

UNITED STATES OF AMERICA  
POSTAL REGULATORY COMMISSION  
WASHINGTON, DC 20268-0001

Before Commissioners:

Robert G. Taub, Chairman;  
Nanci E. Langley, Vice Chairman;  
Mark Acton;  
Tony Hammond; and  
Michael Kubayanda

Regulations Concerning Classification  
Changes that Modify Product Lists

Docket No. RM2019-3

NOTICE OF PROPOSED RULEMAKING CONCERNING  
CLASSIFICATION CHANGES MODIFYING PRODUCT LISTS

(Issued May 8, 2019)

I. INTRODUCTION

The Commission initiated this proceeding to explore updating its regulations to address proposed classification changes to product descriptions in the Mail Classification Schedule (MCS) that may modify the market dominant and/or competitive product lists.<sup>1</sup> The Commission is specifically reviewing changes to regulations involving updates to the size and weight limitations applicable to market dominant mail matter. See 39 CFR 3020.111. For the reasons set forth below, the Commission proposes the following revisions to 39 CFR 3020.111(a), which appears after the signature of this Order.

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<sup>1</sup> Advance Notice of Proposed Rulemaking Concerning Classification Changes Modifying Product Lists, January 29, 2019 (Order No. 4987). The Advance Notice of Proposed Rulemaking Concerning Classification Changes Modifying Product Lists was published in the *Federal Register* on February 4, 2019. See Competitive Postal Products, 84 FR 1420 (February 4, 2019).

## II. BACKGROUND

Section 3682 provides that the Postal Service may establish size and weight limitations for mail matter in the market dominant category of mail consistent with regulations the Commission may prescribe under section 3622. 39 U.S.C. 3682. Section 3020.111(a) requires the Postal Service to inform the Commission of updates to size and weight limitations for market dominant mail matter. 39 CFR 3020.111(a). The Commission is required to evaluate any proposed updates “in accordance with the policies and the applicable criteria” of chapter 36 of title 39 of the United States Code. 39 CFR 3020.111(c).

In Docket No. MC2019-3, the Postal Service filed a request pursuant to 39 CFR 3020.111 seeking to change the weight limit to 15.994 ounces (from 64 ounces) for Outbound Single-Piece First-Class Mail International (FCMI) Large Envelopes (Flats), which is a market dominant product.<sup>2</sup> The Postal Service stated that FCMI Flats weighing 16 ounces or more would be charged the applicable First-Class Package International Service (FCPIS) price.<sup>3</sup> FCPIS is an existing product on the competitive product list.

In Order No. 4932, the Commission approved the update to the weight limitation because it was in accordance with the policies and applicable criteria of chapter 36 of title 39.<sup>4</sup> However, in that order, the Commission stated that “the practical impact of the proposed update is a transfer of FCMI Flats weighing over 15.994 ounces from the market dominant product list to the competitive product list.” Order No. 4932 at 5. The Commission expressed concerns that “the Postal Service could use the size and weight

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<sup>2</sup> Docket No. MC2019-3, Notice of the United States Postal Service of Update to the Maximum Weight Limit for Outbound Single-Piece First-Class Mail International Large Envelopes (Flats) in the Mail Classification Schedule, October 10, 2018.

<sup>3</sup> International Mailing Services: Product and Price Changes—CPI, 83 FR 52351 (October 17, 2018). The Postal Services stated that, if mailed as FCPIS, these mailpieces would be charged between 17 percent and 157 percent more than FCMI Flats. See Docket No. MC2019-3, Response of the United States Postal Service to Commission Information Request No. 1, October 26, 2018, question 2.

<sup>4</sup> Docket No. MC2019-3, Order Approving Update to Weight Limitation, December 19, 2018, at 5 (Order No. 4932).

limitation regulations to make extensive changes to product lists without proper Commission oversight.” *Id.*

On January 29, 2019, the Commission initiated this docket to evaluate 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 section 3642. Order No. 4987 at 1, 3. The Commission sought comments from interested parties on 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.* at 3.

