

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

MARKET TEST OF EXPERIMENTAL PRODUCT
SAMPLES CO-OP BOX

Docket No. MT2010-1

**COMMENTS OF THE
NEWSPAPER ASSOCIATION OF AMERICA**
(April 20, 2010)

The Newspaper Association of America (“NAA”) submits these comments in response to Order No. 434 providing notice regarding the Postal Service’s contemplated market-test of a “Samples Co-Op Box.”¹ The proposal leaves appears to involve an illegal use or licensing of the Postal Service’s brand name on packaging and would incorrectly classify an advertising product as competitive. The proposal as it now stands should be cancelled.

I. INTRODUCTION

NAA represents the interests of nearly 2,000 newspapers in the United States and Canada. Its members account for nearly 90 percent of the daily newspaper circulation in the United States and a wide range of non-daily U.S. newspapers. NAA member newspapers operate Total Market Coverage (“TMC”) programs that use Standard Mail High Density and Saturation flats mail rates. Newspapers also deliver product samples in the newspaper and through the mail via their TMC programs.

¹ Notice of the United States Postal Service of Market Test of Experimental Product – Samples Co-Op Box (Mar. 29, 2010) (“USPS Notice”).

Comment on the proposed market test is hindered by the vagueness of the *USPS Notice*. The Postal Service does not provide a clear description of the new “product” to be tested. At places, it implies that the “product” is simply a branded “box;” at others, the “product” appears to consist not only of the box but also of the upstream sale (for free) of the delivery of product samples.

Elsewhere the Postal Service has been more forthcoming about the product and market test. In particular, on April 9 the Postal Service issued a press release that included this photograph of the box:²



In the same release, the Postal Service indicated that the boxes would be distributed to 200,000 consumers in the test markets of Charlotte and Pittsburgh, but would also be distributed nationally on a limited basis.³

² See U.S. Postal Service Press Release No. 10-034 (April 9, 2010); see also https://liteblue.usps.gov/news/link/2010/nl_0409.htm.

The Postal Service has failed to provide information sufficient to allow the Commission to find that the proposed market test otherwise complies with the requirements of Section 3641. The proposal erroneously treats advertising as a competitive product. Furthermore, there is ample reason to believe that the dropping of some 200,000 boxes of free product samples in two mid-sized markets could well substantially disrupt those markets.

In addition, as discussed below it is doubtful whether the Postal Service even has the legal authority to engage in the activities described in its *Notice*. Whether the “product” is merely a branded packaging “box,” or whether it is the licensing of the Postal Service’s brand name and logo to a private sector entity⁴ for display on a mailing container, there is doubt that the Postal Service has legal authority to engage in the activity consistent with Commission Order No. 392.

Finally, the Postal Service has provided the Commission with no information regarding other important matters as:

- Any financial terms between the Postal Service and the partner company, including any commitments in the future.
- How the Postal Service is recovering the value conferred on the partner company from the use of its brand name on the box?
- The cost to the Postal Service of producing the co-op mailing boxes.
- What, if any, processing and delivery arrangements will be in place to ensure that the USPS-branded box is timely delivered?
- The costs of any such processing and delivery arrangements.

³ U.S. Postal Service Press Release No. 10-034 (April 9, 2010).

⁴ The partner reportedly is Start Sampling Inc.

- Why the partner company can't simply assemble the samples and send them by a box without any participation by the Postal Service beyond normal delivery?
- The number of product samples planned for a particular test market compared to the size of the test markets, facts which would enable the Commission to consider the market-disruption factor.

The Commission should not allow the market test to proceed unless these questions are first addressed.

II. THE VERY LIMITED DESCRIPTION OFFERED BY THE POSTAL SERVICE FAILS TO MAKE A SHOWING SUFFICIENT TO SATISFY THE REQUIREMENTS OF SECTION 3641

Section 3641 provides the conditions in which the Postal Service may conduct a market test of an experimental product. The Postal Service has not shown that the Section 3641 criteria are satisfied.

