

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

REGULATIONS ESTABLISHING SYSTEM)
OF RATEMAKING)

Docket No. RM2007-1

**VALPAK DIRECT MARKETING SYSTEMS, INC. AND
VALPAK DEALERS' ASSOCIATION, INC.
REPLY COMMENTS ON REGULATIONS ESTABLISHING A SYSTEM OF
RATEMAKING IN RESPONSE TO COMMISSION ORDER NO. 26
(October 9, 2007)**

INTRODUCTION

On August 15, 2007, the Commission issued Order No. 26, its "Order Proposing Regulations to Establish a System of Ratemaking," proposing for review an initial set of regulations limited to rates and classifications. Commission Order No. 30 established September 24, 2007 as the deadline for comments on the proposed regulations, and 27 sets of Initial Comments were filed. October 9, 2007 is the deadline for reply comments. Valpak Direct Marketing Systems, Inc., and Valpak Dealers' Association, Inc. (hereafter "Valpak") submit these joint reply comments in response to this request for comments on the proposed regulations.

**I. THE ADMINISTRATIVE PROCEDURE ACT REQUIRES THAT THE
COMMISSION'S REGULATIONS AFFORD MAILERS SUBSTANTIAL DUE
PROCESS PROTECTIONS**

Several comments pertain to how the Commission's proposed regulations comport with the issue of due process, and requirements of the Administrative Procedure Act ("APA") in particular. For instance, the **Direct Marketing Association** ("DMA") Initial Comments

repeated its earlier comments in response to Commission Order No. 2, observing that the Postal Service's rate flexibility will come by obtaining rate changes "without having first to go through a full-blown hearing-on-the-record under the Administrative Procedure Act." DMA Initial Comments, p. 2. Although it is certainly correct that a "full-blown hearing-on-the-record" no longer is required under Title 39 of the U.S. Code, the APA nevertheless requires that mailers be afforded substantial notice and comment protections.

The **National Postal Policy Council** ("NPPC") Initial Comments explain its view that "Due process under the Administrative Procedure Act forbids the Commission from adjudicating disputed issues of material fact without adequate opportunity for interested parties to develop an evidentiary record on those issues." NPPC Initial Comments, p. 9 (citation omitted). *See also National Newspaper Association* ("NNA") Initial Comments, pp. 1-2 (explaining NNA's interest that "the smaller subclasses receive the due process protections from the Commission that the authorizing statute permits.")

Although neither DMA nor NPPC nor NNA discussed specific requirements of the APA, the Commission must ensure that its regulations comply with that law. These issues were addressed in the *Medco Health Solutions, Inc.* ("Medco") Initial Comments, pages 2-10. For reasons stated there, the Commission's proposed regulations need to be strengthened to provide APA-required notice and comment.

II. PAEA REQUIRES THE COMMISSION’S REGULATIONS TO ENHANCE THE LEVEL OF TRANSPARENCY INTO POSTAL SERVICE RATE SETTING AND CLASSIFICATION CHANGES FROM THAT PROVIDED UNDER PRA

Several commenters mentioned the need for “transparency” under the Postal Accountability and Enhancement Act (“PAEA”). *See, e.g.*, Major Mailers Association (“MMA”) Initial Comments, p. 1; McGraw-Hill Initial Comments, p. 6; USPS Initial Comments, pp. 5, 6. Indeed, PAEA requires that the ratemaking system “shall be designed to ... **increase the transparency** of the ratemaking process,” not just “reduce the administrative burden ... of the ratemaking process.” 39 U.S.C. section 3622(b)(6) (emphasis added). *See* Valpak Initial Comments (pp. 7-12).

Pitney Bowes Inc. (“PB”) recognized the need under PAEA for what it called “**Enhanced** Transparency,” but apparently believes that the proposed rules provide it. PB Initial Comments, p. 7 (emphasis added). The **Office of the Consumer Advocate** (“OCA”) discussed the need for “**improving** transparency surrounding the regulation of the Postal Service under the PAEA.” OCA Initial Comments, p. 1 (emphasis added). OCA further noted the problems that could be created by a “possible lack of transparency” as being “unnecessary motions practice ..., complaints, or even potential litigation over claimed rights or needs for additional information” OCA Initial Comments, p. 11.

Whether it be called “increased” or “enhanced” or “improved” transparency, the starting point is the “transparency,” *i.e.*, amount of information that has been provided for the past 35 years under the Postal Reorganization Act of 1970 (“PRA”). Certainly, it would be impossible for the Commission’s regulations to increase transparency if they result in any significant diminution of the level of transparency that existed under PRA.

Under PRA, rate requests were accompanied by substantial information under Commission rules, Subpart B (“Rules Applicable to Requests for Changes in Rates or Fees”), totaling almost 11 pages of Commission rules (not including pages on additional rules governing Market Response Rates for Express Mail). However, under the Commission’s proposed regulations, Subpart B (“Rules for Rate Adjustments for Rates of General Applicability (Type 1 Rate Adjustments)”), those portions of section 3010.14 “Contents of Notice of Rate Adjustment,” relating to neither the Consumer Price Index (“CPI”) cap nor worksharing discounts, are described in less than one page of double-spaced text.

Although additional public disclosure requirements are anticipated by the annual report requirement of 39 U.S.C. section 3652, the Commission has not promulgated regulations in that area. As Newspaper Association of America (“NAA”) stated: “it is difficult to comment on ... the proposed ratesetting rules without an understanding of how the Commission envisions the interplay between annual reporting requirements, the data submissions required to support notices of rate adjustments, and the respective roles of the reporting requirements and the complaint process.” NAA Initial Comments, p. 13. Valpak concurs. As of this point, it cannot be said that the Commission’s proposed rules provide anywhere near the transparency provided under PRA, and as they now stand they therefore clearly fail to provide the “increased transparency” required by PAEA.

Moreover, the proposed regulations do not constitute a complete set of PAEA rules, leaving currently unregulated the Postal Service’s duty to submit annual reports and the access of mailers to the complaint process.

It does not appear that Congress intended for the Commission to put its regulations into effect on a piecemeal basis. 39 U.S.C. section 3622(a) requires the Commission to establish “within 18 months ... a modern **system** for regulating rates and classes for market dominant products.” (Emphasis added.) The Commission is required to issue regulations to “prescribe the content and form of public reports ... to be provided by the Postal Service” under 39 U.S.C. section 3652. *See* 39 U.S.C. § 3652(e)(1). The “annual determination of compliance” under 39 U.S.C. section 3653 is to be made pursuant to “regulations promulgated thereunder.” *See* 39 U.S.C. § 3653(b)(1). Lastly, PAEA establishes that rate complaints may be filed pursuant to 39 U.S.C. section 3662, with “regulations promulgated” under 39 U.S.C. section 3662(a). Together, these various statutory provisions establish the system under PAEA to govern ratemaking. It is unclear how the “modern system” works without any regulations governing annual public reports, the annual determination of compliance, and the complaint procedure. Congress allowed 18 months to the Commission to issue regulations, and the regulations governing all aspects of ratemaking should be promulgated at the same time. Moreover, to make its rules piecemeal, as it has done here, deprives “interested persons” the kind of “opportunity to participate in the rulemaking process” as provided for in 5 U.S.C. section 553(c). *See generally* NAA Initial Comments, p. 13.

III. COMMISSION PROPOSED RATEMAKING PROCEDURES NEED TO BE STRENGTHENED

Many commenters have praised the proposed ratemaking regulations as fully sufficient to meet a more limited role in ratemaking prescribed for the Commission under PAEA. *See generally* Association for Postal Commerce (“PostCom”) Initial Comments,¹ pp. 1-2 (“there must be only limited, narrow review of rate changes that comply with the cap,” p. 1); DFS Services LLC (“DFS”) Initial Comments, p. 1 (“places the responsibility for pricing upon the Postal Service....,” p. 1); Mail Order Association of America (“MOAA”) Initial Comments, p. 1. These commenters allegedly seek a “modern system of ratemaking” based on the curious principles of reduced transparency, avoidance of the Administrative Procedure Act, and severely limited opportunities for interested parties to comment. If in the future these commenters or their mailer-members actually were charged what they believe to be illegally high rates, it can be anticipated that the position of at least some would change, perhaps dramatically.

Of course, certain mailer associations may prefer a system where influence is exercised behind closed doors at the Postal Service, rather than on the public record at the Commission. In recent years, with the division of Standard Mail into Regular and ECR subclasses in Docket No. MC95-1 and with the broad expansion of membership of some mailer associations, it has become virtually impossible for them to participate in litigation before the Commission on any

¹ PostCom so embraces the concept of Postal Service flexibility that it urges the Commission to limit mailer rights even on matters not now embodied in proposed regulations. Thus, PostCom first urges that the Commission promulgate rules requiring that complaints both (i) may not be filed “during the 45-day notice period of a rate change” (p. 2), and later (ii) may be filed only during the “annual compliance review” (p. 4).

issues of meaning affecting some subsets of their membership without offending some other subset. *See, e.g.*, Motion for Acceptance of Late Notice of Intervention by the Coalition of Catalog Mailers, Docket No. R2006-1 (April 3, 2007), p. 2. As a result, it is generally only individual mailers whose absence of internal conflicts allow them to focus on and participate before the Commission effectively on certain issues. Perhaps this complex phenomenon explains why these mailer associations seem at times to have little concern for preserving due process rights either for themselves or for their member companies.

It is fortunate that the rights of mailers who place high value on transparency, due process, and compliance with the APA are not to be determined by the trusting passivity of these commenters, but by requirements established by Congress. The provisions of Title 39 of the U.S. Code which govern postal ratemaking are set out in the Appendix hereto. It is these provisions and the APA that govern the authority of the Commission to write regulations in this area and that define the minimum procedural protections afforded to interested parties.

To facilitate analysis of the Commission's proposed regulations in Order No. 26, each step for (1) General Rate Setting (Type 1-A) and (2) Negotiated Service Agreements ("NSAs") (Type 2) has been set out sequentially in chart form. For each step, the following charts address: (a) procedure and citation to 39 CFR proposed regulations; (b) timing requirements; and (c) form/content requirements. Valpak observations about the proposed regulations, based on the applicable statutes, are interspersed.

