

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Regulations Pertaining to 39 U.S.C. § 601

Docket No. RM2020-4

PUBLIC REPRESENTATIVE COMMENTS

(April 7, 2020)

Kenneth E. Richardson
Public Representative

Richard A. Oliver
Kenneth R. Moeller
Assisting the Public Representative

TABLE OF CONTENTS

	<i>Page</i>
I. INTRODUCTION	1
II. BACKGROUND – STATUTES, REGULATIONS, DIRECTIVES, ADVISORY OPINIONS.....	3
A. Statutory Exceptions to the Monopoly	4
B. Postal Service Regulations	6
C. Postal Service Directives	7
D. Postal Service Advisory Opinions	9
III. SCOPE AND EXERCISE OF THE COMMISSION’S AUTHORITY	9
IV. QUESTIONS FOR CONSIDERATION	12
A. General Discussion.....	12
B. Comments on Questions Presented	14
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?.....	14
a. Section 601(a) provisions	14
b. Section 601(a) is clear on its face, but Postal Service regulations have expanded beyond § 601(a) the characteristics of letters and messages that may be carried out of the mails.	15
c. Some additional regulations are necessary to carry out the intent of the statute	16
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?.....	20
a. Are statutory requirements clear and concise?	20
b. Are additional regulations necessary to carry out the intent of the statute?.....	21
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?.....	22
a. Applicable dates	22

b.	Ambiguity of parenthetical phrase in § 603(b)(3)	24
c.	Postal Service regulations include procedures that allow it to modify its grandfathered suspension rules.	27
d.	Potential future Postal Service modification of certain regulations is prohibited.....	28
e.	Regulations needed	29
4.	Do any terms that currently appear in 39 U.S.C. 601 require a further definition?	29
5.	Can consumers and competitors easily determine when a mailpiece is subject to monopoly protections?	30
6.	What is the current effect of the letter monopoly on consumers, small businesses, and competitors?	31
a.	Consumers	31
b.	Small Business.....	32
c.	Competitors	33
7.	Are the weight and/or price requirements found in 39 U.S.C. 601(b) still relevant?	33
8.	Are the weight and/or price requirements found in 39 U.S.C. 601(b) applied uniformly?	34
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?	34
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.	34
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?	37
a.	The intent of Congress is sufficiently included in the statute and regulations.....	37
b.	Do the regulations advance the public interest?	37
c.	Should any changes be considered that can be implemented by regulation?	38
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? ...	38
	a. Views of the Postal Service, users of the mail and the general public about potential changes in the letter monopoly	40
	b. Views expressed in reports to Congress on the potential for change of the USO or Postal Service monopolies.....	42
	c. USO and monopoly reports	44
	d. Contribution over attributable costs for much of the contestable mail indicates large profit possibilities and high market value for a potential competitor.	47
	e. Potential competition	49
	f. Innovation will follow increased competition.....	50
	g. A need for studies to unlock the value of the postal monopolies.....	51
	h. The Postal Service’s financial condition may be improved significantly by monetizing parts of the mailbox and/or letter monopoly.....	53
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?.....	53
	a. The Postal Service provides a new type of security; security of privacy from the interception of internet communications	54
	b. Other public benefits of the Postal Service that Congress should consider	56
	c. The Postal Service’s financial situation now requires studies to estimate the market value of monetizing parts of the monopolies for consideration by Congress.....	56
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?	58
V.	RECOMMENDATIONS BY QUESTION.....	60
VI.	CONCLUSION.....	62

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Regulations Pertaining to 39 U.S.C. § 601

Docket No. RM2020-4

PUBLIC REPRESENTATIVE COMMENTS

(April 7, 2020)

I. INTRODUCTION

On February 7, 2020, the Commission issued an advance notice of proposed rulemaking to seek input from the public about potential legislation and regulations the Commission might promulgate to carry out the requirements of 39 U.S.C. 601.¹

Section 601 describes when the Postal Service's letter monopoly does not apply to a mailpiece; thereby permitting such mailpiece to be carried out of the mails. Section 601 also authorizes, for the first time, carriage outside of the mails of two other types of letters having either minimum postage or minimum weight. It also grandfathers Postal Service regulations suspending the postal monopoly statutes. Finally, § 601 provides that any regulations necessary to carry out § 601 shall be promulgated by the Commission. 39 U.S.C. 601(c).

The ANOPR requests comments on 14 specific questions. Before responding to these questions, the Public Representative's Comments review the state of the current statutory requirements of the Private Express Statutes (PES) prohibiting the carriage of certain letters outside of the mails. Next, these Comments discuss the Postal Service's regulations in Parts 310 and 320 of title 39 of the Code of Federal Regulations as well as directives and advisory opinions pertaining to the carriage of letters out of the mails.

¹ Advance Notice of Proposed Rulemaking to Consider Regulations to Carry Out the Statutory Requirements of 39 U.S.C. 601, Order No. 5422, February 7, 2020 (ANOPR).

These Comments then analyze 39 U.S.C. 601 in depth and its implications for continuing the Postal Service's detailed regulations providing for exclusions, exceptions and suspensions of the letter monopoly. Given § 601(c), these Comments also consider the respective authorities of the Postal Service and the Commission to administer the PES regulations and to promulgate any new regulations. As discussed below, the interplay of Postal Service regulations and any regulations the Commission may issue under § 601(c) creates unusual regulatory issues in the administration of the PES.

The ANOPR explains that the scope of this proceeding and inquiry is not intended to extend to the mailbox monopoly (or mailbox rule), which grants the Postal Service, subject to several notable exceptions, exclusions or suspensions, the exclusive authority to deposit mailable matter in a letter box. See 18 U.S.C. 1725. ANOPR at 1 n, 1. For the reasons discussed below, the comments requested by the Commission about potential changes to the statutory and regulatory requirements regarding the letter monopoly and how they affect the financial condition of the Postal Service and other stakeholders necessarily involves consideration of the future of both the mailbox and letter monopolies.

As currently applied, the monopolies may be dramatically and negatively impacting the Postal Service's opportunities to improve its financial condition as well as to improve mail services for the general public. For that reason, Comments regarding the desirability of commencing to study the *market* value of the letter and mailbox monopolies are included below. These Comments strongly urge the Commission to undertake a review and analyses to estimate the potential *market* value of a portion of the letter and mailbox monopolies to a potential purchaser, licensee, or franchisee who would compete with the Postal Service for the carriage of appropriate products for commercial bulk mail and advertising mail currently within both First-Class and Marketing Mail. The purchase, license or franchise of a portion of the monopolies does not need to and should not be intended to impinge upon either the Commission's or the

Postal Service's commitment to affordable Universal Service to those areas of the country that would not be otherwise served by postal services.

These Comments are being prepared in the midst of the current pandemic. Consideration of these issues has become even more urgent in light of the Postal Service's statement released on March 27, 2020, in which the Postal Service stated that "the national decline in economic activity has led to a rapid drop in mail volumes and a significant loss in needed revenues."² The ultimate outcome on the economy and mail volume is unknown, but these Comments assume the economy will return to normal within the time frame needed for full study and analysis of the market value of that part of the monopolies that may be monetized by sale, license or franchise.

II. BACKGROUND – STATUTES, REGULATIONS, DIRECTIVES, ADVISORY OPINIONS

The Private Express Statutes (PES) are a collection of criminal and civil statutes that give the Postal Service a monopoly over the carriage and delivery of letters.³ The scope of the letter monopoly is currently subject to statutory exceptions and administrative limitations adopted by the Postal Service. The Postal Service's administration of the letter monopoly has been conducted by means of regulations, directives, and advisory opinions.

² See Docket No. RM2018-3, Comments on Joint Motion to Hold Proceedings in Abeyance, and Request for Official Notice, Request for Issuance of Information Request, and Suggestion of Further Steps, March 30, 2020, at 3.

³ See 18 U.S.C. 1693-1699; 39 U.S.C 601-606. The practice of granting a monopoly over the carriage and delivery of letter mail began in England and continued in the United States with the enactment of statutes modeled on earlier English statutes. Report on Universal Service and the Postal Monopoly, December 19, 2008, at 16, 37-38. (USO Report).

A. Statutory Exceptions to the Monopoly

Through the early 1970's, the scope of the letter monopoly was limited by the following statutory exceptions:⁴

- (1) An exception for “cargo letters”: letters that accompany or relate to cargo being conveyed;⁵
- (2) An exception for letters carried by “special messengers”: letters carried by messengers on an infrequent and irregular basis for senders or addressees;⁶
- (3) An exception for letters carried by “private hands”: letters carried without compensation;⁷
- (4) An exception for “stamped envelopes”: letters enclosed in special government stamped envelopes;⁸
- (5) An exception for “prior to posting” carriage of letters: letters taken to the nearest post office or postal car by private carriage.⁹
- (6) An exception for “letters of the carrier”: letters sent by or addressed to the person carrying the letters.¹⁰

In 1970, Congress enacted the Postal Reorganization and Salary Adjustment Act of 1970. Pub. L. 91-375, 84 Stat. 719 (1970) (2006) (PRA).¹¹ Section 2 of the PRA

⁴ *Id.* at 16-17. During this period, the administration of the letter monopoly was based principally upon judicial and Postal Service interpretations. *Id.* at 48-49, 57.

⁵ 18 U.S.C. 1694; Act of Mar. 8, 1794, ch. 23, § 14, 1 Stat. 354, 360.

⁶ 18 U.S.C. 1696(c); Act of Feb. 20, 1792, ch. 7, § 14, 1 Stat. 232, 236.

⁷ 18 U.S.C. 1696(c); Act of Mar. 3, 1845, ch. 43, § 11, 5 Stat. 732, 736-37.

⁸ 39 U.S.C. 601, Act of Aug. 31, 1852, ch. 113, § 8, 10 Stat. 121, 141-42.

⁹ 18 U.S.C. 1696(a); Act of Mar. 3, 1879, ch. 180, § 1, 20 Stat. 355.

¹⁰ 18 U.S.C. 1696(a); Act of Mar. 8, 1794, ch. 23, § 14, 1 Stat. 354, 360.

¹¹ The PRA gave the Postal Service powers with important implications for the administration of the PES. See 39 U.S.C. 601-606. These six sections were: § 601 – Letters carried out of the mails; § 602 – Foreign letters out of the mails; § 603 – Searches authorized; § 604 – Seizing and detaining letters; § 605 – Searching vessels for letters; and § 606 – Disposition of seized mail.

amended and codified the stamped envelope exception as 39 USC § 601(a). 84 Stat. 727. Section 2 also codified and expanded an earlier act authorizing the Postmaster-General to suspend the stamped envelope exception as 39 USC § 601(b). *Id.* The suspension authority adopted in § 601(b) was subsequently relied upon by the Postal Service to adopt the administrative suspensions that now appear in part 320 of the Postal Service's regulations. Those suspensions have been used to shape the scope of the letter monopoly. The PRA left the remaining five statutory exceptions unchanged.

The Postal Accountability and Enhancement Act (PAEA). Pub. L. 109-435, 120 Stat. 3198 (2006) made further changes to the letter monopoly. Section 503 repealed the Postal Service's authority in § 601(b) to suspend the operation of § 601(a). Section 503 also adopted three new statutory exceptions to the letter monopoly¹²:

- (1) A price limit exception: letters charged an amount at least equal to six times the amount charged for the 1st ounce of a single-piece first class letter;
- (2) A weight limit exception: letters weighting at least 12 ½ ounces, *Id.*;
- (3) A monopoly suspension exception: letters carried by private carriers pursuant to the Postal Service's earlier suspension of the letter monopoly, *Id.*

With the enactment of the PAEA, the letter monopoly now has nine statutory exceptions: the stamped envelope exception in 39 U.S.C. 601(a); the five exceptions enacted by earlier statutes, and the 3 exceptions now set forth in 39 U.S.C. 601(b).¹³ The suspension exception enacted by section 601(b)(3) includes the seven suspensions adopted by the Postal Service as regulations and currently set forth in 39 CFR part 320.

¹² Pub. L. 109-435, § 503(a), 120 Stat. 3198, 3234-3235.

B. Postal Service Regulations

Following enactment of the PRA in 1970, the Board of Governors undertook “a complete study and reevaluation of the restrictions on the private carriage of letters and packets contained in the [39 U.S.C. 601-606] and §§ 1694-1696 of title 18, United States Code, and the regulations established and administered under these laws.” PL 91-375, sec. 7, 84 Stat. 719, 783 (1970).

The Postal Service “concluded that changes in the Statutes are unnecessary but that certain administrative practices can and should be improved.”¹⁴ To improve its administrative practices, the Postal Service proposed regulations “intended to provide a uniform and comprehensive interpretation of reasonable length with minimum ambiguity...[and]... to correct the inadequacies of the present essentially adjudicatory system.”¹⁵ The proposed regulations were, with certain changes, adopted as parts 310 and 320 in title 39 of the Code of Federal Regulations (CFR).¹⁶ Parts 310 and 320 covered six principle areas:¹⁷

(1) definitions, including definition of the term “letter” (39 CFR 310.1(a));

(2) the statutory stamped letter exception (39 CFR 310.2 (b) –(c));

¹⁴ Restrictions on Private Carriage of Letters, Proposed Comprehensive Standards for Permissible Private Carriage, 38 Fed. Reg. 17512, July 2, 1973. (38 Fed. Reg. 17512, July 2, 1973).