### III. COMMENTS

The Commission received comments from the National Postal Policy Council, the Major Mailers Association, the National Association of Presort Mailers, and the Association for Mail Electronic Enhancement (collectively, Joint First-Class Mailers); the Association for Postal Commerce (PostCom); the Postal Service; and the Public Representative.<sup>5</sup>

The Joint First-Class Mailers state that the Commission should require the submission of the information required by section 3642 whenever the Postal Service proposes a weight and size change that could have the effect of transferring a portion of a product’s volume between the market dominant and competitive categories, with no *de minimis* exception. Joint First-Class Mailers Comments at 1. They explain that the Commission has ample authority to modify the regulations to address specific issues that arise when a proposed modification to weight and size would shift market dominant mail to the competitive product list. *Id.* at 3. They recommend that the Commission

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<sup>5</sup> Comments of the National Postal Policy Council, the Major Mailers Association, the National Association of Presort Mailers, and the Association for Mail Electronic Enhancement, April 5, 2019 (Joint First-Class Mailers Comments); Comments of the Association for Postal Commerce, April 5, 2019 (PostCom Comments); Comments of the United States Postal Service, April 5, 2019 (Postal Service Comments); Public Representative Comments, April 5, 2019 (PR Comments).

amend section 3020.111 to require the Postal Service to provide information required by sections 3020.31 and 3020.32 of the Commission's rules when it proposes a weight or size modification that would have the effect of transferring part or all of the volume of a market dominant product to the competitive category. *Id.* at 5.

PostCom states that the Commission cannot, consistent with the Postal Accountability and Enhancement Act, 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 would be transferred. PostCom Comments at 2. To the extent that the Commission's regulations do not require such a review, PostCom recommends that the Commission modify its regulations to do so. *Id.* PostCom suggests that the Commission keep two principles in mind in developing rules to implement this requirement. *Id.* at 4. First, the rules should require the Postal Service to provide information pursuant to section 3642, with no exception, 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 product lists. *Id.* In particular, if the change would result in the transfer of some portion of a product from the market dominant product list to the competitive product list, the rules should require the Postal Service to demonstrate that it cannot exercise market power over the volume of the type of mail that would be transferred as a result of the change. *Id.* at 4-5. 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. *Id.* at 5. PostCom states that the Postal Service is in the best position to understand the impact of its proposed changes. *Id.*

The Postal Service comments that the D.C. Circuit's decision in the Return Receipt for Merchandise (RRM) case forecloses importing section 3642's requirements into section 3682.<sup>6</sup> In particular, the Postal Service makes several distinctions between

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<sup>6</sup> Postal Service Comments at 2; see *USPS v. Postal Regulatory Comm'n*, 886 F.3d 1261 (D.C. Cir. 2018).

section 3642 and section 3682, such as the difference between the Postal Service's discretion to determine rates, sizes, and weights versus the Commission's authority to change product lists and the different deadlines for Commission review under each section. Postal Service Comments at 2. The Postal Service states that there is no statutory basis for evaluating size and weight limit changes under the standards that apply to product list transfers under section 3642. *Id.* at 4. The Postal Service also contends that practical considerations such as its authority to make operational decisions and its need to rely on statutory deadlines make it inappropriate to import section 3642 review into changes under section 3682. *Id.* at 7-8. In addition, the Postal Service states that the Commission already has a solution to prevent misuse of section 3682 as the Commission could find that a pretextual size and weight change is improperly filed. *Id.* at 8. Thus, the Postal Service recommends that the rulemaking be closed. *Id.* at 9.

