOSE.—For the purposes of this section, the repeated mailing of matter which is nonmailable under this section by any person or the advertisement by any person that the person will mail cigarettes, smokeless tobacco, or roll-your-own tobacco in return for payment shall constitute prima facie evidence that such person is engaged, for commercial or money-making purposes, in the mailing of matter which is nonmailable under this section.

“(e) COORDINATION OF EFFORTS.—In the enforcement of this section, the Postal Service shall cooperate and coordinate its efforts with related activities of any other Federal agency or of any State or local government, whenever appropriate.

“(f) ACTIONS BY STATES RELATING TO CERTAIN TOBACCO PRODUCTS.—

“(1) AUTHORITY OF STATES.—Whenever the attorney general of a State (or an official or agency of a State or local government designated by the State) has reason to believe that any person has engaged or is engaging in mailings to residents of that State in violation of subsection (a)(2)(A), the State (or designee) may bring, in an appropriate district court of the United States, a civil action to enjoin such mailings, to carry out paragraphs (1) and (4) of subsection (b), or to obtain such other relief as the court may deem appropriate.

“(2) RIGHTS OF THE POSTAL SERVICE.—The State (or designee) shall serve prior written notice of any action under paragraph (1) upon the Postal Service and provide the Postal Service with a copy of its complaint, except in any case where such prior notice is not feasible, in which case the State (or designee) shall serve such notice immediately upon instituting such action. The Postal

Service, in accordance with section 409(g)(2), shall have the right (A) to intervene in the action, (B) upon so intervening, to be heard on all matters arising therein, and (C) to file petitions for appeal.

“(3) EFFECT ON STATE COURT PROCEEDINGS.—Nothing contained in this section shall be construed to prohibit an authorized State official from proceeding in State court on the basis of an alleged violation of any general civil or criminal statute of such State.

“(4) LIMITATION.—Whenever the Postal Service institutes a civil action for violation of subsection (a)(2)(A), no State may, during the pendency of such action instituted by the Postal Service, subsequently institute a separate civil action for any violation of subsection (a)(2)(A) against any defendant named in the Postal Service’s complaint.

“(g) DEFINITIONS.—For purposes of this section—

“(1) the terms ‘cigarette’ and ‘roll-your-own-tobacco’ have the meanings given them by section 5702 of the Internal Revenue Code of 1986;

“(2) the term ‘smokeless tobacco’ has the meaning given such term by section 2341 of title 18; and

“(3) the term ‘State’ includes the District of Columbia, the Commonwealth of Puerto Rico, and the Virgin Islands.”.

(b) ADMINISTRATIVE SUBPOENAS.—Section 3016(a) of title 39, United States Code, is amended in paragraphs (1)(A) and (2) by inserting “3002b or” before “3005(a)”.

(c) ENFORCEMENT OF POSTAL SERVICE ORDERS.—Section 3012 of title 39, United States Code, is amended—

(1) in subsection (a)—

(A) in paragraph (1), by striking “section 3005(a)(1) or” and inserting “section 3002b(c)(1), 3005(a)(1), or”; and

(B) in paragraph (2), by inserting “3002b(c)(2) or” before “3005(a)(3)”;

(2) in subsection (c), by inserting “3002b(c) or” before “3005(a)” each place it appears; and

(3) in subsection (f), by inserting “3002b(c) or” before “3005” each place it appears.

(d) SEMIANNUAL REPORTS.—Section 3013 of title 39, United States Code, is amended—

(1) in paragraph (1), by inserting “3002b(b) or” before “3005”; and

(2) in paragraph (3), by striking “section 3007 of this title” and inserting “section 3002b(c) or section 3007, respectively”.

(e) CLERICAL AMENDMENT.—The table of sections for chapter 30 of title 39, United States Code, is amended by inserting after the item relating to section 3002a the following:

“3002b. Nonmailability of certain tobacco products.”.

(f) EFFECTIVE DATES.—

(1) IN GENERAL.—Except as provided in paragraph (2), the amendments made by this section shall take effect on the 60th day after the date of the enactment of this Act, and shall apply with respect to any mail matter mailed on or after such 60th day.

