

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, D.C. 20268-0001

AMENDMENTS TO RULES OF PRACTICE

Docket No. RM2020-4

**COMMENTS OF THE UNITED STATES POSTAL SERVICE
IN RESPONSE TO ORDER NO. 5422**

(April 7, 2020)

On February 7, 2020, the Commission issued Order No. 5422, which initiated this rulemaking, propounded a number of questions concerning the letter monopoly, and requested that parties provide comments regarding those questions. The Commission stated that it was conducting this rulemaking pursuant to its authority under 39 U.S.C. § 601(c). For the reasons discussed below, the Commission should close this proceeding, because there is no need to issue regulations pursuant to Section 601(c). In addition, most of the questions raised in Order No. 5422 address issues that go well beyond the scope of the Commission's authority under Section 601(c), and are therefore not suitable for resolution in a rulemaking proceeding pursuant to that section. Instead, to the extent that the Commission wishes to consider whether it should make recommendations to Congress concerning the scope of the letter monopoly, it should consider whether to do so in a public inquiry docket.

I. THE COMMISSION'S REGULATORY AUTHORITY IS LIMITED

The Commission undeniably has the authority to promulgate "[a]ny regulations necessary to carry out" Section 601, subject to certain limitations described below. 39 U.S.C. § 601(c). Thus, the Commission can, through regulations, resolve any ambiguities in the application of four categories of exceptions to the letter monopoly:

- 1) The postage payment exception (Section 601(a));
- 2) The “six times basic rate” exception (Section 601(b)(1));
- 3) The 12.5-ounce exception (Section 601(b)(2));
- 4) Any now-codified regulations that permit private carriage of letters under certain conditions, including, but not limited to, aspects of the definition of a letter and the seven suspensions of the letter monopoly in 39 C.F.R. §§ 320.2-.8 (Section 601(b)(3)).¹

It is important to note, however, that Congress went only so far when it provided the Commission with this limited rulemaking authority. It could easily have extended the Commission’s regulatory powers in other dimensions, yet it chose not to do so.

First, Congress did not give the Commission rulemaking (and complaint) authority over the remainder of the Private Express Statutes, which include, in addition to Section 601, other provisions of 39 U.S.C. Chapter 6 and 18 U.S.C. §§ 1693-1699. Those other provisions are what establish the core prohibition on private carriage of letters, as well as certain of its exceptions; Section 601 merely enumerates additional exceptions from the prohibition. The Congress that revised Section 601 clearly knew about the Title 18 letter monopoly statutes: indeed, it expressly made them relevant to certain matters before the Commission. See Postal Accountability and Enhancement Act of 2006 (PAEA), Pub. L. No. 109-435, §§ 203, 404(a), 120 Stat. 3198, 3209, 3227-28 (codified at 39 U.S.C. §§ 409(e)(1), 3642(b)(2)). It is therefore clear that Congress

¹ Section 601(b)(3)’s codification is not limited to the regulatory provisions cited therein. Those citations are preceded by the phrase “including, in particular,” indicating that other regulatory provisions might also be codified if they have a similar function. And the express citation of 39 C.F.R. § 310.1, which is not styled as a “suspension,” makes clear that codification does not depend on such formalism, notwithstanding Congress’s use of the term “suspension” in Section 601(b)(3).

acted intentionally by limiting the Commission's rulemaking authority to Section 601, rather than expressing that authority in terms broad enough to encompass the other letter monopoly statutes.²

Second, Congress did not delegate to the Commission the authority to revoke or modify the statutory exceptions – including the regulations codified by the statute – or to create new exceptions. Here, too, the lack of such authority in Section 601 is highlighted by express delegations to the Commission elsewhere in the PAEA. See Pub. L. No. 109-435, §§ 201(a), 202, 120 Stat. 3200-01, 3205 (codified at 39 U.S.C. §§ 3621(a), 3631(a)) (specifying lists of market-dominant and competitive products, “subject to any changes the Postal Regulatory Commission may make under section 3642”); *id.* § 201(a), 120 Stat. 3204 (codified at 39 U.S.C. § 3622(d)(3)) (authorizing the Commission to modify or replace the initial market-dominant rate-regulation system).

