On June 20, 2019, the Postal Regulatory Commission (Commission) requested public comment on whether proposals to be considered by the Extraordinary Congress of the Universal Postal Union (UPU) scheduled for September 24-26, 2019, are “consistent with the standards and criteria for modern rate regulation established by the Commission under 39 U.S.C. 3622.” Order No. 5127. In response, the U.S. Chamber of Commerce respectfully submits the following comments.

1 Delivery services for inbound international goods and bulky documents must be considered a market dominant product in this proceeding.

In this docket, the threshold question is which proposals before the UPU Extraordinary Congress relate to “market dominant products.” Four basic proposals have been submitted to the Extraordinary Congress. All relate to the treatment of “E-format items,” which will be loosely referred to as “small packets” in this comment.1 Three proposals revise terminal dues provisions applicable to small packets; one limits remail of bulk shipments of small packets. Some countries are considering proposals to amend one or more of these proposals. Since this docket is limited to comments on proposals involving market dominant products, the first question is whether delivery of inbound small packets is a market dominant product for purposes of this proceeding.

In Order No. 4980 (Jan. 1, 2019),2 the Commission, pursuant to a request by the U.S. Postal Service (USPS), decided that transfer of inbound small packets “is conditionally

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1 Technically, the term “E-format items” refers to small packets (goods of any shape) and bulky letters (documents whose size or weight exceeds UPU definitions for “small letters” and “large letters”). Small packets, however, comprise the large the majority of all E-format items and constitute the sole motivation for all of the proposals submitted to the Extraordinary Congress.

2 Docket No. MC2019-17, Transfer of Inbound Letter Post Small Packets to the Competitive Product List.
approved pending the proposal, review, approval, and implementation of new prices.” Id. at 23. The Commission summarized the issues that still needed to be satisfied before transfer to the competitive category could be completed as follows:

It has been demonstrated that some statutory requirements have been met, which allows for the removal of Inbound Letter Post small packets and bulky letters from the market dominant Inbound Letter Post product and the addition of the Inbound Letter Post Small Packets and Bulky Letters product to the competitive product list. The Postal Service has yet to propose prices for the new competitive Inbound Letter Post, Small Packets and Bulky Letters product or associated inbound registered mail services, and therefore, has not demonstrated compliance with 39 U.S.C. § 3633. See Request at 9. In addition, the Postal Service has not yet determined whether the proposed prices will be available to non-designated operators in addition to designated operators. Response to CHIR No. 1, question 6. Thus, the request to transfer the price category is conditionally approved pending the proposal, review, approval, and implementation of new prices. In addition to the statutory requirements, the Commission’s review of the proposed prices will consider whether they are consistent with the policies outlined in the Presidential Memorandum. [Id. at 22-23 (emphasis added)]

The Commission has not yet completed this review. On May 20, 2019, USPS proposed a broad range of rates for delivery of inbound small packets from which it would later, in its discretion, select a specific schedule of rates. USPS submitted the proposed range of rates and methodology for deriving specific rates under seal. In response, the Chamber and other commenters argued that (i) the proposed rates and underlying methodology should be unsealed to allow informed public comment; (ii) a range of rates failed to satisfy notice requirements of title 39, § 3632(b)(1); (3) the proposed rate schedule failed to comply with the Presidential Memorandum because it provided a simplified flat rate schedule that benefitted foreign postal operators but excluded similar domestic mailers and private operators.

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3 Based on limited publicly available information, USPS appears to have discretion to choose a linear regression of small packet rates ranging from local zone commercial rates to zone 9 retail rates, a range spanning several hundred. Even with a single rate zone, the difference between retail and commercial rates is on the order of 20 to 30 percent.


5 Section 3632(b)(1) of title 39 requires that “Rates and classes shall be established in writing complete with a statement of explanation and justification and the date as of which such rate or class takes effect.”
In Order No. 5152 (July 12, 2019), the Commission apparently agreed with the Chamber on the need to respect § 3632(b)(1). The Commission ordered USPS to notify a specific schedule of rates at least 15 days before the new rates are implemented.

