

BEFORE THE  
UNITED STATES POSTAL REGULATORY COMMISSION  
WASHINGTON, D.C.

Regulations Establishing a System of  
Ratemaking

Docket No. RM2007-1

COMMENTS OF  
FEDERAL EXPRESS CORPORATION  
IN RESPONSE TO ORDER NO. 26 PROPOSING REGULATIONS  
TO ESTABLISH A SYSTEM OF RATEMAKING

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Dated: September 24, 2007

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On August 15, 2007, the Commission requested comments on proposed regulations that would establish a modern system for regulating rates and classes for market dominant and competitive products. Order No. 26 (the "Order"). Such regulations are required by amendments to Title 39, United States Code, effected by the Postal Accountability and Enhancement Act (PAEA), Pub. L. No. 109-435, 120 Stat. 3198 (December 20, 2006). In this filing, Federal Express Corporation ("FedEx") respectfully offers the following comments for consideration by the Commission.<sup>1</sup>

Overall, we believe the Commission has made an excellent beginning. The PAEA has asked a great deal of the Commission in a short amount of time. We commend the Commission and its staff for their diligent efforts to implement the reforms of the PAEA as faithfully and rapidly as

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<sup>1</sup>All references in this filing by section (e.g., "§3622" or "Section 3622") are to Title 39, as amended, unless otherwise indicated. Generally, in quoted material *italicized text* indicates emphasis in the original and underscoring text indicates emphasis added by FedEx.

possible, well ahead of the deadlines set by Congress. The Order covers a wide range of important topics. In this document, we would like to address two aspects of particular concern to FedEx: (1) implementation of the PAEA reforms with respect to international postal products, in particular inbound international postal products; and (2) the implications of the Order for future administration of the postal monopoly. We reserve the right to comment on other aspects of the Order in reply comments.

## **1 INTERNATIONAL POSTAL PRODUCTS**

### **1.1 Objectives of international postal policy**

Although the primary organizing principle of the PAEA is the division of postal products into market dominant and competitive categories, this scheme is overlain by a second, older dichotomy: the division into domestic and international postal services. In establishing a new legal framework for regulation of market dominant products, the PAEA begins with a statement of goals, the “objectives” of § 3622(b), to guide regulatory implementation. For the regulation of international postal products, the PAEA follows a similar approach. Section 407(a) provides a declaration of international postal policy that offers an equivalent set of “objectives” for regulation of international postal products.

Section 407(a) directs all federal agencies to orient their actions towards three goals. The first goal is “efficient operation of international postal services and other international delivery services for cultural, social, and economic purposes.” The second goal is “unrestricted and undistorted competition in the provision of international postal services and other international delivery services, except where provision of such services by private companies may be

prohibited by law of the United States.” The third goal is “a clear distinction between governmental and operational responsibilities” within both the U.S. government and in intergovernmental organizations responsible for postal services.

While these goals may be more obviously applicable in other contexts, they are also directly related to current rulemaking. Regulation of market dominant and competitive international mail products should, so far as practicable, advance the objectives of international postal policy adopted by Congress. Where, in a specifically international context, the Commission is uncertain about how to proceed, the Commission should be guided by the objectives of §407(a).

**1.2 The Order correctly categorizes outbound international expedited and priority products.**

The revised statute defines a “competitive product” as a “a product subject to subchapter II of chapter 36.” § 102(9). Section 3631, in turn, applies the provisions of subchapter II of chapter 36 to, inter alia, “expedited mail,” “priority mail,” and “bulk international mail” subject to changes in the list of competitive products made by the Commission in accordance with § 3642. In § 3642, the defining criterion for retaining a product on the list of market dominant products is whether the “Postal Service exercises sufficient market power that it can effectively set the price of such product substantially above costs, raise prices significantly, decrease quality, or decrease output, without risk of losing a significant level of business to other firms offering similar products.” By default, products which are not market dominant products are competitive products.

In its discussion of international mail, the Order begins with the application of the terms “expedited mail” and “priority mail” to international mail products.

OCA notes that the listing of priority mail and expedited mail in section 3631(a) does not distinguish between domestic and international mail or between single-piece and bulk. OCA Comments, June 18, 2007, at 23. Thus, it asserts that priority mail and expedited mail should include both domestic and international in the competitive mail classification schedule. This position is not unreasonable and the Commission proposes to include outbound international priority mail (Priority Mail International) and expedited mail (Global Express Guaranteed and Express Mail International) as separate products within the priority mail and expedited mail classifications respectively. [Order ¶ 3010 (footnotes omitted)]

FedEx agrees with this interpretation of the terms “expedited mail” and “priority mail” as applied to outbound international mail. Since these terms do not distinguish between (i) domestic and international mail or between (ii) single-piece and bulk, the most plausible interpretation is that they apply to all types of expedited and priority mail. Such an interpretation accords with the primary test for categorization set out in § 3642 since the Postal Service does not in fact exercise sufficient market power in these services to control the prices or service quality in the market.<sup>2</sup> It accords, as well, with the statutory objective of moving towards “unrestricted and undistorted competition” in postal products outside the postal monopoly. §407(a)(2).

**1.3 The terms “bulk parcel post” and “bulk international mail” should be interpreted to apply to international parcel post services and international letter post services, respectively.**

The Order then addresses the meaning of “bulk parcel post.” Order, at 51-52. Here, the Order overlooks the fact some “bulk parcel post” consists of international parcel postal services

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<sup>2</sup>The Postal Service estimates that its share of international air shipments is 8 percent. See Paul Vogel, Managing Director, Global Business and Senior Vice President, USPS, “Express Delivery Services Market and the US Postal Monopoly: Co-existing in the Modern Postal Services Marketplace” (Presentation at China - U.S. Symposium on Postal Reform and the Express Delivery Services, 17-18 September 2007, Beijing).

for bulk mailers. Since “expedited mail” and “priority mail” are (correctly in our view) interpreted to include both domestic and international services because they are not delimited, by the same reasoning “bulk parcel post” should be interpreted to include “bulk international parcel post.”