¹⁵ *Id.* The need for uniform and comprehensive interpretations was driven by the fact that “[t]he body of precedents resulting from the administrative and judicial decisions contains inconsistencies and is not easily understandable.” *Id.* The inadequacies of the adjudicatory system referred to by the Postal Service included the fact that the public found it necessary to request advisory opinions in order to obtain guidance. *Id.*

¹⁶ Comprehensive Standards for Permissible Private Carriage, 39 Fed. Reg. 33209, Sept. 16, 1974. (39 Fed. Reg. 33209, September 16, 1974). The regulations preceding the 1974 regulations had been codified in the 1970 revision of 39 CFR part 152. These regulations were rescinded. 39 FR 33209, 33210.

¹⁷ Unless otherwise indicated, each of the citations set forth in the following list is to the 1974 edition of the Code of Federal Regulations.

- (3) the remaining five statutory exceptions for cargo letters, special messengers, private hands, prior to posting, and letters of the carrier (39 CFR 310.2(d) and 310.3);
- (4) provisions for administrative suspensions: a section authorizing administrative suspensions (39 CFR 310.2(c)) and an administrative suspension for data processing materials (39 CFR 320.1-320.2);¹⁸
- (5) provisions for requesting advisory opinions under both parts 310 and 320 (39 CFR 310.6):and
- (6) provisions for amending the regulations in both parts 310 and 320 (39 CFR 310.7).

C. Postal Service Directives

As part of its operational activities, the Postal Service has issued a variety of Directives “to direct or guide field operations or the public.”¹⁹ Included among its directives are Publications. *Id.* Publications provide “specialized instructions, often

¹⁸ Three additional suspensions were added during 1979: a suspension for certain letters of college and university organizations (39 CFR 320.4); a suspension for certain international-ocean carrier-related documents (39 CFR 320.5); and a suspension for extremely urgent letters (39 CFR 320.6). Provisions for revoking or amending suspensions were included as part of these changes. See Enforcement and Suspension of the Private Express Statutes, 44 Fed. Reg. 52832, September 11, 1979 (44 Fed. Reg. 52832, September 11, 1979); Suspension of the Private Express Statutes; Extremely Urgent Letters, 44 Fed. Reg. 61178, October 24, 1979. A fifth suspension was adopted during 1980: a suspension for advertisements accompanying parcels or periodicals (39 CFR 320.7). Enforcement and Suspension of the Private Express Statutes, 45 Fed. Reg. 59871, September 11, 1980 (45 Fed. Reg. 59871, September 11, 1980). The sixth and last suspension to be adopted by the Postal Service was a suspension for international remailing (39 CFR 320.8). Suspension of the Private Express Statutes, 51 Fed. Reg. 29638, August 20, 1986.

¹⁹ The Postal Service describes a Directives as “A policy statement; regulation; set of guidelines, procedures, or standards; reference work; or similar material issued by the appropriate functional organization. It serves to direct or guide field organizations or the public. USPS directives include policy manuals, the *Postal Bulletin*, and any numbered handbook or publication, as well as kits, labels, management instructions, notices, posters, signs, and tags.” Publication 32 - Glossary of Postal Terms, July 2013.

meant for the public.”²⁰ Publication 542 addresses the Private Express Statutes. See Publication 542, Understanding the Private Express Statutes, June 2014. Publication 542 was already in existence at the time the PAEA was enacted in 2006.²¹

Following the enactment of the PAEA, the Postal Service “updated Publication 542 to incorporate the [PAEA’s] changes to [§ 601(b) of] Title 39.”²² The Postal Service describes that update as “informational in nature.” *Id.* Publication 542 “is intended as a user-friendly guide to the PES.” 2014 Pub. 542, 1-5 Purpose of this Publication. It “provides basic information” about the Private Express Statutes, including descriptions of the statutory exceptions to, and suspensions of, the letter monopoly as contained in 39 CFR parts 310 and 320. Publication 542 also includes examples to guide the user. 2014 Pub. 542, 1-5 Purpose of the Publication.

Publication 542 expressly states that “[i]t does not supersede any regulation found in the *Code of Federal Regulations (CFR)*.” *Id.* In the case of the price limit exception and the weight limit exception in §§ 601(b)(1) and 601(b)(2), the Postal Service has not adopted any corresponding regulations. The Postal Service’s guidance in Publication 542 is limited to brief descriptions of the two new statutory exceptions.²³

²⁰ The Postal Service describes its Publications as “specialized instructions, often meant for the public, such as how-to guides or brochures, catalogs, and reference works.” Publication 223, Directives and Forms Catalog – Contents, 2 Postal Service Directives, Publications March 2020.

²¹ See, e.g., Publication 542, Understanding the Private Express Statutes, June, 1998.

²² Responses of the United States Postal Service to Questions 1-3 of Chairman’s Information Request No. 1, March 11, 2020, Response to Question 1.a. (Responses to CHIR No. 1). The Postal Service provided the following link to Publication 542: <http://local300npmhu.org/wordpress-content/uploads/2013/07/Pub-542-Understanding-Private-Express-Statutes.pdf>.

²³ See 2014 Pub. 542, 3-1 Price (39 U.S.C. 601(b)(1)) (“A letter may be carried out of the mails when the amount paid for the private carriage of the letter is as at least six times the rate then currently charged for a 1-ounce single-piece First-Class Mail letter”) and 3-2 Weight (39 USC 601(b)(2)) (“A letter may be carried out of the mails when the letter weighs at least 12.5 ounces”).

D. Postal Service Advisory Opinions

In addition to its regulations and Publication 542, the Postal Service has issued advisory opinions addressing “issues of scope, definitional questions, and the application of exceptions and suspensions.”²⁴ The Postal Service states that, “[n]early all of these opinions predate November 1, 1996”, and that the last such opinion was issued during May, 2006, before the enactment of the PAEA. *Id.*, Questions 2.a. and 2.b.

III. SCOPE AND EXERCISE OF THE COMMISSION’S AUTHORITY

Section 601(c) provides that “[a]ny regulations necessary to carry out this section shall be promulgated by the Commission.” On its face, the authority created by this section appears clear and unambiguous. Unfortunately, it is neither. In order to exercise its authority under § 601(c), the Commission must recognize the limits of that authority. It should also endeavor to promulgate regulations that promote transparency and minimize confusion and disruption. In other words, the Commission must determine what it can do and how best to do it. Both of these tasks could prove to be difficult.

A determination of the scope of the Commission’s authority is complicated by § 601’s content, its relationship to other PES exceptions, the content of the Postal Service’s existing PES regulations, and by reference to the Postal Service’s Publication 542 and any relevant advisory opinions.²⁵

On its face, § 601’s scope is limited to four statutory exceptions to the letter monopoly—the stamped envelope exception in § 601(a), the price limit exception in §

²⁴ Responses to CHIR No. 1, Question 2.b.

²⁵ Even if the Commission determines that Publication 542 and advisory opinions are non-binding, the content of those issuances could be relevant to an interpretation of the existing Postal Service regulations. See *Associated Third Class Mail Users v. United States Postal Service*, 600 F.2d 824 (D.C. Cir. 1979).

601(b)(1), the weight limit exception in § 601(b)(2), and the grandfathered suspension exception in § 601(b)(3). Section 601 does not address the remaining five statutory exceptions: the cargo exception, the special messenger exception, the private hands exception, the prior to posting exception, and the letters of the carrier exception. See Section I.A, *supra*.

The separation of statutory PES exceptions into two groups—those contained in § 601 and those provided for in earlier statutes—implies that the Commission’s authority to promulgate regulations “necessary to carry out *this section* [*i.e.* “§ 601”]” (emphasis added) does not extend to the promulgation of regulations for the other five statutory exceptions left unaddressed by § 601. Such a limitation on the Commission’s authority could present significant practical problems in promulgating regulations that are complete, consist, and clear. These issues will be discussed further in our responses to the Commission’s specific questions in the ANOPR.

Questions regarding the scope and exercise of the Commission’s authority under § 601(c) are also presented by the content of the Postal Service’s existing regulations. For example, a question has previously been raised regarding the appropriate legal basis for § 310.2(b)(2).²⁶ The resolution of that issue could determine whether § 310.2(b)(2) should be retained and, if not, *how* the Commission should remove it.²⁷ These, and other, similar, issues are addressed in our responses, *infra*, to the specific questions presented in the ANOPR.

The statutory exceptions for the price limit exception and the weight limit exception created by § 601(b)(1) and § 601(b)(2) present different problems. There are no implementing regulations for either of these two new exceptions. The Postal

²⁶ The issue was raised in Appendix C to the Commission’s USO Report. Appendix C was prepared by George Mason University’s School of Public Policy. 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 241-242. (USO Report, App. C). The issue, as presented in Appendix C, is that § 310.2(b)(2) goes beyond the authority provided by § 601(a) and must be provided by § 601(b)(3).

²⁷ Similar questions are presented with respect to other PES exceptions and suspensions.

Service has presumably refrained from issuing regulations for these two statutory exceptions in recognition of the PAEA's grant to the Commission of exclusive authority to promulgate any necessary regulations under § 601(c). The Postal Service has nevertheless revised its Publication 542 to address both exceptions. See Pub. 542-3 Exceptions to the PES, 3-1 Price (39 U.S.C. 601(b)(1)) and 3-2 Weight (39 U.S.C. 601(b)(2)).

Under §601(c), the Commission has the authority to issue any regulations it finds necessary for the implementation of both § 601(b)(1)'s price limit exception and § 601(b)'s weight limit exception. However, questions remain regarding how this should be done and whether the Commission has the authority to amend or replace, or to direct the Postal Service to amend or replace, Publication 542-3, Exceptions to the PES, 3-1 Price (39 U.S.C. 601(b)(1)) and 3-2 Weight (39 U.S.C. 601(b)(2)). Even if the Commission has that authority, it might conclude that the exercise of that authority is either unnecessary or inadvisable because any regulations it promulgates will override any inconsistencies in the non-binding Publication 542.

Questions regarding the scope and exercise of the Commission's § 601(c) authority with respect to § 601(b)(3)'s grandfathered suspensions are similar to those discussed above. They include questions regarding whether the Commission can promulgate regulations that affect the five statutory exceptions not referred to in § 601; whether Postal Service exclusions from the definition of "letter" currently set forth in 39 CFR 301.1(a)(7) are subject to § 601(b)(3) and can therefore be addressed by Commission regulations promulgated under § 601(c); and whether any differences between the statutory formulation of exceptions and the formulation of those exceptions in Publication 542 can and should be addressed by Commission regulations promulgated under § 601(c). These are but a sampling of the types of questions the Commission will confront should it attempt to promulgate new regulations under § 601(c).

IV. QUESTIONS FOR CONSIDERATION

A. General Discussion

In addition to the framework of the PES, Postal Service regulations, directives and advisory opinions, there is also the backdrop of several exhaustive reports in recent years on the letter and mailbox monopolies. These too are relevant in determining the Commission's approach to the letter and mailbox monopolies.

Since 2007, several reports have been published evaluating the letter monopoly. In 2007, the Federal Trade Commission stated that the monopoly should only be as broad as needed to satisfy the statutory requirement of universal service.²⁸ During October 2008, the Postal Service issued its own comprehensive report on universal postal service and the postal monopoly.²⁹ A few months later, the Commission issued its 2008 USO Report tracing the history of both the postal monopolies and the Postal Service's universal service obligation. USO Report at 15-84. Attached to the USO Report were exhaustive studies of the postal monopoly and universal service obligation prepared by George Mason University's School of Public Policy. See note 25, *supra*. In 2017, a Government Accountability Office report expressed concern that narrowing the monopoly could decrease revenues and threaten the universal service obligation, but recognized that it may also lead to greater efficiencies and innovation.³⁰ Most recently, in 2018, the Task Force on the United States Postal System opined that the statutory monopoly business model is increasingly ineffective.³¹

²⁸ 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.

²⁹ Report on Universal Service and the Postal Monopoly, United States Postal Service, October, 2008.

³⁰ 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.

³¹ United States Postal Service, A Sustainable Path Forward, Report from the Task Force on the United States Postal Service System, December 4, 2018 at 33 (Task force Report). The Task Force was established by Executive Order 13829 on April 12, 2018 and chaired by the Secretary of the Treasury.

Some of the 14 questions presented also request comment on possible legislative changes that may be required due to technological changes as well as the financial position of the Postal Service. The discussion and ongoing methodological studies in recent years have measured both the cost of the USO as it may be offset by the “profit” for the Postal Service from the letter and mailbox monopolies. They generally measure only the cost and profit from the Postal Service’s point of view. These Comments respond to the Commission’s request for legislative suggestions and recommend the Commission’s initiation of an analysis and study that will advance these periodic measurements of the USO and letter and mailbox monopolies. It is hoped that some of these Comments will initiate the development of working estimates of the monetized value to the Postal Service of selling, licensing, or franchising the right to carry certain types of First-Class and Marketing Mail letters and cards out of the mails. This would likely apply to single piece and bulk mail letters and cards intended as advertising in competition with the Postal Service.