(2) SEMIANNUAL REPORTS.—The amendments made by subsection (d) shall apply beginning with the report submitted for the reporting period in which occurs the 60th day after the date of the enactment of this Act.

SEC. 2. TECHNICAL CORRECTION.

(a) IN GENERAL.—Sections 3007(a)(1), 3012(b)(1), and 3018(f)(1) of title 39, United States Code, are amended by striking “409(d)” and inserting “409(g)(2)”.

(b) EFFECTIVE DATE.—The amendments made by subsection (a) shall take effect as if included in the enactment of the Postal Accountability and Enhancement Act (Public Law 109–435).

PURPOSE AND SUMMARY

H.R. 5912 was introduced by Rep. John McHugh on April 29, 2008. This bill makes cigarettes and certain other tobacco products nonmailable through the U.S. Postal Service (USPS).

BACKGROUND AND NEED FOR LEGISLATION

There are an estimated 700 websites that sell cigarettes to U.S. consumers, with at least half based in foreign countries. Because virtually all of these websites lack any meaningful age verification

and make no effort to block sales to youth, they give minors ready access to cigarettes and other tobacco products. In addition, the vast majority of Internet cigarette sales evade payment of state and local taxes, making cigarettes available at below market prices, which increases use, especially among youth. Internet sites can also provide a sales network for counterfeit and other smuggled cigarettes. States have made many efforts to stem this market, including passing new laws prohibiting or restricting Internet cigarette and other tobacco product sales and entering into special agreements with the major private carriers (United Parcel Service, Federal Express, and DHL) in which the carriers agreed not to make deliveries to consumers for illegally operating Internet sellers. Nevertheless, illegally operating Internet sellers are avoiding these restrictions, sending as much as 90% of mail-order cigarettes through the United States Postal Service (USPS).

On April 24, 2008, the Subcommittee on Federal Workforce, Postal Service, and the District of Columbia held a hearing to discuss the transporting of tobacco products through the USPS. Witnesses at the hearing testified about the pressing need to make cigarettes nonmailable. Connecticut Attorney General Richard Blumenthal described the current ability of online shippers to send cigarettes through the USPS as a significant barrier to efforts to curb youth smoking and to overall anti-smoking public health initiatives. He also discussed how such mailings usually involve tax evasion. Bill Corr, Executive Director of the Campaign for Tobacco Free Kids, described the role of the USPS as the key delivery pathway for children ordering cigarettes online. Eric Proshansky of the New York City Law Department described state and city efforts to curb the delivery of cigarettes to youth, and stated that giving states a civil right of action to enforce a nonmailability statute would greatly enhance enforcement. Finally, USPS Vice President and General Counsel Mary Anne Gibbons testified that if Congress passes a law making cigarettes nonmailable, the USPS will cooperate with all other relevant state and federal agencies in its enforcement.

H.R. 5912 amends the U.S. Code to make cigarettes, smokeless tobacco, and roll-your-own tobacco nonmailable products. It gives the USPS tools for enforcement, including the ability to issue orders against those who violate the law for commercial or money-making purposes. The bill also creates a right of action for states that allows them to assist in enforcement of this new law.

LEGISLATIVE HISTORY

H.R. 5912 was introduced on April 29, 2008, and referred to the Committee on Oversight and Government Reform. On April 24, 2008, the Subcommittee on Federal Workforce, Postal Service, and the District of Columbia held a legislative hearing on a draft version of this bill. The witnesses were Richard Blumenthal, Attorney General, Connecticut; Bill Corr, Executive Director, Campaign for Tobacco Free Kids; Eric Proshansky, Deputy Chief of the Division of Affirmative Litigation, New York City Law Department; and Mary Anne Gibbons, Vice President and General Counsel, USPS. On April 29, 2008, the Subcommittee considered H.R. 5912 and approved the bill by voice vote. The full Committee considered H.R. 5912 on May 1, 2008, and favorably ordered H.R. 5912 to be reported, as amended, by a voice vote.

SECTION-BY-SECTION

Section 1: Nonmailability of certain tobacco products

Subsection (a): This subsection makes cigarettes, smokeless tobacco, and roll-your-own tobacco nonmailable items in the U.S. Code. It sets a civil penalty of up to \$100,000 per violation, requires the USPS to hold a hearing prior to determining if a violation has occurred, and describes factors the USPS should consider in determining the amount of the penalty.