A. Section 3641 Applies To A "Free" Market Test

As a preliminary matter, the Postal Service suggests that Section 3641 does not apply to the contemplated test because no revenue will be collected. *USPS Notice* at 2. The Postal Service rests this suggestion on language in Section 3641(e) which provides that products may be tested only if the anticipated or actual revenues do not exceed \$10,000,000 in any year. Despite so suggesting, the Postal Service proceeds to address the Section 3641 criteria, so its case does not rest on this point.

Nonetheless, the Postal Service's suggestion misreads the law. Section 3641 by its terms applies to any market test. Nothing in that Section creates an exception for experiments that are "free" to the mailer (or to entities whose advertising samples are delivered by the mailer). That the one-time mailing

generates no revenues simply means that the Postal Service easily would fit under the statutory revenue maximum. A market test is still a market test, even when conducted for free (although the free nature of such a test will distort the results), and the statutory factors and the statutory limitations on the Postal Service's permissible activities apply.

B. The Postal Service Erroneously Classifies The Delivery Of Advertising Product Samples As Competitive

Advertising delivery, including the delivery of product samples, is a market-dominant postal product. Indeed, the Postal Service today delivers many product samples today at market-dominant Standard Regular rates. That is not changed through the expedient of putting more than one sample in a single box in what amounts to a shared samples mailing.

What *is* “competitive” is the *separate and distinct* upstream market for distribution of the samples that are within the box. That competition occurs through a variety of means including direct mailers, in-store displays, and newspapers. That market, however, is different from the delivery market in which the Postal Service operates.

While not addressing the differences between those distinct markets, the Postal Service argues that the Samples Co-Op box is not covered by the postal monopoly because the postal box will weigh more than 12.5 ounces. (It is unclear if that weight is of the box only or includes the weight of samples.) However, the status of an item as exempt from the Private Express Statutes is not dispositive, but is merely a necessary condition for even considering classifying a product as Competitive. Here, assuming that the Postal Service has

correctly identified the product as the box, there is no suggestion that any entity other than the Postal Service may deliver privately the USPS-branded Samples Co-Op Box.

The Postal Service argues that numerous, comparably priced sample distribution methods are available in the private sector and that these would not be affected in a significantly unfavorable manner by entry by the Postal Service.⁵ This erroneously conflates the distribution and delivery markets. The proper issue is the legal status of the delivery of a USPS-branded box of advertising product samples, which currently would be a market-dominant product and for which, under the market test, the Postal Service would retain a monopoly.

Finally, the statute requires the Commission to give due regard to availability and nature of enterprises in the private sector engaged in the delivery of the product involved. See 39 U.S.C. §3642(b)(3)(A), as referenced in 39 U.S.C. §3641(b)(3). Those entities represented by NAA oppose the Postal Service's reclassification of the market-dominant samples delivery as competitive.

C. The Postal Service Has Not Shown How Providing Product Samples For Free Would Not Be Disruptive

The Postal Service admits that it is “unclear” what effect the Samples Co-Op box will have on the market. However, there is reason to believe that the “research test” itself could have a direct, immediate impact on the Charlotte and Pittsburgh markets.

⁵ Note that this argument about Postal Service “entry” implies that the “product” here is something other than simply a box bearing a Postal Service logo.

First, because product samples are to be included in the box at no charge to the consumer packaged goods companies, the market test almost by definition will have an impact on the market. The Postal Service is not, despite statements in its *Notice* (at 7), charging market rates. NAA is aware of no vendors in the business of providing sample delivery for free. Perhaps the Postal Service may charge postage rates in some future incarnation of the product (for which it must first return to the Commission), but the market test now before the Commission is free to participating sample companies and incurs no postage charges at all.