Narrowing of the monopolies can be expected to lead to development by a competitor or competitors of innovative methods in the delivery of such mail and the implementation of novel methods of receiving delivery in receptacles or other methods at days and times of day to be determined by the purchaser, licensor or franchisee of access to those monopolies. With purchase, license or franchise of such rights, the Postal Service could monetize the value of a portion of its letter and mailbox monopolies to revitalize its finances and place it on a longer term, but shorter path, to financial stability.

In these Comments, the suggested analysis would calculate the potential market value under various scenarios to bidders for certain monopoly rights. The sale or licensing of a significant part of the monopolies could, if opened up for bid, garner a significant down payment and considerable annual amortization payments to the Postal Service. The sale or license could yield several financial advantages for the Postal Service. Some measure of the real value to bidders with deep pockets and having a level of developed infrastructure would help to determine whether bids for the portion of

the monopoly placed for sale, license or franchise is reasonable. There can be no doubt that the monetized value of the monopoly is probably many billions of dollars that would assist if not solve the Postal Service's financial problems as well as improve service and postage prices for the public through innovation that inevitably follows competition.

B. Comments on Questions Presented

The Commission has solicited 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). It has requested Comments on the following 14 questions. Some of the Comments below expand upon the 14 specific topics listed in the ANOPR.

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?

- a. *Section 601(a) provisions*

Section 601(a) of title 39 provides an exception to the letter monopoly for letters having the characteristics specified in § 601(a) that allows them to be carried out of the mails. Section 601(a) was effective July 1, 1971, long before the PAEA.³² Section 601(a) is limited in scope. It describes the necessary exterior characteristics of an envelope carrying a message in order to be lawfully carried out of the mails. The message must be enclosed in an envelope that has the appropriate postage that would have been charged by the Postal Service, be properly addressed, be sealed so the letter cannot be removed without defacing the envelope, have the stamps canceled in ink by the sender, and must have the date of the letter's transmission or receipt by the carrier is endorsed on the envelop in ink. 39 U.S.C. 601(a)(1)-(6).

³² Section 691(a) modified and codified the stamped envelope exception originally enacted in 1852. See note 8, *supra*.

- b. *Section 601(a) is clear on its face, but Postal Service regulations have expanded beyond § 601(a) the characteristics of letters and messages that may be carried out of the mails.*

Section 601(a) appears on its face to be clear and concise. If the regulations precisely tracked or did not digress from the import of the section in any way, there would be no potential need for the Commission to issue regulations to carry out the intent of § 601(a). However, the Postal Service's regulations at 39 CFR 310.2 implementing § 601(a) do not track precisely the language of the statute; rather the regulations diverge from the statutory language and the regulations establish other Postal Service procedures that could permit certain letters to be carried out of the mails without any apparent authority under § 601(a) or other legislation.

Section 310.2(b)(1)(ii) as originally adopted in 1974 provides for payment of the amount of postage that would otherwise have been paid to the Postal Service to be paid "by stamps, or postage meter stamps, on the cover or by other methods approved by the Postal Service."³³ The payment by "other methods" goes beyond the language of 39 U.S.C. 601(a), which specifies payment "by stamps, or postage meter stamps, on the envelope."

In 1980, § 310.2(b) was amended further to provide for payment by alternative methods.³⁴ Section 310.2(b)(2)(i) also provides that the private carriage of letters would be lawful if provided under an agreement with the Postal Service that includes some or all of the provisions specified in paragraph (b)(1) of this section [§ 310.2(b)(1)], "or it may change them", but it must [ensure payment and meet certain other conditions not specified in 39 U.S.C. 601(a)].

³³ 39 CFR § 310.2(b)(1)(ii). As originally adopted, §310.2(b)(1)(ii) was numbered § 310.2(b)(2). See 39 Fed. Reg. 3968, January 31, 1974.

³⁴ Alternative Methods of Paying Postage; Privately Shipped Letters, 45 Fed. Reg. 77028, November 21, 1980. (45 Fed. Reg. 77028, November 21, 1980).

A further potential problem is presented by § 310.2(c) which permits further Postal Service suspensions. It states, “The Postal Service may suspend the operation of any part of paragraph (b) of this section where the public interest requires the suspension.” This rule goes beyond 39 U.S.C. 601, as amended, which took the suspension power away from the Postal Service.

c. *Some additional regulations are necessary to carry out the intent of the statute*

It appears that § 310.2(b)(2)(i) should be revised to eliminate the possibility that written agreements between the Postal Service and a carrier circumvent the requirements of 39 U.S.C. 601(a). How such revisions should be accomplished is discussed in the following section and in the Public Representative’s response to Question 14, *infra*. In addition, the currently effective agreements entered into pursuant to that regulation should be reviewed to determine whether any of them already fail to meet the requirements 39 U.S.C. 601(a).

Commission authority. To answer the question of whether additional regulations may be necessary to carry out the intent of the statute, regardless whether the regulations improperly expanded upon § 601(a), it is necessary to ask whether the Commission would have the authority to issue such regulations.

The short answer is that there is no Commission authority, or Postal Service authority for that matter, to issue regulations that would serve to reduce the current Postal Service regulations that suspend the carriage of letters outside of the mails. The Postal Service’s regulations were grandfathered.

Part III, *supra*, discusses the authority granted to the Commission by § 601(c) to promulgate regulations necessary to carry out § 601. That authority appears broad, yet it does not advance permission so far as to allow Commission retraction of Postal Service regulations that expanded upon the exception to the monopoly in § 601(a) that carriers had relied upon as permission for their carriage of messages out of the mails.

The legislative history of § 601 explained that the purpose of § 601(b) is to ensure that carriers who had relied upon the Postal Service's regulations to carry letters out of the mails were not harmed by retraction of those regulations.³⁵ The intent of Congress in amending § 601 was to maintain regulations that purported to permit private carriage by suspension of § 601. *Id.* The grant of authority to the Commission would not have been intended to grant the Commission authority to undercut that which the Congress intended. The grant would not have intended to allow the Commission to remove regulations that expanded the monopoly through suspension (i.e. "purporting to suspend") of the operation of § 601(a) that carriers had relied upon.

Postal Service procedures. Several of the Postal Service's § 601(a) regulations establish Postal Service procedures that could grant carriers new authority to carry letters out of the mails. Those regulations may lead to conflict with the provisions of § 601(b) and § 601(c). The Postal Service's regulations incorporating § 601(a) provide for Postal Service approval of § 601(a) type activities that may differ from the provisions of § 601(a).

Section 39 CFR 310.2(b)(1)(ii). As noted above, 39 CFR 310.2(b)(1)(ii) requires postage to be on the envelope "or by other methods approved by the Postal Service." The latter language does not appear in § 601(a).

Section 601(c) grants the Commission the authority to issue any regulations necessary to carry out the provisions of § 601. If the Postal Service approved a method other than the manner defined in § 601(a) or the Postal Service regulations or as currently permitted by § 310.2(b)(1)(ii), the Postal Service may be effectively issuing new regulations which is an area left to the Commission. Consequently, that provision in the current Postal Service regulations could provide for a procedure beyond the Postal Service's authority.

³⁵ House of Representatives Committee on Government Reform, H. Rep. No. 109-66, Part 1, 109th Cong., 1st Sess., H.R. 22 (April 28, 2005) at 57-58.

On the other hand, the provisions authorizing payment by alternative methods under written agreements have been characterized by the Postal Service as “consistent with 39 U.S.C. § 601(a)...[and]...a convenience to avoid the cumbersome and inefficient tasks of affixing and canceling postage stamps on lawful, privately carried mail....”³⁶ The Commission must determine whether agreements for this purpose are within the scope of 39 U.S.C. 601(a) and therefore appropriate.

The method of resolving such questions in the future is complicated by § 601(c) that turned over to the Commission the authority to promulgate any regulations necessary to carry out “this section;” that is, all of § 601. The carriage of mail outside the mails authorized by the Postal Service is grandfathered by § 601(b)(3), but that should not allow the Postal Service to expand upon the allowances for carriage of letters outside of the mails by using expansive interpretation of the regulations. In addition to § 310.2(b)(1), above, there are two other places in the Postal Service’s regulations that currently provide for the Postal Service to render decisions about the carriage of letters outside of the mails. If those merely interpret current regulations or the law, they are appropriate. The Postal Service may not expand or contract the current allowances for carriage of letters out of the mails. In addition to 310.2(b)(1)(ii), discussed immediately above, two other regulations currently may lead to substantive Postal Service decisions, § 310.2(c) and § 310.6.

Section 310.2(c). As noted above, § 310.2(c) permits Postal Service suspension of “any part” of § 310.2(b). In effect, Section 310.2(c) allows substantive regulation of suspensions by the Postal Service. It states, “The Postal Service may suspend the operation of any part of paragraph (b) of this section where the public interest requires the suspension.” This rule is contrary to the authority granted this Commission by § 601(c) and should be removed either by the Postal Service or the

³⁶ Response of the United States Postal Service to Chairman’s Information Request No. 2, April 3, 2020, Response to Question 1.c. (USPS Response to CHIR No. 2).

Commission. The recommended methods for handling the interplay of Commission and Postal Service procedures to promulgate necessary regulations is discussed below in response to Question 14.

Section 310.6. Similarly, the Postal Service's regulation at 39 CFR 310.6 (advisory opinions) recognizes a potential need for advisory opinions relating to parts 310 and 320 that include language replicating § 601(a). Regulation § 310.6 applies not only to the sections specifically mentioned in § 601(b)(3) [§ 310.2 and §§ 320.2-8], but to all other provisions of parts 310 and 320.

Section 310.6 provides that, "An advisory opinion on any question arising under this part [310] and part 320 of this chapter may be obtained by writing the General Counsel [at the Postal Service's headquarters]. A numbered series of advisory opinions is available for inspection by the public in the Library of the U.S. Postal Service, and copies of individual opinions may be obtained upon payment of charges for duplicating services."³⁷

In response to CHIR No1,³⁸ the Postal Service indicated that it does not have authority to issue new suspension regulations. If Congress intended by § 601(b) that the suspensions from carriage out of the mails is to remain constant, then as noted above, those regulations including 310.6 ostensibly permitting some modifications by the Postal Service to its grandfathered regulations should be eliminated.

Recommendation: A new regulation should be issued either by the Commission or the Postal Service to make clear the Postal Service may approve only practices which are within the confines of interpreting existing regulations.

³⁷ Section 310.6 was modified to change the address in the rule although § 601(c) provides that this Commission shall issue any necessary regulations. 75 FR 23295, May 29, 2010. The Public Representative does not believe this was outside the Postal Service's administrative authority.

³⁸ Responses to CHIR No. 1, Question 3.b.

Recommendation: Additional regulations are needed to clarify that the Postal Service *does not* have authority to approve characteristics of an envelope to be carried out of the mails under its rule 310.2(b)(1)(ii), to grant suspension of any part of paragraph 310.2(b) as provided for in § 310.2(c), and to issue substantive advisory opinions affecting suspensions pursuant to § 310.6 of the Postal Service's regulations.

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?

This response will address only § 601(b)(1) and § 601(b)(2) since § 601(b)(3) is the subject of Question 3, below.

a. Are statutory requirements clear and concise?

Section 601(b)(1) and § 601(b)(2) listed for the first time two new instances when a letter may be carried out the mails. Section 601(b)(1) applies when the amount paid for the private carriage of a letter is 6 times the rate then currently charged for the 1st ounce of a single-piece letter. Section 601(b)(2) applies when the letter weighs at least 12.5 ounces.

Section 601(b)(1) and (b)(2) are each clear and concise. They have not been incorporated into the Postal Service's regulations, but they have been noted in the Postal Service's Publication 542.³⁹ That publication provides administrative guidelines for management and guidance to the public, but it does not have the force of law as do formal regulations.

³⁹ Responses to CHIR No. 1, March 11, 2020, Question 1.a. The Postal Service "has updated Publication 542 to incorporate the changes to Title 39."

b. Are additional regulations necessary to carry out the intent of the statute?

Although not necessary to carry out the intent of the statute, for clarity and convenience of the public, it would be convenient to the public if those two subsections could be incorporated into the CFR along with the current provision that incorporates § 601(a) into the regulations permitting letters meeting the list of criteria in section 310.2(b) to be carried out of the mails. The Postal Service has stated it has not issued any regulations incorporating the provisions of § 601(b)(1) and § 601(b)(2),⁴⁰ but it has not stated that it has no authority to issue regulations incorporating the statutory exceptions to the letter monopoly in § 601(b)(1) and § 601(b)(2). However, the Commission cannot modify directly the Postal Service's regulations and the Postal Service concedes that it no longer has authority to promulgate regulations for suspensions of the PES. *Id.*

As discussed in Part III of these Comments, § 601(c) places the authority only with the Commission to issue any regulations necessary to carry out section 601. The Commission has no authority to issue Postal Service regulations; nor can such authority be deemed granted by § 601(c). Thus, unless the Commission adds the provisions of § 601(b)(1) and § 601(b)(2) to its own regulations, they will not be included in the CFR as lawful exceptions to the letter monopoly.⁴¹ Nevertheless, since § 601(b)(1) and § 601(b)(2) are exceptions to the letter monopoly, similar to section 601(a), the most convenient solution for the public would be to add each exception to the regulation covering § 601(a) currently in the Postal Service's regulations at 39 CFR 310.2(b).

