

Before the  
POSTAL REGULATORY COMMISSION  
WASHINGTON, DC 20268-0001

Market Test and Experimental Product  
Samples Co-Op Box

Docket No. MT2010-1

PUBLIC REPRESENTATIVE COMMENTS IN RESPONSE TO  
UNITED STATES POSTAL SERVICE FILING OF THE SAMPLES  
CO-OP BOX EXPERIMENTAL PRODUCT MARKET TEST

(April 20, 2010)

1. INTRODUCTION

In response to Order No. 434, the Public Representatives submit the following comments regarding the Postal Service's notice to conduct a Market Test of an Experimental Product.<sup>1</sup> Order No. 434 gives interested persons an opportunity to submit comments on whether the Postal Service's notice<sup>2</sup> to conduct a research effort using market tests is consistent with the criteria of 39 U.S.C. 3641. On April 15, 2010, the Postal Service submitted supplemental materials in response to the questions concerning costs posed by the Chairman of the Commission.<sup>3</sup>

The Public Representatives conditionally support the Postal Service's filing with several reservations, and submit that further regulation of market tests could better ensure that tests, of an experimental product like the one envisioned, are more consistent with the likely legislative intent. While the filing is lacking in some regards, the reasons for further regulatory caution may themselves gain resonance by allowing samples co-op box experimental product market test to proceed. These comments will

---

<sup>1</sup> Order No. 434 - Notice and Order Concerning Market Test of Experimental Product, March 31, 2010 (Order).

<sup>2</sup> Notice of the United States Postal Service of Market Test of Experimental Product – Samples Co-Op Box, March 29, 2010 (Notice).

<sup>3</sup> Response of the United States Postal Service to Chairman's Information Request No. 1, April 15, 2010 (Response).

outline where the Postal Service's proposal is lacking, specifically where the Postal Service claims the conditions of 3641(b) are met, and future actions that are necessary to ensure the public receives sufficient information to ensure market tests are conducted with adequate transparency.

## 2. DISCUSSION

The Postal Service has been encouraged to innovate and introduce certain experimental products under the Postal Accountability and Enhancement Act (PAEA), Pub. L. No. 109-435, 120 Stat. 3218 (2006)(PAEA). See 39 U.S.C. §3641. It has laudably proposed to exercise this authority to leverage its sustainable advantage in delivering products, rather than information that stands alone here (*e.g.*, shipping atoms, not just bits of data, *etc.*).

The market test in question seems to concern a product that directly concerns four kinds of roles: (1) the Postal Service or delivering enterprise; (2) an intermediary who cooperates with Postal Service to aggregate multiple consumer package goods;<sup>4</sup> (3) consumer packaged goods companies (CPGs) who supply sample products; and (4) customers or sample recipients mainly comprised of households. Since the proposed arrangement between the Postal Service with the intermediary appears to be very similar to a negotiated service agreement, the Commission may need to closely scrutinize the experimental competitive product to observe if it is truly a postal service, and, if so, whether it is provided at unduly preferential rates or even without charge.<sup>5</sup>

Also, under the present plan for research using the market test, the Postal Service's filing draws into question the proper line between pre-market test research and market testing. In effect, it asks the Commission to decide whether any prior

---

<sup>4</sup> "A partner will prepare several hundred thousand co-op boxes, each containing product samples from multiple CPGs." See Notice at 4.