Chart No. 1a: General Rate Setting (Type 1a)

Procedural Step/ Citation	Timing	Form/Content
1. USPS Notice of Rate Adjustment — to Public (§3010.10(1))	At least 45 days prior to intended implementation date.	In a manner reasonably designed to inform the mailing community and the general public that it intends to change rates.

The Initial Comments filed by the Alliance of Nonprofit Mailers and Magazine Publishers of America, Inc. (“ANM/MPA”) praise the proposed regulations for embracing the principle that “a general rule requiring a ... period [longer than 45 days] is inconsistent with PAEA” (ANM/MPA Initial Comments, p. 2). This view is not realistic. The Commission correctly interprets 39 U.S.C. section 3622(d)(1)(C) language “not later than 45 days before” as providing a minimum (not a maximum) period, and the Commission’s proposed rules require only a minimum 45-day period. Order No. 26, pp. 14-15. However, the Commission reasonably cannot simply carry over the minimum 45-day period from the statute into the regulations. This period is far too short for all of the events that must occur. For example, if mailers are to have 45-day notice of a Commission-approved rate increase, that leaves zero days for Commission review. (Mailers really need 60 days for implementation of new rates, and have typically been given about this much advance notice.) On the other hand, if the Commission takes 45 days for its review, it provides zero days notice to mailers of Commission-approved rate increases. Accordingly, it is submitted that the 45-day period be lengthened to 105 days (45 + 60 days) at a minimum, and preferably 120 days. Note: the

Postal Service already has stated that it intends to file 90 days in advance. *See generally* Order No. 26, p. 15, n.9 (paraphrasing the Postal Service's comments).

The proposed regulations set forth no requirement that any details whatsoever undergirding a rate increase be in a Postal Service public notice. Indeed, the proposed regulations do not even contain a clear requirement that proposed rates themselves be contained in the Postal Service public notice.

Chart No. 1b: General Rate Setting (cont'd)

Procedural Step/ Citation	Timing	Form/Content
2. USPS Notice of Rate Adjustment — to PRC (§3010.10(2))	At least 45 days prior to intended implementation date	<ol style="list-style-type: none"> 1. Schedule of proposed rates. 2. Planned effective date(s). 3. Representation of public notice having been made. 4. Identity of Postal Service official available to provide prompt responses to requests for clarification from PRC. 5. Accompanied by: <ul style="list-style-type: none"> Information relating to cap a. amount of applicable change in CPI-U with workpapers; b. schedule showing unused rate authority available; c. percentage change in rates for each class with workpapers; d. the new amount of unused rate authority; e. use of unused rate authority, if any. Information relating to Worksharing f. schedule of workshare discounts with avoided costs; g. justification of proposed workshare discounts that exceed avoided costs; h. information on new workshare discounts. Other Matters i. a discussion of §3622(b) (“factors:”) and (c) (“objectives”); and j. such other information.

OCA points out that interested parties may file motions asking the Commission to seek clarification of Postal Service proposals. *See generally* OCA Initial Comments, p. 11, n.13. However, an express provision for clarification of questions that mailers have should be incorporated into the regulations.

The requirement listed under “other matters” is limited to “discussion” only, with (i) no requirement that factors and objectives be met; and (ii) no express requirement that each factor and objective be discussed for each product.

The proposed regulations provide no express requirement for filing data and analysis supporting a rate increase at the level currently provided under PRA, and they therefore provide **less transparency** than under PRA, in violation of 39 U.S.C. section 3622(b)(6). Since the Commission has not promulgated rules for annual reporting, it is currently impossible for mailers to know whether they will have the current level of data and analysis supporting a rate increase as part of the annual review process. *See* 39 U.S.C. § 3653. *See also* NAA Initial Comments, p. 9, n.6 and p. 13.

Chart No. 1c: General Rate Setting (cont’d)

Procedural Step/ Citation	Timing	Form/Content
3. PRC Publication to Public of Proposed Rate Adjustment (§3010.13(a))		

No deadline is specified for the Commission notice. No requirements are specified for content of the Commission notice, in violation of the APA. *See* Medco Initial Comments, p. 6.

Chart No. 1d: General Rate Setting (cont'd)

Procedural Step/ Citation	Timing	Form/Content
4. PRC Public Comment Period (§3010.13(a))	20 days from PRC Publication	Comments limited to only whether the rate adjustments: 1. Are at or below the CPI cap 2. Are consistent with the policies of 39 U.S.C. §3622

The Commission nowhere expressly considers the APA, and does not determine that 20 days is “reasonable” notice under APA. *See id.*

The Commission’s discussion of this proposed regulation specifies: “The Commission does not invite, and will not entertain, public comment during the 45-day review period on matters such as costing methods.” Order No. 26, p. 18, ¶ 2029. Limitation on public comments is contrary to the spirit of APA. *See Medco Initial Comments*, p. 7. Certainly, comments on matters relating to cost (including costing methodology) should always be in order. Indeed, costing is a factor in ratemaking that the “modern system of ratemaking” repeatedly requires to be recognized in 39 U.S.C. section 3622, and thus any restriction on commenting on costing methodology is internally inconsistent with the express invitation to comment on all policies contained in section 3622. *See Section VI, infra*. It cannot be argued that costing methodology comments will be permitted under the annual review process, as the Commission has developed no regulations as of this point from which such a conclusion can be drawn. When the Commission issues regulations governing the annual review, this may change, but as of now, if costing methodology is off limits in rate proceedings, it is off limits completely.

Further, this no-comment warning would also bar mailers from advising the Commission that the rates were illegal under applicable law other than 39 U.S.C. section 3622. For example, nonprofit rates could be set in excess of the statutory maximums established in 39 U.S.C. section 3626, but the Alliance of Nonprofit Mailers would be barred from comment. Rates for editorial matter in Periodicals could be zoned, but the Magazine Publishers of America, or other interested parties, would be barred from comment.

Chart No. 1e: General Rate Setting (cont'd)

Procedural Step/ Citation	Timing	Form/Content
5. PRC Notice and Order re Decision (§3010.13(c))	14 days after conclusion of public comment period	Addresses only whether the planned rate adjustments are in compliance with the CPI cap.

The Commission's review is limited to and addresses only 39 U.S.C. section 3622(d) requirements, ignoring Postal Service compliance with 39 U.S.C. section 3622(b) factors and 39 U.S.C. section 3622(c) objectives, and other ratemaking provisions in 39 U.S.C. See Appendix, *infra*.

Chart No. 1f: General Rate Setting (cont'd)

Procedural Step/ Citation	Timing	Form/Content
6. USPS Amended Notice of Rate Adjustment to PRC (§3010.13(d))		Describe the modifications to its planned rate adjustments to bring them in compliance.

There is no requirement in the proposed regulations for publication of rate adjustments to the public by the Postal Service or the Commission, which is in violation of the APA. *See* Medco Initial Comments, p. 6.

Chart No. 1g: General Rate Setting (cont'd)

Procedural Step/ Citation	Timing	Form/Content
7. PRC Notice and Order re Decision on Amended Notice (§3010.13(e))	14 days after amended notice	Addresses whether the planned rate adjustments are in compliance with the CPI cap.

The proposed regulations permit no public comment on the Postal Service Amended Notice, in violation of the APA. *See id.*

Chart No. 2a: Negotiated Service Agreements (Type 2)

Procedural Step/ Citation	Timing	Form/Content
1. USPS — Public Notice (§3010.41)	At least 45 days prior to intended implementation date.	In a manner reasonably designed to inform the mailing community and the general public that it intends to change rates.

See discussion of Postal Service public notice with respect to Type 1-A rate adjustments, *supra*. There is no requirement in the proposed regulations for Postal Service public disclosure of the negotiated service agreement itself, or any supporting information.

Chart No. 2b: Negotiated Service Agreements (cont'd)

Procedural Step/ Citation	Timing	Form/Content
2. USPS — Notice of Agreement to PRC (§3010.41)	At least 45 days prior to intended implementation date.	<ol style="list-style-type: none"> 1. A copy of the NSA 2. Planned effective date(s) 3. Representation of public notice 4. Identity of Postal Service official available to provide prompt responses to requests for clarification from PRC 5. A statement identifying all parties to the agreement and clearly explaining the operative components 6. Details of expected improvements in either the net financial position or operations of the Postal Service 7. Identification of each component of the NSA expected to enhance the performance of the Postal Service 8. Details re actions to protect the marketplace from unreasonable harm 9. Such other information 10. Data collection plan, including a plan to provide annual reporting

The proposed rules impose no duty on the Commission to provide public notice of the NSA “Notice of Agreement” (including the NSA agreement itself), which violates the APA.

See generally OCA Initial Comments, p. 3.

Chart No. 2c: Negotiated Service Agreements (cont'd)

Procedural Step/ Citation	Timing	Form/Content
3. Public Comment Period		

The proposed regulations provide no opportunity for public comment, in violation of the APA.

Chart No. 2d: Negotiated Service Agreements (cont'd)

Procedural Step/ Citation	Timing	Form/Content
4. PRC Notice and Order re Decision		

The Commission proposed regulations provide only one hint of what its response to an NSA filing might be. In describing the possible need for “other information,” the Commission references a “determination of whether the requested increases are consistent with applicable statutory policies.” Proposed regulations § 3010.42(g). Certainly, the proposed regulations need to be more detailed and specific.

Lastly, similar comments could be made with respect to classification changes. *See* proposed regulations §§ 3020.30-35, 90-92.

IV. THE COMMISSION’S REGULATIONS GOVERNING “SPECIAL CLASSIFICATIONS” (“NEGOTIATED SERVICE AGREEMENTS”) MUST PROVIDE FOR NOTICE, DISCLOSURE, COMMENT, AND A COMMISSION DETERMINATION THAT THE RATES COMPLY WITH PAEA.