In fact, prior to the PAEA, the Postal Service had interpreted former Section 601(b) as authorizing it to effectively create new exceptions to the letter monopoly (including by “suspending” the application of the monopoly to the relevant private activity, excluding matter from the definition of a “letter,” and other regulatory means),³

² See, e.g., *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, ___ U.S. ___, 139 S. Ct. 617, 631 (2018) (“Under the Government's reading, [a provision authorizing judicial challenges to certain EPA actions] would encompass EPA actions [that] are nowhere listed in [the provision enumerating relevant EPA actions]. Courts are required to give effect to Congress'[s] express inclusions and exclusions, not disregard them.”) (citing *Russello v. United States*, 464 U.S. 16, 23 (1983) (“Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” (internal quotation marks and brackets omitted))).

³ See, e.g., *H.R. 3717, the Postal Reform Act of 1996: Hearings Before the Subcomm. on the Postal Serv. of the House Comm. on Gov't Reform & Oversight*, 104th Cong. at 159-60 (1996) (responses by Postmaster General and Chief Executive Officer Marvin T. Runyon to questions for the record). The Postal Rate Commission opposed this interpretation, instead asserting that the Postal Service was authorized only to suspend the postage-payment exception (thereby broadening, not narrowing, the

and the PAEA's framers were explicit about their intent to preclude any such administrative authority and to retain Congressional control over the letter monopoly's scope. H.R. REP. NO. 109-66, pt. 1, at 57-58 (2005); S. REP. NO. 108-318, at 32 (2004). The PAEA's framers viewed Section 601(b)(3) as locking in the existing regulatory exceptions to protect mailers and private carriers benefitting from them.⁴ They also rejected a recommendation by the President's Commission on the United States Postal Service that the Commission "be granted the authority to refine the scope of the mail monopoly[.]" because

[f]rom the perspective of the Committee, both the postal monopoly and universal service are issues of broad public policy – not regulatory issues. For that reason, the Committee decided that the power to refine either the monopoly or the universal service obligation should remain in the hands of Congress. However, the Committee thought it would be helpful to hear from the Regulatory Commission what potential changes to either the monopoly or the universal service obligation they believed made sense. Congress would then have the option to enact any of the Regulatory

monopoly's scope). See H.R. REP. NO. 109-66, pt. 1, at 57-58. Thus, the Commission's position even before the PAEA was that only Congress can modify or augment the statutory exceptions.

⁴ H.R. REP. NO. 109-66, pt. 1, at 58 ("The 'grandfather clause' provided in the bill will authorize the continuation of private activities that the Postal Service has permitted under color of this section. In this way, the bill protects mailers and private carriers who have relied upon regulations that the Postal Service has adopted to date[.]"); S. REP. NO. 108-318 at 32 (Section 601(b)(3) "codif[ies] the current postal monopoly suspensions[.] thus permitting continued private sector provision of services to these markets"). The possibility of administrative rescission of the suspensions had long concerned mailers and carriers. See, e.g., *The Private Express Statutes: Hearings Before the Subcomm. on Postal Serv. of the House Comm. on Post Off. & Civil Serv.*, 93d Cong. at 6, 9-10, 98-99, 130-32, 136, 148-49, 153-54, 157, 164, 166-68, 170 (1973) (testimony on behalf of the Associated Third-Class Mail Users; Reader's Digest Services, Inc.; Courier Express Corp.; MPA, Inc.; Brinks Armored Car Services, Inc.; Purolator Services, Inc.) (voicing concerns that administrative revocation of suspensions could harm mailers, private carriers, and freedom of the press); see also *Private Express Statutes: Hearings Before the Subcomm. on Postal Operations & Servs. of the House Comm. on Post Off. & Civil Serv.*, 96th Cong. at 136 (1979) (written statement of Arthur Eden, Senior Consultant, National Economic Research Assocs., Inc.) (same); see also *Effectiveness of the Postal Reorganization Act of 1970, Part 2: Joint Hearings Before the Subcomm. on Postal Operations & Servs. and the Subcomm. on Postal Personnel & Modernization of the House Comm. on Post Off. & Civil Serv.*, 97th Cong. at 396-97 (1982) (written statement of Timothy J. May, Reader's Digest, Inc.) (noting that Reader's Digest's lack of concern over "substantial oppression of private enterprise" through administrative definition of the letter monopoly's scope depended on the then-existing regulations remaining in force).

