

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

Amendment to Rules Regarding Rate  
Incentives for Market Dominant Products

Docket No. RM2020-5

NOTICE OF PROPOSED RULEMAKING TO AMEND RULES REGARDING RATE  
INCENTIVES FOR MARKET DOMINANT PRODUCTS

(Issued February 14, 2020)

I. INTRODUCTION

Pursuant to 39 U.S.C. §§ 503 and 3622, this Order establishes a rulemaking docket that proposes amendments to the Commission's regulations concerning rate incentives for market dominant products appearing in existing 39 C.F.R. part 3010.<sup>1</sup> The proposed amendments would revise the regulation defining "rate of general applicability" for purposes of market dominant rate adjustment proceedings, include an additional criterion for a rate incentive to be eligible for inclusion in a percentage change

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<sup>1</sup> The Commission notes that on April 20, 2020, the rules appearing in title 39 of the Code of Federal Regulations, including what is currently codified at part 3010, will be re-organized. See Docket No. RM2019-13, Order Reorganizing Commission Regulations and Amending Rules of Practice, January 16, 2020 (Order No. 5407). The Commission will make any necessary adjustments to the rules proposed in this Order to make them conform to the new system of organization in a final order. All references to part 3010 within this Order refer to the existing regulations.

in rates calculation, and require that more information concerning market dominant rate incentives be included in a notice of rate adjustment. The proposed rules appear after the signature of this Order.

## II. BACKGROUND

The Commission's rules permit the Postal Service, when adjusting market dominant rates as part of a rate adjustment proceeding, to include rate incentives that the Postal Service plans to offer in the percentage change in rates calculation, as long as the rate incentive meets certain criteria. 39 C.F.R. § 3010.23(e). These criteria are: (1) that the rate incentive is in the form of a discount or can easily be translated into a discount; (2) that sufficient billing determinants are available for the rate incentive to be included in the percentage change in rate calculation;<sup>2</sup> and (3) that the rate incentive is a rate of general applicability. 39 C.F.R. § 3010.23(e)(2). The Commission's rules also require the Postal Service to provide "sufficient information to demonstrate that the rate incentive is a rate of general applicability[.]" 39 C.F.R. § 3010.12(b)(9)(i).

When the Commission promulgated rules with regard to the treatment of market dominant rate incentives, it included a specific definition of "rate of general applicability" in the context of market dominant rate adjustments.<sup>3</sup> The rule provided that:

[A] [r]ate of general applicability means a rate applicable to all mail meeting standards established by the Mail Classification Schedule, the Domestic Mail Manual, and the International Mail Manual. A rate is not a rate of general applicability if eligibility for the rate is dependent on factors other than the characteristics of the mail to which the rate applies. A rate is not a rate of general applicability if it benefits a single mailer. A rate that is only available upon the written agreement of both the Postal Service and a

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<sup>2</sup> In Order No. 1879, the Commission explained that "sufficient billing determinants" require "that adequate volume data are available for each rate cell of the rate incentive so the rate incentive can be accurately included in the percentage change in rates calculations for the class." Docket No. RM2014-3, Notice of Proposed Rulemaking on the Treatment of Rate Incentives and De Minimis Rate Increases for Price Cap Purposes, November 18, 2013, at 9 n.11 (Order No. 1879).

<sup>3</sup> See *generally* Docket No. RM2014-3, Order Adopting Final Rules on the Treatment of Rate Incentives and De Minimis Rate Increases for Price Cap Purposes, June 3, 2014 (Order No. 2086).

mailer, a group of mailers, or a foreign postal operator is not a rate of general applicability.

39 C.F.R. § 3010.1(g).

In explaining this definition, the Commission stated that “[t]he volume of mail sent by a mailer under an incentive program is a characteristic of the mail to which the rates under the incentive program apply,” meaning that rates which are subject to volume thresholds can constitute rates of general applicability. Order No. 2086 at 15.