The Public Representative states that given that section 3642 resides within chapter 36, the size and weight limitation update must be in accordance with section 3642. PR Comments at 8. The Public Representative suggests that the rules should be modified to require the Postal Service to provide section 3642 information when noticing a size or weight limitation change or requesting permission for a material change to the MCS. *Id.* at 11. The Public Representative states that the Commission should define a proposed change as a product addition, deletion, or transfer when the change is expected to result in volume changes of at least 50 percent in the subsequent fiscal year. *Id.* The Public Representative proposes amendments to sections 3020.30(a), 3020.111(a), and 3020.80(a). *Id.* at 11-12. The Public Representative contends that by applying the rules in section 3020.111 to size and weight changes, the Commission may expedite the review of such proceedings that "raise a *prima facie* issue of application of section 3642 rather than issuing and awaiting the response to an information request." *Id.* at 11.

#### IV. SUMMARY OF PROPOSED RULE

Currently, section 3020.111(a) requires the Postal Service to file a notice with the Commission 45 days prior to the effective date of the proposed update to size and weight limitations for market dominant mail matter. The notice must include a copy of the applicable sections of the MCS and the proposed updates therein in legislative format. 39 CFR 3020.111(a). The Commission evaluates the proposals in accordance with the policies and the applicable criteria of chapter 36 of title 39 of the United States Code. 39 CFR 3020.111(c). To assist the Commission in its review, the Postal Service has explained in previous notices how the proposed update is in accordance with the policies and applicable criteria of chapter 36 of title 39 of the United States Code.<sup>7</sup>

The Commission instituted this proceeding to evaluate whether this information is sufficient to address instances where a proposed update to size and weight limitations appears to modify the product lists without proper Commission oversight. In particular, the Commission is concerned with changes that may camouflage an unreasonable price increase, materially harm users or competitors, or otherwise constitute an abuse of market power. Accordingly, the Commission proposes that 39 CFR 3020.111(a) be amended to include the requirement that the Postal Service explain if a proposed update to a size or weight limitation will adversely affect users and competitors. The Commission also proposes to add a requirement that the Postal Service explain how a size and weight limitation change is in accordance with the policies and applicable criteria of chapter 36 of title 39 of the United States Code, as consistent with the Postal Service's current practice.

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<sup>7</sup> See, e.g., Docket No. MC2019-3, Notice of the United States Postal Service of Update to the Maximum Weight Limit for Outbound Single-Piece First-Class Mail International Large Envelopes (Flats) in the Mail Classification Schedule, October 10, 2018, at 3-6.

The proposed amendment would not be overly burdensome to the Postal Service, as it does not require the information necessary for a section 3642 review, such as establishing a lack of market power over the volume of mail that would be affected by the change. In practice, the Postal Service already explains how a size and weight limitation change complies with the statutes and rules. The requirement to explain the potential effects of the change on users and competitors in its notice is consistent with the requirements for material changes to product descriptions. See 39 CFR 3020.81(c).

By requiring the Postal Service to explain the potential effects of a size and weight limitation change, the proposed amendment addresses the concern that updates to size and weight limitations could materially impact users of the product and competitors. The proposed amendment also allows the Commission to evaluate whether the size and weight limitation update effectively modifies the product lists. Furthermore, although it would be required to explain the potential effects of the size/weight limitation, the Postal Service could also describe any mitigating factors or explain explicitly why the change would not modify the product lists.

Receiving this information at the outset of the proceeding promotes transparency with the Commission and the public on the potential effects of a size and weight limitation change. Moreover, by receiving this information in the notice, the Commission can more efficiently evaluate a size/weight limitation change within the 45-day statutory deadline by limiting information requests on potential harm to users and competitors. Thus, the proposed amendment will assist the Commission in evaluating whether a size and weight limitation is in accordance with the policies and the applicable criteria of chapter 36 of title 39 of the United States Code.<sup>8</sup>

Should the Commission find that a size and weight limitation has the effect of modifying the product lists such that a product is added, deleted, or transferred, the Commission may require a notice of a size/weight limitation change to be refiled under

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<sup>8</sup> Because the Commission is not proposing to require information under section 3642, the Commission does not address here whether it has the authority to require section 3642 information or whether the RRM decision is applicable in this proceeding.

section 3642, as the Postal Service noted in its comments. Nonetheless, the Commission agrees with PostCom that the Postal Service is in the best position to understand the impact of its proposed change. Thus, the Postal Service is encouraged to closely evaluate whether a proposed update to a size or weight limitation would modify the product lists subject to section 3642 and file under the proper statutes and regulations.

