

ORDER NO. 5422

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

Before Commissioners:

Robert G. Taub, Chairman;
Michael Kubayanda, Vice Chairman;
Mark Acton;
Ann C. Fisher; and
Ashley E. Poling

Amendments to Rules of Practice

Docket No. RM2020-4

ADVANCE NOTICE OF PROPOSED RULEMAKING TO CONSIDER REGULATIONS
TO CARRY OUT THE STATUTORY REQUIREMENTS OF 39 U.S.C. 601

(Issued February 7, 2020)

I. INTRODUCTION

The Commission issues this advance notice of proposed rulemaking to seek input from the public about what regulations promulgated by the Commission may be necessary to carry out the requirements of 39 U.S.C. 601, “Letters carried out of the mail,” which, as explained in greater detail below, describes when the letter monopoly does not apply to a mailpiece.¹

¹ The scope of this proceeding and inquiry does not extend to the mailbox monopoly (or mailbox rule), which grants the Postal Service the exclusive ability to deposit mailable matter in a letter box. See 18 U.S.C. 1725.

II. BACKGROUND

A. The Private Express Statutes (PES)

The Postal Service has exclusive rights in the carriage and delivery of letters under certain circumstances. This letter monopoly is codified in the PES, which are a group of civil and criminal statutes that make it unlawful for any entity other than the Postal Service to send or carry letters. See 18 U.S.C. 1693-1699; 39 U.S.C. 601-606.²

B. Section 601

Section 601 provides specific instances (exceptions) where letters may be carried out of the mail (*i.e.*, not subject to the letter monopoly). These statutory exceptions include letters charged more than six times the current rate for the first ounce of a single-piece first class letter and letters weighing more than 12.5 ounces. See 39 U.S.C. 601(b)(1), (b)(2). A “grandfather clause” in Section 601(b)(3) also references exceptions from prior Postal Service policies and regulations. The statute also directs the Commission to promulgate any regulations necessary to carry out this section. See 39 U.S.C. 601(c).

C. Postal Service Regulations

Prior to the Postal Accountability and Enhancement Act (PAEA) of 2006, the Postal Service issued regulations to define and suspend the PES.³ These regulations defined the crucial term “letter” as “a message directed to a specific person or address and recorded in or on a tangible object,” subject to several provisions. 39 CFR 310.1(a). The regulations also described several statutory exceptions to the letter

² Although these provisions of the U.S. Code are customarily referred to collectively as the “Private Express Statutes,” they do not all relate to private expresses or prohibit carriage of letters out of the mails.

³ See Postal Accountability and Enhancement Act, Pub. L. 109-435, 120 Stat. 3198 (2006); see also 39 CFR 310, 320.

monopoly, such as when the letter accompanies and relates to cargo or when a special messenger is used. See 39 CFR 310.3. In addition, the regulations describe administrative suspensions of the PES (39 CFR 310.1(a)(7) n.1, 320), including suspensions for certain data processing materials or for extremely urgent letters. See 39 CFR 320.2, 320.6. These regulations were originally promulgated by the Postal Service in 1974 and have been amended several times.⁴ In 2003, the President's Commission on the United States Postal Service recommended that the scope of the letter monopoly should be clarified and periodically reviewed by a Postal Regulatory Board.⁵

In 2006, Congress passed PAEA to clarify the limited statutory exemptions to the monopoly.⁶ In addition to adding price and weight limits as exceptions (601(b)(1), (b)(2)), Congress also added a "grandfather clause" in Section 601(b)(3) to authorize the continuation of private activities that the Postal Service had permitted by regulations to be carried out of the mail. The House Report on the PAEA explains that the clause protects mailers and private carriers who had relied upon the regulations adopted as of the date of the bill. See *id.* at 58. Congress also eliminated the Postal Service's authority to adopt any future regulations creating additional exceptions or defining the scope of the postal monopoly. See 39 U.S.C. 401(2), 404a(a)(1), 601. Congress instead gave the Commission the authority to promulgate "any regulations necessary to

⁴ See Comprehensive Standards for Permissible Private Carriage, 39 FR 33211, Sept. 16, 1974.

⁵ Embracing the Future: Making the Tough Choices to Preserve Universal Mail Service, July 31, 2003, at 71. The President's Commission recommended "transforming the narrowly focused Postal Rate Commission [] into an independent Postal Regulatory Board." *Id.* at XIII.

⁶ See H.R. Rep. No. 109-66 (2005) part 1, at 57. Congress stated that "the bill clarifies the scope of the statutory monopoly that historically has been defined solely by the [Postal Service]." *Id.* at 58.

carry out this section [601].”⁷ To date, the Commission has not promulgated any regulations pursuant to Section 601(c), and issues this advance notice of proposed rulemaking to explore potential options for doing so now.