Not only does this approach bring greater consistency to the interpretation of the U.S. statute, but it also renders the U.S. regulatory framework more consistent with standard international postal terminology. As the Order observes, “the Universal Postal Union (UPU) identifies three types of mail: Letter Post, Express, and Parcel Post.” Order at ¶ 3021. Of the items included in the §3631(a) list of competitive products, these UPU categories correspond most closely with “[bulk] international mail,” “expedited mail,” and “[bulk] parcel post,” respectively.

The UPU category “letter post” corresponds naturally with “international mail” in the §3631(a) item “bulk international mail.” While usage of the word “mail” in the acts of the UPU is infrequent and not entirely consistent, it generally refers to letter post items (in phrases such as “airmail,” “surface airlift mail”, “bulk mail,” “mail processing”). Thus, in an international context, “bulk international mail” should normally be interpreted to refer to letter post items that are posted in “bulk” (we address the interpretation of this concept below).

The second UPU category, express mail (technically “EMS” in UPU terminology), naturally corresponds to the item “expedited mail” in § 3631(a). The Order implicitly recognized this correspondence by categorizing outbound Express Mail, i.e., the Postal Service’s name for services which the UPU regards as “express mail,” as an expedited mail product within the meaning of § 3631(a).

Finally, the UPU category “parcel post” corresponds most naturally with “parcel post” in the §3631(a) item “bulk parcel post.” Such separate consideration of “international parcel post” and “international mail” is appropriate. From the early days of the UPU in the nineteenth century until 1999, the legal framework for the international parcel post was wholly distinct from the international letter post. Even after 1999, the Universal Postal Convention clearly distinguishes between letter post and parcel post. In the U.S. law, “bulk parcel post” should thus be interpreted to include “international parcel post” that is posted in “bulk.”

This definitional clarity seems likely to prove useful in avoiding situations in which American regulatory concepts create unnecessary ambiguity by cutting across generally accepted and understood international postal terminology.

**1.4 Inbound international postal items which are handled as Express Mail or Priority Mail in domestic operations should be classified as “expedited mail” and “priority mail,” respectively.**

The Order incorrectly implies that the categorization of inbound express and priority mail products depends on whether these are “bulk” products.<sup>3</sup> This suggestion seems wholly inconsistent the Order’s finding in paragraph 3010 that the items “expedited mail” and “priority mail” in § 3631(a) refer to both domestic and international mail. Since the terms “expedited mail” and “priority mail” are not limited to bulk products in § 3631(a), there is no need to reach the question of whether they are considered “bulk” products under UPU regulations or from any other perspective. Accordingly, in regard to outbound express and priority products, the

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<sup>3</sup> See Order ¶ 3021 (“The Commission, however, has no data indicating that either Express or Parcel Post is properly considered to be “bulk international mail.”)

Commission's interpretation of "expedited mail" and "priority mail" clearly embraces both single-piece and bulk products.

There is no plausible reason for taking a different approach towards categorizing inbound international expedited and priority mail. Since inbound international express mail is delivered by the Postal Service via its domestic Express Mail services, from a Postal Service standpoint Express Mail is an inbound international mail product as well as a domestic mail product. Any inbound mail item that is delivered by means of Express Mail should be considered a competitive product.<sup>4</sup> Such a rule presents no ambiguity or uncertainty. Of course, the Commission may not have up-to-date information on how foreign postal operators describe to their customers the upstream portion of the end-to-end international service that concludes as Express Mail in the United States, but such information is unnecessary to correct categorization of these postal products under U.S. law.<sup>5</sup>

Similarly, after the Postal Service receives inbound international letter post items which meet the criteria of domestic Priority Mail, it is sorted, transported, and delivered along with domestic Priority Mail. Inbound international priority mail service is the same as domestic Priority Mail. In the international context, as in the domestic context, priority mail is less distinct

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<sup>4</sup> There is no inbound equivalent to outbound Global Express Guaranteed. That is, the Postal Service does not collect inbound shipments for delivery on an express basis within the United States by a private express company. If it did, such a service should be considered a competitive product regardless of how it may be described in marketing campaigns by foreign post offices.

<sup>5</sup> International express mail service is organized by means of product-specific contracts between postal administrations. A private organization called the EMS Cooperative coordinates the commercial efforts of public postal operators providing international express mail. Although loosely related to the Universal Postal Union, the EMS Cooperative is funded and governed by its member postal operators outside of governmental control. See generally, the website of the EMS Cooperative at <http://www.ems.coop>.

from the traditional postal service for letters. Domestically, Priority Mail is a service for first class items weighing more than 13 ounces. In international terms, the same items would be regarded as heavy “letter post” items. The fact that U.S. postal law distinguishes between letter post items based on weight is not unusual. Foreign postal laws do as well. Under the laws of many industrialized countries and many developing countries, letter class items weighing more than a certain amount are deemed outside the postal monopoly while lighter items are still within the monopoly. Moreover, under the revised postal law, foreign posts may contract with private companies for delivery of inbound international letter post items weighing more than 13 ounces. Thus, in the United States the competitiveness of the market for delivery of heavy inbound letter post items is similar to the competitiveness of the market for delivery of equivalent domestic items. Any inbound mail item that is delivered by means of Priority Mail should be considered a competitive product.