In regard to the Chamber’s citation of the requirements of 39 U.S.C. § 3632(b)(1), . . . the Postal Service proposes to provide notice of these specific per-piece and per-kilogram prices within the approved price range . . . at least 15 days before the effective date of those prices. . . . Requiring the Postal Service to file specific rates at least 15 days before the effective date of those prices would satisfy the requirement that the Postal Service file prices with the Commission before the prices go into effect. See 39 U.S.C. § 3632(b)(3). (Order No. 5152 at 19 (emphasis added) (footnotes omitted))

The Commission did not accept or reject the arguments that specific rates should be unsealed. The Commission concluded that it would be premature to decide the issue and deferred consideration until specific rates were filed. While the Commission noted the arguments of the Chamber and others that the proposed rates were inconsistent with the Presidential Memorandum, it did not consider whether the proposed rates were “consistent with the policies outlined in the Presidential Memorandum” as the Commission declared it would do in Order No. 4980. After summarizing the concerns of the Chamber and others the Commission’s Order concludes with the observation that “the record does not contain sufficient information for the Commission to determine whether or not there is evidence of undue discrimination or preference in violation of 39 U.S.C. § 403(c).” Order No. 5152 at 23.

In light of this record, it appears that the Commission has not yet completed the “review, approval, and implementation of new prices” which, under Order No. 4980, must precede transfer of inbound small packets services to the competitive category. Hence, inbound small packet service must be considered a market dominant product for purposes of this proceeding, and under § 407(c) the Commission is obliged to advise the Secretary of State on whether each of the proposals, and any associated amendments, submitted to the

Chamber CP2019-155 Comments at 5 & n.9


7 With respect to unsealing the rates, the Commission declared, “Because the Postal Service must file specific prices at least 15 days before the planned effective date of those prices, the Commission believes it is premature now to analyze the issue [of unsealing the proposed rates], but interested parties and the Commission may review the appropriateness of the Postal Service’s designation of the material as non-public once the Postal Service files specific prices.” Order No. 5152 at 20-21.
Extraordinary Congress are “consistent with the standards and criteria for modern rate regulation established by the Commission under 39 U.S.C. 3622.”

2 Options A and C as proposed are inconsistent with the standards and criteria for modern rate regulation.

Acceptance and delivery of inbound small packets is a wholly domestic service of USPS. All operations take place entirely on U.S. soil. After inspection by Customs and Border Protection, inbound small packets are released to the custody of USPS and transported to a bulk mail center in the U.S. — called an “International Service Center” (ISC) in the case of inbound international mail — sorted, and then transported, sorted at a destination bulk mail center, and delivered to addressees. From the time inbound small packets leave the ISC until they are placed in the addressee’s mailbox, inbound small packets are commingled with and treated exactly the same as similar postal items posted by U.S. mailers.

Acting in compliance with the 2016 UPU Convention, USPS has since January 1, 2018, charged foreign postal operators substantially less for the delivery of small packets than it has charged domestic U.S. mailers, private carriers, and foreign postal operators dispatching items from offices located outside their national territories (ETOEs) for equivalent services. Moreover, USPS has charged significantly different delivery rates to different groups of foreign postal operators. Such a discriminatory approach to price is inconsistent with U.S. law and has significantly distorted competition in the e-commerce market in the US (favoring foreign merchants over U.S. merchants) and the provision of international transportation service by American carriers (favoring postal operators over private operators). It has also raised the level of First Class Mail rates for domestic mailers.

There is no need to belabor this point. Every Annual Compliance Determination issued by the Commission since 2007 has condemned the inadequacies of the UPU terminal dues system and called for reform. Several studies by Copenhagen Economics for the Commission have demonstrated in detail the nature and extent of the distortions that result from price discrimination in the delivery of inbound small packets. The Presidential Memorandum issued on August 23, 2018, after many months of internal study, explains
why such distortions are contrary to U.S. law and national interests. The § 407(c)(1) comments of Acting Chairman Robert G. Taub and Commissioner Mark D. Acton in response to proposals relating to the 2016 UPU Convention likewise describe clearly why such pricing policies cannot be considered “consistent with the standards and criteria for modern rate regulation.”