An alternative is for the Commission to issue a brief reference about § 601(b)(1) and § 601(b)(2) in its own regulations as providing another exception to the letter monopoly. This approach may have a drawback in that the Postal Service enforces the

⁴⁰ Responses to CHIR No. 1, Question 1.a.

⁴¹ If the Commission determines to issue its own regulations of the various exceptions to the letter monopoly, these two provisions also should be incorporated.

letter monopoly through its own regulations and it would have no authority to enforce the regulatory provisions not otherwise incorporated into its own regulations.

A more common sense option may be to issue no regulations for § 601(b)(1) and § 601(b)(2). The intent of the statute was carried out by the passage of § 601. There is no requirement that the statutory section be included in regulations, nor is it necessary for the convenience of the public, particularly since it is granting a privilege for the carriage of letters out of the mails rather than creating a prohibition. The PAEA was enacted in 2006. The Postal Service has provided guidelines in Publication 542. The Public Representative is not aware of any controversy having arisen about this section since its enactment. There does not appear to be a need now for a regulation mimicking 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?

- a. *Applicable dates*

Section 601(b)(3) is not particularly artful in expressing either its purpose or its effect. The section freezes regulations of the Postal Service for the carriage of letters out of the mails that were effective as of two different dates. A letter may be carried out of the mails if such carriage is within the scope of Postal Service regulations in effect on the date this Commission issued regulations under 39 U.S.C 3633 (December 10, 2007), or if such carriage is pursuant to other specific Postal Service regulations in §§ 310.1 and 320.2-8 that were in effect on July 1, 2005.

The July 1, 2005 date is within the clause of § 601(b)(3) that is enclosed within the parenthetical clause. It freezes the Postal Service regulations in §§ 310.1 and 320.2-8 as of that date. On the other hand, the more general provision of § 601(b)(3) in the same sentence that is outside of the parenthesis applies an effective cut-off date for all other Postal Service regulations “that purport to permit private carriage by suspension of the operation of this section” (§ 601); that is, the effective date of the regulations promulgated by the Commission pursuant to 39 U.S.C. 3633 (per section 503(b) of the PAEA) *i.e.*, December 10, 2007.⁴²

In other words, the more general part of § 601(b)(3) applies to the carriage of letters within the scope of services described by the Postal Service in § 601(b)(3), (other than those regulations in sections 310.1 or 320.2-8). Frozen also are all other such Postal Service regulations that purport to permit private carriage of mail by suspension of the regulations “as then in effect,” *i.e.*, December 10, 2007. The “as of” date for those other regulations might have been intended to be July 1, 2005, but (“as then in effect”) applies to the date on which § 601(b) became effective, that is, the date regulations implemented pursuant to 39 U.S.C. 3633 took effect. That date was December 10, 2007, not, July 1, 2005.

It appears that this distinction has no practical effect since the Postal Service’s regulations regarding carriage of letters out of the mails did not change in the interim period between the two dates. Based on the responses to CHIR No. 1, Questions 3.b. and 1.a, according to the Postal Service, it no longer has authority to issue rules for new suspensions and it has not issued regulations in connection with § 601(b)(1) and § 601(b)(2).

⁴² The rules issued by the Commission were to be effective 30 days after publication in the Federal Register, November 10, 2007. 72 FR 63697. See Docket No. RM2007-1, Regulations Establishing a System of Ratemaking, October 29, 2007 (Order No. 43) at 109.

Recommendation. As time passes, it may be more difficult to locate with certainty those regulations that were in effect on July 1, 2005 and December 10, 2007, unless an affirmative statement is added within the regulations identifying the regulations effective as of the appropriate dates.

b. *Ambiguity of parenthetical phrase in § 603(b)(3)*

Section 601(b)(3) permits letters to be carried out of the mails pursuant to the Postal Service's pre-PAEA suspensions of the letter monopoly. While the basic thrust of § 603(b)(3) is clear, its precise scope is not. The lack of clarity is due to an ambiguity in the parenthetical phrase used in § 601(b)(3) parenthetical that is used to specify which regulations § 603(b)(3) is intended to grandfather. The Public Representative recommends that the Commission address this ambiguity and, if necessary, promulgate regulations that will carry out the intent of the statute.

The ambiguity at issue is introduced by the words "including, in particular" in the parenthetical that reads as follows: "(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)". The phrase "including, in particular", suggests that there are regulations in addition to those in sections 310.1 and 320.2-320.8 that should be considered suspension regulations covered by § 601(b)(3). This interpretation has been used to argue that portions of § 310.2(b) and all of the statutory exceptions listed in § 310.3 are authorized by exercise of the pre-PAEA suspension authority in § 601(b).⁴³ In both cases, the argument is that the suspension authority was the only plausible basis for adopting those sections and that, without the exercise of that suspension authority, the adoption of those regulations would not have been lawful. *Id.*

In the case of § 310.2(b)(2)(ii), the regulatory provisions adopted by the Postal Service related to payment alternatives available to private carriers who availed

⁴³ USO Report, App. C at 240-242.

themselves of the stamped envelope exception in § 310.2(b)(1). The assertion that § 310.2(b)(2) was adopted as an exercise of the suspension authority is based upon the fact that it provides for written agreements between shippers or carriers and the Postal Service that “ may include some or all of the provisions of paragraph (b)(1) of this section, or it may change them....” The provisions of Paragraph (b)(1) that can be omitted or changed are provisions that restate the six statutory requirements for private carriage of mail under the stamped envelope exception. Cf. 39 CFR 310.2(b)(1) and 39 U.S.C. 601(a). Unless the suspension authority was invoked under 39 U.S.C. 601(b) as it existed prior to enactment of the PAEA, the six requirements in § 601(a) could not have been circumvented by means of a written agreement between the Postal Service and shippers or carriers.

The suggestion that the suspension authority is the basis for all of the regulations in § 310.3 implementing statutory exceptions is based upon the assertion that § 310.3(e),⁴⁴ which implements the statutory “prior-to-posting” exception, exceeds the scope of the exception as contained in the statute. Whereas § 310.3(e) permits private carriage from a mailer to a distant downstream post office or facility, the statute limits private carriage to the post office or facility nearest the mailer.⁴⁵ This inconsistency raises the question of whether § 310.3(e) must, by default, be based upon the Postal Service’s suspension authority. The assertion that § 310.3(e) is based on the suspension authority leads to the further claim that all of the statutory exceptions in § 310.3 are based upon the suspension authority. USO Report, App C. at 241.

These arguments ignore the fact that § 601(b)(3) requires that, to be based upon the pre-PAEA suspension authority in § 601(b), a regulation must “*purport* to permit private carriage by suspension of this section [§ 601(b)] (as then in effect).” 39 U.S.C.

⁴⁴ Section 310.3(e) restates the prior-to-posting exception in more detail than § 310.2(d)(5). The discussion of § 310.3(e) in the text also applies to § 310.2(d)(5).

⁴⁵ Cf. 39 CFR 301.3(e) and 18 U.S.C. 1696(a).

601(b)(3) (emphasis added). In the case of both § 310.2(b)(2) and § 310.3(e), the Postal Service did not *purport* to base private carriage on the suspension authority.

Section 310.2(b) was included in the Postal Service's 1974 Regulations and, although other regulations adopted by the Postal Service at the same time relied upon the suspension authority, § 310.2(b) did not;⁴⁶ nor did the subsequent amendments to § 310.2(b)(2).⁴⁷ Similarly, the regulation in § 310.3(e) implementing the statutory prior-to-posting exception did not *purport* to permit private carriage by suspension.

By contrast, when the Postal Service purported to have exercised its suspension authority, the regulations adopted on the basis of the exercise of that authority should be recognized as subject to the Commission's authority under § 601(b)(3). For example, in adopting § 310.1(a)(7), the Postal Service excluded certain specific items in the definition of "letter" and, in a footnote, stated that those items "do not self-evidently lie outside the definition of 'letter'". Accordingly, in adopting § 301.1(a)(7), the Postal Service "suspended the restrictions of the Private Express Statutes." The recognition that § 301.1(a)(7) is based on the suspension authority does not, however, necessarily require that all other subsections of § 310.1(a) be deemed to have been based on the suspension authority. Additional subsections should be deemed to be based upon the suspension authority only if it can be demonstrated that they "purport to permit private carriage by suspension."

There is one subsection of § 310.2 that clearly purports to permit private carriage by suspension. That subsection is § 310.2(c) which provides that "[t]he Postal Service may suspend the operation of any part of paragraph (b) of this section where the public interest requires the suspension." This regulation is inconsistent with the provisions of

⁴⁶ See 39 Fed. Reg. 33209, September 26, 1974. Furthermore, the payment provisions in § 310.2(b) expressly refer to the stamped envelope provisions in § 310.2(a).

⁴⁷ See Alternative Methods of Paying Postage on Privately Shipped Letters, 45 Fed. Reg. 60453, September 12, 1980. As amended, § 310.2 (b) retained its express connection to § 310.2(a).

amended § 601(b) which removed the Postal Service's authority to suspend the operation of the letter monopoly. See 39 U.S.C. 601(b).

Recommendation. The Public Representative submits that the Commission should clarify that the scope of § 601(b)(3) covers only those specific regulations that purport to permit private carriage of letters by suspension under § 310.1; §§ 320.2-320.8; and any other regulations that can be shown to have been based on the suspension authority.

Recommendation. The Commission should clarify that the Postal Service no longer has the authority to suspend operation of the letter monopoly. The method for taking such actions is discussed in response to Question 14.

- c. *Postal Service regulations include procedures that allow it to modify its grandfathered suspension rules.*

The Postal Service regulations are not lengthy but cover approximately 11 pages in the CFR volumes. The Postal Service's regulations provide for procedures to request advisory opinions and for agreements between a carrier and the Postal Service permitting the carriage of letters out of the mails.

These provisions are a complicating factor within the Postal Service's regulations. The Postal Service's regulations in § 320.2(c) contemplate potential Postal Service modifications to the grandfathered regulation in § 320.2(b) that is frozen by § 601(b)(3). In addition, another potential modification to the grandfathered regulations is in § 320.2(b)(2) that allows letters to be carried out of the mails if the activity "is in accordance with the terms of a written agreement" between the shipper or the carrier and the Postal Service. Such an agreement could effectively modify the regulations in effect as of the cut-off dates.

Either of these provisions can work to adjust the rules for carriage of letters out of the mails. Section 310.2(b)(2) allows contractual agreements with the Postal Service to modify the types of activity (i.e. reduced envelope requirements) permitted for the carriage of letters out of the mails. More broadly, § 320.2(c) permits Postal Service

“suspension” of *any part* of 320.2(b) where required in the public interest. By “suspending” any part of 320.2(b), the regulation appears to mean that any criteria that allow for carriage of letters out of the mails may be eliminated by the Postal Service, thereby restricting those allowable instances for carriage of letters out of the mails. On the other hand, that section does not appear to allow for any expansion of the opportunity for carriage of letters out of the mail.

In view of § 601(c), the question arises whether sections of the Postal Service’s regulations providing for Postal Service adjustment of its regulations to permit certain letters to be carried out of the mails (some of which are based upon the provisions of § 601(a)) should continue to remain in effect.

d. *Potential future Postal Service modification of certain regulations is prohibited.*

The language in § 601(b)(3) freezes the above cited Postal Service regulations that purport to permit suspensions of § 601 in effect on July 1, 2005, or December 10, 2007, against any substantive changes in the postal monopoly. Given that there has been only one advisory opinion applying the letter monopoly regulations since July 1, 2005, § 601(b)(3) is apparently clear and workable.⁴⁸ It also appears that those particular regulations currently in effect should be revised or removed to make clear the Postal Service cannot issue substantive changes to those regulations.

Section 601(c) permits only the Commission to issue any regulations necessary to carry out § 601 which is the only statutory basis providing explicit definitions of three types of letters that may be carried out of the mails. In such case, it appears that only the Commission may issue clarifying regulations or rules to enforce or administer regulations effective on those dates and currently effective. Those provisions together with § 601(b)(1) and § 601(b)(2) are the only ones that provide a statutory basis for the

⁴⁸ Responses to CHIR No. 1, Question 2.e.

carriage of explicit types of letters out of the mails. That is, the services may not be expanded or restricted any further.

e. *Regulations needed*

Recommendation. The Commission should clarify § 601(b)(3) with its own regulations stating the extent to which the Commission interprets § 601(b)(3) as prohibiting any Postal Service modification of the monopoly regulations of the Postal Service.

4. Do any terms that currently appear in 39 U.S.C. 601 require a further definition?

The Postal Service has not modified its relevant regulations since July 1, 2005,⁴⁹ and so has not included the new statutory exceptions in § 601(b)(1) and § 601(b)(2) in its regulations. As discussed by the Public Representative in response to Question 2, above, those definitions do not need to be included in the Postal Service's regulations, but their inclusion would be useful for clarity so that the regulations combine all of the exceptions to the letter monopoly in one location. The Postal Service may be able to address any need for additional guidance through its advisory opinion procedure to the extent it may allow interpretations of the rules but, in effect, it may not add new rules that modify the current monopoly. The Postal Service may provide information to respond to any inquiries or difficulties that mailers may have with the current definitions in its rules.