**1.5 Inbound international parcel post products should be classified as “bulk parcel post” if they meet the definition of “bulk” postal products applicable to outbound international postal products.**

While the correspondence between the international parcel post and the §3631(a) term “bulk parcel post” is (we submit) manifest, some difficulty arises in determining what international parcel post services are “bulk” services. Worse, as the Commission indicates, “demarcation between bulk and single-piece international mail is less clear” for inbound services than for outbound services.” Order ¶ 3021. Nonetheless, such difficulties must not be allowed to defeat implementation of the PAEA reforms to the maximum extent possible. When it comes to international parcel services, in particular, it is useful to stand back from the law for a moment and consider market realities.

An express intent of Congress is to foster “unrestricted and undistorted competition in the provision of international postal services and other international delivery services, except where provision of such services by private companies may be prohibited by law of the United States.” § 407(a). The competitive nature of international parcel post market is amply documented in the work of a committee of the UPU’s Postal Operations Council, the Parcels Group. The mission of the Parcels Group is to coordinate the parcel services of public postal operators and improve the competitiveness of international parcel post. In 2005, the Parcels Group prepared an “International Parcel Post Business Plan, 2005-2008,”<sup>6</sup> which describes the development of international parcel market in the following terms.

The standard parcels market constitutes a significant segment of the overall parcel market and is one of the two core products offered by all UPU Posts. It is estimated to be worth in excess of 120 billion US dollars per annum worldwide, with 10% of the parcels market being cross-border. However, the parcels market industry is being increasingly influenced by globalization, competition, changing customer patterns and opportunities presented by e-commerce. The traditional parcels market has undergone significant changes in the last two decades, with new market drivers bringing both opportunities and threats. This Business Plan will provide evidence that the share of the international parcels market currently held by Posts is falling, and that many postal operators have not been able to keep up with customer requirements for delivery of their parcels.

Many Posts have begun to reform and redefine their strategies for international parcels development in order to become as commercial, competitive and efficient as the private-sector enterprises with which they are competing. However, there is a widening gap between industrialized and developing countries which needs to be addressed. Changing customer requirements, particularly in the face of a growing choice of suppliers, have meant that in many developing countries the Posts have been left behind in technological

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<sup>6</sup> UPU, Postal Operations Council, Parcels Steering Committee, “Finalised Parcels Business Plan” POC Parcels SC 2006.1 –Doc 8 (Jan. 21, 2006). The “International Parcel Post Business Plan, 2005-2008” is appended to that report.

development. Customers now expect to know whether their parcels have been delivered with basic track-and-trace requirements and Posts are increasingly realizing that they need to upgrade their current service offering and product features in order to offer a competitive product. [Id.at 3]

In order to offer a competitive product, the Business Plan goes on to describe how public postal operators need to improve customer services. The development, implementation and measurement of standardized customer service procedures and targets must meet customers' expectations of excellent customer service. Customer requirements have become far more sophisticated and demanding over the last 20 years. Many Posts are already developing customer-focused policies, which include account management facilities, customer relation management and customer satisfaction surveys. However, there is still work to be done by a number of Posts in this area. It is imperative that Posts recognize the fundamental importance of excellent customer service. [Id. at 5]

The Business Plan surveys the international parcels market, highlighting the efforts of DHL, FedEx, TNT, and UPS. Then, turning to public postal operators, the Business Plan reports,

The general trend, partly dependent on the local postal administration's main commercial markets or sphere of influence, has been to form partnerships with other local administrations and/or the other competing companies. This process, already under way for some time in the less restrictive markets, is gathering pace. Recent examples include the European Parcels Group (EPG), which provides a high-quality parcel delivery service in over 20 countries, and the United States joining forces with a number of Posts in the Asia and Pacific region to provide a parcel service with full track and trace. This process, in one form or another, is likely to be the way of the future for most postal administrations, though specifying a time-frame is difficult, particularly for the less developed countries. . . .

In the more advanced economies, growth is also prevalent in the "time-certain" and "day-certain" markets, where international market competition is far more intense and where market share is dominated by international parcel handling companies principally operating in the North American, European and Asia-Pacific markets. The very fact that these markets are available has led to developed postal administrations competing in them. In many parts of the world, however, particularly in the developing/underdeveloped countries, these opportunities are not available. [Id. at 8]

Overall, the picture that emerges from this Business Plan is one of vigorous competition

among different public postal operators, private operators, and combinations thereof in markets that are continually evolving with shifts in technology, customer needs, and business strategies. Moreover, *unequal application of customs law is a significant factor in this competition*. In its evaluation of the strengths and weaknesses of public postal operators in this competitive market, the Business Plan lists among seven key postal strengths, “Customs clearance: Simpler customs clearance procedures.”<sup>7</sup> Summarily categorizing all inbound international parcel post services as market dominant and exempting them from equal customs treatment preserves this market distorting factor and fails to give effect to either the spirit or the letter of the revised U.S. law.

Returning to the particulars of the statute, what is needed is a definition of the concept of “bulk” in the context of international parcel post that offers tangible progress towards the policy objectives set by Congress. The way forward has already been suggested by the Postal Service. In its comments of June 18th, the Postal Service proposed the following definition of “bulk” in respect to international mail:

With respect to “bulk international mail,” . . . the term “seems most logically interpreted to refer to multi-item mailings tendered by a single mailer.” The multiple quantities could be entered at the time of each mailing or throughout the course of a given term, pursuant to volume commitments or other types of annual guarantees. An annual guarantee based on weight or postage, rather than pieces, is still roughly equivalent to a predetermined volume commitment.<sup>8</sup>

The Order appears to agree with the reasonableness of the Postal Service’s criteria although it seeks details in how the criteria may be applied to outbound international mail. Order at 54. In

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<sup>7</sup> Id. 9. The Parcel Services Subgroup, chaired by the U.S. Postal Service, is assigned responsibility for “Promotion of more effective and simplified Customs handling procedures.” Id. at 11.