<sup>5</sup> 39 U.S.C. §§ 101 and 403(c). It is also an open question whether the Postal Service envisions its proposed experimental product as a regulated postal service of simply mailing and delivery or some hybrid service (*i.e.*, such as a composite of (a) mailing with packaging and (b) non-postal sample aggregation activities, *etc.*). Without advance disclosure of the agreed terms, the extent of any joint venture and nature of the product remain unclear.

research should be required in advance to establish a reasonable likelihood of success prior to undertaking the costs of a market test primarily to advance research.<sup>6</sup>

### *Description of the Market Test*

Because of the shape and weight based prices instituted in 2005, the Postal Service states it has continuously been losing market share of the distribution of samples. Notice at 3. This is because consumer packaged goods companies (CPGs) have found other ways to market their products including handing out samples in grocery stores. In order to regain market share the Postal Service has teamed up with a partner for the samples co-op box experimental product market test. The partner will prepare the boxes with samples for delivery by the Postal Service.<sup>7</sup> After delivery the Postal Service and its partner will survey areas to see how well the samples co-op boxes were received, and gather data on whether sales of products that were included as samples in the samples co-op box increased in specific areas. Gathering this data will enable the Postal Service to market the product better to CPGs and hopefully expand the Postal Service's revenue base in competitive services. But if the market test is unsuccessful it appears that that the Postal Service will not offer the product as a subsequent market test or a new product.

### *Pre-Market Research and Market Testing*

The description of the experimental product also appears to result from an amalgam of tasks and duties of multiple stakeholders, without an adequate demarcation of tasks, liabilities, and duties. No agreement has been filed under seal. It poses unanswered questions about the general availability of the experimental product envisioned not only at the level of potential partnering intermediaries but at the level of CPGs eligible for participation, as well. Despite these deficiencies, the proposal appears to technically comply with the letter of the statutory provisions, even if it falls

---

<sup>6</sup> The Postal Service candidly explains that "It is important to note that the mailing and research are very exploratory in nature; the Postal Service does not yet have a firm plan in place on how to proceed after the test." Notice at 4.

<sup>7</sup> It is not entirely clear whether such a partner is independent of the CPGs, also may be a CPG distributing its own products, or may be a CPG with market dominance in one or more consumer goods sectors.

short in certain respects in satisfying the spirit of the regulations that envisions spurring innovation with a likelihood of success as a contributing line of business.

### 3. REQUIREMENTS OF SECTION 3641

The Postal Service's Notice indicates that the samples co-op box experimental product satisfies each of the requirements of section 3641, but it does so in terms that are too conclusory in certain instances.<sup>8</sup> Under 39 U.S.C. § 3641, the Postal Service may not conduct a market test of an experimental product, unless it satisfies each of the following conditions:

- (1) The product is significantly different from all products offered by the Postal Service within the 2-year period preceding the start of the test (§ 3641 (b)(1));
- (2) The product will not result in undue market disruption, especially for small business concerns (§ 3641(b)(2));
- (3) The product is correctly characterized as either market dominant or competitive (§ 3641(b)(3)); and
- (4) The total revenues that are anticipated, or in fact received, by the Postal Service from such product do not exceed ten million dollars in any year, subject to adjustments (§ 3641(e)(1)), unless an exemption is ordered (§ 3641(e)(2)).<sup>9</sup>

While the Postal Service's Notice does not address the statutory conditions that govern a market test in adequate detail, it also fails to provide reasonable commercial assurances that its envisioned market tests will be likely to generate revenues that exceed the costs of the product generally.<sup>10</sup> Nor does it clarify as to whether product-specific revenues for this purportedly competitive experimental product will be to likely

---

<sup>8</sup> See generally, Notice at 3-4.

<sup>9</sup> The revenue cap may be subject to certain adjustments (§3641(g)), and the Commission may limit the amount of revenue the Postal Service may obtain from any particular geographic market as necessary to prevent market disruption" (§ 3641(e)(1) citing § 3641(b)(2)); see also 3641(h). The most vulnerable segment of the market to market disruption from such market tests ordinarily is the one comprised of small business concerns.

<sup>10</sup> The Commission's questions sought additional details on the Postal Service's planned collection of information to develop costs.

meet the relevant long run incremental costs associated with this offering in the event it matures beyond an initial trial-balloon phase.