Option A will continue these distortions and restrictions until at least January 1, 2021, albeit in slightly less aggravated form. Option A never moves to self-declared rates. It is self-evident that Option A cannot be considered “consistent with the standards and criteria for modern rate regulation.”

Option C likewise fails to comply with the standards and criteria for modern rate regulation for two main reasons. While Option C moves over time to self-declared rates in principle, it maintains the distorting effects of the current terminal dues system for many years into the future by adopting a series of annual limits on rate increases. Assuming a modest annual increases in USPS domestic rates, it appears unlikely the U.S. will be able to introduce self-declared rates even by 2025, the last year governed by Option C. Such a lengthy transition is unacceptable under the terms of the Presidential Memorandum. More fundamentally, at the end of the transition Option C adopts an arbitrary ceiling on self-declared rates. In Option C, the ceiling is established by 70% of the charge for a 158-gram small packet that results from a linear formula, which serves as a proxy for domestic postage rates. For much of the last 20 years knowledgeable UPU observers have considered that the inbound delivery costs are likely between 60% and 80% of retail domestic rates. However, there is no evidence regarding the correct ratio in the U.S. at present or, more significantly, what it will be in the future. Moreover, it is apparent that the linear formula established by Option C provides only a rough approximation of the actual schedule of domestic postage rates. In short, there can be no assurance that a ceiling set

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10 The ceiling rate is derived from a linear regression of the domestic rates for delivery of small packets of
at 70% of an rough proxy for domestic postage rates will give the Commission sufficient flexibility to ensure “fair and nondiscriminatory rates for goods” and elimination of any “preference for inbound foreign small packages containing goods that favors foreign mailers over domestic mailers [or] postal operators over private-sector entities providing transportation services.” Presidential Memorandum § 3(a).

3 Option B is the option that achieves the objectives laid out in the Presidential Memorandum.

Option B will allow the U.S. to introduce self-declared rates on January 1, 2020, in line with the President’s deadline. The ceiling rate of 100% of the linear proxy for domestic postage rates is high enough to ensure that the Commission has sufficient flexibility to ensure that rates for delivery of inbound small packets are non-discriminatory and non-preferential and will remain so in the future despite the approximate nature of the linear proxy formula.\(^{11}\)

The Commission should endorse Option B as “consistent with the standards and criteria for modern rate regulation” with one caveat.\(^ {12}\) The caveat relates to the exemption from self-declared rates for annual letter post flows of less than 50 tonnes from countries in the transitional system. This exemption cannot be considered as consistent with principles of modern rate regulation. Continuation of rate preferences for small packets received from Group 4 countries will continue to distort international trade and restrict competition in the markets affected.\(^ {13}\) While the Chamber does not object to aid to the postal systems of

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\(^{11}\) Note that, importantly, while use of the mid-point zone is required in the calculation of the ceiling rate, it does not appear to serve as a restriction on the self-declared rates themselves. See Proposal 20.28.91, art.28bis(1)(2)(3).

\(^{12}\) Proposal 20.28.91, art.28bis(1)(1)(6). Given the more generous provision in Option C, it appears likely that this level will be raised to 100 tonnes if Option B is accepted by the Extraordinary Congress.

\(^{13}\) For these reasons, services for delivery of inbound small packets at highly preferential rates should not be transferred the competitive category since competition in services will not be feasible.
needy developing countries,\textsuperscript{14} under U.S. law such aid measures should be developed and justified by the State Department and not endorsed by the Commission as consistent with modern rate regulation.

4 Conclusion

The Chamber is hopeful the U.S. will remain in the UPU and that the U.S. will move immediately to self-declared rates that are non-discriminatory, while not handcuffing the Commission’s ability to make its lawful determination of that rate as a percentage of the domestic rate.

Respectfully submitted,

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\footnote{\textsuperscript{14} It seems clear, however, that such aid should be provided on the basis of the specific needs of the developing countries rather than on the volumes of letter post mail they send to the U.S.}