Second, factors not addressed in the *USPS Notice* could have market disruptive effects. For example, would the “Samples Co-Op box” create an unfair or inappropriate competitive advantage for the favored vendor used to solicit the product samples, inasmuch as that vendor:

- will have the exclusive right to send product samples for free using a USPS-provided free box;
- would benefit from the access to the consumer package goods companies it has obtained by virtue of its relationship with the Postal Service;
- would benefit from the perception that its special relationship with the Postal Service may confer it with favorable delivery or other service terms.

The lack of transparency surrounding this endeavor prevents the Postal Service from meeting its burden of showing that the market test of the product would not be market disruptive.

III. THERE IS SUBSTANTIAL DOUBT THAT THE POSTAL SERVICE LAWFULLY MAY OFFER THE PRODUCT

In the first paragraph of its *Notice*, the Postal Service states that the “product” is “a parcel box” that will contain product samples from more than one consumer packaged goods companies. *USPS Notice* at 1. As is evident from the image above, the “Samples Co-Op box” bears the Postal Service’s logo.

But matters are not quite so clear. What little description of the box the Postal Service has offered raises doubts as to whether it even has the legal authority to offer such a “product.”

A. The Postal Service Could Not Offer The Samples Co-Op Box As A Packing And Shipping Item

The Postal Service does not contend that this product is a “Packing and Shipping” item (a Competitive postal product), nor could it. This is because the Commission has limited Shipping and Mailing Supplies to postal retail locations and the Postal Service’s website.⁶ Nothing in the *USPS Notice* suggests that the availability of the “Samples Co-Op box” is so limited. On the contrary, it appears that the box is exclusively available to its partner and no other mailer.

B. The Postal Service May Not License Its Brand Name To A Third-Party For Use In Mailing Or Shipping Supplies

In Order No. 392, the Commission forbade the Postal Service from licensing its trademarks to enable a third party to sell USPS-branded mailing and shipping products related to postal operations. However, it appears that the

⁶ *Modification of Mail Classification Schedule Product Lists in Response to Order No. 154*, Order No. 391 at 26 (Jan. 13, 2010); *Review of Nonpostal Services (Phase II)*, Order No. 392 at 26 (Jan. 14, 2010); *Review of Nonpostal Services*, Order No. 154 at 33-34 (Dec. 19, 2008).

Postal Service may be trying to do precisely that here -- licensing its brand name, including its Sonic Eagle trademark, on the box for the benefit of a single private entity with which it has partnered.

In Order No. 392, the Commission anticipated some of the issues arising from this proposed affixing of a Postal Service brand on a package:

USPS-brand package implies the USPS-brand product offers additional value as a result of the Postal Service's duty to provide nationwide mail service, and consumers may expect that, but additional value distinguishing USPS-branded mailing and shipping products has not been demonstrated.

Order No. 342 at 25. The Commission concluded that "the Postal Service has neither demonstrated a public need for licensing the Postal Service brands for use in mailing and shipping supplies, nor that the private sector does not have the ability to meet the public need for such products." *Id.*

Here, the Postal Service makes no effort to show that the private sector is unable to meet the demand for product sample distribution. On the contrary, the Postal Service cites currently available distribution methods, including "in-store distribution, venue-based distribution, door hangers, coupons, newspaper bundling, and bundling with purchased consumer products." *USPS Notice* at 6. These current private sector offerings confirms the wisdom of the Commission's ruling in Order No. 392, and is a reason why the Postal Service need not engage in this venture, rather than a justification for its doing so.

Indeed, there does not appear to be *any* need for the Postal Service to participate in the Samples Co-Op box in any manner other than delivery.

Presumably a business experienced in direct mail, as the partner is said to be,

can assemble a package of product samples for mailing as a single item without any assistance from the Postal Service.

IV. CONCLUSION

For the foregoing reasons, the Newspaper Association of America respectfully submits that the Commission should not allow the Postal Service to conduct the purported market test of the Samples Co-Op Box.

Respectfully submitted,

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