However, the Commission also specifically stated that the volume sent by a mailer in a previous year is not a characteristic of the mail to which rates under an incentive program apply, meaning that rates which are subject to a certain quantity of mail having been sent in a previous year would not constitute rates of general applicability. *Id.* at 15-16.<sup>4</sup>

Since 2013, the Postal Service has offered a rate incentive called the “Earned Value Reply Mail Promotion.”<sup>5</sup> The basic features of this promotion have remained largely the same since 2013 (*i.e.*, it is available to mailers who send out Business Reply Mail, Courtesy Reply Mail, and/or Share Mail enclosures which are subsequently returned or forwarded by the recipients). However, the specific credits offered and the terms for qualifying for the credits have changed over time. In Docket No. R2020-1, the Commission found that some of the terms featured in recent iterations of the promotion

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<sup>4</sup> The Commission explained that “a promotional rate that provides a 5 percent rebate on a mailing that includes 1,000 or more pieces could be a rate of general applicability . . . .” *Id.* at 15. So could “a promotion that provided a 1-cent per piece discount for Standard Mail once a mailer sends 100,000 pieces . . . .” *Id.* However, “a promotional rate that provided a 2-cent discount for First-Class letters weighing more than 2 ounces to any mailer that in the previous year sent more than 100,000 First-Class letters weighing more than 2 ounces would not be a rate of general applicability[.]” because “eligibility for the discount hinges on the volume of mail sent by the mailer before the incentive program begins.” *Id.* at 16. In such a circumstance, “certain mailers would not be able to qualify for the promotion, no matter how much or what kind of mail they sent going forward[ ] . . . [and] no matter how they altered their business model or mailings to respond to the Postal Service’s incentives . . . .” *Id.*

<sup>5</sup> See Docket No. R2013-10, Order on Price Adjustments for Market Dominant Products and Related Mail Classification Changes, November 21, 2013, at 55-56 (Order No. 1890).

highlighted a potential ambiguity in the Commission's rules, and the Commission indicated that it would further investigate this ambiguity in a rulemaking.<sup>6</sup>

Since 2014, when the Commission issued its rules on the treatment of rate incentives, there have been five iterations of the Earned Value Reply Mail Promotion. In Docket No. R2015-4 and Docket No. R2016-2, the Commission approved as a rate of general applicability an iteration of the promotion that featured a 2-cent credit for *any mailer*.<sup>7</sup> This iteration also featured an additional 1-cent "bonus" credit (for a total of 3 cents) for repeat participants whose returns exceeded the number from the prior year. Order No. 2365 at 10; Order No. 2461 at 3; Order No. 2861 at 4. The 1-cent "bonus" credit was treated as a rate not of general applicability in the percentage change in rates calculation.<sup>8</sup> This was consistent with the Commission's historic treatment of such discounts. See, e.g., Order No. 1890 at 61.

In Docket No. R2016-5, the Commission approved for inclusion in the percentage change in rates calculation an iteration of the promotion that featured a 5-cent credit for *any mailer*.<sup>9</sup>

In Docket No. R2019-1, the Postal Service proposed an iteration of the promotion that was structured similarly to earlier versions but contained, in retrospect, a significant

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<sup>6</sup> Docket No. R2020-1, Order on Price Adjustments for USPS Marketing Mail, Periodicals, Package Services, and Special Services Products and Related Mail Classification Changes, November 22, 2019, at 23-24 (Order No. 5321).

<sup>7</sup> Docket No. R2015-4, Order on Price Adjustments for First-Class Mail Products and Related Mail Classification Changes, February 24, 2015, at 10 (Order No. 2365); Docket No. R2015-4, Order on First-Class Mail Promotions and Related Mail Classification Schedule Changes, April 30, 2015, at 3 (Order No. 2461); Docket No. R2016-2, Order on Price Adjustments for Market Dominant Products and Related Mail Classification Changes, December 10, 2015, at 4 (Order No. 2861).