Those initial comments that addressed proposed regulations relating to “Special Classifications” (which include negotiated service agreements (“NSAs”)) (39 U.S.C. § 3622(c)(10)) involving market dominant products (Type 2 Rate Adjustments) generally fall into two camps. One camp believes that the proposed regulations do not permit adequate review, and the other camp seems relatively satisfied with proposed regulations directly related to NSA proposals, but seems to believe that the Commission was confused about its proposed regulations because the Commission defines each NSA as a separate product triggering the new product review required by 39 U.S.C. section 3642 and proposed regulation section 3020.30. (After initial comments were filed on September 24, 2007, the Commission issued its *Opinion and Recommended Decision* in Docket No. MC2007-1, the Bank of America Corporation (“BAC”) NSA, providing a real-world illustration of why the superficial Commission review of NSAs, which was endorsed by commenters in this second camp, will not ensure compliance with PAEA.)

A. The Proposed “Special Classifications” Regulations Do Not Provide Adequate Public Notice, Comment, or Review Procedures

Newspaper Association of America identifies deficiencies in the Commission’s proposed NSA regulations, including the lack of express requirements that interested mailers (i) be given access to copies of the NSA agreement (NAA Initial Comments, pp. 5-6) and (ii) be permitted to comment before the Commission’s decision on the NSA (NAA Initial

Comments, pp. 6-9). NAA urges that the duty established under PAEA to make NSA's available to "similarly situated mailers" be addressed in the PRC's regulations. NAA Initial Comments, p. 12. Valpak strongly supports the position advanced by NAA on each of these issues.

Likewise, the **American Postal Workers Union** ("APWU") believes that the proposed regulations "do not go far enough to ensure that proposed NSAs satisfy the statutory requirements of 39 U.S.C. § 3622(c)(10)." APWU Initial Comments, p. 6. APWU argues that interested parties must be permitted to obtain information about NSAs during the advance notice period. *See* APWU Initial Comments, pp. 6-8. Valpak agrees that if the statutory requirements for NSAs contained in PAEA are to be complied with, the Commission should open the process to permit interested parties to obtain information about NSAs.

The review process which the Commission designs either will be open to public notice and comment, or conducted privately. An open NSA review process is one where the Commission provides disclosure, meets the requirement of increased transparency, meets the APA requirement of notice and comment, and ensures that only NSA's in compliance with PAEA are implemented. A system in which NSAs can be both negotiated and approved in secret cannot be consistent with a "modern system of regulating rates." To do so would permit decisions by government employees to give tens of millions of dollars in postage reductions to some of the largest and most powerful companies in the country for reasons that never need to be explained to anyone. In such a system, negotiated rates can be bestowed for arbitrary reasons, and even provide a temptation to reduce rates for improper purposes. The more that this decision-making process is hidden from public scrutiny, the more it frustrates

PAEA’s mandate for “increased transparency” and the benefits to be derived therefrom. *See* 39 U.S.C. § 3622(b)(6).

B. The Scope of Commission Review of Special Classifications is Not Limited to Section 3622(c)(10)

Several commenters commend the proposed regulations for apparently requiring that NSA’s only comply with 39 U.S.C. section 3622(c)(10) and not the entirety of PAEA. *See Major Mailers Association* Initial Comments, p. 6; *USPS* Initial Comments, p, 4; *Pitney Bowes Inc.* Initial Comments, p.12; *DFS* Initial Comments, p. 2. On the other hand, NAA makes a reasonable reading of 39 U.S.C. section 3622(c)(10) as providing “specific, **additional** criteria for NSAs ... that **go beyond** those applicable to general rate changes.” NAA Initial Comments, p. 3 (emphasis added); *see also* p. 9.

The NAA view is supported by the specific language of section 3622(c)(10) — “including agreements between the Postal Service and postal users” — which indicates that NSAs, is a subpart of “special classifications for both postal users and the Postal Service,” and as a subpart of that broader category, must be assessed “in accordance with the policies of this title.” To read this subsection as applying a special rule isolating NSAs from the overall policies of Title 39, as the Commission has done in Subpart D of its proposed rules, not only wrenches NSAs from their context as “special classification[s],” but excepts NSAs from the overall congressional policy requiring the Postal Service “to apportion costs of all postal operations to all users of the mail on a fair and equitable basis,” free from “unreasonable discrimination among users of the mail” and from “undue or unreasonable preferences to any

such user,” as provided in 39 U.S.C. section 403. *See* Rule 3010.40. Further, by excepting NSAs from such foundational policy considerations as “fairness” and “nondiscrimination,” the Commission ignores “the entire statutory scheme,” that indicates that the Commission has “no such power” to except NSA’s from all of the factors, objectives and requirements of section 3622. *See* Securities and Exchange Commission v. Sloan, 436 U.S. 103, 123 (1978). Finally, by reading section 3622(c)(10) in isolation from the whole PAEA, the Commission has violated the long-standing rule of statutory construction that “[i]n expounding a statute, [one] must ... look to the provisions of the whole law and to its object and policy.’” *See* United States National Bank of Oregon v. Independent Insurance Agents of America, Inc., 508 U.S. 439, 455 (1993). This rule is especially applicable to ensure that an administrative agency, such as the Commission, interpret and apply each provision of a statute in accordance with “the object and structure of the Act [here PAEA] as a whole.” Dole v. United Steelworkers of America, 494 U.S. 26, 36 (1990).

One party, the **National Postal Policy Council**, goes so far as to say that the proposed regulations require too much information for consideration before implementation of an NSA, and that any consideration of NSAs should be left to complaint cases or the annual compliance review. *See* NPPC Initial Comments, pp. 8-10.² Amazingly, NPPC invokes “[d]ue process under the Administrative Procedure Act” (“APA”) to conclude that no disputed issues of material fact should be brought up since interested parties must be given adequate opportunity

² Of course, as discussed in Section II, *supra*, it is impossible to know what kind of review will be permitted by either complaint cases or the Annual Compliance Review, as the Commission has not issued proposed regulations governing either procedure.

to develop an evidentiary record. *Id.*, p. 9. NPPC supports the Commission's limitation of issues in the NSA review process because the Commission proposed regulations do not provide the opportunity to develop an evidentiary record. This argument is completely backward. No administrative agency can artificially narrow its scope of rulemaking based on the fact that it chooses not to give the public a complete opportunity to participate in the rulemaking. If the law requires the Commission to review NSAs for compliance with all applicable postal regulations, then the procedures it adopts must comply with the APA and provide the public with at least the opportunity to comment, if not "develop an evidentiary record" as stated by NPPC. *See generally*, Medco Initial Comments, pp. 6-8.

Without question, a PAEA "Special Classification" requires development of both (i) a special classification, and (ii) a special rate, albeit for one mailer under an NSA. Congress has required that all of 39 U.S.C. section 3622 is applicable to ratesetting. Subsection 3622(c)(10) is a provision that applies uniquely to Special Classifications; but it is not the only provision that applies to Special Classifications. The burden of demonstrating that no other part of the statute except section 3622(c)(10) applies to NSAs is clearly on those who urge that the rest of section 3622 does not apply, and none of those who take that view have met this burden.

C. The Proposed Regulations on NSAs and on Modifying the Product Lists Are Not in Conflict.

The Commission's proposed regulations set forth separate procedures (i) for NSAs in particular (§ 3010.40-43), as well as (ii) for new products (including NSAs) to be added to the

market dominant and competitive product lists (§ 3020.30-35).³ Several parties have asserted that “internal inconsistency” exists in the Commission’s proposed regulations with respect to NSAs. *See* USPS Initial Comments, pp. 2-12; Advo, Inc. (“Advo”) Initial Comments, pp. 2-4; DFS Initial Comments, pp. 2-4. Although the Commission expressly stated that it intends to treat NSAs as separate products for purposes of the Mail Classification Schedule, the commenting parties appear to believe the Commission must be mistaken, because that would subject NSAs to two procedures.

Actually, the Commission established two different methods to comply with two different PAEA requirements. No inconsistency is involved. Indeed, the Commission does not have the latitude to decide what is or is not a “product.” PAEA defines “product” in 39 U.S.C. section 102(6) as “a postal service with a distinct cost or market characteristic for which a rate or rates are, or may reasonably be, applied.” We cannot think of a product with a more distinct “cost or market characteristic” than an NSA, and each has a separate negotiated rate. Clearly, NSAs are separate products under PAEA, and neither mailers, the Postal Service, nor the Commission is at liberty to disregard that statutory definition and the consequences that flow from it.⁴ This definition applies unambiguously to an NSA.

³ Proposed regulation section 3020.31(d)(1) requires, as part of the Postal Service’s request to modify a product list (add, delete, or move between lists), the filing to:

- (d) Indicate whether each product that is the subject of the request is:
 - (1) A special classification within the meaning of 39 U.S.C. § 3622(c)(10) for market dominant products....

⁴ The Commission’s proposed NSA regulations do not appear to address the situation of an NSA that involves both market dominant products and competitive products.

According to the Commission’s proposed definition of a NSA, it is “a written contract, to be in effect for a defined period of time, between the Postal Service and a mailer, that provides for customer-specific rates or fees and/or terms of service in accordance with the terms and conditions of the contract. A rate associated with a [NSA] is not a rate of general applicability.” There can be no question that a NSA is a “postal service.” Nor can there be any question that it is a service “with a distinct cost,” whether that cost be measured by service provided or the rate paid. Nor can there any question that a NSA is a “postal service with a ... market characteristic,” namely, it is a service provided at a rate that is **not** a rate of “general applicability.” Thus, it is a postal service, the rate or rates for which are to be measured by a standard of “reasonableness,” namely, all those “objectives,” “factors”, and “requirements” set forth in 39 U.S.C. section 3622.

Therefore, no question exists whether “the unambiguously expressed intent of Congress”⁵ is that NSA’s are “products” subject to all PAEA requirements, not just the additional ones set forth in 39 U.S.C. section 3622(c)(10). Neither mailers, nor the Postal Service, nor the Commission is at liberty to disregard this plain “statutory mandate or [to] frustrate the congressional polic[ies]” of “fairness” and “nondiscrimination” underlying” PAEA by narrowing the definition of product to exclude NSAs. *See generally Volkswagenwerk Aktiengesellschaft v. Federal Maritime Commission*, 390 U.S. 261, 268-70 (1968).

⁵ *See Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984).

D. The Commission’s Opinion and Recommended Decision in Docket No. MC2007-1 Demonstrates the Need for “Increased Transparency” of NSAs.