*Significantly different product.*

The Postal Service indicates that the market test product is significantly different from the previous offering that had been included in the Postal Service's past reports of postal services. The rationale is lacking in two respects. First, it is not entirely clear whether the support adequately distinguishes the proposed product from one or more alternative postal products that are likely to be close substitutes.<sup>11</sup> Second, the product apparently includes the process of composing the content or supervising the configuration of samples within the samples box. Yet, it is unclear if the tasks of planning, sorting, logistics, or composition are sufficiently distinct from prior tasks that Postal Service personnel has performed for substantially similar postal or non-postal products during the past two years. One may question whether the subtasks and characteristics of the so-called new product truly evince any distinct market characteristics, like ones due to markedly features or functionalities that have no substitutes among conventional lines of Postal Service business. It is also unclear if the asserted distinction is merely a separate rate level or discount designed advance to benefit one or more intermediating partners. See, e.g. 39 U.S.C. 403(c).

The Postal Service explains that while companies have sent samples through the mail in the past there has never been a specific product designed to send these items. It could have more clearly provided a substantial description of how the product is significantly different from other products to ensure this condition was met. In the Postal Service's discussion of the significant differences from other products is rather terse:

The Postal Service has never offered a similar product in the past. As noted earlier, CPGs have, from time to time, sent product samples to consumers through the mail, but such mailings have usually been limited in scope and have declined in recent years. In any case, the Postal Service has never provided special packages or rates for such mailings.

---

<sup>11</sup> To be more complete, the discussion could have explained how the samples co-op box differed "significantly" from parcels mailed with single-piece Parcel Post, Priority Mail or Parcel Select. Also, it could have elaborated upon what has deterred CPGs from using other heavier USPS parcel products in the past.

Notice at 5.

On the other hand, one distinct parameter is clear. The Postal Service's specifications impose a 12.5-ounce minimum on the weight of the package. This likely constitutes a significantly different approach to sending samples through the mail than was previously used by CPGs and conventional mailers of multiple vendors' goods.<sup>12</sup>

#### *Undue market disruption*

In accordance with 3641(b)(2) the market test must not "create unfair or otherwise inappropriate competitive advantage for the Postal Service or any mailer, particularly in regard to small business concerns." There are risks of several instances of unfair competition in the market test. First, the Postal Service is not charging a fee to the manufacturers to include their sample in the samples co-op box, therefore the samples in the samples co-op box may receive a competitive advantage over those samples not in the box.

Second, the Postal Service does not indicate that the samples co-op box is a product of general applicability. The Postal Service does indicate that it may become generally applicable in a future market test or new product offering. Since the Postal Service is instituting this market test to gather market research, it is providing the samples co-op box at no charge to its unnamed partner, and distributing samples for several unnamed CPGs. Its selected partner may appear to gain preferential treatment over rival intermediaries that actually or potentially could serve the aggregating role for multiple CPGs. By design, only a select few appear eligible to participate in the market test.

Because this market test is designed to gather market research, it is understandable that the Postal Service is beginning with only certain mailers to conduct the survey research.<sup>13</sup> Absent market disruption, the PAEA does not appear to

---

<sup>12</sup> The transition from light weight to heavier weight parcels might not necessarily constitute a significantly different product, but the results of the Postal Service's market research may shed more light on the differences and/or similarities.

<sup>13</sup> The Postal Service has not provided any details about their survey such as size, expected response rate or sample questions, therefore the Public Representatives are unable to provide an analysis on this subject.

categorically govern whether market tests are permissible or impermissible based upon general availability. As such, until a clarifying set of regulations are issued, it appears that both types are potentially permissible, based upon context. It is likely that one factor that is probably worthy of greater investigation is whether the rivals of an intermediating partner, that use the experimental service as one component, are pricing interdependently. While the record lacks this kind of support, it may be premature to foreclose market tests that merely raise the issue, when the risks of market disruption are not yet readily ascertainable. Accordingly, when the Commission prepares its proposed rules it may consider whether to delineate separate standards for experimental products during market tests of general applicability versus ones that are not of general applicability (such as ones based upon negotiated service agreements for competitive products).