<sup>8</sup> The Postal Service and the Commission only accounted for the 2-cent credit in the percentage change in rates calculation; not the 1 cent bonus credit. See Docket No. R2015-4, Library Reference PRC-LR-R2015-4/9, May 7, 2015, Excel file "PRC CAPCALC-STD-R2015-4.xlsx," tab "Promotions;" Docket No. R2015-4, Library Reference USPS-LR-R2015-4/2, January 15, 2015, Excel file "Promotions Data.xlsx," tab "Earned Value Summary."

<sup>9</sup> Docket No. R2016-5, Order on Price Adjustments for Market Dominant Products, June 16, 2016, at 5 (Order No. 3373).

difference. First, a 3-cent credit was made available, without any volume threshold, to new participants in the promotion.<sup>10</sup> Second, repeat participants could only remain eligible for the 3-cent credit if their returns met or exceeded 95 percent of their number of returns from the prior year. Order No. 4875 at 8. The difference between this and earlier iterations of the promotion resulted in a group of mailers—repeat participants who failed to meet the prior-year return threshold—who could not qualify for the promotion. This stood in contrast to earlier iterations of the promotion, in which the portions of credits approved for inclusion in the percentage change in rates calculation were available to *any mailer*. Nevertheless, the Commission approved both tiers of the Earned Value Reply Mail Promotion for inclusion in the percentage change in rates calculation in Docket No. R2019-1. *Id.* at 10.

In Docket No. R2020-1, the Postal Service proposed an iteration of the promotion that went further yet. Similar to the Docket No. R2019-1 iteration, it featured a 2-cent credit to be made available to new participants, without a volume threshold, as well as to repeat participants whose returns met or exceeded 93 percent of their number of returns from the prior year. Order No. 5321 at 16-17. However, it also featured an additional 2-cent “bonus” credit (for a total of 4 cents) for repeat participants whose returns exceeded 100 percent of their number of returns from the prior year. *Id.* The Postal Service sought inclusion of both tiers of this promotion in the percentage change in rates calculation. *Id.* The structure of the CY 2020 Earned Value Reply Mail Promotion created an additional group of mailers who could not qualify for the promotion beyond the group created in the CY 2019 iteration. In addition to repeat participants who failed to meet or exceed the 93 percent prior-year return threshold being unable to access the 2-cent “base” tier of the promotion, neither new participants nor repeat participants who failed to exceed 100 percent of their prior-year returns were able to access the 2-cent “bonus” tier.

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<sup>10</sup> Docket No. R2019-1, Order on Price Adjustments for First-Class Mail, USPS Marketing Mail, Periodicals, Package Services, and Special Services Products and Related Mail Classification Changes, November 13, 2018, at 8 (Order No. 4875).

In response to an information request, the Postal Service cited as the primary support for its conclusion that both tiers of credits constituted rates of general applicability the fact that the Commission did not determine similar rates to be rates not of general applicability in Docket No. R2019-1.<sup>11</sup> The Public Representative, on the other hand, took the position that the additional 2-cent “bonus” tier constituted a rate not of general applicability, whereas the “base” 2-cent tier was a rate of general applicability.<sup>12</sup> Specifically, she concluded that:

[T]here are fundamental differences between [the CY 2019 and CY 2020 iterations of the promotion] that warrant different price cap treatment. The CY 2019 promotion separated participants into two groups—new customers and return customers—each with ostensibly different credit structures, but both types of customers could qualify for a 3-cent per-piece credit . . . during the promotion period. While the CY 2019 promotion required only return customers to meet a 95 percent threshold based on their promotion volume from the prior year, as a practical matter, the same threshold applied for all customers. . . . By contrast, the CY 2020 promotion includes a 2-cent per piece credit that is only available to some mailers. Other mailers are unable to qualify for the credit regardless of any actions they may take. While both new and return customers can earn a 2-cent per piece credit on eligible volume, only return customers can earn an additional 2-cent per piece credit for meeting the 100 percent threshold.

Docket No. R2020-1 PR Comments at 3-4 (citations omitted).