<sup>8</sup> “Initial Comments Of The United States Postal Service on the Second Advance Notice Of Proposed Rulemaking” (June 18, 2007) at 13.

principle, FedEx, too, agrees with this definition of “bulk” in the context of international postal services.

This definition of a “bulk” postal product should apply equally to outbound and inbound international parcel post services. There is no reason why “bulk” should have a different meaning in one context than in the other. With respect to outbound international postal services, the Postal Service has already identified several products which fit this definition of “bulk” postal product. According to the Postal Service, the only outbound parcel post services are bulk products are those included within the framework of International Customized Mail agreements (ICMs).

Using this definition of “bulk,” foreign public postal operators will also be able identify which of their international parcel post products are “bulk” products for purposes of U.S. law. As in the case of inbound letter post qualifying as priority mail, there is no need for the Commission to collect up-to-date information on how foreign postal operators describe to their customers the upstream portion of the end-to-end international service that concludes as bulk parcel post in the United States. There is no reason to believe that Commission may not rely upon foreign public postal operators to comply with this as well as other requirements of U.S. law. All that the Commission needs to do is to provide is clear guidance as to those requirements.

**1.6 Inbound international letter post products should be classified as “bulk international mail” if they meet the definition of “bulk” postal products applicable to outbound international postal products.**

Another area of intense international competition is bulk letter post mail. Consider the position of a European post office with commercial customers who send large mailings to the United States. The national post office faces substantial competition from several sources:

(i) remail companies that collect the mail and ship to the Postal Service via other public postal operators , (ii) public postal operators who establish local offices to collect international mail (“ETOES”), (iii) consolidators who freight the mail to the United States where it is posted as domestic mail, and (iv) electronic transmission of data that is transformed into physical mail out of the country.

The Postal Service proposed definition of “bulk” for international postal products appears equally serviceable for letter post and parcel post products. The Postal Service itself applied the same definition of “bulk” to identify bulk international parcel post and letter post products.<sup>9</sup> Hence, Commission regulations could reasonably adopt the same definition of “bulk” to guide foreign public postal operators in identifying bulk letter post services to the United States.

It should also be noted that the Universal Postal Union distinguishes between “bulk mail” and non-bulk mail for several purposes.<sup>10</sup> Regulation RL 142 of the 2004 Universal Postal Convention defines bulk mail as follows:

8.1 Bulk items shall be characterized by:

8.1.1 the receipt, in the same mail or in one day when several mails are made up per day, of 1,500 or more items posted by the same sender;

8.1.2 the receipt, in a period of two weeks, of 5,000 or more items posted by the same sender.

Commission regulations might, therefore, indicate that, for the purposes of U.S. law, “bulk

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<sup>9</sup> “Initial Comments Of The United States Postal Service on the Second Advance Notice Of Proposed Rulemaking” (June 18, 2007) at 13. Based on views expressed by the Postal Service and other parties, the Order concludes that “bulk international mail” refers to three outbound international letter post services: International Priority Airmail Service (IPA), International Surface Airlift Service (ISAL), and M-bags. Order at 52-53. FedEx agrees that these products appear to be “bulk international mail” products.

<sup>10</sup> See, e.g., Universal Postal Convention (2004), Regulations RL 182 (transmission of bulk items); RL 219 (request for payment specific to bulk mail); RL 230 (accounting for bulk mail); and CN 32 (letter bill, bulk mails).

international mail” includes any letter post product which is considered “bulk mail” under UPU regulations.

**1.7 Proper interpretation of § 407(e)(2) supports, but is unnecessary to, the proposed approach towards categorization of inbound international postal products.**

The Order goes on to suggest that difficulties surrounding the interpretation of § 407(e)(2) present obstacles to categorizing any inbound international mail service as a competitive product.

The Order explains:

Second, it is not apparent that classifying any inbound international mail as a competitive product has the same significance it does for outbound mail. To be sure, section 407(e) applies to the importation of shipments deemed competitive. More specifically, however, it applies to such shipments by the Postal Service and private companies owned by U.S. citizens. The Postal Service does not operate ETOEs (extra-territorial offices of exchange). Thus, there are no foreign-originating mail shipments by the Postal Service. Currently, shipments of inbound mail are handled by foreign posts and by private carriers. Foreign posts are not defined as private companies for purposes of section 407(e). In addition, although the Postal Service receives inbound mail from foreign posts at various customs locations, whether such mail is, within the meaning of section 407(e), “imported by the Postal Service” is unclear. Finally, even if *shipments received* by the Postal Service from foreign posts are construed as *shipments by* the Postal Service, there may be good reason to view such inbound mail as market dominant. The record is not sufficiently developed to enable the Commission to determine what inbound international mail is appropriately classified as “bulk international” and, therefore, a competitive product. The parties commenting on the foregoing discussion should thoroughly address the law and facts supporting their position and, in particular, the application of section 407(e) to inbound mail. [Order ¶ 3022]

**1.7.1 Full and effective implementation of § 407(e) is important to the orderly development of the global delivery services market.**

Preliminarily, we must emphasize that full and effective implementation of §407(e) is extremely important for all private global delivery services. The single greatest obstacle to the development of efficient global delivery services is the patchwork of national customs laws.

While some friction from customs laws is inevitable, a major impediment to keeping this friction to a minimum is that government delivery services do not bear the full costs of customs regulation. Therefore, this important constituency within the government does not bring its powers to bear on sister agencies on behalf of customs simplification. Furthermore, discrimination between private and public providers tends to limit consumers' choices: to have the ability to use a simplified customs procedure, they must choose the governmental provider.