On October 4, 2007, the Commission issued its *Opinion and Recommended Decision* in Docket No. MC2007-1 (“Rate and Service Changes to Implement Baseline Negotiated Service Agreement with Bank of America Corporation”). In that recommended decision, the Commission observed that **discovery** conducted by intervenors **revealed** that Postal Service beliefs and representations to the Commission of cost savings resulting from the NSA were highly **inaccurate**. See Docket No. MC2007-1, *Op. & Rec. Dec.* (Redacted Version), pp. 1-2, ¶¶ 1005-6. As a result, instead of an estimated cost savings of \$5.5 million⁶ over the life of the agreement, the Commission’s analysis of the record revealed that in a theoretically best (but practically impossible) case, the Postal Service **will lose** an estimated \$25.1 million⁷, and more realistically the **loss** could be up to \$45.8 million.⁸ Although the Commission recommended the NSA, it urged the Governors to reconsider implementing this NSA. See *id.*, p. 1, ¶ 1002. It questions the Postal Service’s negotiation of successful NSA’s. See *id.*, Concurring Opinion of Commission Goldway, p. 1. This recent docket highlights the risk of deferring to the Postal Service on NSAs and the benefit received by the Commission from participation by the public in reviewing NSAs. The Commission should design an open

⁶ See Docket No. MC2007-1, *Op. & Rec. Dec.* (Redacted Version), p. 19, ¶ 3014.

⁷ See *id.*, p. 38, ¶ 4027. The Commission noted that the Postal Service had testified that it is committed to giving functionally equivalent NSAs to similarly situated mailers. The cumulative effect of a series of such functionally equivalent NSAs could be a **loss of hundreds of millions of dollars**.

⁸ See *id.*, pp. 38-39, ¶ 4028.

process, to receive in reviewing future NSAs the same type of benefits it commented on receiving in the BAC NSA.

E. The Idea that Postal Service Losses on NSAs Will Not Affect Other Mailers Is False.

The **National Postal Policy Council** Initial Comments state:

Regardless of the profitability of any individual NSA, or even all NSAs in the aggregate, 39 U.S.C. § 3622(d) caps overall increases to the levels justified by the CPI.... If the Postal Service offers excessive or needless discounts to an NSA partner, the Postal Service alone will bear the financial consequences. [NPPC Initial Comments, pp. 9-10.]

Similarly, the **Time Warner Inc.** (“Time Warner”) Initial Comments state:

Under the PAEA, the replacement of the breakeven requirement by price caps prevents losses on one product from triggering compensating rate increases for other products. [Time Warner Initial Comments, p. 12.]

There is only one circumstance under which these statements could not be wrong. That is if the Postal Service first earns and retains profits. At the present time, however, the Postal Service has no retained earnings from which it can absorb losses on NSAs. Moreover, for FY 2007 (which ended September 30, 2007), the financial report to the Board of Governors open session on August 8, 2007 anticipates a deficit of \$4.469 billion (through Quarter 3). The

outlook for FY 2008 would appear to be for an additional deficit.⁹ The above-quoted arguments by NPPC and Time Warner are thus devoid of current reality.

Until the Postal Service does in fact earn and retain profits, any losses on NSAs, such as those expected to arise under the recently-approved baseline NSA for Bank of America Corporation, as well as any functionally equivalent NSAs for similarly situated mailers, simply will add to the Postal Service's accumulated deficit. True, capped rate increases under PAEA are not geared to a financial breakeven requirement, and the Postal Service can borrow, at least up to its statutory limits, to cover operating losses, including all losses on NSAs.¹⁰ Ultimately, though, the accumulated deficit, including all losses on NSAs, must be recouped from mailers (unless Congress were to cover Postal Service losses with an appropriation, which seems a highly unlikely prospect). Recouping such losses while operating under a CPI rate cap will be well nigh impossible.

What is ignored by NPPC and Time Warner, as well as others making similar arguments, is the provision in PAEA that under "extraordinary or exceptional" circumstances the Postal Service can request an above-cap rate increase, referred to in Order No. 26 as an

⁹ PAEA itself has imposed significant extraordinary costs on the Postal Service estimated by Postal Service CFO H. Glen Walker in a colloquy with Board of Governors Chairman James C. Miller at the September 26, 2007 Open Session of the Board of Governors meeting. Without PAEA, the Postal Service would have had a projected FY 2008 Net Income of \$0.4 billion (rather than a loss of \$0.6 billion actually suffered under PAEA), and an estimated FY 2007 Net Income of \$1.5 billion (rather than a loss of \$5.4 billion actually suffered under PAEA). It is difficult to understand how these losses due to PAEA can be made up in a cap regime without the Postal Service filing a last "PRA-style" rate case as permitted under the transition rule, 39 U.S.C. section 3622(f).

¹⁰ Such borrowing adds interest expense, which also must be covered under the CPI rate cap.

“exigent” rate increase. **The “extraordinary or exceptional” rate increase would produce the same result as the former financial breakeven requirement.** When imposed, **all mailers**, including those not benefitting from a loss-producing NSA, then would be required to pay higher rates in excess of the cap. The availability of a rate increase exceeding the cap means **all mailers should continue to have an interest in helping prevent the Postal Service from entering into NSAs that result in losses.**

Finally, it also deserves mention that the “loss” on the BAC NSA comes from giving a discount with no *quid pro quo* — *i.e.*, no extra volume, no measurable cost savings, and no other quantifiable benefits in return for substantial discounts. The Commission’s conclusion that the NSA will result in a “loss” does not mean that BAC’s mail will fail to cover its attributable cost (as the Commission’s *Opinion and Recommended Decision* appropriately determined). It simply means that the NSA will enable BAC to **reduce its contribution to Postal Service overhead, while shifting that burden to other mailers.** It also means that merely requiring revenues from NSAs to cover their attributable costs is not a sufficient protection for mails not party to the NSA. The notion that the Postal Service can lose large amounts of money in NSAs without consequence to other mailers simply because of the passage of PAEA is unwarranted.

V. A LASPEYRES PRICE INDEX SHOULD BE THE ONLY TEST FOR COMPLIANCE OF A RATE ADJUSTMENT WITH AN APPLICABLE CAP.

Time Warner discusses the importance of making clear that a Laspeyres price index, using the most recent available billing determinants at the time a rate adjustment is proposed, “should constitute the first and last hurdle of compliance” with any applicable cap. Time Warner Initial Comments, p. 6. Valpak agrees.

The literature makes it clear that a Paasche weighting system holds no more claim to being an estimate of the rate increase than a Laspeyres weighting system. Time Warner then explains that practical, legal, and theoretical reasons all favor the Laspeyres index, and, indeed, that the Paasche index has unfavorable characteristics.

Valpak would add two additional considerations. First, the CPI system of the Bureau of Labor Statistics is a Laspeyres index, so that consistency with construction of the cap itself would suggest using Laspeyres weights. Second, the fixed weight indexes used by the Postal Service and the Commission in volume projections apply Laspeyres weights. Therefore, all parties have considerable experience in development and application of Laspeyres indexes.

Accordingly, although section 3010.23(d) does point to the exclusive use of before-rates billing determinants, it would be helpful for the Commission’s regulations to confirm explicitly that no additional analysis beyond these data is needed.

VI. COSTING INFORMATION SHOULD BE AVAILABLE AT THE TIME OF NOTICE OF A RATE ADJUSTMENT.

In order to design a system that leads to “predictability and stability in rates” (referencing 39 U.S.C. § 3622(b)(2)), the National Newspaper Association “urges the Commission to reconsider its apparent view that PAEA discourages any examination of costs whatever.” NNA Initial Comments, p. 8. Valpak strongly agrees with NNA that if the Commission has the “view that PAEA discourages any examination of costs whatever” it should “reconsider” any such view.

At the same time that NNA supports Commission examination of costs, NNA asserts its view that “cost of service is no longer the regulatory basis for postal prices....” *Id.* NNA correctly believes that costs are still important to ratemaking, even under a price cap system. Certainly these views are not inconsistent.

First, the price cap applies only at the class level, and market dominant mail has only four broad primary classes: First-Class, Periodicals, Standard Mail, and Package Services. The Commission has determined that the cap cannot be applied at any level below the class level. Order No. 26, pp. 20-21, ¶ 2036. No mailer pays rates at the class level — or even at the product level. Mailers pay rates at the rate-cell level. Therefore, in determining the rate that mailers pay, the role of the rate cap may be limited.

Second, the PAEA price cap delinks the **overall level of revenues** from the **overall level of costs**, but the price cap certainly does not imply that inquiry into costs should not be made. Paying due attention to costs neither conflicts with, nor dishonors, caps, nor does it

imply a return to a financial breakeven requirement, which often is considered incorrectly to be the essence of a cost-of-service ratemaking.

Great effort has been devoted to measuring and recognizing cost under PRA, but not just because it was required by PRA.¹¹ Attention to costs is consistent with the economic literature on pricing and accepted practice in regulatory ratemaking, particularly where workable competition is not an option. *See* Valpak Initial Comments in Response to PRC Order No. 2, p. 7. Over the past 35 years, considerable progress has been made by the Commission and the Postal Service in recognizing costs to the benefit of mailers, as evidenced not only by the growth in worksharing and similar kinds of deaveraging, but also by the identification and recognition of cost drivers like those underlying the Periodicals rates recommended by the Commission in Docket No. R2006-1.¹²

With cost recognition in rate setting having support of the economic literature and a track record of success based on such cost recognition, the burden is on those who now contend that costs are irrelevant and are to be disregarded in postal rate setting. Those commenters who take this seemingly popular view never seem to provide direct citations to PAEA, but speak only in vague policy generalities, of the sort bandied about by politicians. *See, e.g.*, Advo Initial Comments, p. 1; ANM/MPA Initial Comments, pp. 1-2; PostCom

¹¹ Indeed, the central PRA ratemaking criterion was 39 U.S.C. section 3622(b)(3) (“direct and indirect postal costs attributable to that class”), and that is substantially similar under PAEA, 39 U.S.C. section 3622(c)(2) (“that each class of mail or type of mail service bear the direct and indirect postal **costs** attributable to” it).

¹² *See generally* Valpak Reply Comments in Response to Commission Order No. 2 (May 7, 2007), pp. 13-19.