When the Commission established its rate incentive rules in Order No. 2086, it clearly stated that requiring a particular quantity of mail to have been sent in a previous year in order to qualify for a rate incentive in the current year would be considered a rate *not* of general applicability. Order No. 2086 at 16. In that situation, it would be impossible for an ineligible participant to, essentially, go back in time in order to increase a previous year’s volume to become eligible for the rate incentive. *Id.* The

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<sup>11</sup> Docket No. R2020-1, Response of the United States Postal Service to Chairman’s Information Request No. 3, question 1, October 23, 2019 (Docket No. R2020-1 Response to CHIR No. 3).

<sup>12</sup> Docket No. R2020-1, Public Representative Comments, October 29, 2019, at 4 (Docket No. R2020-1 PR Comments).

Commission also discussed several past incentive programs for which eligibility had been based on the volume (or number of mailings) sent by a mailer during the prior year, and stated that those instances would not constitute rates of general applicability. *Id.* at 20-22, 25.

However, unlike the examples presented in Order No. 2086, recent iterations of the Earned Value Reply Mail Promotion have not required any particular quantity of mail volume to have been sent in a previous year. Instead, recent iterations of the Earned Value Reply Mail Promotion have required that the number of returns in the current year meet or exceed a certain percentage of the number of returns received in a previous year. The Postal Service and the Public Representative both appear to have interpreted the Commission's rules to mean that because any mailer has the theoretical capability to send enough mail volume in the current year to meet or exceed the amount they sent in a previous year, they have the theoretical capability to make themselves eligible for the incentive. Thus, both the Postal Service and the Public Representative appear to have distinguished the use of historical volume for purposes of mailer-specific volume thresholds from the use of historical volume for purposes of static volume thresholds. Under their interpretation, a rate incentive featuring a mailer-specific volume threshold based on historical volume data could qualify as a rate of general applicability and be included in the percentage change in rates calculation.<sup>13</sup> Order No. 2086 clearly addressed rate incentives that use a static volume threshold based on historical volume data, but it did not specifically speak to the issue of rate incentives that use a mailer-specific volume threshold based on historical volume data. Order No. 2086 at 15-16.

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<sup>13</sup> See Docket No. R2020-1 Response to CHIR No. 3, question 1.a-c. (“[unlike past rate incentives that] only considered pieces mailed in the prior year to determine eligibility, the number of [enclosures] sent during the CY 2020 promotional period dictates the degree to which participating mailers earn credits.”); Docket No. R2020-1 PR Comments at 3-4 (suggesting that the Commission include the “base” tier of the Earned Value Reply Mail Promotion in the percentage change in rates calculation).

The Commission noted that in Docket No. R2020-1, the Postal Service had failed to provide “sufficient information to demonstrate that the [Earned Value Reply Mail Promotion] [was] a rate of general applicability,’ as required by 39 C.F.R. § 3010.12(b)(9)(i).” Order No. 5321 at 22. Nevertheless, given the ambiguity surrounding this issue, and in the interest of maintaining predictability, the Commission permitted the Earned Value Reply Mail Promotion to be included in the percentage change in rates calculation in Docket No. R2020-1, while indicating that it would initiate a rulemaking and propose any necessary revisions to its rules. *Id.* at 23-24.

### III. PROPOSED AMENDMENTS

The Commission proposes to clarify its rules by making three revisions. First, the Commission proposes to amend 39 C.F.R. § 3010.1(g) to clarify that in order to qualify as a rate of general applicability, a rate cannot be based on mailer-specific data, such as historical mailer volume. Second, the Commission proposes to amend 39 C.F.R. § 3010.23(e)(2) to add an additional criterion for a rate incentive to be eligible for inclusion in the percentage change in rates calculation—that the rate incentive must be made available to all mailers equally on the same terms and conditions. Finally, the Commission proposes to amend 39 C.F.R. § 3010.12(b)(9) to add additional requirements intended to ensure that the Postal Service provides sufficient information at the outset of a market dominant rate adjustment proceeding. These requirements will permit the Commission and stakeholders to verify that all rate incentives included in a percentage change in rates calculation comply with the definition of “rates of general applicability” and are made available to all mailers equally on the same terms and conditions.