In addition, this subsection permits the USPS to bring a civil action in federal court to enforce, this section and explains that penalties recovered are to be deposited in the U.S. Treasury.

This subsection also permits the USPS to issue orders if the USPS is satisfied that evidence shows that a person violated this law for commercial or money-making purposes. Such orders would instruct postmasters on how to address subsequent mailings by the person, and require the person to cease and desist from mailing the products made nonmailable in this section. A Postal Service order under this subsection would be enforceable as described below in subsection (c). The USPS may consider repeated mailings of products nonmailable under this section, or the advertisement of these products, as evidence of violation for commercial or money-making purposes, unless such evidence is effectively rebutted.

Moreover, this subsection instructs the USPS to cooperate with related activities of other federal agencies and state or local governments, such as investigations of illegal sellers of tobacco products, attempts to recover unpaid federal, state, or local taxes, or investigations of overseas sellers.

Furthermore, this subsection grants a state (or its designee) the right to bring a federal civil action to enjoin the mailing of products made nonmailable by this Act to citizens of that state, and to enforce the payment of civil penalties to the U.S. Treasury. The state may also seek such other relief as the court may deem appropriate. The state must provide notice to the USPS before bringing such an action, or as soon as possible afterwards. The USPS has the right to intervene in any such action by a state. The bill clarifies that this section has no effect on the ability of authorized state officials to proceed in state court on state claims. It also clarifies that once the USPS institutes an action under this section, a state may not institute a separate civil action under this section against the same alleged violator.

Subsection (b): This subsection gives the USPS the ability to issue administrative subpoenas in the enforcement of this law.

Subsection (c): This subsection applies existing mechanisms for enforcement of USPS orders to this section. The violation of an order will result in civil penalties which the Postal Service can seek in district court. Any party against whom an order has been issued may seek judicial review of the order or at any stage of subsequent proceedings.

Subsection (d): This subsection requires the USPS to submit to the USPS Inspector General semiannual reports on its enforcement of this section.

Subsection (e): This subsection makes a clerical amendment.

Subsection (f): The subsection states that the amendments made by this bill are to take effect on the 60th day after the day this bill is enacted.

Section 2: Technical correction

This section makes a technical amendment.

EXPLANATION OF AMENDMENTS

Chairman Waxman offered an amendment in the nature of a substitute with language clarifying, that in civil actions brought by a state (or its designee), the state may seek to enjoin the mailing of products made nonmailable by this Act to residents of that state, to enforce the payment of civil penalties to the U.S. Treasury, or to obtain such other relief as the court may deem appropriate. It struck from the introduced bill language specifying a type of relief a state could seek. The Waxman amendment was adopted by voice vote.

Rep. Issa offered an amendment to strike the section of the bill giving states the right to bring civil actions to enjoin the mailing of products made nonmailable by this Act to residents of that state, to enforce the payment of civil penalties to the U.S. Treasury, or to obtain such other relief as the court may deem appropriate. The amendment failed by voice vote.

Rep. Issa offered an amendment to strike the section of the bill giving states the right to bring civil actions to enjoin the mailing of products made nonmailable by this Act to residents of that state, to enforce the payment of civil penalties to the U.S. Treasury, or to obtain such other relief as the court may deem appropriate; and to replace that section with a provision permitting states to intervene in civil enforcement actions by the USPS and to seek relief in such actions in the amount of unpaid state and local taxes. The amendment failed on a vote of 5–20.

Rep. Foxx offered and withdrew an amendment to create exceptions to the nonmailability provision for business-to-business mailings, mailings from a retail consumer to a business, products sent for testing purposes, and from certain tobacco manufacturers using age verification systems.

Rep. Foxx offered an amendment to prevent the Act from taking effect until 60 days after the USPS Inspector General makes a written finding that the Act will not contribute to demand for contraband tobacco products, to illicit trade in tobacco by organized crime, or to illicit trade of tobacco by terrorist groups. The amendment failed on a vote of 4–20. Rep. Sali offered and withdrew a second degree amendment to the Foxx amendment, requiring both the Inspector General of the USPS and the U.S. Attorney General to make the written findings.