*Proper categorization as competitive.*

The third condition that the market test must meet is 3641(b)(3) which requires the correct categorization as competitive or market dominant. Currently, when samples are sent through the mail stream they are typically sent as Standard Mail Parcels, which is a market dominant product. CPGs could also combine mailings on their own and use one of the Postal Service's many other parcel products (Parcel Select, Priority Mail, Single-Piece Parcel Post, or others). Since there are both market dominant and competitive parcel products, any correct categorization based upon substitute services remains ambiguous. Yet, there appears to be no reason to deny the Postal Service's request to classify the samples co-op box experimental product market test as competitive.<sup>14</sup>

*Revenue, cost support, and contribution*

In the Notice for the samples co-op box the Postal Service explains that it has partnered with a company to assemble samples to include in the samples co-op boxes

---

<sup>14</sup> The inchoate nature of the experimental product in question, weighs in favor of the Postal Service on this factor, since pre-market research activities typically warrant slightly less scrutiny as to disruption of the competition. The resulting Order should clarify, however, that it does not limit the reach of the law ordinarily governing unfair trade practices.

and that no postage will be charged for the boxes. Notice at 1. It is disconcerting that the Postal Service is engaging in market research for its partner, as well as the companies where the samples are produced, but the Postal Service bears all of the postage costs. The inclusion of a “willingness to pay” survey in conjunction with this market test would be beneficial. Along with gathering market research to market the product to CPGs, the Postal Service should also be instructed to gather data to ensure CPGs are eventually willing to pay enough to cover the costs of sending the samples co-op box.

Section 3641(e) sets a limit to how much revenue a market test can generate, but is silent as to whether a market test must generate any revenue. The Postal Service should not develop any expectations, while new regulations are still in the offing, that conducting market research without receiving any postage revenue is justifiable. Even if only a nominal fee is charged for the market test product, it is important for the Postal Service to know that customers are willing to pay for the product. This will help to ensure if the market test experimental product does become a permanent competitive product it has the potential to generate sufficient revenues to recover attributable costs and make an adequate contribution to institutional costs.<sup>15</sup>

#### 4. OPERATIONAL CONSIDERATIONS

##### *Termination date*

In its filing the Postal Service gave vague timelines of its implementation of the market test. The Postal Service states that the “research test will begin on or shortly after May 1, 2010” and the “mailing will likely be completed in a single week.” Notice at 8. The Public Representatives believe that it would be beneficial to have a set termination date for the market test, to ensure that third-parties who are not participating in the market test are not harmed by this market test for an extended period of time.<sup>16</sup>

---

<sup>15</sup> For example, the Postal Service could charge \$1.79 per piece, which would cover the unit attributable cost of least costly competitive parcel product grouping (Parcel Select and Parcel Return Service). See FY 2009 Annual Compliance Determination at 29. These pieces do on average weight five times the minimum weight for samples co-op boxes; however this may be a good starting point.

<sup>16</sup> Because CPGs may only distribute a few samples to consumers on an annual basis, providing one sample co-op box may disrupt the market for more than the one week when the sample co-op box is received by consumers.

### *Future revenue-free market tests*

An approval of this market test should be framed in a way to preclude precedential effects that might otherwise lead to larger and more costly revenue-free market tests. Generating zero dollars in revenue to ensure compliance with condition that the market test generates less than \$10 million does not appear to satisfy the broader intent behind the PAEA.<sup>17</sup> Market Tests were established to allow the Postal Service to explore new product offerings without meeting the more burdensome rules of establishing a new product. However, this limited exemption was allowed in exchange for adhering to standards consistent with basic principles of public interest that weigh against government supported competition absent a demonstrable public need.