III. ISSUES FOR CONSIDERATION

A. General Discussion

In the more than 45 years since the Postal Service initially promulgated its regulations, the postal industry has fundamentally changed. The Postal Service recently stated that the “most significant competitor for First-Class Mail is digital communication, including electronic mail, and other digital technologies such as online bill payment and presentment.”⁸ The USPS Office of Inspector General also released a report citing electronic diversion as a key factor that has affected the First-Class Mail correspondence segment.⁹

Over time there have been several published reports discussing or evaluating the letter monopoly. In a 2007 report, the Federal Trade Commission stated that the monopoly should only be as broad as needed to satisfy the statutory requirement of universal service.¹⁰ The Commission, in response to Section 702 of the PAEA, issued a report on Universal Postal Service and the Postal Monopoly, which traced the history of

⁷ 39 U.S.C. 601(c). Docket Nos. MC2012-14 and R2012-8, Order Approving Addition of Valassis Direct Mail, Inc. Negotiated Service Agreement to the Market Dominant Product List, August 23, 2012, at 6-7 (Order No. 1448) (citing Section 601(c) and stating that the Postal Service no longer has authority to issue regulations interpreting or defining the postal monopoly); *see also* Docket No. MC2012-13, Order Conditionally Granting Request to Transfer Parcel Post to the Competitive Product List, July 20, 2012, at 6-7 (Order No. 1411) (“As a result of the PAEA, the Postal Service no longer has authority to issue regulations interpreting or defining the postal monopoly. The Commission now has the authority to promulgate such regulations.”). Order No. 1411 at 7 n.13.

⁸ The U.S. Postal Service Five-Year Strategic Plan FY2020-FY2024, January 7, 2020, at 14.

⁹ *See* USPS Office of Inspector General, *A New Reality: Correspondence Mail in the Digital Age*, March 5, 2018, at 9.

¹⁰ *Accounting for Laws that Apply Differently to the United States Postal Service and its Private Competitors: A Report by the Federal Trade Commission*, January 16, 2008, at 93.

the monopoly to its current status.¹¹ The Government Accountability Office reported that narrowing the monopoly could decrease revenues and threaten the universal service obligation, but may also lead to greater efficiencies and innovation.¹² In 2018, the Task Force on the United States Postal System stated that the statutory monopoly business model is increasingly ineffective.¹³ In particular, it explained that “technological changes have significantly reduced the effectiveness of the statutory monopoly business model by undermining the historical barriers to market competition and product substitution.” *Id.*

The Commission has generally discussed or acknowledged the letter monopoly when reviewing requests to modify the product lists. In such cases, the Commission must consider whether a product is covered by the monopoly. See 39 U.S.C. 3642(b)(2). For example, in Docket Nos. MC2012-14 and R2012-8, where the Commission approved a new product as a Market Dominant Negotiated Service Agreement, the Commission acknowledged, without considering the merits of, assertions by the Postal Service that a specific product is subject to the postal monopoly. Order No. 1448 at 6-7.

Specifically in dockets where the Postal Service seeks to classify a product as competitive, it often cites various statutory and regulatory exceptions to the monopoly. For example, in Docket No. MC2012-13, the Postal Service asserted that the contents of Parcel Post are outside the scope of the letter monopoly because: (1) invoices or

¹¹ Report on Universal Service and the Postal Monopoly, December 19, 2008, at 15-84 (USO Report). The USO Report includes, as an appendix, George Mason University’s presentation and analysis of the history of the postal monopoly. See George Mason University, School of Public Policy, Postal Monopoly Laws: History and Development of the Monopoly on the Carriage of Mail and the Monopoly on Access to Mailboxes, November 2008, at 250 (“[A]ny decision by the Commission interpreting the term letter in section 601 would be considered tantamount to defining the scope of the monopoly.”). *Id.*

¹² U.S. Governmental Accountability Office, U.S. Postal Service, Key Considerations for Potential Changes to USPS’s Monopolies, GAO-17-543, June 22, 2017, at 8.

¹³ Task Force on the United States Postal Service, United States Postal Service: A Sustainable Path Forward, December 2018, at 33.

receipts accompanying merchandise mailed as Parcel Post are subject to the cargo exception in 39 CFR 310.3(a), (2) incidental, non-addressed, non-personalized advertising may be enclosed pursuant to 39 CFR 320.7, and (3) any letters enclosed would be permitted due to the price exception pursuant to 39 U.S.C. 601(b)(1). Order No. 1411 at 6-7. In another case, the Postal Service acknowledged that a sealed parcel could contain letter material and, therefore, stated it intended to raise prices consistent with 39 U.S.C. 601(b)(1) to avoid the application of the PES.¹⁴ The Commission has acknowledged these past assertions.¹⁵

In Docket No. MC2013-57, several parties addressed whether the Round-Trip Mailer product, which consists of a round-trip mailing of a disc, was covered by the postal monopoly.¹⁶ In particular, the parties disputed whether the content of the Round-Trip Mailer constitutes a “letter” that is subject to the Private Express Statutes. *Id.* Because of a finding on market power, the Commission did not rule on the merits of the monopoly issue. *Id.* at 56. However, the Commission noted that “[t]he legal and policy issues surrounding the postal monopoly have far-reaching and important implications that go beyond the boundaries of this proceeding.” *Id.* The Commission further stated that the “issue may be appropriate for review in a separate proceeding.” *Id.* The Commission believes it is now time for that separate proceeding.

