Pursuant to Order No. 4987, the Association for Postal Commerce ("PostCom") submits these comments on the Commission’s Advanced Notice of Proposed Rulemaking. The Commission seeks comment on “whether changes to MCS provisions that, in effect, add products to, remove products from, or transfer products between product lists, are changes that implicate the requirements of” 39 U.S.C. § 3642. Order No. 4987 at 3. More specifically, the Commission asks “whether it should update its regulations to require information pursuant to section 3642 when changes to the size and weight limitations appear to modify the product lists.” Id. PostCom submits that the answer to each of these questions is an emphatic yes.

The need for such a rule is readily apparent from the proceeding that gave rise to the instant inquiry. As the Commission explains in Order No. 4987, the Postal Service proposed in Docket No. MC2019-3 to revise the size and weight limits for a market dominant product, Outbound Single-Piece First-Class Mail International Large Envelopes (Flats). Order No. 4987 at 2. In approving this change, the Commission recognized that the “practical impact” of the change would be the transfer of First Class Mail International Flats weighing more than 15.994 ounces to the competitive product list. Id. at 2-3 (quoting Order No. 4932 at 5). The Commission further notes the Public Representative’s recognition that allowing such changes without oversight could allow the Postal Service to “effectively eliminate products from a
product list by drastically reducing the range of a product’s weight limitations or could effectively add products to a product list by greatly expanding the limitations.” Order No. 4987 at 3.

Having properly identified the problem, the Commission is obligated to remedy it so long as it has the authority to do so. The Postal Accountability and Enhancement Act not only grants the Commission the authority to remedy this problem, but it requires the Commission to develop a solution. That is, the Commission cannot, consistent with the statute, allow the Postal Service to transfer mail from the market dominant to the competitive product list, by any means, without establishing that the Postal Service lacks market power over the volume that will be transferred. If an MCS change of any kind—including but not limited to changes to the size and weight limitations—would result in the transfer of volume from the market dominant to the competitive product list, the Commission must evaluate the propriety of that transfer according to the standards in 39 U.S.C. § 3642 and its existing regulations at 39 C.F.R. part 320 subpart B. [Check cite] To the extent the Commission’s regulations do not currently require such a review, the Commission should modify its regulations to do so.

First, it is worth explaining why the fact that 39 U.S.C. §3682, which specifically authorizes the Postal Service to specify size and weight limitations for its products, does not dictate a contrary result. It is true that § 3682 does not reference the requirements of § 3642 governing changes to the product lists. But that is a function of the respective purposes of those sections of the statute. __ While § 3682 governs the specific criteria by which size and weight changes can be made, section 3642 establishes principles that apply to the definition and description of products more broadly. Specifically, section 3642 states:

The market-dominant category of products shall consist of each product in the sale of which the Postal Service exercises sufficient market power that it can
effectively set the price of such product substantially above costs, raise prices significantly, decrease quality, or decrease output, without risk of losing a significant level of business to other firms offering similar products. The competitive category of products shall consist of all other products.

39 U.S.C. § 3642(b)(1). This section of the statute allows for no exceptions: if the Postal Service can exercise market power over a product, that product must be classified as market dominant. A product can only be transferred to the competitive list, therefore, if the Postal Service can demonstrate that it lacks market power over the product. See United States Postal Service v. Postal Regulatory Commission, 785 F.3d 740, 744 (2015) (explaining PAEA’s division of postal products into two categories, market dominant and competitive, and identifying as competitive those products as to which the “Postal Service faces meaningful competition”); 39 C.F.R. §3020.32(d) (requiring the Postal Service to verify that a requested modification to the product lists “does not classify as competitive a product over which the Postal Service exercises sufficient market power”).

The statute further recognizes that subclasses and other subordinate units can be transferred between product lists, meaning that a change that only transfers a portion of a market dominant product’s volume to the competitive product list must meet these same criteria. 39 U.S.C. § 3642(c). Indeed, the Postal Service has requested such approvals in the past, including as recently as this past year. See, e.g., Docket No. MC2019-17, Order No. 4980 at 5 (explaining the Postal Service’s request to “remove Inbound Letter Post small packets and bulky letter from the market dominant Inbound Letter Post product” and “add identical service to the competitive product list”) (Jan. 9, 2019).

In other words, while § 3682 grants the Postal Service the limited authority to establish size and weight limits for its products, nothing in that section suggests this authority should limit the broader requirement of § 3642 that all products should be classified as either market
dominant or competitive, and that all products—regardless of their size or weight limits—over which the Postal Service exercises market power must be classified as market dominant.

Further, the Commission enjoys broad authority to modify its rules governing the information that must be submitted with requests to change MCS language. With respect to changes to the product description, the Commission already requires the Postal Service to provide information describing the changes, the rationale for the change, and a description of the likely impact of the change on users of the product, as well as certify that the change complies with the price cap. 39 C.F.R. § 3020.81. The Commission may approve or reject the proposed changes. Id. at § 3020.83. The Commission has imposed more detailed requirements for modifications to the product lists. For instance, it requires the Postal Service to “[d]emonstrate why the change is in accordance with the policies and the applicable criteria of chapter 36 of title 39,” 39 C.F.R. § 3020.32 (a), and to “[e]xplain why . . . the change . . . advances the objectives of 39 U.S.C. 3622(b), taking into account the factors of 39 U.S.C. 3622(c).” 39 C.F.R. § 3020.32(b). If the Commission determines the request to modify the product lists is inconsistent with statutory policies, it may institute further proceedings and/or “[d]irect other action as the Commission may consider appropriate.” 39 C.F.R. §§ 3020.34 and 35.

In developing rules to implement this requirement, the Commission should keep two principles in mind. First, the rules should admit of no exceptions: if a change in the size or weight limitations would modify the product lists by adding, deleting, or, especially, transferring some part of a product between the product lists, the rules should require the Postal Service to provide information pursuant to 39 U.S.C. § 3642. In particular, if the change would result in the transfer of some portion of a product from the market dominant list to the competitive list, the
rules should require the Postal Service to demonstrate that it cannot exercise market power over the volume the type of mail that would be transferred as a result of the change.

Second, the rules should place the burden on the Postal Service to determine, in the first instance, whether the proposed changes would modify the product lists. While the Commission on its own motion and the public should have the ability to raise this issue whenever the Postal Service makes a change to MCS provisions, the Postal Service is in the best position to understand the impact of its proposed changes. Accordingly, it should indicate whether or not its proposed MCS changes implicate the requirements of 39 U.S.C. § 3642 when it proposes these changes.

PostCom fully supports the Commission’s efforts to develop such rules and commends the Commission for undertaking this rulemaking. Perhaps the Commission’s most important role in the regulatory scheme under PAEA is to protect against the abuse of market power by the Postal Service.1 This role can only be fulfilled if the Commission ensures that the statutory delineation between market dominant and competitive products is vigorously enforced. This proceeding represents an important step toward ensuring that the Postal Service does not take actions—even inadvertently—that blur this distinction or result in the improper classification of mail.

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1 See United States Postal Service v. Postal Regulatory Commission, 816 F.3d 883, 885 n.2 (explaining that the price cap requirement “is meant to assure that the Postal Service does not abuse a dominant position” and that “[t]he language of 39 U.S.C. § 3642 has been consistently taken to reflect basic antitrust concerns with market power.”)
Respectfully submitted,

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