For the United States to introduce equal application of customs laws to competitive postal products at home and espouse equal treatment abroad represents a major step in the long march towards a more efficient international customs regime.<sup>11</sup> Since the United States is a leading trading nation, it has a large stake in the evolution of a global infrastructure of delivery services that is as efficient and undistorted as possible by uneven government regulation.

This is not to say that FedEx seeks to burden individual, noncommercial mailers with excessive customs formalities. On the contrary, postal and customs officials deserve great credit for developing a simplified and uniform system of customs declarations for international postal shipments. This system has worked well for the personal, noncommercial shipments typically transmitted by post and could be continued, provided that use of it was open equally to similar public and privately provided services. At the same time, express companies and customs officials have developed more rapid, but more costly, procedures for the customs processing of

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<sup>11</sup> FedEx acknowledges that the processes anticipated by § 407(e)(2) are complex and require considerable work both by USPS and Customs and other agencies to implement. We understand that some of these procedures are already being worked on, and others are in the planning stages. The question of implementation timing, however, should have no impact on recognition of the fundamental Congressional mandate of equal treatment for international products that are within a competitive market.

the urgent commercial consignments typically transported by express companies. There is no need to subject simple, noncommercial shipments to complex, commercial customs procedures. Both categories of customs processing have their merits, and both should continue to be available for appropriate international shipments. But the type of customs processes should be determined by the type of shipper, shipment and service, not by the status—governmental or non-governmental—of the service provider. All international delivery services, regardless of their public or private status, should have the same options for customs processing of similar shipments. This, as we understand it, is a major goal of the PAEA amendments, and it is certainly a goal of FedEx.

Moving towards a customs regime that is based on the shipment type and applies equally to all types of carriers will also facilitate a related desideratum: global customs simplification. In the world generally, customs simplification is impeded by the simple fact that customs rules often do not apply to the government carrier. As a result, Customs officials often overlook the need for simple rules for low-cost shipments, so that the only consumer choice is either private delivery (with inappropriately complex processes for such simple shipments) or governmental services (which may not provide the full range of choice that even the individual consumer might want). Customs equality will have the mundane but extremely important practical effect of uniting postal and private delivery services in which is truly their common interest, maximum feasible simplification of customs barriers. This union of interests, it may be hoped, will in turn lead to optimized procedures for all services in a more diversified marketplace.

**1.7.2 Since the Commission does not administer § 407(e), there appears to be no reason for the Commission to interpret it.**

Although proper implementation of §407(e) is extremely important to global delivery services, it is unclear why the Order chooses to focus on § 407(e)(2) in an inquiry into the correct categorization of inbound international mail. By its terms, § 407(e) is directed to federal agencies other than the Commission. This subsection provides in full:

(e)(1) In this subsection, the term ‘private company’ means a private company substantially owned or controlled by persons who are citizens of the United States.

(2) With respect to shipments of international mail that are competitive products within the meaning of section 3631 that are exported or imported by the Postal Service, the Customs Service and other appropriate Federal agencies shall apply the customs laws of the United States and all other laws relating to the importation or exportation of such shipments in the same manner to both shipments by the Postal Service and similar shipments by private companies.

(3) In exercising the authority under subsection (b) to conclude new postal treaties and conventions related to international postal services and to renegotiate such treaties and conventions, the Secretary of State shall, to the maximum extent practicable, take such measures as are within the Secretary’s control to encourage the governments of other countries to make available to the Postal Service and private companies a range of nondiscriminatory customs procedures that will fully meet the needs of all types of American shippers. The Secretary of State shall consult with the United States Trade Representative and the Commissioner of Customs in carrying out this paragraph.

(4) The provisions of this subsection shall take effect 6 months after the date of enactment of this sub- section or such earlier date as the Bureau of Customs and Border Protection of the Department of Homeland Security may determine in writing.

Since § 407(e) only imposes duties on federal agencies other than the Commission, it does not seem necessary for the Order to address § 407(e) in order for the Commission to carry out its obligations under the statute. If § 407(e) were deleted from the statute, the Commission’s

obligations would remain unaffected. How, then, does inclusion of § 407(e) affect the Commission's duties? The Order offers no answer.

Pursuant to §407(e)(2), Customs and other agencies concerned with importation and exportation must look to the definition of competitive products in order to carry out their duties, since that provision only applies to “competitive products” within the meaning of §3631. Hence, the Order correctly notes that, “the Commission's findings regarding international mail classified as competitive products are relevant to the application of customs and related laws to the importation and exportation of such shipments.” Order ¶ 3020.

But the fact that the Commission's determinations will have relevance for other agencies does not mean that it should bend them in contradiction to the statutory definitions. The results of categorization of a postal product as a competitive product—in this case, a requirement that Customs apply customs laws equally to certain shipments—is not properly an object of this proceeding.<sup>12</sup> The Commission's task is to decide whether or not specific postal products are to be considered competitive products. It is then up to Customs and other relevant agencies to find a way to carry the PAEA's to those agencies in a practicable and economical manner. We are confident that Customs and the other federal agencies are capable of doing so.