Recommendation. The Commission should define the meaning of the words "any regulations necessary to carry out" in § 601(c) and specify that the Postal Service may continue to provide advisory opinions interpreting its rules. The Commission should also consider by regulation defining "any regulations necessary to carry out" as

⁴⁹ Responses to CHIR No. 1, Question 1.a.

permitting the Postal Service to issue substantive rules regarding the monopoly as long as the Commission has final authority or oversight regarding proposed rules.

5. Can consumers and competitors easily determine when a mailpiece is subject to monopoly protections?

An exception to the letter monopoly appears in § 601(a) and is copied into Postal Service regulations at § 310.2(b). Statutory § 601(b)(1) and § 601(b)(2) are exceptions to the letter monopoly that allow letters 6 times the first-ounce First-Class rate or weighing at least 12.5 ounces to be carried out of the mails. They are not included in any regulations. In addition, § 310.3 of the Postal Service's regulations provides for five *exceptions* from the letter monopoly for other types of letters. Sections 320.2-8 provide a list of further *suspensions* for certain types of materials.⁵⁰ These exceptions and two types of suspensions are not well organized as a whole, are not all included within regulations, and thus are confusing.

There is no place in the statutory law or Postal Service regulations, not to mention the approximately 264 numbered advisory opinions that may reside in the Postal Service's library,⁵¹ that pull together all of the rules and regulations regarding the letter monopoly or the mailbox monopoly. It is thus difficult to determine easily whether a mailpiece is subject to the letter or mailbox monopoly. However, apart from the pitfalls of reproducing the Postal Service's regulations precisely, that possible course of action raises questions of current and future issuance authority and enforcement authority over any particular regulations that may be issued.

⁵⁰ The further suspensions are for certain data processing materials, certain college and university organizations, certain international-ocean carrier-related documents, extremely urgent letters, advertisements accompanying parcels or periodicals, and for international remailing. Pursuant to § 310.7, these suspensions may be revoked only by rulemaking in accordance with the Administrative Procedure Act. See § 320.9. This rule would not preclude the Commission from revoking such suspensions, but §601(b)(3) grandfathering the Postal Service's suspension rules precludes the Commission from revoking the suspensions.

⁵¹ Responses to CHIR No. 1, Question 2.b.

Recommendation. The Commission might tailor new explanatory regulations that lay out in orderly format where in the statutes and in the Postal Service regulations each of the requirements regarding the monopolies are included in statute, the Postal Service regulations, its Operating Manuals or advisory opinions, as the case may be.

6. What is the current effect of the letter monopoly on consumers, small businesses, and competitors?

- a. *Consumers*

1. The current effect of the monopoly on consumers has been substantially diminished by the availability and wide-spread use of electronic alternatives to the mail. Nevertheless, consumers continue to receive large amounts of commercially related advertising mail through the Postal Service for which security is not particularly significant. Because there is no direct competition for delivering letters, particularly commercial letters and advertising, the postage that would be charged by competitors to deliver such letters is unknown. If the monopoly on such letters were eased, competition will likely be able to reduce delivery costs and postage prices, thereby reducing mailing costs for advertising that can eventually be reflected in reduced product prices. The George Mason study assumed potential price discounts on the order of 10 percent but assumes they would be offset by efficiency gains.⁵²

2. The mailbox monopoly has also restricted the development of alternative methods by which consumers receive mail. The mailbox monopoly has likely had the effect of restricting innovation in the method of receiving letter and card mail. If the letter monopoly were relaxed for certain letters and cards, consumers could enjoy the benefits of new mailbox designs such as automated receptacles, or multiple levels or compartments in mailboxes, or at different locations due to different or automated

⁵² FY2019 Annual Report to the President and Congress, Postal Regulatory Commission, January 2020 (2019 Annual Report), at 51.

delivery methods. Large cluster boxes by Amazon in commercial locations represent a recent innovation due to competition that could also receive letters and cards. In large buildings or large businesses with mailrooms, there are generally not traditional mailboxes that would need redesign or replacement. Competitors in such locations could simply leave the mail where the Postal Service leaves the mail, such as in mailrooms or large mailboxes.

b. *Small Business*

1. The PES exceptions and suspensions discussed elsewhere in these Comments currently provide limited relief to small businesses allowing them, for example, to include invoices with shipping packages and to transfer computer and accounting data by private carrier, and legal documents and checks by private carrier. The PES exceptions and suspensions permit small businesses to transmit items more conveniently and, very likely, less expensively than by using the Postal Service.

2. Because there is no direct competition for delivering letters due to the letter monopoly in the PES, particularly commercial letters and advertising, the postage that would be charged by competitors to deliver such letters to small businesses is unknown. If the monopoly on such letters is relaxed and monetized, competitors will likely be able to reduce the prices. The George Mason study assumed some price reductions on the order of 10 percent.

3. The mailbox monopoly restricts the opportunity for small businesses to receive mail from secondary sources wishing to deliver information at low cost. Small businesses in small offices receiving mail directly from a private carrier could easily provide a second mailbox receptacle for mail from a Postal Service competitor. In many cases for very small businesses, of which the Public Representative has personal knowledge, although a small official mailbox may be available, office mail is often simply dropped in a designated in-basket or as a practical matter, handed to an employee. Larger businesses likely have mailrooms to sort the mail. In either case, additional different deliveries by competitors would not necessarily be inconvenient.

c. *Competitors*

The effect of the letter monopoly on potential competitors is that it precludes the opportunity to compete on any playing field with the Postal Service for commercial and advertising mail that does not need to be secure from interception or privacy concerns. If competition were introduced and the opportunity to deliver certain commercial and advertising mail is available, competitors would very likely innovate their systems of sorting, transportation or delivery. These new methods would assuredly lead to reduced postal prices. If the new methods do not produce savings, competitors are unlikely to introduce them. Thus, by operation of price elasticity, lower prices would increase the volume of such mail in the interest of several stakeholders, including the public's interest.

7. Are the weight and/or price requirements found in 39 U.S.C. 601(b) still relevant?

Whether or not the weight and price requirements are still relevant, they remain clear statutory law. Section 601(c) does not authorize the Commission to adjust the price or weight limits in § 601.

Any Congressional reconsideration of the limits in § 601(b)(1) and § 601 (b)(2) would need to balance the benefits to the Postal Service and the impact upon competition for the carriage of letters out of the mails. The Public Representative has no information whether either the price multiple or minimum weight limit is higher or lower than necessary to adequately protect the letter monopoly. The total volume of mail sent at various price and weight multiples must be reviewed to determine the magnitude of the impact on volumes carried by the Postal Service. If the price multiples or weight limit are too high, then competition for the carriage of letters out of the mails may be unreasonably suppressed. If the limits are too low, then more letters with a lower postage multiple or lower weight can be carried out of the mails to compete with the Postal Service and take needed letter volume from the Postal Service.

8. Are the weight and/or price requirements found in 39 U.S.C. 601(b) applied uniformly?

The Commission's intended meaning of "uniformly" is not explained in the question. The Public Representative has no information that the price and weight limitations in § 601(b)(1) and § 601(b)(2) are not applied uniformly by the Postal Service.

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?

According to the Postal Service, no regulations or administrative directives have issued in connection with § 601(b)(1) or § 601(b)(2) since the effective date of 601(b).⁵³ One advisory opinion issued after July 1, 2005, but before December 10, 2007.⁵⁴ The Postal Service acknowledges that due to § 601, it no longer has authority to promulgate new suspensions to the PES.⁵⁵

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.

The term "letter" is ambiguous. The Postal Service addressed that ambiguity in 1974 when it adopted and codified a detailed definition in § 310.1(a).⁵⁶ Since then, the

⁵³ Responses to CHIR No. 1, Question 1.a.

⁵⁴ *Id.*, Question 2.e. The advisory opinion is attached to the response. It notes the Postal Service's directive in its Domestic Mail Manual, 134.1.4 includes provisions for computing postage on a number of letters sent together to more than one agent. Advisory Opinion 06-01, May 11, 2006 at 4.

⁵⁵ *Id.*, Question 3.b.

⁵⁶ Comprehensive Standards for Permissible Private Carriage, 39 Fed Reg. 33209, September 16, 1974.

definition has been amended only three times.⁵⁷ The Postal Service's Publication 542 also addresses the definition of "letter." Pub. 542, 2 Definitions, 2-1 Letter (39 CFR 310.1). In addition, advisory opinions addressing the meaning and application of the term "letter" are available from the Postal Service's Office of General Counsel.⁵⁸

While "clarity" is in the eye of the beholder, one important measure of whether the definition of "letter" is clear is the number of times it has been amended since it was first adopted in 1974. As noted above, there have been only three amendments of § 310.1(a) over that 46 year period. The last such amendment was adopted almost 40 years ago in 1980. 45 Fed. Reg. 59871, September 11, 1980.

Another potentially significant indicator of the definition's clarity is the frequency of requests for advisory opinions. In that regard, the Postal Service states that it "has responded to infrequent correspondence concerning the Private Express Statutes since the implementation of section 601 [*i.e.* since 2007, but has not represented this correspondence to be in the form of an advisory opinion." Responses to CHIR No. 1, Question 2.e.

Given the small number of amendments to § 301.1(a) since its adoption in 1974, the absence of any requests for formal advisory opinions since 2007, and the infrequent correspondence received by the Postal Service regarding the Private Express Statutes over the last 13 years, it is fair to conclude that there is no pressing need for changes to the definition of letter, unless such a need now can be demonstrated. The Postal Service and others directly impacted by the Private Express Statutes may be able to demonstrate such a need.

The second consideration identified by the Commission is whether the definition of "letter" is concise. The Public Representative submits that conciseness is a relative

⁵⁷ 44 Fed. Reg. 52832, September 11, 1979; Private Express Statutes: Exclusion of Certain Matter, 45 Fed. Reg. 3034, January 16, 1980; 45 Fed. Reg. 59871, September 11, 1980.

⁵⁸ New advisory opinions can be requested pursuant to 39 CFR 310.6. Existing opinions can be obtained from the Postal Service Headquarters Library. Responses to CHIR No. 1, Question 2.a.

concept. On the one hand, the definition of “letter” consumes two-single spaced pages in the Code of Federal Regulations. The definition appears to be quite long. Upon closer examination, the definition addresses a wide range of communications containing a significant amount of detail to address the wide range of communications potentially subject to the letter monopoly. Without such detail, clarity could be sacrificed, thereby generating confusion and increasing the time and expense needed to administer the letter monopoly. Such a result would undermine the original objectives of the Postal Service’s regulations. 38 Fed. Reg. 17512, July 2, 1973.

While there may not be an immediate need for revisions to the definition of letter, there is another aspect of § 310.1(a) that requires attention. As discussed in response to Question 3, *supra*, the list of items excluded from the definition of “letter” by § 310.1(a) must arguably have been based upon the Postal Service’s exercise of its suspension authority under 39 U.S.C. 601(b) as it existed prior to enactment of the PAEA. If so, this presents a potentially significant practical problem. Under § 601(b)(3), the Commission’s authority to promulgate regulations necessary to carry out 39 U.S.C. 601 is expressly limited to “such carriage [as] 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) (emphasis added). In other words, if the Commission’s § 601(c) authority is limited to § 310.1(a)(7), the Commission and the Postal Service would share authority to revise § 310.1(a).

Recommendation. Given the potential for shared authority over § 310.1(a), the Public Representative recommends that, at a minimum, the Commission consider promulgating regulations that identify those portions of § 310.1(a) over which it has authority by virtue of 39 U.S.C. 601(c) in order to preserve that authority.

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?

This Question 11 includes three questions: whether the intent of Congress is correctly implemented by statute and regulatory requirements, whether those requirements advance the public interest, and whether any changes should be considered that can be implemented by regulation. An understanding of the intent of Congress is necessary to fully determine whether the statutory and regulatory requirements correctly implement that Congressional intent.

- a. *The intent of Congress is sufficiently included in the statute and regulations*

Inasmuch as Congress grandfathered particular Postal Service regulations by § 601(b)(3), it must be assumed the Postal Service's regulations represent the intent of Congress as far as § 601(b)(3) is concerned. The provisions of § 601(b)(1) and § 601(b)(2) are not embodied in any Postal Service or Commission regulations. It therefore cannot be said that the current regulations include the intent of Congress for § 601(b)(1) and § 601(b)(2). However, as noted above, the Postal Service's Publication 542 incorporates the terms of those sections in its explanation of the letter monopoly. Moreover, § 601(b)(1) and § 601(b)(2) are enforceable under the criminal law without explicit recitation in the Postal Service's regulations.

- b. *Do the regulations advance the public interest?*

There are no regulations implementing § 601(b)(1) and § 601(b)(2). As to regulations for those sections advancing the public interest, the question is therefore moot. As to whether the current statutory requirements and other regulations [regarding the letter monopoly] are in the public interest, those issues are discussed in Questions 12 and 13.c.

- c. *Should any changes be considered that can be implemented by regulation?*

At the present time, the Public Representative is not aware of any substantive changes to the exemption, exceptions and suspensions of the letter monopoly that need to be changed. Suggestions for changing in the interest of clarity are discussed in response to Questions 1, 2, 3 and 14. The problems with framing Commission regulations to modify the Postal Service regulations concerning suspension are discussed in response to Questions 4, 5 and 10.