Commission's recommendations with which they agreed.

S. REP. NO. 108-318 at 39.

In light of these specific expressions of intent, nothing in the PAEA or its legislative history indicates that Congress's conferral of rulemaking authority on the Commission would allow the Commission to modify, create, or abolish exceptions to the letter monopoly. Rather, Congress's intent in the PAEA is clear: it wanted to clarify the application of the monopoly through its amendments to Section 601, while reserving to itself the question as to whether to further redefine the scope of the monopoly in the future. This approach makes perfect sense, because redefining the scope of the monopoly should occur only as part of a comprehensive reexamination of the Postal Service's legal obligations and funding mechanisms: a task that only Congress can perform.⁵

All of the foregoing points lead to one other necessary conclusion: the Commission's rulemaking authority does not extend to redefining the term "letter." Section 601 refers to "letters" only in the context of setting forth certain exceptions to the general prohibition on the private carriage of letters set forth in the Title 18 letter-monopoly statutes (over which, again, Congress did not give the Commission rulemaking authority). Implementing regulations necessary to carry out those exceptions to the general prohibition cannot logically extend to altering the very meaning of the prohibition itself. Indeed, it bears emphasizing that Congress, in Section

⁵ As the Government Accountability Office noted in its prior study of the monopolies, there was "broad consensus" among postal stakeholders that considering whether to change the scope of the monopoly should only take place within the context of analyzing postal policy generally, including the universal service obligation (USO). Gov't Accountability Off., GAO-17-543, U.S. Postal Service, Key Considerations for Potential Changes to USPS's Monopolies 15 (2017).

601(b)(3), expressly codified the letter-definition regulations in 39 C.F.R. § 310.1, thereby effectively converting “letter” into a term of art with a fixed statutory definition.⁶ This fact was recognized by the Commission shortly after the PAEA’s enactment.⁷ And again, Congress in the PAEA rejected a proposal to give the Commission broad authority over the scope of the letter monopoly, or to create new exceptions to the monopoly, as redefining the definition of “letter” would do. Seeking to modify the “letter” definition would also impermissibly expand the Commission’s delegated authority, as the definition would govern not only Section 601, but also Sections 602-606 and 18 U.S.C. §§ 1693-1699, over which Congress gave the Commission no authority at all.

With these limitations in mind, the Commission’s remit is clear: it can clarify any ambiguities that might arise regarding the exceptions set forth in Section 601 (including any ambiguities within the codified regulations), but it lacks the power to modify, add to, or subtract from those provisions.

II. CERTAIN QUESTIONS IN THE ORDER ARE NOT THE PROPER SUBJECTS OF A RULEMAKING

Despite the limits on the Commission’s authority, many of the questions provided as comment prompts in Order No. 5422 suggest an inquiry into whether and how the statutory parameters of the letter monopoly should be further reformed. Questions 3, 4,

⁶ “A letter may also be carried out of the mails when . . . (3) 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).” 39 U.S.C. § 601(b)(3).