### **1.7.3 Classification of inbound international postal products as a competitive product has the same legal “significance” as for outbound international postal products.**

Paragraph 3022 of the Order begins with the statement that “it is not apparent that classifying any inbound international mail as a competitive product has the same significance it does for outbound mail.” This statement is so puzzling that perhaps it should not be taken too

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<sup>12</sup> As the Order also notes, at ¶ 3020 n. 34, the Commission's role is limited to the conclusion regarding classification. This footnote is somewhat confusing, and should be clarified to note that the Commission's job is classifying according to the statutory definitions, while the other agencies have to devise the procedures for handling the products categorized as “competitive” on an equal basis..

literally. To the extent that it is meant literally, however, FedEx must disagree. The *significance* of classifying an inbound international mail product as a competitive product is precisely the same as it is for an outbound international mail product. In both cases, the *significance* is, basically, that the Postal Service's products are regulated according to the more liberal requirements of Subchapter II of Chapter 26 rather than the stricter requirements of Subchapter I. Moreover, with respect to both outbound and inbound international mail products, classification as a "competitive product" has same *significance* under § 407(e). In both cases, the result is that "the Customs Service and other appropriate Federal agencies shall apply the customs laws of the United States and all other laws relating to the importation or exportation of such shipments in the same manner to both shipments by the Postal Service and similar shipments by private companies." (As the Commission implicitly recognizes at the top of page 55, the "customs laws of the United States" apply to outbound shipments as well as inbound shipments.) Thus, the "significance" of classifying a product as market dominant or competitive appears to be the same for all products, including inbound international mail products.

**1.7.4 The only plausible interpretation of the *final phrase* in § 407(e) is that it refers to shipments that are exported or imported by the Postal Service and to similar shipments exported or imported by private companies.**

In analyzing the meaning of § 407(e)(2), the Order begins by observing that ambiguity arises from the final phrase "to both shipments by the Postal Service and similar shipments by private companies." The Order notes that there are no "*foreign-originating mail shipments by the Postal Service.*" The implication seems to be that, since the Postal Service does not physically transport any package into the United States, there are no inbound "shipments by the Postal Service" and hence § 407(e) does not apply inbound international mail. Congress was

unconcerned with equal customs treatment for shipments sent to the Postal Service by foreign postal operators.

We would agree that if one focused one's attention solely on the phrase "shipments by the Postal Service" and ignored the rest of the statute and its legislative history, then it is less than clear whether the phrase "shipments by the Postal Service" includes inbound international mail. Suppose, for example, that the statute said only, "Customs authorities shall apply customs laws equally to shipments by the Postal Service and by American companies." One might then argue that this sentence does not apply to any items shipped into the United States by foreign post offices or foreign partners of American companies, only to items which are physically dispatched to the United States by corporate entities owned by either the Postal Service or by U.S. citizens. Of course, the fact that customs laws are predominantly concerned with inbound items naturally raises the question why Congress would adopt such a law in the first place if it applies only to outbound shipments.

Fortunately, in the case of the PAEA, Congress's purpose is not so obscure. Section 407(e) is one long sentence. In this sentence, the phrase "by the Postal Service" is used twice. The sentence begins with a prepositional phrase that describes the scope of the issue addressed: "With respect to shipments of international mail that are competitive products within the meaning of section 3631 . . . that are exported or imported by the Postal Service, . . ." Thus, it is clear that Congress is addressing competitive products that are "shipments of international mail . . . exported or imported by the Postal Service." The sentence goes to refer to "the customs laws of the United States and all other laws relating to the importation or exportation of such shipments." Plainly, the phrase "*such shipments*" refers to both inbound and outbound mail since

“such shipments” can refer only to the “shipments of international mail” mentioned in the introductory prepositional phrase. The laws referenced are both the import and export control laws, and the sentence directs Customs and other federal agencies to apply these import and export laws “in the same manner.” Under what circumstances should equal treatment be accorded? The sentence concludes, “. . . to both shipments by the Postal Service and similar shipments by private companies.” Given this context, what do the phrases “shipments by the Postal Service” and “similar shipments by private companies” refer to? The most reasonable answer, surely, is that, since the sentence as a whole is plainly referring to *shipments of international mail that are imported and exported* and to *laws relating to the importation or exportation of such shipments*, then the final phrase must be referring to shipments that are imported and exported by the Postal Service as well as similar shipments are imported or exported by private companies. Congress has omitted two more repetitions of words “imported or exported” because, after two usages in the same sentence, it is already clear that the sentence is addressing importation and exportation.

The alternative interpretation is that, although it is evident that Congress is concerned about (1) postal imports as well as exports and (2) equal application of import laws as well as export laws, nonetheless Congress intended by the final phrase to exclude inbound international mail from equal application of import laws. No reasonable person could consider this an equally plausible interpretation of this sentence. Nor could any reasonable person conclude that this second interpretation does more to foster the objectives of § 407(a), in particular “unrestricted and undistorted competition in the provision of international postal services and other international delivery services.”

We submit that interpretation of the final phrase of Congress of § 407(e) is not ambiguous. The purpose of Congress in this sentence is perfectly discernible from reading of the entire sentence. Focusing on the final phrase in isolation from the rest of the sentence creates an artificial appearance of ambiguity where none exists.

**1.7.5 The *introductory phrase* in § 407(e)(2), “shipments of international mail that . . . [are] imported by the Postal Service,” refers to inbound mail which the Postal Service receives from foreign posts.**

The Order goes on to raise a similarly artificial objection in interpreting the introductory prepositional phrase of § 407(e)(2). The Order suggests, “although the Postal Service receives inbound mail from foreign posts at various customs locations, whether such mail is, within the meaning of section 407(e), ‘imported by the Postal Service’ is unclear.” Such a conclusion is not tenable. Once again, the introductory phrase is, “With respect to shipments of international mail that are competitive products within the meaning of section 3631 that are exported or imported by the Postal Service.” It is not plausible that Congress employed the phrase “shipments of international mail. . . that are . . . imported by the Postal Service” with the intention of excluding “inbound mail from foreign posts.” Where, precisely, is the ambiguity? Surely “shipments of international mail” includes “inbound mail from foreign posts.” Perhaps the Order is suggesting the word “imported” creates ambiguity? Perhaps the argument is that mail is not “imported by” the Postal Service but merely “received by” the Postal Service? But such a hyper-technical distinction is not consistent with general usage. The section of Customs’ regulations applicable to inbound mail is called “Part 145. Mail Importations.” 19 CFR Part 145 (2006). It applies generally to “All mail arriving from outside the Customs territory of the United States which is to be delivered within the Customs territory of the United States.” 19 CFR § 145.2(b) (2006).