Recommendation. As discussed in response to other questions, some existing Postal Service regulations of a procedural nature that may allow the Postal Service to alter the scope of the letter monopoly should be changed by regulation of either the Postal Service or the Commission.

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?

Certain significant legislative changes regarding the scope of the letter monopoly could in the longer run favorably affect the financial condition of all stakeholders in the postal industry, including Postal Service employees as well as the taxpayer. As discussed throughout these Comments, because of § 601(b)(3) and § 601(c), neither the Commission nor the Postal Service has much opportunity, if any, to meaningfully modify the scope of the letter monopoly. Any potential change to the regulations that is currently allowed by statute would have only limited, if any, impact on service and revenue of the Postal Service. Legislation is necessary to impact the scope of the letter monopoly. Legislation that simply and gratuitously opens the letter monopoly to the carriage of some or all specific letter products outside the mails as well as opening up the mailbox monopoly, without more, would deprive the Postal Service of critical

revenue and threaten its ability to continue meeting the USO without taxpayer assistance.

Given the Postal Service's current financial condition, a move that freely opens the monopolies would be foolhardy in this era and would threaten imminent financial collapse. However, if, as a condition of that monopoly modification, the *value of the monopoly is unlocked* with a large up-front payment or down payment followed by regular amortization payments to the Postal Service from a potential competitor(s) who would purchase, license or franchise rights to compete within portions of the current monopolies might, at once, alleviate much of the Postal Service's financial difficulties without burdening the taxpayer. At the same time, it could permit relatively short-term experimentation with easing a portion of the letter monopoly that does not involve personal messages between private parties.

At the current time, the flexibility afforded the Postal Service by the USO and the revenue generated by the monopolies continues to be significant. The consequences of any proposals to revise the letter monopoly by opening the door to competition, no matter how slight, must be carefully considered and analyzed. Estimates of various outcomes must cover a range of factors, if the monopoly is to be eased.

Legislation that permits monetization of the Postal Service's monopolies by purchase, license or franchise of a right to use part of the monopolies in competition with the Postal Service could positively and significantly affect the financial condition of the Postal Service, its competitors, users of the mail and be in the general public interest. It may be a game changer for the future of the Postal Service.

The Public Representative is not aware of any recent studies specifically measuring the value to the Postal Service of selling, licensing or franchising parts of the monopolies. That would require estimating the market value of opening up parts of the monopolies to potential competitors who could compete alongside the Postal Service for contestable mail. It appears likely that the market value of a part of the monopolies is a

multiple many times the Postal Service's current profit from contestable mail. It may amount to tens of billions of dollars for the benefit of the Postal Service's stakeholders.

The Public Representative is only recommending the Commission commence a study or appropriate proceedings to estimate the potential market value of a part of the Postal Service's monopolies to provide a basis for further Congressional consideration. The Comments below discuss views about changing the letter monopoly, the current measures of the value of the letter and mailbox monopolies, thoughts about monetization of the monopolies, measuring potential market value of the monopolies, alternative methods of opening the monopolies for various letter products, and the potential benefits of competition.

a. *Views of the Postal Service, users of the mail and the general public about potential changes in the letter monopoly*

The Postal Service has argued that the letter and mailbox monopolies are necessary to offset the cost of services that would not be operated if the Postal Service were operating like a business. USO Report at 187. Yet, the most frequent argument against the letter monopoly is that "competitive markets might produce more efficient, innovative, flexible, and fairer services to buyers and producers." *Id.* If some of those monopoly advantages can be monetized, much of the cost of the USO would still be covered by the monopolies, but other USO costs might be attributed to other governmental operations. For instance, the actual USO cost of postal services to areas of the nation that the Postal Service would not otherwise serve was only \$500 million in FY 2019, out of a total USO cost of \$5.21 billion.⁵⁹ The monopolies remaining with the Postal Service would continue to be available to recover much of that \$500 million USO cost. Moreover, other USO costs may be absorbed more properly by other governmental departments; such as, the costs of the Postal Inspection Service that

⁵⁹ Annual Report to the President and Congress, Postal Regulatory Commission, FY 2019 (FY 2019 Annual Report) at 42, Table IV-1.

assists in enforcing the criminal laws. The Inspection Service's costs may be more appropriately absorbed by another federal department. The costs of some other public services may be more appropriately met by other sources responsible for those costs. Also, free or reduced rates for broad public benefits that are currently covered by the monopolies might in some instances be paid by taxpayers. Comprehensive legislation opening the monopolies should address these matters.

The Commission's 2008 USO Report found through a survey that while the public expected the current level of universal service to continue, there was not unanimity to continue the monopolies. USO Report at 155. The lack of unanimity to continue the monopolies in that survey was detected before the economic contraction in 2008 that led to the financial instability of the Postal Service. The 2008 USP Report recognized the 2008 recession rendered less germane the results of the survey. *Id.* Today, almost 12 years after the 2008 Report and longer since the survey, increased financial uncertainty of the Postal Service renders the feedback about monopolies even less germane.

In addition, the data obtained in the study was limited. The study only surveyed households with landline telephones and tended to survey senior citizens not employed outside the home. *Id.* at 156. Communications have also changed since the survey. At the time, less than a third of those surveyed received online bills and more than 2 of 5 said they would not allow bills currently received by mail to be sent by email. Also, more than 4 out of 5 paid bills using the Postal Service at the time, and half of the respondents did not pay any bills online. *Id.* at 157. The use of the internet to pay bills is dramatically different today. That would very likely have an impact on the public's current views about the monopolies.

The survey also determined that the preferences for the then current levels of volume and delivery frequency for advertising mail were low, with a very high number (95 percent) that would not object to delivery 3 days or less. *Id.* This suggests that even at that time, the public did not desire the service levels for advertising mail to be as high as the levels of service for other market dominant mail.

Although 58 percent favored the Postal Service's exclusive right to the mailbox monopoly, "significantly more people" would allow other entities access to the mailbox if they were specifically named. There was a split among respondents about whether the rates or service quality would increase or decrease. *Id.* at 158, 160. Only 19 percent said they would be inconvenienced if advertising mail were delivered one day late. *Id.* at 160.

Although the 2008 USO Report found that the public was inclined to permit some inroads into the monopolies, the more recent changes in mail volumes and bill paying practices together with the Postal Service's reduced financial condition suggests the public today would be more amenable to considerations of a workable adjustment to the letter and mailbox monopolies.

In 2008, the Commission explained that the economic crisis had a substantial impact on volumes and revenue. Had the 2008 USO Report been issued previously, the Commission would not have recommended changes to the USO or postal monopolies. But, in light of the economic slowdown, the Commission recommended that Congress closely monitor the postal situation and recognized the possibility "now" existed "that significant changes may become necessary to preserve effective and efficient postal service for the Nation." *Id.* at 1. The further economic and financial events since 2008 now strongly suggest the need to consider near-term changes to the postal monopoly and also to the mailbox monopoly to enable the purchase, license or franchise of a portion of the letter monopoly. The advantage for the public of a license or franchise is that it would have a time limit but be renewable, and revocable for cause. The advantage to the licensor or franchisee is that the initial out-of-pocket cost is likely to be less.

b. *Views expressed in reports to Congress on the potential for change of the USO or Postal Service monopolies.*

The Commission's 2008 USO Report noted that any consideration of potential changes to the statutory or regulatory requirements regarding the scope of the letter

monopoly should start with the Commission's recommendation in the 2008 USO Report. It stated, "Given the continuing drop in mail volume, broad support of the monopoly by stakeholders, and an uncertain economic climate, the Commission does not recommend any changes to the letter monopoly." *Id.* at 199. It concluded that as the postal industry evolves, the USO study and the additional contractor's work (GMU) "should provide valuable insight to policy considerations surrounding possible changes to the monopoly in the future." *Id.* The USO Report concluded that "any changes to the USO or monopolies be carefully balanced in light of the Postal Service's uncertain financial state" and that the Postal Service requires the flexibility afforded by the postal monopolies and a flexible, qualitative USO. *Id.* At 200-201.

The Commission's overview stated, "The Commission recommends that, before any decisions to adjust or eliminate universal service or the monopoly are made, the resulting impact on the societal benefits of a Federal postal service should be carefully assessed." *Id.*, Executive Summary at 6.

In the 11 years since those conclusions were reached, mail volumes have continued to drop and the Postal Service's financial state has become even more uncertain. At times, its financial state became precarious when working capital and cash on hand dipped far below desirable levels.⁶⁰ In 2019, capital expenses and the obligations to serve the public were only met by defaulting on retiree benefit fund and retiree health benefit fund obligations.⁶¹ Analysis at this time must consider the

⁶⁰ For instance, the operations were so short of cash that early in FY 2012 the Postal Service's cash liquidity was mostly in the range of only \$2 to \$3 billion, well below the minimum liquidity level of \$7 billion (about 32 days of operations). Form 10-K Report at 33, United States Postal Service, Integrated Financial Plan FY 2012 (IFP), filed November 23, 2011 at 6.

⁶¹ In 2019, the Postal Service's Form 10-K stated, "As of September 30, 2019, past due amounts payable to the PSRHBF totaled \$47.2 billion, past due amounts payable to OPM for CSRS totaled nearly \$4.8 billion and past due amounts payable to OPM for FERS totaled \$3.4 billion." United States Postal Service, 2019 Report on Form 10-K, filed November 14, 2019 at 40. It continued, "The source of funds needed to fulfill these commitments [for capital expenditures and to meet statutory obligations to provide prompt, efficient and reliable postal service to the nation] has been generated from our operating activities and defaults for non-payment on certain retirement and retiree healthcare obligations." *Id.* at 41.

continuing inability of the Postal Service to shake itself out of the financial morass of the last ten years. Absent a taxpayer bailout, mailers of all types may discover that opening the monopoly with the potential for improved services and prices is a better alternative than the very large rate increases most certainly required to recover Postal Service costs.

More recently, the President's December 5, 2018 Task Force Report recommended franchising the mailbox: "As a means of generating more income, the mailbox monopoly could be monetized." Task Force Report at 53. It could be done by retaining the mailbox monopoly and regulating access for a fee to certified private companies. *Id.* The Task Force reached a finding as a first recommendation under the heading "franchising the mailbox" that, "[t]he USPS should explore new business opportunities that allow it to extract value from its existing assets and business lines." *Id.* at 61. It further recommended monetizing the mailbox monopoly as a strategic option which it viewed as an administrative action to generate more income. *Id.* at 65. The Task Force Report does not explain how the Postal Service could administratively franchise access to the mailbox without new statutory authority. Perhaps it had in mind an imaginative application of the general powers of the Postal Service through §§ 101(a) and 404(a), not heretofore recognized, that would permit that type of administrative action without new legislative authorization.

c. *USO and monopoly reports*

The current estimates of the profitability of the mailbox and the letter monopolies are based upon methodological studies that have been available for many years. The Commission's methodology measuring the cost of the USO and the letter and mailbox monopolies rests on many detailed assumptions about the volumes of contestable mail that might be lost to competition and the

loss to the Postal Service of opening up the monopoly. They have been revised several times and are again currently undergoing another review in Docket No. PI2020-1.⁶² The monopoly profits for each of five most recent years are regularly included in the Commission's Annual Reports to the President and Congress.⁶³ It is of critical importance to understand that the model assumes a competitor will only take contestable mail where the revenue exceeds not only the attributable costs but also the "fixed" costs. *Id.* at 51. The assumed fixed costs are set forth in the model. Presumably they apply the Postal Service's fixed costs. A competitor, particularly one with a delivery network and organizational structure in place, may have much lower fixed costs.

The 2008 USO Report estimated the value of the letter and mailbox monopolies to the Postal Service. It said, "Profits under the status quo are calculated and then compared with profits without the monopoly element under review, leaving the elements of the USO in place." USO Report at 143. The 2008 USO Report concluded, "A first estimate of the annual value of the combined letter mail and mailbox monopolies, based on FY 2007, is \$3.5 billion, although this estimate is subject to substantial variation." USO Report, Executive Summary at 5.

The study by George Mason University (GMU) computed several alternative estimates of the value of the letter and mailbox monopolies combined. The GMU analyses did not confidently predict the precise effect on profits from easing the letter monopoly, but offered an array of assumptions about the outcome from contracting out the mailbox and letter monopolies. The outcomes were dependent upon competitors' service options, *i.e.*, discounted rates to attract customers from 0% up to 20%; 1, 3, or 6 delivery days; estimated competitor cost advantages of 0% up to 30%; and competitors

⁶² Docket No. PI2020-1, Public Inquiry on the Methodology to Estimate the Value of the Postal Service Letter and Mailbox Monopoly, October 1, 2018 (Order No. 5280).