The Commission is concerned that interpreting “rate of general applicability” to permit volume thresholds based on historical volume data would contravene the policy reasons underlying the general applicability requirement. As the Commission stated in Order No. 2086, “volume sent by a mailer in a previous year is *not a characteristic of the mail to which rates under the incentive program apply.*” Order No. 2086 at 16

(emphasis added). This is true regardless of whether the prior-year volume threshold being applied is static or dynamic. Past behavior by mailers bears no relationship to mail being sent in the present. Therefore, the Commission proposes to revise its rules to ensure that there is no ambiguity in the definition of “rate of general applicability” with regard to the use of historical volume data.

The Commission is equally concerned about the fairness of permitting mailer-specific thresholds for determining eligibility for market dominant rate incentives. In such cases, the rate incentive is not made available to all mailers on the same terms and conditions.<sup>14</sup> When a rate incentive that offers lower prices is included in a percentage change in rates calculation, the result is that the Postal Service retains price adjustment authority with which to increase rates on other mailers. Although this may be permissible where the rate incentive is made available to all mailers on equal terms, it is arguably unfair where there are some mailers that are not eligible for the rate incentive. In such circumstances, the discounts received by eligible mailers would, in part, be subsidized by higher rates paid by non-eligible mailers. Therefore, the Commission proposes to revise its rules to add an additional criterion to 39 C.F.R. § 3010.23(e)(2) requiring that any rate incentives included in a percentage change in rates calculation be made available to all mailers equally on the same terms and conditions.

Finally, the Commission is concerned that in the most recent market dominant rate adjustment proceeding the Postal Service did not submit the information required by 39 C.F.R. § 3010.12(b)(9) demonstrating that its proposed rate incentives constituted “rates of general applicability” as defined in the Commission’s regulations. Order No.

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<sup>14</sup> As explained above, both of the two most recent iterations of the Earned Value Reply Mail Promotion specifically excluded certain groups of mailers. In CY 2019, repeat participants who failed to meet or exceed 95 percent of their prior-year return threshold could not qualify for the promotion. In CY 2020, not only were repeat participants who failed to meet or exceed 93 percent of their prior-year return threshold unable to access even the “base” tier of the promotion, but neither new participants nor repeat participants who failed to exceed 100 percent of their prior-year return threshold were able to access the “bonus” tier.

5321 at 22. In order to clarify for future cases the specific information necessary to make this determination, as well as a determination with regard to the new criterion the Commission is proposing for 39 C.F.R. § 3010.23(e)(2), the Commission proposes modifying the requirements for the contents of the Postal Service's notice of rate adjustment related to market dominant rate incentives. These more detailed initial requirements will require the Postal Service to provide sufficient information at the outset of a market dominant rate adjustment proceeding to ensure that any rate incentives included in a percentage change in rates calculation meet the criteria of 39 C.F.R. § 3010.23(e)(2).

The Commission's proposal in this docket seeks to ensure fairness to mailers in determining when the Postal Service may receive additional rate adjustment authority by including rate incentives as part of a percentage change in rates calculation. The Commission's rules also permit the Postal Service to offer rate incentives that do not qualify for inclusion in the percentage change in rates calculation. Under the Commission's rules, such rate incentives are treated as negotiated service agreements. See 39 C.F.R. § 3010.23(e)(1).

#### IV. SECTION-BY-SECTION ANALYSIS

*Proposed § 3010.1(g).* Proposed § 3010.1(g) is revised to state clearly that the definition of "rate of general applicability" within the context of a market dominant rate adjustment proceeding means a rate incentive that is not based on mailer-specific data, such as historical volume data.

