Pursuant to Order No. 5088, the Association for Postal Commerce (“PostCom”) submits these comments on the Commission’s Notice of Proposed Rulemaking Concerning Classification Changes Modifying Product Lists. Following the Advanced Notice of Proposed Rulemaking issued through Order No. 4987, the Commission has developed proposed rules intended to address its concerns with changes to size and weight limitations that “may camouflage an unreasonable price increase, materially harm users or competitors, or otherwise constitute an abuse of market power.” Order No. 5088 at 7. PostCom appreciates the Commission’s attention to these issues and respectfully submits the following comments on the proposed rules.

As PostCom explained in its comments on the Advance Notice, the need for rules to protect against such abuses should be unquestioned. 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 will be transferred. If a Mail Classification Schedule change of any kind—including but not limited to changes to the size and weight limitations of a product—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.

The Commission’s proposed rules are an important step towards creating such protections. Importantly, the proposed rules satisfy the two primary criteria PostCom identified in its comments on the Advanced Notice. First, they apply to all size and weight changes proposed by the Postal Service and require the Postal Service to assess and describe the impact on users and competitors of all such changes, no matter how little volume they impact. Second, they place the initial burden on the Postal Service of identifying such impacts and assessing compliance.

Ideally, the proposed rules would go farther and require the Postal Service to at least specifically indicate whether the changes would reclassify market-dominant volume as competitive. But this analysis should be encompassed within the proposed rule’s requirements of a description of the impact “on users of the product(s)” and a description of how the changes are “in accordance with the policies and the applicable criteria of chapter 36.” A change to size and weight limits that reclassifies a portion of a market-dominant product as a competitive product would have a significant impact on users of that product, and such a change would only comply with the applicable criteria of chapter 36 if the Postal Service cannot “exercise[] sufficient market power [such] that it can effectively set the price of [the transferred portion of the] 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.” 39 U.S.C. § 3642(b)(1). Thus, the Commission is correct that it need not explicitly
incorporate § 3642 into the proposed regulations—though, as explained in PostCom’s comments on the Advanced Notice, it undoubtedly has the authority to do so.¹

Finally, PostCom agrees that should the Commission find a size and weight limitation has the effect of modifying the product lists, it should require the Postal Service to refile its application under section 3642. While it is appropriate for the Postal Service to evaluate the impacts of its proposal “and file under the proper statutes and regulations” in the first instance, the Commission should exercise vigilant oversight of this initial determination and remedy any improper filings.

Respectfully submitted,

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¹ Briefly, the court’s decision in USPS v. PRC, 886 F.3d 1261 (D.C. Cir. 2018), does not hold otherwise. That case turned primarily on the principle that a review of a product change under § 3642 is a broader inquiry than that of a price change under § 3622 and should already incorporate, to the extent necessary, a review of the prices of the relevant product. Id. at 1269-71. In fact, the court recognized that the Commission’s rules specifically incorporate § 3622 review into its procedures for conducting a review under § 3642. Id. at 1271 (citing 39 C.F.R. § 3020.32(b)). It is therefore incorrect to read this decision as preventing the Commission from incorporating standards associated with one portion of the statute into review of product changes pursuant another portion of the statute, especially where, as here, the relevant statutory provision specifically allows such incorporation.