Rep. Issa offered an amendment that retained the right of states to bring civil actions, but eliminated states' ability to enjoin the mailing of products made nonmailable by this Act to residents of that state, or to enforce the payment of civil penalties to the U.S. Treasury. This amendment would permit states only the right to seek relief in the amount of unpaid state and local taxes. The amendment failed by voice vote.

COMMITTEE CONSIDERATION

On Thursday, May 1, 2008, the Committee met in open session and favorably ordered H.R. 5912 to be reported to the House by a voice vote.

ROLLCALL VOTES

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM
110TH CONGRESS
ROLL CALL

No. ROLL CALL

DATE: MAY 1, 2008

Description: ISSA AMENDMENT TO H.R. 5912 - #1

Democrats	Aye	No	Present	Republicans	Aye	No	Present
MR. WAXMAN (<i>Chairman</i>)		X		MR. DAVIS (VA) (<i>Ranking</i>)	X		
MR. TOWNS		X		MR. BURTON			
MR. KANJORSKI		X		MR. SHAYS			
MS. MALONEY		X		MR. McHUGH		X	
MR. CUMMINGS		X		MR. MICA			
MR. KUCINICH		X		MR. SOUDER			
MR. DAVIS (IL)		X		MR. PLATTS		X	
MR. TIERNEY		X		MR. CANNON			
MR. CLAY		X		MR. DUNCAN			
MS. WATSON		X		MR. TURNER			
MR. LYNCH				MR. ISSA	X		
MR. HIGGINS				MR. MARCHANT			
MR. YARMUTH		X		MR. WESTMORELAND			
MR. BRALEY		X		MR. McHENRY			
MS. NORTON		X		MS. FOXX	X		
MS. McCOLLUM		X		MR. BILBRAY			
MR. COOPER				MR. SALI	X		
MR. Van HOLLEN		X		MR. JORDAN	X		
MR. HODES		X					
MR. MURPHY (CT)		X					
MR. SARBANES		X					
MR. WELCH							

Roll Call Totals: Ayes 5 Nays 20 Present Voice Vote: Passed Failed X Unanimous consent: Passed Failed

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM
110TH CONGRESS
ROLL CALL

No. ROLL CALL

DATE: MAY 1, 2008

Description: FOXX AMENDMENT TO H.R. 5912 - #2

Democrats	Aye	No	Present	Republicans	Aye	No	Present
MR. WAXMAN <i>(Chairman)</i>		X		MR. DAVIS (VA) <i>(Ranking)</i>		X	
MR. TOWNS		X		MR. BURTON			
MR. KANJORSKI				MR. SHAYS			
MS. MALONEY		X		MR. McHUGH		X	
MR. CUMMINGS		X		MR. MICA			
MR. KUCINICH		X		MR. SOUDER			
MR. DAVIS (IL)		X		MR. PLATTS		X	
MR. TIERNEY		X		MR. CANNON			
MR. CLAY		X		MR. DUNCAN			
MS. WATSON		X		MR. TURNER			
MR. LYNCH				MR. ISSA	X		
MR. HIGGINS				MR. MARCHANT			
MR. YARMUTH		X		MR. WESTMORELAND			
MR. BRALEY		X		MR. McHENRY			
MS. NORTON		X		MS. FOXX	X		
MS. McCOLLUM		X		MR. BILBRAY			
MR. COOPER				MR. SALI	X		
MR. Van HOLLEN		X		MR. JORDAN	X		
MR. HODES		X					
MR. MURPHY (CT)		X					
MR. SARBANES		X					
MR. WELCH							

Roll Call Totals: Ayes 4 Nays 20 Present Voice Vote: Passed Failed X Unanimous consent: Passed Failed

APPLICATION OF LAW TO THE LEGISLATIVE BRANCH

Section 102(b)(3) of Public Law 104–1 requires a description of the application of this bill to the legislative branch where the bill relates to terms and conditions of employment or access to public services and accommodations. H.R. 5912 makes certain tobacco products nonmailable in the USPS. This bill does not relate to employment or access to public services and accommodations.