⁶³ *E.g.* see, Annual Report to the President and Congress, FY 2019 at 50 (FY 2019 Annual Report).

achieving contestable volume of 50% up to 150% of the contestable mail available. USO Report, at 144, Table 5. At that time, estimates of the combined values for the letter and mailbox monopolies varied from \$0.2 billion to \$7.10 billion with a base case of \$3.48 billion. *Id.*

Most recently, the Commission's annual estimates of the postal monopoly, combining the letter and mailbox monopolies, has increased dramatically since 2008. Over the last five years the value has risen from \$4.61 billion to \$5.51 billion in FY 2018. 2019 Annual Report at 50, Table IV-6. Again, "The value of the postal monopoly is an estimate of the profit that the Postal Service would potentially lose if both the mailbox and letter monopolies were lifted and the Postal Service were subject to competition for mail currently covered by the postal monopoly." 2019 Annual Report at 50. The combined letter and mailbox monopoly are valued at 5.51 billion, while the mailbox monopoly alone is valued at only \$0.99 billion. Although a separate estimate of the value of the letter monopoly is not provided, it is apparent that the letter monopoly represents a significant portion of the \$4.52 difference in the value of those monopolies. *Id.*

The Comments filed with the Commission in Docket No. PI2020-1 evaluating the methodology estimating the value of the letter and mailbox monopolies suggest the current method does not necessarily yield the "upper bounds" of the monopolies' value.⁶⁴ PostCom believes the current methodology "may actually understate the value of the monopoly" for several reasons. First, it contends that contrary to the underlying assumption in the model, the Postal Service is not obtaining the greatest possible contribution from its monopoly products. It contends current contribution levels could be higher—productivity has stagnated in recent years and unit costs have been growing faster than inflation. It further notes the high cost coverages for market dominant letter

⁶⁴ Docket No. PI2020-1, Comments of the Association for Postal Commerce (PostCom), November 1, 2019 at 2.

products, strongly suggesting latent demand, particularly for those products with high cost coverages that are considered contestable markets. *Id.* 3.

United Parcel Service (UPS) also argued the methodology does not take economies of scale fully into account.⁶⁵ It also contends the methodology underestimates the number of routes where competition could occur. *Id.* at 3. The recent volume of e-commerce packages has changed the dynamics of how private firms take additional volumes into account. Also, more routes are contestable geographically. *Id.* It suggests a range of values for the monopoly value should be prepared. *Id.* at 4. If only the better routes were skimmed, that would reduce competitor's processing costs.

On the other hand, the model assumes the competitor does not incur mail processing cost such as sorting to carrier routes. The model does not consider mailer's switching cost or brand loyalty in estimating volumes to be contested away. Also, bulk parcels, a competitive product, is considered contestable mail if the mailbox monopoly were eased.⁶⁶

- d. *Contribution over attributable costs for much of the contestable mail indicates large profit possibilities and high market value for a potential competitor.*

PostCom points to First-Class Mail Presort, Marketing Mail Letters, and HighDensity/Saturation Letters with high coverages as an indicator of latent demand in areas likely to be contestable markets. PostCom at 3. Not only do

⁶⁵ Docket No. PI2020-1, Initial Comments of United Parcel Service, Inc. on Notice and Order Providing an Opportunity to Comment, November 1, 2019 (UPS Comments) at 3. It also says the assumptions that competitors are 10 percent more efficient but would offset this with a 10 percent discount are unclear, especially in the light of today's markets. *Id.* at 2.

⁶⁶ The Commission's 2019 Annual Report indicates several other shortfalls in the analysis that may result in an overstatement of the profitability of the monopolies. Among them are the assumption that the competitor would win all contestable mail where revenue exceeds attributable costs and that competitor's entry for each route is evaluated regardless of the extent of route clustering. 2019 Annual Report at 51 n. 320.

these products have high cost coverages, but together with very large volumes, they represent an enormous possible contribution that would be very valuable to a potential competitor. Any market value computation requires adding in the overhead costs of a competitor. A potential competitor should be willing to expend a very large payment for the right to contest those markets. For instance, First-Class Mail, presorted letters and cards yielded revenue in FY2019 of \$14.192 billion with a per piece contribution of 25 cents on 37.131 billion pieces for a contribution of \$9.333 billion above attributable costs.⁶⁷ Smaller but significant contribution could be harvested by a competitor from Marketing Mail letters that in FY2019 provided \$9.713 billion of revenue with a 189.6 percent cost coverage.⁶⁸ This adds an additional potential contribution of \$4.589 billion above attributable costs to a competitor entering this contestable product market space. Lastly, PostCom includes HD/SAT Letters (high density/saturation) with revenue of \$1.196 billion and a cost coverage of 204.1 percent. *Id.* This product could yield another \$0.610 billion of contribution from these contestable markets. *Id.* Altogether, these three products currently generate a contribution of \$20.852 billion above the Postal Service's attributable costs.⁶⁹

These are contribution dollars the Postal Service claimed in its Annual Compliance Report for last year, FY2019, which necessarily assumes the Postal Service's current level of productivity and efficiency, its current wages and benefits for those who process and deliver this mail, and Postal Service attributable processing equipment and transportation costs. Thus, the Comments from Docket No. PI2020-1 indicate the letter and mailbox

⁶⁷ 2019 ACR Report at 7, Table 1.

⁶⁸ 2019 ACR Report at 13, Table 2.

⁶⁹ Carrier Route Marketing Mail has a negative contribution of \$0.004 billion on revenue of \$1.669 billion. *Id.*

monopolies most likely have enormous potential for an entity bidding to purchase, license or franchise the right to carry certain letter products out of the mails in competition with the Postal Service.

Of course, potential competitors would already have some, or perhaps much, of the additional overhead organization, facilities and equipment needed to process and deliver the mail it captures. In time, as more volumes of mail are successfully contested, the Postal Service's requirements for overhead investment will diminish. As the volumes to be processed and delivered are reduced, the necessary employee base should also be reduced which may lower the requirements for the retiree and retiree health benefit funds. In addition, its need for administrative personnel and existing overhead facilities and equipment must necessarily be reduced.

Of course, there must be careful consideration and provision for the Postal Service's employees who may be affected by an opening of the monopoly or monopolies. Then current Postal Service employees should be provided the opportunity for voluntary reassignment to the competitor with salary and benefit protections as a condition of a sale, license or franchise. Other employee positions for handling the newly competitive mail could be shed through attrition or by reassignment within the Postal Service without losing benefits.

e. *Potential competition*

Some potential competitors such as UPS, FedEx and, increasingly, Amazon have large networks assembled that would provide some basis for processing and delivering contested mail in a short period of time. United Parcel Service recognized this in their recent comments in Docket No. PI2020-1. It stated, "But a number of potential entrants—including UPS, FedEx, and Amazon—have developed extensive transportation and sorting operations.

Thus, the Commission should consider modifying or relaxing this assumption “that only presorted, locally dropshipped market dominant mail volumes are contestable because an entrant does not have sufficient upstream infrastructure.”⁷⁰

f. *Innovation will follow increased competition.*

Sale, license or franchise of parts of the monopolies is likely to generate many innovations in the delivery and receipt of letter mail products and pricing, and therefore add additional volume that would be in the interest of all stakeholders in the mailing industry. A significant conclusion of the George Mason study in 2008 that continues to be true as a general proposition is that abolishing the postal mailbox monopoly:

might well hasten a cycle of innovation in certain respects comparable to the innovations in communications that followed the breakup of the Bell System in 1984. Such an experiment is by no means without historical precedent. Lawmakers, after all, have long hailed competition in mail delivery as a catalyst for innovation. USO Report, App. D at 80.

The Public Representative agrees with George Mason’s conclusion.

Potential innovations by an entity or entities that would purchase, license, or obtain a franchise to carry letters outside of the mails and, at first, to deliver those letters to mailboxes are not yet known and perhaps not even imagined at this time.

At one time, a single telephone was the only communication device considered for the home. The only question was where to put that black phone and whether it should be on the wall or on a pedestal. Nobody conceived of multiple wireless phones providing many types of information. Similarly, today, the only question for many residences is whether to place the black or silver or white mailbox on the outside of the house or on a post or, for businesses,

⁷⁰ UPS Comments at 4. UPS cites as a basis for the assumptions in the Commission’s methodology, the Commission’s 2008 USO Report at 144-49.

deciding the size of the in-basket within an office setting. Mail slots generally are available in only two widths, small and smaller. Innovation due to competition could greatly enhance and reduce the cost of current practices of delivery. Until Harry Potter came along, no one thought that out of necessity owls could provide a reliable delivery service, just as crows seem to have done during the period of the Game of Thrones or pigeons before them. Innovation in formerly monopoly areas can only improve service in the longer run.

A potential competitor would of course consider the future income before offering to enter the market. The estimate could take into account a variety of technical advances such as drones, electric carts or vehicles, or self-driving vehicles for delivery, new types of mailboxes or cluster boxes, a variety of possible new delivery locations on or near an address, new billing methods, the advantages of advertising ties with another business of the carrier, new shapes of receptacles including electronic receptacles and delivery robots, as well as different or reduced delivery days or delivery at various times of day. Special business to business arrangements for advertising mail or the delivery of periodicals to residences might be arranged with fees that may be paid by the carrier or the recipient for delivery as negotiated between the carrier, the mailer and the consumer.

g. *A need for studies to unlock the value of the postal monopolies.*

All of the Commission's calculations concerning the monopolies focus on determining the "value of the monopolies in terms of the potential lost "profit" of the Postal Service if the monopolies were removed. While such studies are interesting as far as they go, they do not represent or even suggest the next move forward. They only demonstrate the proportion of the Postal Service's business accounted for by the two monopolies (as well as the USO cost). There does not appear to be any discussion about whether a particular proportion of business or profit level is significant or more significant than another.

Apparently, the monopoly profit calculation implicitly assumes that much of the letter monopoly is unnecessary as a matter of economics, although it is needed to support the USO's below cost operations. The underlying theme seems to be that, when the Postal Service's financial health strengthens sufficiently, the postal monopoly could be opened for competitors. That is, opened without charge to those competitors who would choose to compete after unilateral relaxation of the monopoly.

Another approach may be more desirable, and one that may solve much of the Postal Service's financial problems without first waiting years for the Postal Service to reach full financial stability, that is, monetization of some of the postal letter monopoly and the mailbox monopoly. The calculated "value" to the Postal Service of the monopolies attempts to determine annual lost profits from opening the monopoly. It essentially calculates the potential loss of contribution on the contested portion of the mail, some, but not all of which, is letter mail. Rather than giving away the monopoly by simply changing the rules, the monopoly, or access to the monopoly, should rather be sold or licensed for a certain period of time, perhaps in one or more segments.

Monetizing the monopolies in this way might provide an enormous injection of needed funds into the Postal Service. For instance, the estimated profit for the Postal Service from the monopolies is \$5.51 billion, of which only \$0.99 billion derives from the mailbox monopoly. The letter monopoly must represent a very large part of the remaining \$4.52 billion even though the two monopolies cannot simply be subtracted from one another. FY2019 Annual Report, Table IV-6 at 50. Potential annual profits approaching \$4 billion should, when capitalized, be worth many times the \$4 billion. It may be 6, 7 or more times \$4 billion in this period of low interest rates. Perhaps 10 times this estimated annual profit for a potential buyer if costs can be reduced by technological innovations. Without serious estimates of market value being undertaken, the price to purchase the rights to carry advertising mail in competition with the Postal Service may be \$20 billion to \$30 billion, or much more. The George Mason study briefly suggested a similar path, noted above, that could unlock monopoly value.

- h. *The Postal Service's financial condition may be improved significantly by monetizing parts of the mailbox and/or letter monopoly*

While it is far beyond the scope of these comments or this rulemaking, the potential options for a negotiated purchase of the rights to the current monopoly or payment for licensing by one or more interested purchases are unlimited.

The retirement and health benefit funds could be placed on track and normal payments for those costs might be received annually. Purchase of part of the monopolies would also necessarily reduce volumes of First-Class and Standard Mail resulting in reduced number of necessary employees as well as reducing the retiree health benefits and retirement annuity requirements calculated by OPM. The risk of taxpayer bailout would be lessened. Unless the market value of a sale, license, or franchise of portions of the monopolies are calculated, their opportunity cost will never be known. With so much potential value that might be unlocked, all stakeholders could benefit from a full study of the monopolies' potential market value.

Recommendation. The Commission should undertake a study and analysis or public inquiry to begin to estimate the *market* value of parts of the monopolies that might be sold, licensed or franchised. These studies could then be unilaterally reported to Congress to serve as a basis for legislative changes needed to monetize the monopolies.

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?

There are significant social, economic, technological, and other trends that must be taken into account by Congress in considering the scope of the monopoly. Congress most certainly must take into account the technological trend of internet communications that increasingly compete for Postal Service markets. Since the end of the Great Recession in 2009, the economic trend has

gradually improved for the Postal Service, but it remains financially unstable and unable to meet the funding requirements for retirees' annuities and health overseen by OPM. These trends are well known to Congress.

Further, social and technological changes will most certainly arise from the cataclysmic impact of the corona virus now raging across the nation. The Postal Service has already received authority to borrow up to \$10 billion from the U. S. Treasury under the CARES ACT.⁷¹ That amount will likely serve only short term cash requirements and will add to the Postal Service's liabilities. It remains to be seen what the ultimate impact on mail volumes will be from this pandemic. Unfortunately, these factors all exacerbate the Postal Service's financial difficulties and suggest that Congress should seriously look at the value of monetizing the postal monopolies to sell, license or franchise part of the letter and mailbox monopolies.

Two other less well-known trends should also be taken into account by Congress.

