

BEFORE THE  
POSTAL REGULATORY COMMISSION

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Amendments to Rules of Practice

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: Docket No. RM2020-4  
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**COMMENTS OF UNITED PARCEL SERVICE, INC. ON  
ADVANCE NOTICE OF PROPOSED RULEMAKING TO  
CONSIDER REGULATIONS TO CARRY OUT THE  
STATUTORY REQUIREMENTS OF 39 U.S.C. § 601  
(April 7, 2020)**

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United Parcel Service, Inc. (“UPS”) respectfully submits these comments in response to the Commission’s Order No. 5422, inviting comments on potential regulations to implement 39 U.S.C. § 601.<sup>1</sup>

**I. SCOPE OF AUTHORITY**

As an initial matter, UPS notes that this docket raises potentially complex issues relating to the scope of the regulatory authority of both the Commission and the Postal Service and provides a helpful opportunity for the Commission to provide clarity in that regard. For the reasons set forth below, UPS’s view is that the Commission has statutory authority to issue regulations under 39 U.S.C. §§ 503 and 601(c) to define terms like “letters” more clearly and narrowly in a manner that would aid consumers, competitors, and the Postal Service. The Commission could also use this docket to clarify the scope of the Postal Service’s rulemaking authority, which UPS interprets as

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<sup>1</sup> Advance Notice of Proposed Rulemaking to Consider Regulations to Carry Out the Statutory Requirements of 39 U.S.C. 601, Dkt. No. RM2020-4 (Feb. 7, 2020) (“Order No. 5422”).

providing the Postal Service with the limited authority to allow for additional exemptions—but not *additions*—to the letter monopoly.

At a broad level, the Commission has authority under 39 U.S.C. § 601(c) to promulgate “regulations necessary to carry out this section” (*i.e.*, Section 601). The Commission also has the statutory authority under 39 U.S.C. § 503 to “promulgate rules and regulations and establish procedures . . . and take any other action they deem necessary and proper to carry out their functions and obligations to the Government of the United States and the people.” In enacting PAEA, Congress specifically intended for the Commission to have the authority to promulgate regulations interpreting the postal monopoly.<sup>2</sup>

UPS observes, however, that the Commission does not have the power to *expand* the letter monopoly. The reason is that Congress could not have intended to give the Commission the unilateral regulatory authority to expand the scope of activities subject to criminal penalties under Title 18 (18 U.S.C. §§ 1693-1699) for potential violations of the letter monopoly. The rule of lenity requires that any ambiguity in a criminal statute must be resolved in favor of the defendant. *See, e.g., Cleveland v. United States*, 531 U.S. 12, 25 (2000). Thus, any ambiguity (*e.g.*, in the term “letter”) cannot be resolved by expanding the definition of that term, but rather by narrowing it. The Commission has authority to specify those narrowing definitions, consistent with the

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<sup>2</sup> See Order Conditionally Granting Request to Transfer Parcel Post to the Competitive Product List, Dkt. No. MC2012-13 (July 20, 2012), at 7 n.13 (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.”).

rule of lenity, but expansive definitions are outside the Commission's mandate given the criminal penalty attached to a violation of the letter monopoly.

With regard to the Postal Service, UPS observes that the Postal Service does not have the power to change, supervise, or alter the Commission's regulations under 39 U.S.C. § 503 or 39 U.S.C. § 601(c). Thus, the Postal Service also does not have the power to expand the definition of the letter monopoly.

It is unclear whether the Postal Service retains any rulemaking authority under 39 U.S.C. § 601(b)(3). That section allows a letter to be carried out of the mails when "such carriage is within the scope of services described by regulations of the United States Postal Service . . . that purport to permit private carriage by suspension of the operation of this section (as then in effect)." 39 U.S.C. § 601(b)(3) specifically references "sections 310.1 and 320.2–320.8 of title 39 of the Code of Federal Regulations, as in effect on July 1, 2005." Because the references to the Postal Service regulations in 39 U.S.C. § 601(b)(3) are limited to what was "in effect on July 1, 2005" or to what was "then in effect," the Postal Service's rulemaking authority under this section could be read as a grandfather clause, which retains only the exemptions in effect on July 1, 2005. However, because the statutory provision states that the regulations at issue are those "including" the particular ones identified, the statute suggests that additional regulations could be enacted under this provision. Similarly, "then in effect" is best interpreted as exempting carriage where the regulation creating the exemption is in effect at the time the carriage occurred.

UPS therefore understands the statute to mean that the Postal Service may promulgate regulations pursuant to its residual authority under 39 U.S.C. § 601(b)(3), by

creating additional exemptions to the letter monopoly. However, because 39 U.S.C. § 601(b)(3) specifically identifies the regulations in effect as of July 1, 2005 as concrete exemptions to the letter monopoly, the Postal Service may only narrow—but not expand—the scope of the letter monopoly.