STATEMENT OF OVERSIGHT FINDINGS AND RECOMMENDATIONS OF THE COMMITTEE

In compliance with clause 3(c)(1) of rule XIII and clause (2)(b)(1) of rule X of the Rules of the House of Representatives, the Committee's oversight findings and recommendations are reflected in the descriptive portions of this report, including the need to stop the sale of cigarettes to youth.

STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

In accordance with clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, the Committee's performance goals and objectives are reflected in the descriptive portions of this report, including the importance of stopping the sale of cigarettes and other tobacco products to youth.

CONSTITUTIONAL AUTHORITY STATEMENT

Under clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee must include a statement citing the specific powers granted to Congress to enact the law proposed by H.R. 5912. Article I, Section 8, Clause 18 of the Constitution of the United States grants the Congress the power to enact this law.

FEDERAL ADVISORY COMMITTEE ACT

The Committee finds that the legislation does not establish or authorize the establishment of an advisory committee within the definition of 5 U.S.C. App., Section 5(b).

UNFUNDED MANDATE STATEMENT

Section 423 of the Congressional Budget and Impoundment Control Act (as amended by Section 101(a)(2) of the Unfunded Mandates Reform Act, P.L. 104–4) requires a statement on whether the provisions of the report include unfunded mandates. The Committee finds that H.R. 5912 does not include unfunded mandates.

EARMARK IDENTIFICATION

H.R. 5912 does not include any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(d), 9(e), or 9(f) of rule XXI.

COMMITTEE ESTIMATE

Clause 3(d)(2) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison by the Committee of the costs that would be incurred in carrying out H.R. 5912. However, clause 3(d)(3)(B) of that rule provides that this re-

quirement does not apply when the Committee has included in its report a timely submitted cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act.

BUDGET AUTHORITY AND CONGRESSIONAL BUDGET OFFICE COST
ESTIMATE

With respect to the requirements of clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974 and with respect to requirements of clause 3(c)(3) of rule XIII of the Rules of the House of Representatives and section 402 of the Congressional Budget Act of 1974, the Committee has received the following cost estimate for H.R. 5912 from the Director of the Congressional Budget Office:

MAY 20, 2008.

Hon. HENRY A. WAXMAN,
Chairman, Committee on Oversight and Government Reform,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 5912, a bill to amend title 39, United States Code, to make cigarettes and certain other tobacco products nonmailable, and for other purposes.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Mark Grabowicz.

Sincerely,

PETER R. ORSZAG.

Enclosure.

H.R. 5912—A bill to amend title 39, United States Code, to make cigarettes and certain other tobacco products nonmailable, and for other purposes

H.R. 5912 would make it illegal to use the Postal Service to mail cigarettes, smokeless tobacco, and roll-your-own tobacco. Violators of the bill's provisions would be subject to civil penalties of up to \$100,000 for each violation. CBO estimates that implementing H.R. 5912 would have no significant cost to the federal government. Enacting the bill could affect direct spending and revenues, but CBO estimates that any such effects would not be significant.

The Postal Service works with federal and state law enforcement officials to combat illegal sales of cigarettes and other tobacco products, including the sales of those products to minors and transactions in which the seller does not pay the required taxes. Enforcing the provisions of H.R. 5912 would be difficult because certain classes of mail, such as priority mail, are sealed against inspection and because over 200 billion pieces of mail are delivered each year. Based on information from the Postal Service, CBO expects that the service would continue its current efforts relating to illegal tobacco sales and would enforce the bill's provisions as part of those ongoing activities. We do not expect that H.R. 5912 would significantly affect Postal Service spending on such activities, which is classified as direct spending (off-budget).

Because violators of the provisions of H.R. 5912 would be subject to civil fines, the federal government might collect additional fines

if the legislation is enacted. Civil fines are recorded as revenues in the federal budget. CBO expects that any additional revenues would not be significant because of the small number of cases likely to be affected.