The \$10 million revenue ceiling under subpart 3641(e) implies that that it is expected that market tests must generate some revenue, absent exceptional justification. While each item sent through a market test should ordinarily generate some revenue, this is a question of first impression in this context. It may be appropriate to defer it for more particularized treatment in the Commission's forthcoming rules, since the risk of harm to third-parties from market disruption appears sufficiently low or attenuated even in affected areas.

### *Reporting requirements*

The Postal Service should be required, as a preliminary matter, to disclose to the Commission the identity of its initial partner.<sup>18</sup> The disclosure should include any negotiated service agreement with that partner. If there is also a licensing arrangement to permit a partner to use the Postal Service's logo (*i.e.* to place it on the co-op boxes supplied by the partner, *etc.*) that arrangement also should be disclosed to the Commission, along with the other terms of its related agreement.<sup>19</sup> Such identification

---

<sup>17</sup> If the Postal Service decides to do several studies each with several hundred thousand pieces and charge a nominal price, it is easy to see that the market test experimental product could generate \$10 million in revenue quickly. For example, 10 studies, charging \$2.5 per box, with 400,000 boxes equals \$10 million in revenue.

<sup>18</sup> It should be further required to similarly disclose what vendor's samples are being included in the box, to ensure not only one mailer may benefit from this market test (*i.e.* due to the unlikely identity of interest between the intermediating partner and every CPG vendor, *etc.*).

<sup>19</sup> See USPS to Test Direct-Mail Product Sampling USPS-Branded Box Designed To Share Marketers' Costs, Generate Revenue, USPS News Link, [https://liteblue.usps.gov/news/link/2010/nl\\_0409.htm](https://liteblue.usps.gov/news/link/2010/nl_0409.htm)

and related disclosures could permit a further check against impermissible rebates as well.

It is important that the once the survey is complete the Postal Service reports its findings on each of these matters to the Commission.<sup>20</sup> This will assist the Commission as it drafts the market tests rulemaking, to see whether these sort of revenue-free market tests are valuable to the Postal Service and the public. This will also help the Commission to determine whether adequate information is being gathered to evaluate the cost and future price the product. The cost of the market test is necessary information to permit a minimum of transparency. The Postal Service should gather and calculate it through the market test, and report it by sharing this information with the Commission. In these uncertain financial times, it is important that the Postal Service have competitive products that cover their attributable costs as well as potentially contribute to institutional costs. Too many times, genuine accountability by the Postal Service has been overlooked in the context of new market entry.

## 5. CONCLUSIONS

The Postal Service should be encouraged to grow revenues via experimental postal services that leverage its distribution capacity over the last-mile. If it is engaging in activities to increase mail volume, enhance net revenues, and redeploy underutilized capacities through innovation, then its efforts are generally laudable. However, it is important that these endeavors have the capability to produce sufficient revenues to cover costs, without undue market disruption, and particularly without harming small business concerns in pilot-cities where tests are concentrated geographically. Nor should it underwrite market research attainable elsewhere, under the pretext of market test exemptions.

On balance, this specific proposal does not appear to be unduly pretextual though. This market test will give the Postal Service information to decide if samples co-op boxes would be a valuable product for its customers, including actual and potential partners. It should be authorized, subject to continuing jurisdiction to permit

---

<sup>20</sup> The Postal Service stated that it can report on the test results upon request. Notice at 4. The Commission should request this information expressly with a specified interval that is operationally optimal.

cancellation as needed. 39 U.S.C. 3641(b)(2) and (f). However, the Postal Service also ought to be obliged to promptly provide further commercial assurances for the market test as specified above, to permit an evaluation of whether product is likely to become a valuable product for its bottom-line, without undue harm to others.

---

Steven Hoffer, Attorney  
Natalie Rea

Public Representatives

901 New York Ave., NW Suite 200  
Washington, D.C. 20268-0001

(202) 789-6811  
[Steven.Hoffer@prc.gov](mailto:Steven.Hoffer@prc.gov)

(202) 789-6864  
[Natalie.Rea@prc.gov](mailto:Natalie.Rea@prc.gov)