## II. SPECIFIC RECOMMENDATIONS

**Defining letters.** 39 U.S.C. § 601 sets out key provisions of the Postal Service’s letter monopoly,<sup>3</sup> indicating when the letter monopoly does not apply to a mailpiece.<sup>4</sup> But the statute does not define the key term “letter,”<sup>5</sup> and the Commission has authority to define this term under 39 U.S.C. § 601(c).<sup>6</sup> Accordingly, the Commission has authority under 39 U.S.C. § 601(c) to adopt a narrower definition of “letters” than the Postal Service adopted in regulations implementing the PES prior to the enactment of the PAEA.<sup>7</sup> As stated above, UPS observes that the Commission does not have the authority to expand the scope of the letter monopoly.

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<sup>3</sup> The letter monopoly is the Postal Service’s right to carry and deliver most addressed, paper-based letters, and is codified in the Private Express Statutes (“PES”). 18 U.S.C. §§ 1693–99; 39 U.S.C. §§ 601–06.

<sup>4</sup> See Order No. 5422, at 1–2.

<sup>5</sup> See 39 U.S.C. § 601.

<sup>6</sup> See, e.g., *Competitive Enterprise Institute v. U.S. Dep’t of Transp.*, 863 F.3d 911, 915-17 (D.C. Cir. 2017) (holding that provision empowering agency to “prescribe such regulations as are necessary to carry out this section” included the authority to define key, undefined term in that section); see also 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*, Appendix C to the Study on Universal Postal Service and the Postal Monopoly (Nov. 2008), at 250 (“It appears that the Commission could plausibly conclude that it should adopt a definition of the term ‘letters’ for the purposes of implementing section 601. Whether or not the Commission should take this step or not appears committed to the sound discretion of the Commission.”).

<sup>7</sup> See 39 § CFR 310.1(a) (defining “letter” as “a message directed to a specific person or address and recorded in or on a tangible object,” subject to certain conditions); Order No. 5422, at 2.

The current regulations define “letter” to refer to messages recorded in or on a “tangible object,” which can include “paper in sheet or card form, recording disks, and magnetic tapes.” 39 C.F.R. § 310.1(a)(1). UPS observes that this definition is overbroad and potentially confusing because it is counterintuitive for letter mail to include non-paper objects like recording disks or magnetic tapes. This issue was previously disputed (but was not resolved) in Docket No. MC2013-57, where there was ambiguity over whether optical disks containing movies or games should be counted as “letters.”<sup>8</sup> UPS recommends that “letters” should be defined to cover only traditional paper objects like sheets and cards.

**Commission Q1.** The Commission has asked if the statutory requirements of 39 U.S.C. § 601(a) are clear and concise, or whether additional regulations are necessary to carry out the intent of the statute.<sup>9</sup> UPS considers the statutory requirements of 30 U.S.C. § 601(a) to be generally clear and concise.

**Commission Q5.** The Commission has inquired if consumers and competitors can easily determine when a mailpiece is subject to monopoly protections.<sup>10</sup> UPS observes that consumers and competitors cannot easily determine when a mailpiece is subject to monopoly protections. First, as explained above, the definition of a “letter” is itself counterintuitive and likely overbroad.

Furthermore, although most of Section 601 is straightforward, 39 U.S.C. § 601(b)(3) permits a host of complicated regulatory exceptions. 39 U.S.C. § 601(b)(3)

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<sup>8</sup> See Order Denying Request, Dkt. No. MC2013-57 (Dec. 23, 2014), at 55.

<sup>9</sup> Order No. 5422, at 7.

<sup>10</sup> Order No. 5422, at 7.

states that a letter may be carried out of the mails when “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 30 of the Code of Federal Regulations, as in effect on July 1, 2015) that purport to permit private carriage by suspension of the operation of this section (as then in effect).” The effect of this provision “is to exclude from the postal monopoly all items for which carriage out of the mail was permitted as of July 1, 2005.”<sup>11</sup> The patchwork of regulations covered by this section is likely difficult for the average consumer to evaluate, understand, and act upon.

**Commission Q6.** The Commission has inquired as to the current effect of the letter monopoly on consumers, small businesses, and competitors.<sup>12</sup> In general, the letter monopoly legally prohibits private firms from delivering products that are covered by the monopoly.<sup>13</sup> UPS has previously urged the Commission to refine its postal monopoly valuation methodology in order to help the Commission assess fair-competition concerns. Ensuring that the Postal Service competes on a level playing field is important for both competitors and consumers.

From a compliance standpoint, competitors and small businesses bear the burden of complying with the letter monopoly rules, many of which involve a host of complicated exceptions and carve-outs. For instance, 39 C.F.R. § 310.3(d) permits the private sending of messages using special messengers, but only if no more than

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<sup>11</sup> Report on Universal Postal Service and the Postal Monopoly, December 19, 2008, at 34–35 (USO Report).

<sup>12</sup> Order No. 5422, at 7.

<sup>13</sup> See Initial Comments of United Parcel Service, Inc. on Notice and Order Providing an Opportunity to Comment, Dkt. No. PI2020-1 (Nov. 1, 2019), at 1-5.

twenty-five letters are involved. Assessing and complying with complicated rules like these is a burden on competitors and small businesses.

### **CONCLUSION**

UPS thanks the Commission for its consideration of these comments, and would be happy to address any further questions that might facilitate the Commission's consideration of these issues.

Respectfully submitted,

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