H.R. 5912 would impose two private-sector and intergovernmental mandates as defined in the Unfunded Mandates Reform Act (UMRA). First, the bill would prohibit the mailing of tobacco products in the United States through the Postal Service. Information from industry experts indicates that most companies that ship tobacco products, including two tribal governments, rarely use the Postal Service to distribute their products. Therefore, CBO estimates that the cost of the mandate would be small. Second, the bill would expand the authority of the Postmaster General to issue subpoenas. Private and public entities, if subpoenaed, would be required to provide testimony, documents, or other evidence. CBO expects that the Postmaster General would use that authority sparingly and that the costs to private and public entities to comply with such subpoenas would be small. Therefore, CBO estimates that the aggregate cost of the mandates would fall well below the annual thresholds established in UMRA for private-sector and intergovernmental mandates (\$136 million and \$68 million in 2008, respectively, adjusted annually for inflation).

The CBO staff contacts for this estimate are Mark Grabowicz (for federal costs); Elizabeth Cove (for the state and local impact); and Jacob Kuipers (for the private-sector impact). This estimate was approved by Peter H. Fontaine, Assistant Director for Budget Analysis.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in *italic*, existing law in which no change is proposed is shown in roman):

TITLE 39, UNITED STATES CODE

* * * * *

PART IV—MAIL MATTER

* * * * *

CHAPTER 30—NONMAILABLE MATTER

Sec.

3001. Nonmailable matter.

* * * * *

3002b. *Nonmailability of certain tobacco products.*

* * * * *

§ 3002b. *Nonmailability of certain tobacco products*

(a) *IN GENERAL.*—Cigarettes, smokeless tobacco, and roll-your-own-tobacco—

(1) *are nonmailable matter;*

(2) shall not be—

(A) deposited in the mails; or

(B) carried or delivered through the mails; and

(3) shall be disposed of as the Postal Service directs.

(b) CIVIL PENALTY.—

(1) IN GENERAL.—Any person who violates subsection (a)(2)(A) shall be liable to the United States for a civil penalty in an amount not to exceed \$100,000 for each violation.

(2) HEARINGS.—

(A) IN GENERAL.—The Postal Service may determine that a person has violated subsection (a)(2)(A) only after notice and an opportunity for a hearing. Proceedings under this paragraph shall be conducted in accordance with section 3001(m).

(B) PENALTY CONSIDERATIONS.—In determining the amount of a civil penalty under this paragraph, the Postal Service shall consider—

(i) the nature, circumstances, extent, and gravity of the violation;

(ii) with respect to the violator, the degree of culpability, ability to pay, and any history of prior violations; and

(iii) such other matters as justice may require.

(3) CIVIL ACTIONS TO COLLECT.—The Postal Service may bring a civil action in an appropriate district court of the United States, in accordance with section 409(g)(2), to collect a civil penalty under this section.

(4) DISPOSITION OF AMOUNTS.—Amounts received in payment of any civil penalties under this subsection shall be deposited as miscellaneous receipts in the Treasury of the United States.

(c) ORDERS.—Upon evidence satisfactory to the Postal Service that any person is, for commercial or money-making purposes, engaged in the sending of mail matter which is nonmailable under this section, the Postal Service may issue an order which—

(1) directs any postmaster, to whom any mailing originating with such person or his representative is tendered for transmission through the mails (other than a mailing that consists only of one or more sealed letters), to refuse to accept any such mailing, unless such person or his representative first establishes to the satisfaction of the postmaster that the mailing does not contain any matter which is nonmailable under this section; and

(2) requires the person or his representative to cease and desist from mailing any mail matter which is nonmailable under this section.

(d) PRIMA FACIE EVIDENCE OF PURPOSE.—For the purposes of this section, the repeated mailing of matter which is nonmailable under this section by any person or the advertisement by any person that the person will mail cigarettes, smokeless tobacco, or roll-your-own tobacco in return for payment shall constitute prima facie evidence that such person is engaged, for commercial or money-making purposes, in the mailing of matter which is nonmailable under this section.

(e) COORDINATION OF EFFORTS.—In the enforcement of this section, the Postal Service shall cooperate and coordinate its efforts

with related activities of any other Federal agency or of any State or local government, whenever appropriate.