- a. *The Postal Service provides a new type of security; security of privacy from the interception of internet communications*

A significant technological trend has developed with the internet and improved technology that must be remembered by Congress whenever it considers the public's interest in maintaining an independent Postal Service for First-Class letters to communicate private messages between individuals. The trend has slowly and quietly developed and presents increasing threats to the security of internet communications. That is, the technological developments that allow persons with a computer and some knowledge to easily intercept internet communications. That technological trend makes

⁷¹ Coronavirus Aid, Relief, and Economic Security Act (CARES ACT), H.R. 748, March 27, 2020, § 6001.

it all the more important to maintain a viable Postal Service to carry letters with private messages between individuals.

The Postal Service's carriage of mail and the sealed against inspection rule provide a security for mailers' communications that is increasingly problematic with electronic internet competitors of the Postal Service where apparently most if not all messages can be intercepted and read for financial and personal information without detection. This type of mail security from public interception of messages has not traditionally been regarded as the kind of security the Postal Service offers. The sealed against inspection requirement has most often been cited to prevent government infringement on privacy or from those having local access to mail boxes, but not to prevent infringement by anonymous persons or businesses across the nation in the general population seeking to gather, secretly, financial or personal information. On the other hand, the very nature of the Postal Service's collection, transportation and delivery process prevents the widespread hacking of such private information from individual physical letters. Thus, the Postal Service is now providing a measure of security for letters from internet hackers not heretofore considered the problem it has become.

If the Postal Service's costs skyrocket and the postal business moves down a slippery slope to where the Postal Service can no longer carry letters profitably or at a reasonable price, then low-cost communication outside the internet will be lost and the security aspect of personal letters will be lost. It goes without saying that the potential dangers from a few persons or groups controlling information on the internet, either in or out of the country, without the alternative safety valve from postal letter communications would not be in the national interest. A limited relaxation of letter and mailbox monopolies by monetization could provide increased financial resources to support the continued delivery of personal communications mail requiring security.

b. *Other public benefits of the Postal Service that Congress should consider*

The Postal Service continues to provide many societal benefits as reported by the Commission in its 2008 USO Report.⁷² These continue to be important and should continue to be funded by the Postal Service along with the necessary parts of the USO. Those societal benefits and the USO are not dependent upon the Postal Service continuing to hold both the letter and mailbox monopolies in their current form. The monopolies are separate and apart from the social benefits and are not linked with the USO. Rather than providing a source of support for the USO as the monopolies have traditionally been portrayed, consideration should be given to ways of monetizing the monopolies to give the Postal Service access to a different and significant source of funds to revitalize the Postal Service in the longer run toward a viable and financially stable Postal Service. Any study of the market value of the Postal Service monopolies should also consider the potential societal benefits that a new competitor who pays for rights to a part of the letter monopoly might provide.

c. *The Postal Service's financial situation now requires studies to estimate the market value of monetizing parts of the monopolies for consideration by Congress*

The monopolies were established long before the relatively recent historic technological trends of internet communication that commenced in the late 1990s and the social media phenomena that has exploded since 2000. The technological trend of

⁷² Those benefits cited in the 2008 USO Report include binding the nations together through its physical infrastructure of post offices and daily carrier mail deliveries, assisting in passport applications, Selective Service registration, IRS Forms dissemination, a Cities Readiness Initiative for potential public health emergencies for carriers to transmit medication in the event of a bioterrorist attack, acting as a first responder for homeland security after national disasters as well as the Postal Inspection Service that assists other law enforcement agencies to investigate crimes outside of the Postal Service. There is also the Carrier Alert Program where carriers note unusual inactivity or injuries at a residence or other addresses. A program to help in the search for missing children and a food drive to stamp out hunger. This continuing trend of providing public assistance should be factored into Congress' decisions to strengthen the Postal Service's finances through innovative approaches. USO Report at 172-175.

computing has fostered new social media affecting interpersonal and commercial communication. The studies for the 2008 Reports pursuant to the PAEA by the Postal Service and the Commission were undertaken prior to the explosive growth of social media. They did not consider fully the impact of the recent technological and social trends on the desirability of continuing all or part of the monopolies. Survey questions about the monopolies were asked in the context of the internet as it had developed only up to that time, at least 15 years ago, or nearly a generation.

As discussed in Question 12, above, opening a market to competition can be expected to lead to creative innovation to the marketplace. The processing costs as well as product delivery and transmission methods can change dramatically through innovation that ultimately changes prices and value to the consumer. These factors could significantly change the economics of the monopolies for a potential purchaser, licensee, or franchisee estimating the market value of the monopolies available.

The technological trend has also changed the economics of the postal landscape as volumes continue to be lost to the internet. These losses have placed the Postal Service's short and long term financial stability at peril. It is well-known that Congress should take these trends into account when considering legislation regarding the Postal Service. Not so often recognized is the increasing need to also consider seriously the value of the monopolies; not merely calculating their cost or profit to the Postal Service, but estimating the unlocked value of the monopolies by monetizing certain parts of the monopolies through sale or license by open bid. The response to question 12, above, discusses the potential benefits to the Postal Service, competitors, mailers, consumers and the general public as well as some methods for estimating the value of monetization. The method of calculating market value would differ in many ways from the methodologies for measuring the value of the monopolies to the Postal Service.

To be clear, this proposal to study the potential for monetization of parts of the monopolies in no way is intended to infringe on the most traditional aspect of the service provided by the Postal Service. Personal communications between individuals must

continue to be delivered by the Postal Service, privately and securely, free from inspection. The Postal Service must also continue to compete to provide those products for which monopoly rights are sold, licensed or franchised.

Recommendation. Any Commission study and analysis or public inquiry to estimate the *market* value of parts of the monopolies that might be sold, licensed or franchised should also recognize in its reports to Congress that the social benefits of the Postal Service would continue after such transaction.

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?

In order to exercise its authority under 39 U.S.C. 601(c), the Commission must address two basic questions. First, what should the Commission do? Second, how should the Commission do it? As presented, Question 14 seems to assume that new Commission regulations will be limited to changes to 39 CFR 310.1 and 320.2 through 320.8. But, as discussed in the Public Representative's answers to several of the preceding questions, changes could be required to other existing Postal Service regulations. For example, the response to Question 3 regarding 39 U.S.C. 601(b)(3) notes that 39 CFR 310.2(c) which provides for additional Postal Service monopoly suspensions should be removed. In addition, the better approach is for the new price-limit exception and weight-limit exception to be added to the existing Postal Service regulations, although that is not a necessity.

Other commenters have also raised issues that could require changes to regulations beyond § 310.1 and §§ 320.2 through 320.8. *E.g.*, the assertion that § 310.2(b)(2) and the regulations in § 310.2(d) and § 310.3 are based upon prior Postal Service suspensions of the letter monopoly. See, USO Report, App. C at 240-242. While the Public Representative does not agree with all of the positions advocated by these commenters, their acceptance by the Commission could require new regulations.

Although some changes could be desirable, the Public Representative believes that, except in rare cases, any changes to the Postal Service's nonbinding guidelines would be beyond the Commission's authority to address under 39 U.S.C. 601(c). For example, Postal Service directives, such as Publication 542, are not binding regulations. Similarly, advisory opinions which address applications of statutory or regulatory provisions are issued for individual requests for guidance and do not purport to establish generally applicable binding rules. Cases could, of course, arise in which a directive or advisory opinion does constitute a *de facto* rule or regulation. But should such cases, if any, be presented, the Commission would be able to assert its authority under 39 U.S.C. 601(c).

The second question that the Commission must address—*i.e.* how should it act when new regulations are necessary—is potentially complicated. By giving the Commission the authority to promulgate “regulations necessary to carry out this section [*i.e.* § 601], Congress has divided the authority for implementing the letter monopoly between the Commission and the Postal Service. As discussed in the responses to prior questions, § 601 is not the only statutory provision that limits the scope of the letter monopoly. Those other statutory provisions carve out exceptions to the monopoly for cargo letters, letters of the carrier, carriage by private hands without compensation, carriage by special messenger, and the prior-to-posting exception. 18 U.S.C. 1694, 1696. Regulations implementing these exceptions have been adopted by the Postal Service, and remain subject to Postal Service authority alone because they are not suspensions.

This bifurcation of authority has the potential for creating unnecessary confusion and conflict. For example, the Commission could, by acting within the undisputed scope of its authority under § 601(c), adopt regulations that effectively supplement, or seek to modify, or eliminate one or more existing Postal Service regulations. Unless the Postal Service were to incorporate those changes into its regulations, persons who rely on the Postal Service's regulations could mistakenly overlook the Commission's changes. At a minimum, unnecessary confusion would be created by the existence of

two parallel sets of regulations—one set maintained by the Postal Service and one by the Commission. While appropriate cross-references in the two sets of regulations might eliminate some or most confusion, they would not completely eliminate confusion. At a minimum, parallel sets of regulations would be cumbersome.

One possible solution would be for the Commission to establish procedures for the consideration, adoption, and publication of regulations under 39 U.S.C 601(c) and to seek agreement from the Postal Service on a mechanism under which the Postal Service would revise its regulations to incorporate the regulations adopted by the Commission. If such an agreement cannot be reached, the Commission could incorporate the provisions of any Postal Service regulations it adopts under 39 U.S.C 601(c) into its own regulations, include the complete set of regulations in the Code of Regulations, and post those regulations on its website. However, in the latter case, some Postal Service regulations such as those issued pursuant to 18 U.S.C. 1694 and appearing at 39 CFR 310.3 could not be included in the Commission regulations.

Recommendation. The method for regulations chosen by the Commission should seek to ensure that there is a single source of authoritative regulations easily accessible by interested persons and is transparent.

V. RECOMMENDATIONS BY QUESTION

The numbers below refer to the Questions presented.

1. Recommendation. A new regulation should be issued either by the Commission or the Postal Service to make clear the Postal Service may approve only practices which are within the confines of interpreting existing regulations. See *supra* at 19.

Recommendation. Additional regulations are needed to clarify the extent of the Postal Service's authority to approve characteristics of an envelope carried out of the mails under its rule 310.2(b)(1)(ii), for suspension of any part of paragraph 310.2(b) as provided for in § 310.2(c), and § 310.6 regarding advisory opinions. See *supra* at 19.

3. Recommendation. As time passes, it may be more difficult to locate with certainty those regulations that were in effect on July 1, 2005 and December 10, 2007, unless an affirmative statement is added within the regulations identifying the regulations effective as of the appropriate dates. *See supra* at 23.

Recommendation. The Commission should clarify that the scope of § 601(b)(3) covers only those specific regulations that purport to permit private carriage of letters by suspension under § 310.1; §§ 320.2-320.8; and any other regulations that can be shown to have been based on the suspension authority. *See supra* at 26.

Recommendation. The Commission should clarify that the Postal Service no longer has the authority to suspend operation of the letter monopoly. The method for taking such actions is discussed in our response to Question 14. *See supra* at 26.

Recommendation. The Commission should clarify § 601(b)(3) with its own regulations stating the extent to which the Commission interprets § 601(b)(3) as prohibiting any Postal Service modification of the monopoly regulations of the Postal Service. *See supra* at 28.

4. Recommendation. The Commission should define the meaning of the words “any regulations necessary to carry out” in § 601(c) and specify that the Postal Service may continue to provide advisory opinions interpreting its rules. The Commission should also consider by regulation defining “any regulations necessary to carry out” as permitting the Postal Service to issue substantive rules regarding the monopoly as long as the Commission has final authority or oversight regarding proposed rules. *See supra* at 29.

5. Recommendation. The Commission might tailor new explanatory regulations that lay out in orderly format where in the statutes and in the Postal Service regulations each of the requirements regarding the monopolies are included in statute, the Postal Service regulations, its Operating Manuals or advisory opinions, as the case may be. *See supra* at 30.

10. Recommendation. Given the potential for shared authority over § 310.1(a), the Public Representative recommends that, at a minimum, the Commission consider promulgating regulations that identify those portions of § 310.1(a) over which it has authority by virtue of 39 U.S.C. 601(c) in order to preserve that authority. *See supra* at 36.

11. Recommendation. As discussed in response to other questions, some existing Postal Service regulations of a procedural nature that may allow the Postal Service to alter the scope of the letter monopoly should be changed by regulation of either the Postal Service or the Commission. *See supra* at 38.

12. Recommendation. The Commission should undertake a study and analysis or public inquiry to begin to estimate the *market* value of parts of the monopolies that might be sold, licensed or franchised. These studies could then be unilaterally reported to Congress to serve as a basis for its consideration of changes needed to monetize the monopolies. *See supra* at 53.

13. Recommendation. Any Commission study and analysis or public inquiry to estimate the *market* value of parts of the monopolies that might be sold, licensed or franchised should also recognize in reports to Congress that the social benefits of the Postal Service could continue after such transaction. *See supra* at 58.

14. Recommendation. The method for regulations chosen by the Commission should seek to ensure that there is a single source of authoritative regulations easily accessible by interested persons and is transparent. *See supra* at 60.

VI. CONCLUSION

The Public Representative respectfully submits the foregoing comments for the Commission's consideration.

Respectfully submitted,

Kenneth E. Richardson
Public Representative

Richard A. Oliver
Kenneth R. Moeller
Assisting the Public Representative

901 New York Avenue, N.W.
Washington, D.C. 20268-0001
(202) 789-6859
richardsonke@prc.gov