Granted, the Postal Service is not the “importer” in the same sense as the person who, for example, ordered a sweater from Harrod’s in London to be sent to his U.S. address by mail. But then neither is the private carrier. In this sense, no carrier imports anything. The carrier merely receives items from a shipper and gives them to an ultimate consignee. It strains credibility to the breaking point to suggest that Congress referred to “shipments of international mail . . . that are . . . imported by the Postal Service,” and yet did not mean to refer to what Customs calls “mail importations.”

**1.7.6 The legislative history of the Postal Accountability and Enhancement Act fully supports the above interpretations.**

Provisions of the revised law pertinent to classification of international mail services as competitive products date from the earliest versions of what became the PAEA. In fall 1998, the House Postal Service Subcommittee approved a bill that divided all postal services into competitive and market dominant products.<sup>13</sup> In this bill, international single-piece letters, cards, and parcels were classified as market dominant products while other international mail was classified as competitive. Proposed §§ 3731(b), 3741(a). With the respect to the application of customs law, the bill proposed to revise 39 USC § 407 to require that:

(d)(1) With respect to shipments of international mail within the meaning of section 3741 that are exported or imported by the Postal Service—

(A) the Postal Service shall not tender exported shipments to governmental authorities of any other country for clearance and importation except in accordance with procedures and laws which are equally applicable to similar shipments transmitted by private companies; and

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<sup>13</sup>H.R. 22, 105th Cong., 1st Sess., approved by the Subcommittee on September 24, 1998 (Committee Print, Oct. 1, 1998).

(B)(i) subject to clause (ii), the Customs Service and other appropriate Federal agencies shall apply the customs laws of the United States and all other laws relating to the importation or exportation of such shipments in the same manner to both shipments by the Postal Service and similar shipments by private companies; and

(ii) the Customs Service and other Federal agencies shall deny shipments imported by the Postal Service from a foreign country access to special customs procedures established in accordance with international postal or customs agreements for shipments by postal authorities of other countries unless that foreign country makes available such special customs procedures both to shipments to such country from the United States by the Postal Service and similar shipments to such country from the United States by private companies.

In this version of the postal reform bill, it is apparent that the passage is referring to the application of customs laws to both inbound and outbound international mail. The intent is to ensure equal customs treatment for the Postal Service's competitive products and similar products of private carriers. Clause (B)(ii) goes even further. It says that equal treatment is insufficient where a foreign customs administration treats American carriers in a discriminatory manner, that is, by giving the Postal Service the benefit of simplified customs provisions established in the Universal Postal Convention and denying such treatment to private American delivery services. In such situations, says this draft bill, Customs must deny the benefits of simplified UPU-style customs treatment to inbound international mail from that country even if similar treatment is accorded inbound shipments transported by private company from that country. The final revision of the PAEA retreated from this requirement of reciprocity. It dropped clause (B)(ii) in favor a less stringent remedy: an instruction to the Secretary of State to encourage equal treatment of American carriers by foreign customs offices. See § 407(e)(3). Nonetheless, consideration of the entire original text helps to make still clearer the meaning of the words in clause (B)(i), which has been adopted in revised law as § 407(e)(2).

The most recent House committee report leading up to the PAEA, adopted in 2005, refers to the committee's (by then) longstanding concern to equalize the application of customs laws to competitive international shipments. The report notes:

In light of studies conducted by the General Accounting Office and the former U.S. Customs Service, subsection 407(e) requires the Bureau of Customs and Border Protection of the Department of Homeland Security to afford non-discriminatory access to U.S. customs procedures for both the Postal Service's Competitive products and similar products of U.S.-owned private carriers. Since some foreign governments currently limit access to simplified customs procedures to government post offices—thus discriminating between the Postal Service and U.S. private carriers—the subsection requires the Secretary of State “to the maximum extent practicable” to negotiate with other countries to make available customs procedures that do not discriminate between the Postal Service and U.S. private carriers while fully meeting the needs of all types of American shippers.<sup>14</sup>

What studies by the GAO and the Customs Service are being cited by the House committee?

The GAO study was “U.S. Postal Service: Competitive Concerns about Global Package Link” (June 1998). It was concerned primarily with the differences in the way foreign customs authorities treat goods shipped via *outbound* international mail services of the Postal Service, on the one hand, and via private carriers, on the other. Such unequal treatment of American delivery services was a matter of concern in a Senate hearing on international postal services held in June 1998.<sup>15</sup>

The Customs Service report was “A Review of Customs Treatment, International Express Mail and Express Consignment Shipments (July 1998).” This report was originally requested by the House Appropriates Committee. It dealt primarily with the difference in the application of

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<sup>14</sup>H.R. Rept. No. 109-66 Pt1, 109th Cong., 1st Sess. (Apr. 28, 2005) at 56.

<sup>15</sup>S. 2082—*The International Postal Services Act of 1998: Hearing on S. 2082 Before the Subcommittee on International Security, Proliferation, and Federal Services of the Senate Comm. on Governmental Affairs*, 105th Cong., 2d Sess. (1998).

customs law to *inbound* international mail.