⁷ Postal Regulatory Comm’n, Report on Universal Postal Service and the Postal Monopoly 36 (2008) [hereinafter “USO Report”] (“As a practical matter, the postal monopoly, as applied on December 19, 2006, now has the authority of statutory law. In effect, the Postal Service’s administrative determinations, suspensions, and regulations have been adopted by Congress as part of its formulation of the postal monopoly.”).

and 10 could be read to suggest that the Commission views itself as empowered to change the regulations codified by 39 U.S.C. § 601(b)(3), or otherwise to alter the scope of the letter monopoly;⁸ questions 5-7, 12, and 13 ask policy questions about the public impact and relevance of the monopoly;⁹ and questions 11 and 12 expressly ask about whether statutory requirements should be changed.¹⁰ See Order No. 5422, Advance Notice of Proposed Rulemaking to Consider Regulations to Carry Out the Statutory

⁸ The identified questions ask:

3. Is the scope of 39 U.S.C. 601(b)(3) – permitting that the carriage of letters out of the mail provided “such carriage is within the scope of services described by regulations of the United States Postal Service (including, in particular, sections 310.1 and 320.2-320.8 of title 39 of the Code of Federal Regulations, as in effect on July 1, 2005) that purport to permit private carriage by suspension of the operation of this section (as then in effect)” – sufficiently clear and concise, or are additional regulations necessary to carry out the intent of the statute?

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

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.” Order No. 5422.

⁹ The identified questions ask:

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

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

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

12. How might changes to the statutory and regulatory requirements regarding the scope of the letter monopoly affect the financial condition of the Postal Service, competitors of the Postal Service, users of the Postal Service, and/or the general public interest?

13. Are there any social, economic, technological, or other trends that should be taken into account by Congress in considering the scope of the monopoly?” *Id.*

¹⁰ The identified questions ask:

11. Do the current statutory and regulatory requirements correctly implement the intent of Congress and advance the public interest, or should consideration be given to any changes that may be implemented by regulation?

12. How might changes to the statutory and regulatory requirements regarding the scope of the letter monopoly affect the financial condition of the Postal Service, competitors of the Postal Service, users of the Postal Service, and/or the general public interest?; 13. Are there any social, economic, technological, or other trends that should be taken into account by Congress in considering the scope of the monopoly? *Id.*

Requirements of 39 U.S.C. 601, PRC Docket No. RM2020-4 (Feb. 7, 2020), at 7-8.

Given that these subjects are beyond the Commission's rulemaking authority under Section 601(c), it is far from clear why the Commission is purporting to examine them in a rulemaking proceeding. The Commission has always conducted deliberations on potential legislative proposals through public inquiry proceedings. One example is the Commission's 2008 report to Congress about the universal service obligation and the letter monopoly. Although Congress has not directed the Commission to update that report, the Commission could theoretically undertake to do so voluntarily.¹¹

Another example is the report that the Commission must send to Congress every five years under Section 701 of the PAEA; the next such report is due next year. Like the USO Report, the Section 701 report is expected to include legislative recommendations. Pub. L. No. 109-435, §§ 701(a), 702(b)(1), 120 Stat. 3242. And in both cases, the Commission has sought input through public inquiry proceedings. *See generally* PRC Docket Nos. PI2008-3 & PI2016-3; *see also* PRC Docket No. PI2009-1 (soliciting additional comments on the USO Report).

Order No. 5422 does not reference any immediate occasion for a fresh policy debate on the letter monopoly, let alone one too urgent to await the scheduled Section 701 report next year. In its 2008 USO Report, the Commission declined to recommend legislative changes to the letter monopoly, nor did it see fit to recommend changes in

¹¹ Indeed, the Commission considered voluntarily developing a supplemental report immediately following its submission of the USO Report. Notice and Order Providing an Opportunity for Comment, PRC Docket No. PI2009-1 (Dec. 19, 2008), at 4. Despite receiving a number of comments, it does not appear that the Commission issued a second report in the end.