Initial Comments, p. 1; DFS Initial Comments, p. 1. However, the Commission's responsibility is to implement the words of the law contained in Title 39 of the U.S. Code. Interpretation of PAEA requires a careful legal analysis as to what it actually states, not a political or policy analysis of what some of its supporters at various points before or after passage of the law have said that they intended. As enacted, PAEA is a law with limited legislative history. *See* Valpak Initial Comments in Response to PRC Order No. 2, pp. 3-6. Therefore, PAEA stands and falls on its words. In this case, even though a handful of the key supporters of PAEA may think that they "broke the link" between rates and costs, if a plain reading of the language of PAEA reveals otherwise, the language of PAEA trumps the views of those supporters who believe costs are now irrelevant. When implementing PAEA, the Commission certainly cannot rely on disembodied policy considerations — it must implement precise statutory language.¹³ And in no way does PAEA provide that the appropriate recognition of costs should stop or go backwards. In fact, a close examination of those 15 costing provisions in both PAEA and Title 39 of the U.S. Code which PAEA left unchanged emphasizes the importance of cost recognition in rate setting.

¹³ Another party which focused on precise statutory text is the **National Postal Mail Handlers Union**, which urges the Commission to eliminate the word "exigent" from its regulations as it appears nowhere in the statute, and employ the terms used in the statute wherever possible. We agree with having regulations that reflect accurately what the statute in fact states, and not inventing terms, or embracing broad policies, to achieve a desired result.

39 U.S.C. Chapter 1 (Postal Policy and Definitions)

- (1) **39 U.S.C. section 101(a)** states: “The **costs** of establishing and maintaining the Postal Service shall not be apportioned to impair the over-all value of such service to the people.” (Emphasis added.)
- (2) **39 U.S.C. section 101(d)** states: “Postal rates shall be established to apportion the **costs** of all postal operations to all users of the mail on a fair and equitable basis.” (Emphasis added.) Interestingly, this section does not point to subclasses or products or rate cells of any kind, it refers instead to “all users.” The implication is that no user, regardless of his product mix or the characteristics of his mailing, should find himself facing rates that recognize costs inappropriately. Also, this section calls for an assessment of the “fairness and equity” of the way costs are recognized.
- (3) **39 U.S.C. section 102(6)** explains that **costs** along with market characteristics should be considered in defining products.

39 U.S.C. Chapter 4 (General Authority)

- (4) **39 U.S.C. section 403(a)** requires that postal services be offered “at fair and reasonable rates and fees.” Although opinions can differ on what qualifies as “fair and reasonable,” **costs** are always taken as a key reference point.
- (5) **39 U.S.C. section 403(c)** prohibits “undue or unreasonable discrimination among users” in “establishing classifications, rates, and fees....” Notions of discrimination can focus on matters other than costs, but **costs** are always a primary consideration. In fact, it is well known that economists often describe competing notions of discrimination with formulas that involve marginal cost. Additionally, this section, just like section 101(d), refers to “users” of the mail, not to specific rate cells.
- (6) **39 U.S.C. section 404(b)** authorizes the “Governors ... to establish reasonable and equitable classes of mail and reasonable and equitable rates of postage and fees for postal services in accordance with the provisions of chapter 36.” Again, some understanding of **costs** is unavoidable in determining what is “reasonable” and “equitable.”

39 U.S.C. Chapter 36 (Postal Rates, Classes and Services)

- (7) Under **39 U.S.C. section 3622(b)(1)**, an objective of the ratemaking system is “[t]o maximize incentives to reduce **costs** and increase efficiency.” (Emphasis added.) **Section 3622(c)(12)** also refers to efficiency. Since no one set of rates

can make the Postal Service any more efficient than any other set of rates, this reference must be to the efficiency of the postal sector.¹⁴ This objective calls for specific attention to **costs**.

- (8) **39 U.S.C. section 3622(b)(6)** states an objective of increasing “the transparency of the ratemaking process.” Key parts of transparency should be knowing the reasoning, **costs**, and other evidence on which rates are based. Such evidence has been long recognized by mailers as important.
- (9) **39 U.S.C. section 3622(b)(8)** points to the importance of “just and reasonable ... rates and classifications.” Whatever “just” and “reasonable” are taken to mean, **costs** should be an important reference and they should be transparent.
- (10) **39 U.S.C. section 3622(c)(2)** continues the provision present under PRA in former 39 U.S.C. section 3622(b)(3) which now requires “that each class of mail or type of mail service bear the direct and indirect postal **costs** attributable to” it (emphasis added).
- (11) **39 U.S.C. section 3622(c)(5)** requires that consideration be given to “the degree of preparation of mail for delivery into the postal system performed by the mailers and its effect upon reducing **costs** to the Postal Service.” (Emphasis added.) Costs are clearly a key factor in this consideration and would be even if the language did not mention them specifically. The way this factor is implemented cannot be evaluated without cost information.
- (12) **39 U.S.C. section 3622(c)(10)** addresses what are often called NSAs. **Costs** are important in all parts of this section, as evidenced by the Commission’s proposed regulation, § 3010.42.
- (13) **39 U.S.C. section 3622(e)** provides guidance on worksharing and refers specifically to **costs**, and in particular to the notion of an avoided **cost**. (The Commission has recognized this attention to costs in § 3010.14 of its proposed regulations.)

¹⁴ The lack of direct relationship between rates and efficiency should be clear. For example, consider a postal service that processes letters for \$0.20 and parcels for \$2.00. Lowering the rate for letters might shift the volume toward letters and lower the average total cost, but there is no basis for saying that a postal service with a large proportion of letters (relative to the proportion of parcels) is any more (or less) efficient than a postal service with a smaller proportion of letters.

- (14) **39 U.S.C. section 3652(a)** requires **cost** information be provided in annual reports to the Commission.
- (15) **39 U.S.C. section 3652(b)** confirms that the **cost** information in the annual reports must include detailed information on worksharing.

Accordingly, a fair reading of PAEA, including the provisions of postal law that PAEA has left in effect, makes it clear that costs continue to be central to ratemaking. As OCA correctly states, “The PAEA continues to emphasize the importance of costs in establishing rates.” (OCA Initial Comments, p. 18.) No commenter has even attempted to develop the contrary position based in the language of U.S.C., Title 39, which must both guide and constrain the Commission in developing regulations.

VII. CONCLUSION

For the reasons stated above, the regulations proposed in Order No. 26 are in need of significant revision. Moreover, the Commission needs to promulgate draft regulations for a complaint process and the annual compliance review, and therefore the current proposed regulations are incomplete and are insufficient to support a rate filing under a CPI cap. When complete regulations are drafted, they should be republished for comment so that commenters can view the components as parts of a comprehensive set of PAEA regulations.

Respectfully submitted,

William J. Olson
John S. Miles
Jeremiah L. Morgan
WILLIAM J. OLSON, P.C.

8180 Greensboro Drive, Suite 1070
McLean, Virginia 22102-3860
(703) 356-5070

Counsel for:
Valpak Direct Marketing Systems, Inc. and
Valpak Dealers' Association, Inc.

**APPENDIX:
STATUTORY RESTRICTIONS ON
DOMESTIC POSTAL RATE MAKING AND CLASSIFICATION SETTING
FOR MARKET DOMINANT PRODUCTS CONTAINED IN 39 U.S. CODE**

39 U.S.C. Chapter 1 (Postal Policy and Definitions)

- § 101(a), (d), (e). Postal policy
- § 102(6)-(7). Definitions

39 U.S.C. Chapter 4 (General Authority)

- § 403. General duties
- § 404(b)-(c). Specific powers

39 U.S.C. Chapter 36 (Postal Rates, Classes and Services)

- § 3622. Modern rate regulation
- § 3626. Reduced rates
- § 3627. Adjusting free rates
- § 3629. Reduced rates for voter registration purposes
- § 3652. Annual reports to the Commission
- § 3653. Annual determination of compliance
- § 3661(a). Postal services
- § 3662. Rate and service complaints
- § 3682. Size and weight limits
- § 3683. Uniform rates for books; films, other materials

39 U.S.C. Chapter 1 (Postal Policy and Definitions)

§ 101. Postal policy

(a) The United States Postal Service shall be operated as a basic and fundamental service provided to the people by the Government of the United States, authorized by the Constitution, created by Act of Congress, and supported by the people. The Postal Service shall have as its basic function the obligation to provide postal services to bind the Nation together through the personal, educational, literary, and business correspondence of the people. It shall provide prompt, reliable, and **efficient** services to patrons in all areas and shall render postal services to all communities. The **costs** of establishing and maintaining the Postal Service shall not be **apportioned** to impair the over-all value of such service to the people. [Emphasis added.]

* * *

(d) Postal **rates** shall be established to **apportion the costs** of all postal operations **to all users** of the mail on a **fair and equitable** basis. [Emphasis added.]

(e) In determining all policies for postal services, the Postal Service shall give the highest consideration to the requirement for the most expeditious collection, transportation, and delivery of important letter mail.

§ 102. Definitions

(6) “product” means a postal service with a **distinct cost** or market characteristic for which a **rate or rates** are, or may reasonably be, applied;

(7) “rates”, as used with respect to products, includes fees for postal services; [Emphasis added.]

39 U.S.C. Chapter 4 (General Authority)

§ 403. General duties

(a) The Postal Service shall plan, develop, promote, and provide adequate and efficient postal services at **fair and reasonable rates** and fees. The Postal Service shall receive, transmit, and deliver throughout the United States, its territories and possessions, and, pursuant to arrangements entered into under sections 406 and 411 of this title, throughout the world, written and printed matter, parcels, and like materials and provide such other services incidental thereto as it finds appropriate to its functions and in the public interest. The Postal Service shall serve as nearly as practicable the entire population of the United States.

(b) It shall be the responsibility of the Postal Service--

(1) to maintain an **efficient** system of collection, sorting, and delivery of the mail nationwide;

(2) to provide types of mail service to meet the needs of different categories of mail and mail users; and

(3) to establish and maintain postal facilities of such character and in such locations that postal patrons throughout the Nation will, consistent with reasonable **economies** of postal operations, have ready access to essential postal services.