Like the Senate, the House held a full day hearing on international postal issues. The House hearing was convened in March 2000 and included a broad spectrum of interests including representatives from the Postal Service, the Department of State, the Department of Justice, the Department of Commerce, the United States Trade Representative, the Customs Service, the Postal Rate Commission, the General Accounting Office, leading foreign public postal operators, and global private express services. A major issue in this hearing was the importance of providing equal customs treatment for competitive products generally.

Ambassador Michel Southwick from the Department of State, declared:

In conclusion, it is clear that international postal and delivery services must serve the global economy as a facilitator of an open and fair trading system. This will require further reforms worldwide such as granting private postal providers similar access to customs facilities as that given public postal service providers and a comprehensive global policy strategy that recognizes the need for change in several different fora.<sup>16</sup>

FedEx chairman Frederick W. Smith pointedly referred to “very, very different requirements for clearance of postal items versus those carried by private companies. It is not a good situation from the standpoint of security and safety issues and it certainly is not a level playing field.”<sup>17</sup>

When Postmaster General William Henderson admitted differences in customs treatment, Subcommittee Chairman John McHugh specifically asked, “So would you support the theory that identical mail should be cleared in identical ways?” Mr. Henderson replied unequivocally, “I

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<sup>16</sup> *International Postal Policy: Hearing Before the Subcomm. on the Postal Service of the House Comm. on Government Reform*, 106th Cong., 2d Sess. (2000) at 174.

<sup>17</sup>*Id.* at 80.

would, absolutely.”<sup>18</sup>

The House committee report of 2005 is thus referring to studies of discriminatory application of customs laws to both outbound and inbound competitive products, and the hearings convened in the both the House and the Senate to consider customs and other issues relating to the international postal services. The most recent Senate committee report dealing with the postal reform bill, adopted in 2004, also indicates an intent recorded to address customs inequalities generally.<sup>19</sup>

In sum, both the House and Senate committees indicated a clear intention to bring about a competitively neutral application of customs laws to international shipments both at home and abroad. Both reports expressly note that the Secretary of State is instructed to negotiate with other countries “to make available customs procedures that do not discriminate between the Postal Service and U.S. private carriers.” Such instructions make no sense if Congress intended to exempt inbound international mail from its command to U.S. Customs to apply the customs law equally to competitive products. With such customs discriminations stoutly maintained at U.S. borders, the Secretary of State would be embarked on a fool’s errand.

## **2 IMPLICATIONS FOR THE POSTAL MONOPOLY**

The PAEA vested the Commission with new responsibility for interpreting the scope of the postal monopoly. First, as the Order recognizes, the Commission must determine whether or

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<sup>18</sup>Id at 102.

<sup>19</sup>S. Rept. No. 108-318 (Aug. 25, 2004) at 28, 53.

not a postal product is within the postal monopoly categorizing a product as a competitive product. Order ¶ 4024. Second, the Commission, and only the Commission, is authorized to adopt such regulations as it considers necessary to carry out § 601, the section defining various exceptions of the postal monopoly created by provisions of the criminal code, 18 USC §§ 1694-99. At the same time, the PAEA repealed the authority of the Postal Service to promulgate regulations interpreting these statutory provisions. See § 401(2) (limitation of Postal Service rulemaking authority to title 39).

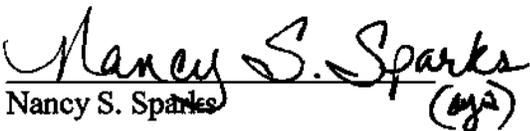
We earnestly urge the Commission to approach these new responsibilities with an open mind. The postal monopoly statutes are very old and cannot be interpreted in a manner faithful to the intent of Congress without considerable inquiry. The postal monopoly regulations adopted by the Postal Service were, at best, loosely based on the underlying statutes and cannot be relied upon uncritically. Indeed, it would legally be impossible to do so, for these regulations were largely derived from the Postal Service's interpretation of a statutory provision, former §601(b), which the PAEA repealed.

In light of these considerations, we would like to make two observations. First, the Order declares without elaboration that "An additional consideration is that three of these types of mail, First-Class letters and sealed parcels, First-Class cards, and Standard Mail, are covered by the postal monopoly." Order ¶ 3077. We do not believe this statement correctly summarizes the scope of the postal monopoly laws as amended by the PAEA. We urge the Commission to either withhold judgment about the about the scope of the postal monopoly in this proceeding or provide the parties a specific opportunity to address the scope of the postal monopoly laws in detail.

Second, we note that the inclusion of “bulk international mail” in the list of competitive products set out in §3631(a) appears to be inconsistent with the principle (although not the explicit prohibition) set out in § 3642(b)(2) that “A product covered by the postal monopoly shall not be subject to transfer under this section from the market-dominant category of mail.” The difficulty is the postal monopoly over the carriage of letters appears to apply to bulk international letters (other than international remail) as well as single-piece international letters. Hence, “bulk international mail,” insofar as it includes bulk international letters, appears to be including monopoly products in the competitive category. It is our understanding that in this proceeding the Commission is seeking to interpret the lists of market dominant and competitive products in §§ 3621 and 3631 and not to address the possibility of changes in those lists that may be implied by § 3642(b). In this proceeding, the proper role for the principles of §3642(b) is to shed light on the meaning of §§ 3621 and 3631. FedEx supports such an approach. Moreover, as stated above, we agree that bulk international letters are properly categorized as competitive products.

Nonetheless, we believe the Commission should at some point address the seeming incongruity between the postal monopoly and the listing of bulk international letters as competitive products.

Respectfully submitted,

  
Nancy S. Sparks (sjs)

Dated: September 24, 2007