#### V. PROPOSED 39 CFR 3020.111(a)

The Commission proposes to revise 39 CFR 3020.111(a) to require additional information that the Postal Service must file with a notice of an update to size and weight limitations for market dominant mail matter.

Proposed paragraph (a) of section 3020.111 requires the Postal Service to describe the likely impact that the change will have on users of the product and on competitors. It also requires the Postal Service to describe how the change is in accordance with the policies and the applicable criteria of chapter 36 of title 39 of the United States Code.

#### VI. ADMINISTRATIVE ACTIONS

The Regulatory Flexibility Act requires federal agencies, in promulgating rules, to consider the impact of those rules on small entities. See 5 U.S.C. 601, *et seq.* (1980). If the proposed or final rules will not, if promulgated, have a significant economic impact on a substantial number of small entities, the head of the agency may certify that the initial and final regulatory flexibility analysis requirements of 5 U.S.C. 603 and 604 do not apply. See 5 U.S.C. 605(b).

In the context of this rulemaking, the Commission's primary responsibility is in the regulatory oversight of the United States Postal Service. The rules that are the subject of this rulemaking have a regulatory impact on the Postal Service, but do not impose any regulatory obligation upon any other entity. Based on these findings, the Chairman

of the Commission certifies that the rules that are the subject of this rulemaking will not have a significant economic impact on a substantial number of small entities. Therefore, pursuant to 5 U.S.C. 605(b), this rulemaking is exempt from the initial and final regulatory flexibility analysis requirements of 5 U.S.C. 603 and 604.

Interested persons are invited to provide written comments concerning the proposed amendment to 39 CFR 3020.111(a). Comments are due no later than 30 days after the date of publication of this notice in the *Federal Register*. Pursuant to 39 U.S.C. 505, Kenneth E. Richardson will continue to serve as an officer of the Commission (Public Representative) to represent the interests of the general public in this proceeding. See Order No. 4987 at 3. Additional information concerning this rulemaking may be accessed via the Commission's website at <http://www.prc.gov>.

## VII. ORDERING PARAGRAPHS

*It is ordered:*

1. Interested persons may submit comments concerning the proposed amendment no later than 30 days from the date of publication of this notice in the *Federal Register*.
2. Pursuant to 39 U.S.C. 505, Kenneth E. Richardson will continue to serve as an officer of the Commission (Public Representative) to represent the interests of the general public in this proceeding.
3. The Secretary shall arrange for publication of the proposed rules and general statement as to the basis and purpose of the proposed rules in the *Federal Register*.

By the Commission.

Stacy L. Ruble  
Secretary

**List of Subjects for 39 CFR Part 3020**

Administrative practice and procedure, Postal Service.

For the reasons stated in the preamble, the Commission proposes to amend chapter III of title 39 of the Code of Federal Regulations as follows:

**PART 3020—PRODUCT LISTS**

1. The authority citation for part 3020 continues to read as follows:

**Authority:** 39 U.S.C. 503, 3622, 3631, 3642, 3682.

2. Amend § 3020.111, by revising paragraph (a) to read as follows:

**§ 3020.111 Limitations applicable to market dominant mail matter.**

(a) The Postal Service shall inform the Commission of updates to size and weight limitations for market dominant mail matter by filing notice with the Commission 45 days prior to the effective date of the proposed update. The notice shall:

- (1) Include a copy of the applicable sections of the Mail Classification Schedule and the proposed updates therein in legislative format;
- (2) Describe the likely impact that the proposed update will have on users of the product(s) and on competitors; and
- (3) Describe how the proposed update is in accordance with the policies and the applicable criteria of chapter 36 of title 39 of the United States Code.

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