(c) In providing services and in establishing **classifications, rates,** and fees under this title, the Postal Service shall not, except as specifically authorized in this title, make any **undue or unreasonable discrimination** among users of the mails, nor shall it grant any **undue or unreasonable preferences** to any such user. [Emphasis added.]

§ 404. Specific powers

* * *

(b) Except as otherwise provided, the Governors are authorized to establish **reasonable and equitable classes** of mail and **reasonable and equitable rates** of postage and fees for postal services in accordance with the provisions of chapter 36. Postal **rates** and fees shall be **reasonable and equitable** and sufficient to enable the Postal Service, under best practices of **honest, efficient, and economical management,** to maintain and continue the development of postal services of the kind and quality adapted to the needs of the United States. [Emphasis added.]

(c) The Postal Service shall maintain one or more classes of mail for the transmission of letters sealed against inspection. The rate for each such class shall be uniform throughout the United States, its territories, and possessions. One such class shall provide for the most expeditious handling and transportation afforded mail matter by the Postal Service. No letter of such a class of domestic origin shall be opened except under authority of a search warrant authorized by law, or by an officer or employee of the Postal Service for the sole purpose of determining an address at which the letter can be delivered, or pursuant to the authorization of the addressee.

39 U.S.C. Chapter 36 (Postal Rates, Classes and Services)

Subchapter I. Provisions Relating to Market-Dominant Products

§ 3622. Modern rate regulation

(a) **AUTHORITY GENERALLY.**—The Postal Regulatory Commission shall, within 18 months after the date of enactment of this section, by regulation establish (and may from time to time thereafter by regulation revise) a **modern system for regulating rates and classes** for market-dominant products.

(b) **OBJECTIVES.**—Such system shall be **designed to achieve** the following objectives, each of which shall be applied in conjunction with the others:

(1) To maximize incentives to **reduce costs** and increase **efficiency.**

(2) To create predictability and stability in rates.

(3) To maintain high quality service standards established under section 3691.

(4) To allow the Postal Service **pricing flexibility**.

(5) To assure adequate revenues, including retained earnings, to maintain financial stability.

(6) To reduce the administrative burden and **increase the transparency** of the ratemaking process.

(7) To enhance mail security and deter terrorism.

(8) To establish and maintain a **just and reasonable** schedule for rates and classifications, however the objective under this paragraph shall not be construed to prohibit the Postal Service from making changes of unequal magnitude within, between, or among classes of mail.

(9) To allocate the total institutional **costs** of the Postal Service appropriately between market-dominant and competitive products.

(c) **FACTORS**.—In establishing or revising such system, the Postal Regulatory Commission shall **take into account**—

(1) the value of the mail service actually provided each class or type of mail service to both the sender and the recipient, including but not limited to the collection, mode of transportation, and priority of delivery;

(2) the requirement that each class of mail or type of mail service bear the **direct and indirect postal costs attributable** to each class or type of mail service through reliably identified causal relationships plus that portion of all other **costs** of the Postal Service **reasonably assignable** to such class or type;

(3) the effect of rate increases upon the general public, business mail users, and enterprises in the private sector of the economy engaged in the delivery of mail matter other than letters;

(4) the available alternative means of sending and receiving letters and other mail matter at reasonable **costs**;

(5) the degree of preparation of mail for delivery into the postal system performed by the mailer and its effect upon reducing **costs** to the Postal Service;

(6) simplicity of structure for the entire schedule and simple, identifiable relationships between the rates or fees charged the various classes of mail for postal services;

(7) the importance of **pricing flexibility** to encourage increased mail volume and operational efficiency;

(8) the relative value to the people of the kinds of mail matter entered into the postal system and the desirability and justification for special classifications and services of mail;

(9) the importance of providing classifications with extremely high degrees of reliability and speed of delivery and of providing those that do not require high degrees of reliability and speed of delivery;

(10) the desirability of special classifications for both postal users and the Postal Service in accordance with the policies of this title, including agreements between the Postal Service and postal users, when available on public and reasonable terms to similarly situated mailers, that—

(A) either—

- (i) improve the net financial position of the Postal Service through reducing Postal Service **costs** or increasing the overall contribution to the institutional **costs** of the Postal Service; or
 - (ii) enhance the performance of mail preparation, processing, transportation, or other functions; and
 - (B) do not cause unreasonable harm to the marketplace.
 - (11) the educational, cultural, scientific, and informational value to the recipient of mail matter;
 - (12) the need for the Postal Service to increase its efficiency and reduce its **costs**, including infrastructure **costs**, to help maintain high quality, affordable postal services;
 - (13) the value to the Postal Service and postal users of promoting intelligent mail and of secure, sender-identified mail; and
 - (14) the policies of this title as well as **such other factors as the Commission determines** appropriate.
- (d) REQUIREMENTS.—
- (1) IN GENERAL.—The system for regulating rates and classes for market-dominant products shall—
 - (A) include an annual limitation on the percentage changes in rates to be set by the Postal Regulatory Commission that will be equal to the change in the Consumer Price Index for All Urban Consumers unadjusted for seasonal variation over the most recent available 12-month period preceding the date the Postal Service files notice of its intention to increase rates;
 - (B) establish a schedule whereby rates, when necessary and appropriate, would change at regular intervals by predictable amounts;
 - (C) not later than 45 days before the implementation of any adjustment in rates under this section, including adjustments made under subsection (c)(10)—
 - (i) require the Postal Service to provide public notice of the adjustment;
 - (ii) provide an opportunity for review by the Postal Regulatory Commission;
 - (iii) provide for the Postal Regulatory Commission to notify the Postal Service of any noncompliance of the adjustment with the limitation under subparagraph (A); and
 - (iv) require the Postal Service to respond to the notice provided under clause (iii) and describe the actions to be taken to comply with the limitation under subparagraph (A);
 - (D) establish procedures whereby the Postal Service may adjust rates not in excess of the annual limitations under subparagraph (A); and
 - (E) notwithstanding any limitation set under subparagraphs (A) and (C), and provided there is not sufficient unused rate authority under paragraph (2)(C), establish procedures whereby rates may be adjusted on an expedited basis due to either extraordinary or exceptional circumstances, provided that the Commission determines, after notice and opportunity for a public hearing and comment, and within 90 days after any request by the Postal Service, that such adjustment is reasonable and equitable and necessary to enable the Postal Service, under best practices of honest, **efficient**, and

economical management, to maintain and continue the development of postal services of the kind and quality adapted to the needs of the United States. [Emphasis added.]

(2) **LIMITATIONS.**—

(A) **CLASSES OF MAIL.**—Except as provided under subparagraph (C), the annual limitations under paragraph (1)(A) shall apply to a class of mail, as defined in the Domestic Mail Classification Schedule as in effect on the date of enactment of the Postal Accountability and Enhancement Act.

(B) **ROUNDING OF RATES AND FEES.**—Nothing in this subsection shall preclude the Postal Service from rounding rates and fees to the nearest whole integer, if the effect of such rounding does not cause the overall rate increase for any class to exceed the Consumer Price Index for All Urban Consumers.

(C) **USE OF UNUSED RATE AUTHORITY.**—

(i) **DEFINITION.**—In this subparagraph, the term ‘unused rate adjustment authority’ means the difference between—

- (I) the maximum amount of a rate adjustment that the Postal Service is authorized to make in any year subject to the annual limitation under paragraph (1); and
- (II) the amount of the rate adjustment the Postal Service actually makes in that year.

(ii) **AUTHORITY.**—Subject to clause (iii), the Postal Service may use any unused rate adjustment authority for any of the 5 years following the year such authority occurred.

(iii) **LIMITATIONS.**—In exercising the authority under clause (ii) in any year, the Postal Service—

- (I) may use unused rate adjustment authority from more than 1 year;
- (II) may use any part of the unused rate adjustment authority from any year;
- (III) shall use the unused rate adjustment authority from the earliest year such authority first occurred and then each following year; and
- (IV) for any class or service, may not exceed the annual limitation under paragraph (1) by more than 2 percentage points.

(3) **REVIEW.**—Ten years after the date of enactment of the Postal Accountability and Enhancement Act and as appropriate thereafter, the Commission shall review the system for regulating rates and classes for market-dominant products established under this section to determine if the system is achieving the objectives in subsection (b), taking into account the factors in subsection (c). If the Commission determines, after notice and opportunity for public comment, that the system is not achieving the objectives in subsection (b), taking into account the factors in subsection (c), the Commission may, by regulation, make such modification or adopt such alternative system for regulating rates and classes for market-dominant products as necessary to achieve the objectives.

* * *

§ 3626. Reduced rates

- (a) (1) Except as otherwise provided in this section, rates of postage for a class of mail or kind of mailer under former section 4358, 4452(b), 4452(c), 4554(b), or 4554(c) of this title shall be established in accordance with section 3622.
 - (2) For the purpose of this subsection, the term "regular-rate category" means any class of mail or kind of mailer, other than a class or kind referred to in section 2401(c).
 - (3) Rates of postage for a class of mail or kind of mailer under former section 4358(a) through (c) of this title shall be established so that postage on each mailing of such mail reflects its preferred status as compared to the postage for the most closely corresponding regular-rate category mailing.
 - (4) (A) Except as specified in subparagraph (B), rates of postage for a class of mail or kind of mailer under former section 4358(d) or (e) of this title shall be established so that postage on each mailing of such mail shall be as nearly as practicable 5 percent lower than the postage for a corresponding regular-rate category mailing.
 - (B) With respect to the postage for the advertising portion of any mail matter under former section 4358(d) or (e) of this title, the 5-percent discount specified in subparagraph (A) shall not apply if the advertising portion exceeds 10 percent of the publication involved.
 - (5) The rates for any advertising under former section 4358(f) of this title shall be equal to 75 percent of the rates for advertising contained in the most closely corresponding regular-rate category of mail.
 - (6) The rates for mail matter under former sections 4452(b) and (c) of this title shall be established as follows:
 - (A) The estimated average revenue per piece to be received by the Postal Service from each subclass of mail under former sections 4452(b) and (c) of this title shall be equal, as nearly as practicable, to 60 percent of the estimated average revenue per piece to be received from the most closely corresponding regular-rate subclass of mail.
 - (B) For purposes of subparagraph (A), the estimated average revenue per piece of each regular-rate subclass shall be calculated on the basis of expected volumes and mix of mail for such subclass at current rates in the test year of the proceeding.
 - (C) Rate differentials within each subclass of mail matter under former sections 4452(b) and (c) shall reflect the policies of this title, including the factors set forth in section 3622(b) of this title.
 - (7) The rates for mail matter under former sections 4554 (b) and (c) of this title shall be established so that postage on each mailing of such mail shall be as nearly as practicable 5 percent lower than the postage for a corresponding regular-rate mailing.
- (b) (1) For the purposes of this title, the term "periodical publications", as used in former section 4351 of this title, includes (A) any catalog or other course listing, including mail announcements of legal texts which are part of post-bar admission education issued by any institution of higher education or by a nonprofit organization engaged in continuing legal education; and (B) any looseleaf page or report (including any index, instruction for filing,

table, or sectional identifier which is an integral part of such report) which is designed as part of a looseleaf reporting service concerning developments in the law or public policy.