With this background, the Commission issues this advance notice of proposed rulemaking to consider approaches to fulfilling its statutory responsibilities under 39 U.S.C. 601(c), including considering whether changes are needed to the regulations concerning the letter monopoly or necessary to carry out Section 601.

¹⁴ See Docket No. MC2015-7, Request of the United States Postal Service to Transfer First-Class Mail Parcels to the Competitive Product List, November 14, 2014, Attachment B at 2.

¹⁵ See Docket No. MC2015-7, Order Conditionally Approving Transfer, July 20, 2017, at 35 (Order No. 4009); Order No. 1411 at 7.

¹⁶ Docket No. MC2013-57, Order Denying Request, December 23, 2014, at 54-56 (Order No. 2306).

B. Issues to be Addressed

The Commission is soliciting comments to identify issues that may be considered when developing regulations to implement 39 U.S.C. 601. See 39 U.S.C. 601(c). All relevant comments will be considered. However, the Commission is interested in comments on the following specific issues:

1. Are the statutory requirements of 39 U.S.C. 601(a) clear and concise, or are additional regulations necessary to carry out the intent of the statute?
2. Are the statutory requirements of 39 U.S.C. 601(b) clear and concise, or are additional regulations necessary to carry out the intent of the statute?
3. Is the scope of 39 U.S.C. 601(b)(3) – permitting that the carriage of letters out of the mail provided “such carriage is within the scope of services described by regulations of the United States Postal Service (including, in particular, sections 310.1 and 320.2-320.8 of title 39 of the Code of Federal Regulations, as in effect on July 1, 2005) that purport to permit private carriage by suspension of the operation of this section (as then in effect)” – sufficiently clear and concise, or are additional regulations necessary to carry out the intent of the statute?
4. Do any terms that currently appear in 39 U.S.C. 601 require further definition?
5. Can consumers and competitors easily determine when a mailpiece is subject to monopoly protections?
6. What is the current effect of the letter monopoly on consumers, small businesses, and competitors?
7. Are the weight and/or price requirements found in 39 U.S.C. 601(b) still relevant?
8. Are the weight and/or price requirements found in 39 U.S.C. 601(b) applied uniformly?
9. Have there been any post-PAEA Postal Service regulations that appear to limit, expand, or otherwise affect the scope of the letter monopoly contrary to law?

10. Is the term “letter” clear and concise, or can any improvements be made to the definition? If so, please provide any proposed definitions and explain how the proposed definition may better implement the intent of Congress and affect the scope of the letter monopoly.
11. Do the current statutory and regulatory requirements correctly implement the intent of Congress and advance the public interest, or should consideration be given to any changes that may be implemented by regulation?
12. How might changes to the statutory and regulatory requirements regarding the scope of the letter monopoly affect the financial condition of the Postal Service, competitors of the Postal Service, users of the Postal Service, and/or the general public interest?
13. Are there any social, economic, technological, or other trends that should be taken into account by Congress in considering the scope of the monopoly?
14. Because the Commission is tasked with developing regulations to carry out 39 U.S.C. 601, to what extent should the Commission adopt regulations that replicate, in whole or in part, the Postal Service’s regulations that appear at 39 CFR 310.1 and 320.2 through 320.8?

IV. ADMINISTRATIVE ACTIONS

A. Docket

The Commission establishes Docket No. RM2020-4 for consideration of the matters discussed in the body of this advance notice of proposed rulemaking.

B. The Regulatory Flexibility Act

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.

C. Comments

Interested persons are invited to provide written comments concerning the topics identified in this advance notice of proposed rulemaking. Comments are due no later than April 7, 2020. The Commission does not anticipate the need for reply comments at this time. Material filed in this docket will be available for review on the Commission's website, <http://www.prc.gov>.

D. Public Representative

Pursuant to 39 U.S.C. 505, Kenneth E. Richardson is appointed to serve as an officer of the Commission (Public Representative) to represent the interests of the general public in this docket.

V. ORDERING PARAGRAPHS

It is ordered:

1. Docket No. RM2020-4 is established for the purpose of considering amendments to the *Code of Federal Regulations*, title 39, chapter III, as discussed in this advance notice of proposed rulemaking.
2. Interested persons may submit comments no later than April 7, 2020.
3. Pursuant to 39 U.S.C. 505, Kenneth E. Richardson is appointed to serve as Public Representative in this proceeding.
4. The Secretary shall arrange for publication of this Order in the *Federal Register*.

By the Commission.

Erica A. Barker
Secretary