the 2011 and 2016 Section 701 Reports.¹² No party has filed a complaint alleging abuse of Section 601, see 39 U.S.C. § 3662(a), and no concerns about application of the monopoly have arisen in any other recent Commission proceedings. From the Postal Service's responses to Chairman's Information Requests in this proceeding, it should be clear that there is no conflict in purported regulatory authority, such as might arguably warrant intervention. It is unclear what new circumstances might warrant reconsideration of the letter monopoly; indeed, given the ongoing COVID-19 pandemic and its uncertain impact on Postal Service volumes and overall financial condition, now does not seem like the right time to consider tinkering with a seemingly settled area of law, particularly one that has little bearing on the more pressing policy issues of the day.¹³ Even if the Commission is determined to conduct some study of potential legislative changes on the letter monopoly, such a study should be conducted (if at all) through a public inquiry, consistent with the limited scope of the Commission's rulemaking authority in this context and established Commission practice.

¹² See Postal Regulatory Comm'n, Section 701 Report: Analysis of the Postal Accountability and Enhancement Act of 2006 (2016), at 37; USO Report at 199; see *generally* Postal Regulatory Comm'n, Section 701 Report: Analysis of the Postal Accountability and Enhancement Act of 2006 (2011).

¹³ In terms of recent developments, Order No. 5422 invokes no factual circumstances, but rather unremarkable observations in other governmental reports. A 2017 Government Accountability Office (GAO) report is cited solely for the observation that "narrowing the monopoly could decrease revenues and threaten the universal service obligation, but may also lead to greater efficiencies and innovation." Order No. 5422 at 5 (citing Gov't Accountability Off., GAO-17-543, U.S. Postal Service, Key Considerations for Potential Changes to USPS's Monopolies 8 (2017)). And a 2018 report by the Task Force on the United States Postal System is quoted to the effect that technological innovation reduces the effectiveness of the letter monopoly. *Id.* (quoting Task Force on the U.S. Postal Serv., United States Postal Service: A Sustainable Path Forward 33 (2018)). These observations could have been made (and have been made) at other times in the past. See USO Report at 186-89. As noted earlier in this section, at the same time that the Commission made these observations, it declined to recommend any changes in the letter monopoly. *Id.* at 199. Thus, despite the relatively recent vintage of the GAO and Task Force reports, it is unclear why their substance should serve as a predicate to rethinking the letter monopoly now.

III. AS TO MATTERS WITHIN THE COMMISSION'S AUTHORITY, THERE IS NO OCCASION FOR A RULEMAKING AT THIS TIME

As noted in section I above, the Commission undoubtedly has the authority to promulgate "regulations necessary to carry out" Section 601, subject to the limitations described above. 39 U.S.C. § 601(c). The question, then, is whether any such regulations are "necessary" at this time. Questions 1-4 and 14 in Order No. 5422 appear to be aimed at this inquiry. Order No. 5422 at 7-8.¹⁴

Questions 1-4 – essentially asking whether any regulations are necessary to clarify 39 U.S.C. § 601(a)-(b) – should be answered in the negative. Since the PAEA's enactment, no party has petitioned the Commission to issue rules clarifying any aspect of Section 601, nor has any party filed a complaint alleging that the Postal Service has misapplied Section 601. If anything, that silence indicates that Section 601 is working as its framers intended. See S. REP. NO. 108-318 at 31 ("By establishing a clear price- and weight-based monopoly definition [under 39 U.S.C. § 601(b)(1)-(2)], both customers and competitors will be able easily to determine when a mail piece is subject to

¹⁴ The identified questions ask:

1. Are the statutory requirements of 39 U.S.C. 601(a) clear and concise, or are additional regulations necessary to carry out the intent of the statute?
2. Are the statutory requirements of 39 U.S.C. 601(b) clear and concise, or are additional regulations necessary to carry out the intent of the statute?
3. Is the scope of 39 U.S.C. 601(b)(3) – permitting that the carriage of letters out of the mail provided "such carriage is within the scope of services described by regulations of the United States Postal Service (including, in particular, sections 310.1 and 320.2-320.8 of title 39 of the Code of Federal Regulations, as in effect on July 1, 2005) that purport to permit private carriage by suspension of the operation of this section (as then in effect)" – sufficiently clear and concise, or are additional regulations necessary to carry out the intent of the statute?
4. Do any terms that currently appear in 39 U.S.C. 601 require further definition?
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?

monopoly protections.”). With respect to the legacy aspects of Section 601 – the postage-payment exception and the codified regulations – the substantive law has been in place for decades. The substantial slowdown in requests for advisory opinions before and since the PAEA suggests that the public understanding of these statutory and regulatory provisions is fairly settled.¹⁵

Interpretive questions have arisen not in the context of Section 601’s primary application of regulating private carriage, but in cases involving the classification of Postal Service products, which depends, in part, on their relationship to the letter monopoly. See 39 U.S.C. § 3642(b)(2); Order No. 5422 at 5-6 (discussing relevant cases). The importation of the outward-facing letter monopoly into the inward-facing classification exercise has the potential to create – and has created – some interpretive issues. See, e.g., Reply Comments of the United States Postal Service, PRC Docket No. MC2015-7 (Jan. 7, 2015), at 15-16. But such issues sound in the classification of postal products under Section 3642(b), not in private parties’ ability to carry letters under Section 601.

As for whether to transfer the letter monopoly regulations to a different part of Title 39 of the Code of Federal Regulations (question 14), it is unclear why that formality would be necessary or helpful. Wholesale transfer of the current Parts 310 and 320 to the “Commission” chapter would create a misleading impression of the scope of the Commission’s authority, which does not extend to the entirety of the Private Express

¹⁵ According to available records, approximately 155 advisory opinions were issued during the 1970s, 85 during the 1980s, 23 during the 1990s, and only 1 during the 2000s (before enactment of the PAEA). None has been issued since the PAEA, and post-PAEA informal correspondence from members of the public to the Postal Service about the letter monopoly has been “infrequent.” See ChIR No. 1 Response at 4 (responses to questions 2.c-e).

Statutes that underlie Parts 310 and 320. Attempting to bifurcate the regulations according to lines of authority would likely be needlessly complex, as well as awkward for readers, with one group of letter-monopoly regulations in one chapter and the rest in another. Given that there is no clear need for regulatory change at this time, the best solution is simply to let the regulations remain as they are. After all, a newcomer to postal matters encountering the statutory phrase, “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),” is apt to look for the relevant rules in the very places listed in the statute: namely, 39 C.F.R. Parts 310 and 320. The Postal Service is well aware that Congress divested it of regulatory authority over Section 601; that is true regardless of whether the relevant regulations formally reside in the “Postal Service” chapter rather than the “Commission” chapter.

IV. CONCLUSION

It is unclear what purpose this rulemaking serves. The Commission’s authority over the letter monopoly is confined to promulgating certain limited regulations to interpret – but not alter – the provisions of Section 601. As such, many of the topics identified in Order No. 5422 are not fit for a rulemaking, but instead for (at most) a public inquiry aimed at exploring possible legislative recommendations. It is not clear why such a public inquiry is warranted now, as opposed to next year, when such a proceeding will be conducted in the context of Section 701 of the PAEA.

As for matters within the Commission’s authority, there is no need for a rulemaking at this time. In the fourteen years of the PAEA, no party has raised any interpretive question bearing on whether private carriage is permitted under Section 601. If anything, this indicates that the language is clear on its face, as Congress

intended. While questions have arisen about Section 601's effect on mail classification under Section 3642, that is a secondary issue that could be addressed, if at all, in proceedings dedicated to that context, rather than on Section 601 generally.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

By its attorney:

Jacob D. Howley

475 L'Enfant Plaza West, S.W.
Washington, D.C. 20260-1137
(202) 268-8917
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