(f) *ACTIONS BY STATES RELATING TO CERTAIN TOBACCO PRODUCTS.*—

(1) *AUTHORITY OF STATES.*—Whenever the attorney general of a State (or an official or agency of a State or local government designated by the State) has reason to believe that any person has engaged or is engaging in mailings to residents of that State in violation of subsection (a)(2)(A), the State (or designee) may bring, in an appropriate district court of the United States, a civil action to enjoin such mailings, to carry out paragraphs (1) and (4) of subsection (b), or to obtain such other relief as the court may deem appropriate.

(2) *RIGHTS OF THE POSTAL SERVICE.*—The State (or designee) shall serve prior written notice of any action under paragraph (1) upon the Postal Service and provide the Postal Service with a copy of its complaint, except in any case where such prior notice is not feasible, in which case the State (or designee) shall serve such notice immediately upon instituting such action. The Postal Service, in accordance with section 409(g)(2), shall have the right (A) to intervene in the action, (B) upon so intervening, to be heard on all matters arising therein, and (C) to file petitions for appeal.

(3) *EFFECT ON STATE COURT PROCEEDINGS.*—Nothing contained in this section shall be construed to prohibit an authorized State official from proceeding in State court on the basis of an alleged violation of any general civil or criminal statute of such State.

(4) *LIMITATION.*—Whenever the Postal Service institutes a civil action for violation of subsection (a)(2)(A), no State may, during the pendency of such action instituted by the Postal Service, subsequently institute a separate civil action for any violation of subsection (a)(2)(A) against any defendant named in the Postal Service's complaint.

(g) *DEFINITIONS.*—For purposes of this section—

(1) the terms “cigarette” and “roll-your-own-tobacco” have the meanings given them by section 5702 of the Internal Revenue Code of 1986;

(2) the term “smokeless tobacco” has the meaning given such term by section 2341 of title 18; and

(3) the term “State” includes the District of Columbia, the Commonwealth of Puerto Rico, and the Virgin Islands.

* * * * *

§ 3007. Detention of mail for temporary periods

(a)(1) In preparation for or during the pendency of proceedings under section 3005, the Postal Service may, under the provisions of section [409(d)] 409(g)(2), apply to the district court in any district in which mail is sent or received as part of the alleged scheme, device, lottery, gift enterprise, sweepstakes, skill contest, or facsimile check or in any district in which the defendant is found, for a temporary restraining order and preliminary injunction

under the procedural requirements of rule 65 of the Federal Rules of Civil Procedure.

* * * * *

§ 3012. Civil penalties

(a) Any person—

(1) who, through the use of the mail, evades or attempts to evade the effect of an order issued under [section 3005(a)(1) or] *section 3002b(c)(1), 3005(a)(1), or 3005(a)(2)* of this title;

(2) who fails to comply with an order issued under *section 3002b(c)(2) or 3005(a)(3)* of this title; or

* * * * *

(b)(1) Whenever, on the basis of any information available to it, the Postal Service finds that any person has engaged, or is engaging, in conduct described by paragraph (1), (2), or (3) of subsection (a), (c), or (d), the Postal Service may, under the provisions of section [409(d)] *409(g)(2)* of this title, commence a civil action to enforce the civil penalties established by such subsection. Any such action shall be brought in the district court of the United States for the district in which the defendant resides or receives mail.

* * * * *

(c)(1) In any proceeding in which the Postal Service may issue an order under *section 3002b(c) or 3005(a)*, the Postal Service may in lieu of that order or as part of that order assess civil penalties in an amount not to exceed \$25,000 for each mailing of less than 50,000 pieces; \$50,000 for each mailing of 50,000 to 100,000 pieces; with an additional \$5,000 for each additional 10,000 pieces above 100,000, not to exceed \$1,000,000.

(2) In any proceeding in which the Postal Service assesses penalties under this subsection the Postal Service shall determine the civil penalty taking into account the nature, circumstances, extent, and gravity of the violation or violations of *section 3002b(c) or 3005(a)*, and with respect to the violator, the ability to pay the penalty, the effect of the penalty on the ability of the violator to conduct lawful business, any history of prior violations of such section, the degree of culpability and other such matters as justice may require.