*Proposed § 3010.12(b)(9).* Proposed § 3010.12(b)(9) is revised to state clearly what information the Postal Service must file to support its claim that a rate incentive meets the necessary criteria to be included in a percentage change in rates calculation.

*Proposed § 3010.23(e)(2)(iv).* Proposed § 3010.23(e)(2)(iv) is added to make it a criterion for a market dominant rate incentive to be included in a percentage change in rates calculation that the incentive be available to all mailers equally on the same terms and conditions.

## V. 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 amendments to the market dominant rate incentive regulations in 39 C.F.R. part 3010. Comments are due no later than 30 days after the date of publication of this notice in the *Federal Register*. All comments received will be available for review on the Commission's website, <http://www.prc.gov>.

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

## VI. ORDERING PARAGRAPHS

*It is ordered:*

1. Docket No. RM2020-5 is established for the purpose of receiving comments on the proposed amendments to 39 C.F.R. part 3010, as discussed in this Order.
2. Interested persons may submit comments no later than 30 days from the date of publication of this notice in the *Federal Register*.
3. Pursuant to 39 U.S.C. § 505, Katalin K. Clendenin is appointed to serve as Public Representative in this proceeding.
4. 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.

Erica A. Barker  
Secretary

**List of Subjects in 39 CFR Part 3010**

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 the Federal Regulations as follows:

**PART 3010—REGULATION OF RATES FOR MARKET DOMINANT PRODUCTS**

1. The authority citation for part 3010 continues to read as follows:

**Authority:** 39 U.S.C. 503; 3622.

2. Amend § 3010.1 by revising paragraph (g) to read as follows:

**§ 3010.1 Definitions.**

\* \* \* \* \*

(g) Rate of general applicability means a rate applicable to all mail meeting standards established by the Mail Classification Schedule, the Domestic Mail Manual, and the International Mail Manual. A rate is not a rate of general applicability if eligibility for the rate is dependent on factors other than the characteristics of the mail to which the rate applies, including the volume of mail sent by a mailer in a past year or years. A rate is not a rate of general applicability if it benefits a single mailer. A rate that is only available upon the written agreement of both the Postal Service and a mailer, a group of mailers, or a foreign postal operator is not a rate of general applicability.

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3. Amend § 3010.12 by revising paragraph (b)(9) to read as follows:

**§ 3010.12 Contents of notice of rate adjustment.**

\* \* \* \* \*

(b) \* \* \*

(9) For a notice that includes a rate incentive:

(i) Whether the rate incentive is being treated under § 3010.23(e)(2) or under § 3010.23(e)(1) and § 3010.24.

(ii) If the Postal Service seeks to include the rate incentive in the calculation of the percentage change in rates under § 3010.23(e)(2), whether the rate incentive is available to all mailers equally on the same terms and conditions.

(iii) If the Postal Service seeks to include the rate incentive in the calculation of the percentage change in rates under § 3010.23(e)(2), sufficient information to demonstrate that the rate incentive is a rate of general applicability, which at a minimum includes: the terms and conditions of the rate incentive; the factors that determine eligibility for the rate incentive; a statement that affirms that the rate incentive will not benefit a single mailer; and a statement that affirms that the rate incentive is not only available upon the written agreement of both the Postal Service and a mailer, or group of mailers, or a foreign postal operator.

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4. Amend § 3010.23 by revising paragraph (e)(2) to read as follows:

**§ 3010.23. Calculation of percentage change in rates.**

\* \* \* \* \*

(e) \* \* \*

(2) A rate incentive may be included in a percentage change in rates calculation if it meets the following criteria:

(i) The rate incentive is in the form of a discount or can easily be translated into a discount;

(ii) Sufficient billing determinants are available for the rate incentive to be included in the percentage change in rate calculation for the class, which may be adjusted based on known mail characteristics or historical volume data (as opposed to forecasts of mailer behavior);

(iii) The rate incentive is a rate of general applicability; and

(iv) The rate incentive is made available to all mailers equally on the same terms and conditions.