(2) Any material described in paragraph (1) of this subsection shall qualify to be entered and mailed as second class mail in accordance with the applicable provisions of former section 4352 through former section 4357 of this title.

(3) For purposes of this subsection, the term "institution of higher education" has the meaning given it by section 101 of the Higher Education Act of 1965, and includes a nonprofit organization that coordinates a network of college-level courses that is sponsored primarily by nonprofit educational institutions for an older adult constituency.

(c) In the administration of this section, one conservation publication published by an agency of a State which is responsible for management and conservation of the fish or wildlife resources of such State shall be considered a publication of a qualified nonprofit organization which qualifies for rates of postage under former section 4358(d) of this title.

(d) (1) For purposes of this title, the term "agricultural", as used in former sections 4358(j)(2), 4452(d), and 4554(b)(1)(B) of this title, includes the art or science of cultivating land, harvesting crops or marine resources, or raising of livestock.

(2) In the administration of this section, and for purposes of former sections 4358(j)(2), 4452(d), and 4554(b)(1)(B) of this title, agricultural organizations or associations shall include any organization or association which collects and disseminates information or materials relating to agricultural pursuits.

(e) (1) In the administration of this section, the rates for third-class mail matter mailed by a qualified political committee shall be the rates currently in effect under former section 4452 of this title for third-class mail matter mailed by a qualified nonprofit organization.

(2) For purposes of this subsection--

(A) the term "qualified political committee" means a national or State committee of a political party, the Republican and Democratic Senatorial Campaign Committees, the Democratic National Congressional Committee, and the National Republican Congressional Committee;

(B) the term "national committee" means the organization which, by virtue of the bylaws of a political party, is responsible for the day-to-day operation of such political party at the national level; and

(C) the term "State committee" means the organization which, by virtue of the bylaws of a political party, is responsible for the day-to-day operation of such political party at the State level.

(f) In the administration of this chapter, the rates for mail under former section 4358(g) of this title shall be established without regard to either the provisions of such former section 4358(g) or the provisions of this section.

(g) (1) In the administration of this section, the rates for mail under subsections (a), (b), and (c) of former section 4358 of this title shall not apply to an issue of a publication if the number of copies of such issue distributed within the county of publication is less than the number equal to the sum of 50 percent of the total paid circulation of such issue plus one.

(2) Paragraph (1) of this subsection shall not apply to an issue of a publication if the total paid circulation of such issue is less than 10,000 copies.

(3) For purposes of this section and former section 4358(a) through (c) of this title, those copies of an issue of a publication entered within the county in which it is published, but distributed outside such county on postal carrier routes originating in the county of publication, shall be treated as if they were distributed within the county of publication.

(4) (A) In the case of an issue of a publication, any number of copies of which are mailed at the rates of postage for a class of mail or kind of mailer under former section 4358(a) through (c) of this title, any copies of such issue which are distributed outside the county of publication (excluding any copies subject to paragraph (3)) shall be subject to rates of postage provided for under this paragraph.

(B) The rates of postage applicable to mail under this paragraph shall be established in accordance with section 3622.

(C) This paragraph shall not apply with respect to an issue of a publication unless the total paid circulation of such issue outside the county of publication (not counting recipients of copies subject to paragraph (3)) is less than 5,000.

(h) In the administration of this section, the number of copies of a subscription publication mailed to nonsubscribers during a calendar year at rates under subsections (a), (b), and (c) of former section 4358 of this title may not exceed 10 percent of the number of copies of such publication mailed at such rates to subscribers.

(i) [Repealed]

(j) (1) In the administration of this section, the rates for mail under former section 4452(b) or 4452(c) of this title shall not apply to mail which advertises, promotes, offers, or, for a fee or consideration, recommends, describes, or announces the availability of--

(A) any credit, debit, or charge card, or similar financial instrument or account, provided by or through an arrangement with any person or organization not authorized to mail at the rates for mail under former section 4452(b) or 4452(c) of this title;

(B) any insurance policy, unless the organization which promotes the purchase of such policy is authorized to mail at the rates for mail under former section 4452(b) or 4452(c) of this title, the policy is designed for and primarily promoted to the members, donors, supporters, or beneficiaries of the organization, and the coverage provided by the policy is not generally otherwise commercially available;

(C) any travel arrangement, unless the organization which promotes the arrangement is authorized to mail at the rates for mail under former section 4452(b) or 4452(c) of this title, the travel contributes substantially (aside from the cultivation of members, donors, or supporters, or the acquisition of income or funds) to one or more of the purposes which constitutes the basis for the organization's authorization to mail at such rates, and the arrangement is designed for and primarily promoted to the members, donors, supporters, or beneficiaries of the organization; or

(D) any product or service (other than any to which subparagraph (A), (B), or (C) relates), if--

(i) the sale of such product or the providing of such service is not substantially related (aside from the need, on the part of the organization promoting such product or service, for income or funds or the use it makes of the profits derived) to the

exercise or performance by the organization of one or more of the purposes constituting the basis for the organization's authorization to mail at such rates; or (ii) the mail matter involved is part of a cooperative mailing (as defined under regulations of the Postal Service) with any person or organization not authorized to mail at the rates for mail under former section 4452(b) or 4452(c) of this title;

except that--

(I) any determination under clause (i) that a product or service is not substantially related to a particular purpose shall be made under regulations which shall be prescribed by the Postal Service and which shall be consistent with standards established by the Internal Revenue Service and the courts with respect to subsections (a) and (c) of section 513 of the Internal Revenue Code of 1986; and

(II) clause (i) shall not apply if the product involved is a periodical publication described in subsection (m)(2) (including a subscription to receive any such publication); and

(III) clause (i) shall not apply to space advertising in mail matter that otherwise qualifies for rates under former section 4452(b) or 4452(c) of this title, and satisfies the content requirements established by the Postal Service for periodical publications: Provided, That such changes in law shall take effect immediately and shall stay in effect hereafter unless the Congress enacts legislation on this matter prior to October 1, 1995.

(2) Matter shall not be excluded from being mail at the rates for mail under former section 4452(b) or 4452(c) of this title, by an organization authorized to mail at those rates solely because--

(A) such matter contains, but is not primarily devoted to, acknowledgements of organizations or individuals who have made donations to the authorized organization; or

(B) such matter contains, but is not primarily devoted to, references to and a response card or other instructions for making inquiries concerning services or benefits available as a result of membership in the authorized organization: Provided, That advertising, promotional, or application materials specifically concerning such services or benefits are not included.

(3) (A) Upon request, an organization authorized to mail at the rates for mail under former section 4452(b) or 4452(c) of this title shall furnish evidence to the Postal Service concerning the eligibility of any of its mail matter or mailings to be sent at those rates.

(B) The Postal Service shall establish procedures to carry out this paragraph, including procedures for mailer certification of compliance with the conditions specified in paragraph (1)(D) or subsection (m), as applicable, and verification of such compliance.

(k) (1) No person or organization shall mail, or cause to be mailed by contractual agreement or otherwise, at the rates for mail under former section 4452(b) or 4452(c) of this title, any matter to which those rates do not apply.

(2) The Postal Service may assess a postage deficiency in the amount of the unpaid postage against any person or organization which violates paragraph (1) of this subsection. This assessment shall be deemed the final decision of the Postal Service, unless the party against whom the deficiency is assessed appeals it in writing within thirty days to the postmaster of

the office where the mailing was entered. Such an appeal shall be considered by an official designated by the Postal Service, other than the postmaster of the office where the mailing was entered, who shall issue a decision as soon as practicable. This decision shall be deemed final unless the party against whom the deficiency was assessed appeals it in writing within thirty days to a further reviewing official designated by the Postal Service, who shall issue the final decision on the matter.

(3) The Postal Service shall maintain procedures for the prompt collection of postage deficiencies arising from the violation of paragraph (1) of this subsection, and may in its discretion, follow the issuance of a final decision regarding a deficiency under paragraph (2) of this subsection deduct the amount of that deficiency incurred during the previous 12 months from any postage accounts or other monies of the violator in its possession.

(l) In the administration of this section, the term "advertising", as used in former section 4358(j)(2) of this title, does not include the publisher's own advertising in a publication published by the official highway or development agency of a State.

(m) (1) In the administration of this section, the rates for mail under former section 4452(b) or 4452(c) of this title shall not apply to mail consisting of products, unless such products--

(A) were received by the organization as gifts or contributions; or

(B) are low cost articles (as defined by section 513(h)(2) of the Internal Revenue Code of 1986).

(2) Paragraph (1) shall not apply with respect to a periodical publication of a qualified nonprofit organization.

(n) In the administration of this section, matter that satisfies the circulation standards for requester publications shall not be excluded from being mailed at the rates for mail under former section 4358 solely because such matter is designed primarily for free circulation or for circulation at nominal rates, or fails to meet the requirements of former section 4354(a)(5).

§ 3627. Adjusting free rates

If Congress fails to appropriate an amount authorized under section 2401(c) of this title for any class of mail sent free of postage under section 3217 or 3403-3406, the rate for that class may be adjusted in accordance with the provisions of this subchapter so that the increased revenues received from the users of such class will equal the amount for that class that the Congress was to appropriate.