* * * * *

(f) In any proceeding at any time under this section, the defendant shall be entitled as a defense or counterclaim to seek judicial review, if not already had, pursuant to chapter 7 of title 5, of the order issued under *section 3002b(c) or 3005* of this title. However, nothing in this section shall be construed to preclude independent judicial review otherwise available pursuant to chapter 7 of title 5 of an order issued under *section 3002b(c) or 3005* of this title.

§ 3013. Semiannual reports on investigative activities of the Postal Service

The Postmaster General shall submit semiannual reports to the Inspector General summarizing the investigative activities of the Postal Service. One semiannual report shall be submitted for the reporting period beginning on October 1 and ending on March 31, and the other semiannual report shall be submitted for the report-

ing period beginning on April 1 and ending on September 30. Each such report shall be submitted within 1 month (or such shorter length of time as the Inspector General may specify) after the close of the reporting period involved and shall include with respect to such reporting period—

(1) a summary of any proceedings instituted under section 3002b(b) or 3005 of this title, and the results of those and of any other such proceedings decided, settled, or otherwise concluded during such period;

* * * * *

(3) the number of applications for temporary restraining orders or preliminary injunctions submitted under [section 3007 of this title] section 3002b(c) or section 3007, respectively, and, of those applications, the number granted;

* * * * *

§ 3016. Administrative subpoenas

(a) SUBPOENA AUTHORITY.—

(1) INVESTIGATIONS.—

(A) IN GENERAL.—In any investigation conducted under section 3002b or 3005(a), the Postmaster General may require by subpoena the production of any records (including books, papers, documents, and other tangible things which constitute or contain evidence) which the Postmaster General considers relevant or material to such investigation.

* * * * *

(2) STATUTORY PROCEEDINGS.—In any statutory proceeding conducted under section 3002b or 3005(a), the Judicial Officer may require by subpoena the attendance and testimony of witnesses and the production of any records (including books, papers, documents, and other tangible things which constitute or contain evidence) which the Judicial Officer considers relevant or material to such proceeding.

* * * * *

§ 3018. Hazardous material

(a) * * *

* * * * *

(f) CIVIL ACTIONS TO COLLECT.—

(1) IN GENERAL.—In accordance with section [409(d)] 409(g)(2), a civil action may be commenced in an appropriate district court of the United States to collect a civil penalty, clean-up costs, and damages assessed under subsection (c).

* * * * *

MINORITY VIEWS

Thomas Jefferson once said that “The natural progress of things is for liberty to yield and government to gain ground.” While the intended purpose of this bill, to prevent minors from accessing certain tobacco products, is certainly something we can all agree upon, I fear that H.R. 5912 is another step in the natural progress to which Mr. Jefferson once referred.

States have criminal laws in place to prevent minors from purchasing tobacco products and as a strong believer in this cause, I am a proud cosponsor of Congresswoman Blackburn’s bill, H.R. 5513, the “Stop Adolescent Smoking Without Excessive Bureaucracy Act of 2008.” However, unlike her bill H.R. 5912 takes a questionable approach towards addressing the problem that could have unintended consequences. First, since the USPS would have to open packages to verify its contents, H.R. 5912 presents constitutional concerns involving the Fourth Amendment’s protection against unreasonable search and seizures. Because of these criminal and constitutional concerns, it would certainly be more appropriately handled by the Judiciary Committee.

As a practical matter, simple tasks such as mailing cigarettes to military service members overseas would be made illegal through this bill. As the USPS has made clear, the resources needed to search for tobacco products would have to be diverted from other priorities such as confiscating illicit drugs and child pornography. Furthermore, this bill would make illegal consumers’ ability to seek refunds for tobacco products through the mail. Given the myriad of tobacco regulations throughout the country, this bill proposes making it illegal to ship samples to officials sanctioned to administer tests to ensure legal compliance. That is why I offered an amendment to allow for the mailing of tobacco products under exceptional circumstances and withdrew it after receiving assurances that these concerns would be addressed before floor consideration.

As Founding Father James Wilson once said, “Government, in my humble opinion, should be formed to secure and to enlarge the exercise of the natural rights of its members; and every government, which has not this in view, as its principal object, is not a government of the legitimate kind.” H.R. 5912 is an example of a move further from, not closer to, Mr. Wilson’s description of the purpose of the federal government.

VIRGINIA FOXX.

○