§ 3629. Reduced rates for voter registration purposes

The Postal Service shall make available to a State or local voting registration official the rate for any class of mail that is available to a qualified nonprofit organization under section 3626 for the purpose of making a mailing that the official certifies is required or authorized by the National Voter Registration Act of 1993.

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Subchapter IV. Reporting Requirements and Related Provisions

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§ 3652. Annual reports to the Commission

(a) **COSTS, REVENUES, RATES, AND SERVICE.**—Except as provided in subsection (c), the Postal Service shall, no later than 90 days after the end of each year, prepare and submit to the Postal Regulatory Commission a report (together with such nonpublic annex to the report as the Commission may require under subsection (e))—

(1) which shall analyze **costs**, revenues, rates, and quality of service, using such methodologies as the Commission shall by regulation prescribe, and in sufficient detail to demonstrate that all products during such year complied with all applicable requirements of this title; and

(2) which shall, for each market-dominant product provided in such year, provide—

(A) product information, including mail volumes; and

(B) measures of the quality of service afforded by the Postal Service in connection with such product, including—

(i) the level of service (described in terms of speed of delivery and reliability) provided; and

(ii) the degree of customer satisfaction with the service provided.

The Inspector General shall regularly audit the data collection systems and procedures utilized in collecting information and preparing such report (including any annex thereto and the information required under subsection (b)). The results of any such audit shall be submitted to the Postal Service and the Postal Regulatory Commission.

(b) **INFORMATION RELATING TO WORKSHARE DISCOUNTS.**—The Postal Service shall include, in each report under subsection (a), the following information with respect to each market-dominant product for which a workshare discount was in effect during the period covered by such report:

(1) The per-item cost avoided by the Postal Service by virtue of such discount.

(2) The percentage of such per-item cost avoided that the per-item workshare discount represents.

(3) The per-item contribution made to institutional costs.

(c) **MARKET TESTS.**—In carrying out subsections (a) and (b) with respect to experimental products offered through market tests under section 3641 in a year, the Postal Service shall—

(1) report data on the **costs**, revenues, and quality of service by market test, which may be reported in summary form; and

(2) report such data as the Postal Regulatory Commission requires.

(d) **SUPPORTING MATTER.**—The Postal Regulatory Commission shall have access, in accordance with such regulations as the Commission shall prescribe, to the working papers and any other supporting matter of the Postal Service and the Inspector General in connection with any information submitted under this section.

(e) **CONTENT AND FORM OF REPORTS.**—

(1) **IN GENERAL.**—The Postal Regulatory Commission shall, by regulation, prescribe the content and form of the public reports (and any nonpublic annex and supporting matter relating to the report) to be provided by the Postal Service under this section. In carrying out this subsection, the Commission shall give due consideration to—

(A) providing the public with timely, adequate information to assess the lawfulness of rates charged;

(B) avoiding unnecessary or unwarranted administrative effort and expense on the part of the Postal Service; and

(C) protecting the confidentiality of commercially sensitive information.

(2) **REVISED REQUIREMENTS.**—The Commission may, on its own motion or on request of an interested party, initiate proceedings (to be conducted in accordance with regulations that the Commission shall prescribe) to improve the quality, accuracy, or completeness of Postal Service data required by the Commission under this subsection whenever it shall appear that—

(A) the attribution of **costs** or revenues to products has become significantly inaccurate or can be significantly improved;

(B) the quality of service data has become significantly inaccurate or can be significantly improved; or

(C) such revisions are, in the judgment of the Commission, otherwise necessitated by the public interest.

(f) **CONFIDENTIAL INFORMATION.**—

(1) **IN GENERAL.**—If the Postal Service determines that any document or portion of a document, or other matter, which it provides to the Postal Regulatory Commission in a nonpublic annex under this section or under subsection (d) contains information which is described in section 410(c) of this title, or exempt from public disclosure under section 552(b) of title 5, the Postal Service shall, at the time of providing such matter to the Commission, notify the Commission of its determination, in writing, and describe with particularity the documents (or portions of documents) or other matter for which confidentiality is sought and the reasons therefor.

(2) **TREATMENT.**—Any information or other matter described in paragraph (1) to which the Commission gains access under this section shall be subject to paragraphs (2) and (3) of section 504(g) in the same way as if the Commission had received notification with respect to such matter under section 504(g)(1).

(g) **OTHER REPORTS.**—The Postal Service shall submit to the Postal Regulatory Commission, together with any other submission that the Postal Service is required to make under this section

in a year, copies of its then most recent—

(1) comprehensive statement under section 2401(e);

(2) performance plan under section 2803; and

(3) program performance reports under section 2804.

§ 3653. Annual determination of compliance

(a) OPPORTUNITY FOR PUBLIC COMMENT.—After receiving the reports required under section 3652 for any year, the Postal Regulatory Commission shall promptly provide an opportunity for comment on such reports by users of the mails, affected parties, and an officer of the Commission who shall be required to represent the interests of the general public.

(b) DETERMINATION OF COMPLIANCE OR NONCOMPLIANCE.—Not later than 90 days after receiving the submissions required under section 3652 with respect to a year, the Postal Regulatory Commission shall make a written determination as to—

(1) whether any rates or fees in effect during such year (for products individually or collectively) were not in compliance with applicable provisions of this chapter (or regulations promulgated thereunder); or

(2) whether any service standards in effect during such year were not met.

If, with respect to a year, no instance of noncompliance is found under this subsection to have occurred in such year, the written determination shall be to that effect.

(c) NONCOMPLIANCE WITH REGARD TO RATES OR SERVICES.— If, for a year, a timely written determination of noncompliance is made under subsection (b), the Postal Regulatory Commission shall take appropriate action in accordance with subsections (c) and (e) of section 3662 (as if a complaint averring such noncompliance had been duly filed and found under such section to be justified).

(d) REVIEW OF PERFORMANCE GOALS.—The Postal Regulatory Commission shall also evaluate annually whether the Postal Service has met the goals established under sections 2803 and 2804, and may provide recommendations to the Postal Service related to the protection or promotion of public policy objectives set out in this title.

(e) REBUTTABLE PRESUMPTION.—A timely written determination described in the last sentence of subsection (b) shall, for purposes of any proceeding under section 3662, create a rebuttable presumption of compliance by the Postal Service (with regard to the matters described under paragraphs (1) and (2) of subsection (b)) during the year to which such determination relates.

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Subchapter V. Postal Services, Complaints, and Judicial Review

§ 3661. Postal services

(a) The Postal Service shall develop and promote adequate and **efficient** postal services. [Emphasis added.]

* * *

§ 3662. Rate and service complaints

(a) **IN GENERAL.**—Any interested person (including an officer of the Postal Regulatory Commission representing the interests of the general public) who believes the Postal Service is not operating in conformance with the requirements of the provisions of sections 101(d), 401(2), 403(c), 404a, or 601, or this chapter (or regulations promulgated under any of those provisions) may lodge a complaint with the Postal Regulatory Commission in such form and manner as the Commission may prescribe.

(b) **PROMPT RESPONSE REQUIRED.**—

(1) **IN GENERAL.**—The Postal Regulatory Commission shall, within 90 days after receiving a complaint under subsection (a)—

(A) either—

(i) upon a finding that such complaint raises material issues of fact or law, begin proceedings on such complaint; or

(ii) issue an order dismissing the complaint; and

(B) with respect to any action taken under subparagraph (A) (i) or (ii), issue a written statement setting forth the bases of its determination.

(2) **TREATMENT OF COMPLAINTS NOT TIMELY ACTED ON.**— For purposes of section 3663, any complaint under subsection (a) on which the Commission fails to act in the time and manner required by paragraph (1) shall be treated in the same way as if it had been dismissed pursuant to an order issued by the Commission on the last day allowable for the issuance of such order under paragraph (1).

(c) **ACTION REQUIRED IF COMPLAINT FOUND TO BE JUSTIFIED.**— If the Postal Regulatory Commission finds the complaint to be justified, it shall order that the Postal Service take such action as the Commission considers appropriate in order to achieve compliance with the applicable requirements and to remedy the effects of any noncompliance (such as ordering unlawful rates to be adjusted to lawful levels, ordering the cancellation of market tests, ordering the Postal Service to discontinue providing loss-making products, or requiring the Postal Service to make up for revenue shortfalls in competitive products).

(d) **AUTHORITY TO ORDER FINES IN CASES OF DELIBERATE NONCOMPLIANCE.**—In addition, in cases of deliberate noncompliance by the Postal Service with the requirements of this title, the Postal Regulatory Commission may order, based on the nature, circumstances, extent, and seriousness of the noncompliance, a fine (in the amount specified by the Commission in its order) for each incidence of noncompliance. Fines resulting from the provision of competitive products shall be paid from the Competitive Products Fund established in section 2011. All receipts from fines imposed under this subsection shall be deposited in the general fund of the Treasury of the United States.

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Subchapter VI. General

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§ 3682. Size and weight limits

The Postal Service may establish size and weight limitations for mail matter in the market-dominant category of mail consistent with regulations the Postal Regulatory Commission may prescribe under section 3622. The Postal Service may establish size and weight limitations for mail matter in the competitive category of mail consistent with its authority under section 3632.

§ 3683. Uniform rates for books; films; other materials

(a) Notwithstanding any other provision of this title, the rates of postage established for mail matter enumerated in former section 4554 of this title shall be uniform for such mail of the same weight, and shall not vary with the distance transported.

(b) The rates of postage under former section 4554(b)(1) of this title shall not be effective except with respect to mailings which--

(1) constitute materials specified in former section 4554(b)(2) of this title; and

(2) are sent between--

(A) an institution, organization, or association listed in subparagraph (A) or (B) of such former section 4554(b)(1) and any other such institution, organization, or association;

(B) an institution, organization, or association referred to in subparagraph (A) and any individual (other than an individual having a financial interest in the sale, promotion, or distribution of the materials involved);

(C) an institution, organization, or association referred to in subparagraph (A) and a qualified nonprofit organization (as defined in former section 4452(d) of this title that is not such an institution, organization, or association; or

(D) an institution, organization, or association referred to in subparagraph (A) and a publisher, if such institution, organization, or association has placed an order to purchase such materials for delivery to such institution, organization, or association.

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