

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

MARKET TEST OF EXPERIMENTAL PRODUCT –
SAMPLES CO-OP BOX

Docket No. MT2010-1

**RESPONSE OF THE UNITED STATES POSTAL SERVICE TO
THE COMMENTS OF THE NEWSPAPER ASSOCIATION OF AMERICA**
(April 23, 2010)

On March 29, 2010, the United States Postal Service filed notice with the Postal Regulatory Commission of a market test of an experimental product titled the “samples co-op box.”¹ In Order No. 434, published on March 31, 2010, the Commission requested comments by interested persons.² The Newspaper Association of America (NAA) filed comments on April 20, 2010.³ The Postal Service hereby responds to the NAA’s comments.

The issue presently before the Commission is whether the Postal Service may conduct a limited market research test that will help the Postal Service determine whether and how to proceed in developing a new product. The NAA’s comments assert that the market test is illegal and should be canceled. This assertion is premised on two main arguments: (1) the market test involves an illegal licensing of the Postal Service brand; and (2) the Postal Service has incorrectly classified the samples co-op box as a competitive product. As discussed in further detail below, the NAA’s argument on licensing is based on a mistaken reading of Commission Order No. 392; and the NAA’s

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

² Notice and Order Concerning Market Test of Experimental Product (March 31, 2010).

³ Comments of the Newspaper Association of America (April 20, 2010).

argument on classification is faulty in light of relevant statutory authority and is, ultimately, irrelevant to the legality of the market test. The Postal Service submits that the NAA has failed to articulate any reason why the market test should not be permitted to proceed.

Licensing of the Postal Service Brand

The NAA cites Commission Order No. 392 as authority for finding that the samples co-op box involves an illegal licensing of the Postal Service brand. In Order No. 392, the Commission prohibited the Postal Service from licensing its brand for use on mailing and shipping goods produced, distributed, and sold by a licensee, where the Postal Service's only involvement was the act of licensing its brand (including incidental supervision of the licensee in order to protect the integrity of the brand).⁴ The Commission reasoned that licensing is a nonpostal service and therefore subject to Commission review under 39 U.S.C. § 404(e)(3). Section 404(e)(3) directs the Commission to determine whether a nonpostal service shall continue by taking into account the public need for the service and the ability of the private sector to meet the public need. The Commission determined that there was no public need for such licensing that was not already being met by the private sector. The Commission therefore ordered the Postal Service to terminate the licensing of third-party mailing and shipping products.

The Commission emphasized that its decision regarding licensing was predicated on the fact that it was reviewing a nonpostal service, and that its task would have been significantly different if it were reviewing an activity that was claimed to be a

⁴ Phase II Review of Nonpostal Services Under the Postal Accountability and Enhancement Act (January 14, 2010) (Order No. 392).

postal service.⁵ Therefore, the reasoning in Order No. 392 is inapplicable to the samples co-op box, which, as a mailable package that will be delivered, is clearly a postal service.⁶ Certainly, the Postal Service is permitted to use its brand on its own postal products. The involvement of a private party with expertise in preparation of the mailpiece (namely, assembling the product samples into the boxes) does not alter the fact that the samples co-op box is a postal service.⁷

The inapplicability of Order No. 392 (and therefore 39 U.S.C. § 404(e)(3)) makes certain other arguments offered by the NAA irrelevant as well, such as its argument that the market test is inappropriate because the private sector can fulfill consumer packaged goods companies' sample distribution needs. In making this argument, the NAA improperly attempts to incorporate the standards for the review of a nonpostal activity into the review of a market test. While the existence of alternative services provided by the private sector may be a sufficient basis for rejecting the continuation of a nonpostal activity under Section 404(e), it is not a sufficient basis for rejecting a postal service. The PAEA expressly contemplates the existence of postal services that compete with the private sector, by authorizing competitive products (as well as the introduction by the Postal Service of *new* competitive products under Sections 3641 and

⁵ See Order No. 392, at 17 (noting that “the Commission’s responsibilities when deciding whether to authorize postal, vis-à-vis nonpostal services, differ significantly”).

⁶ The definition of “postal service” in 39 U.S.C. § 102(5) states, in relevant part, that the term “refers to the delivery ... of mailable packages, including acceptance, collection, sorting, transportation, or other functions ancillary thereto.”

⁷ The Postal Service notes that it does not intend to restrict itself to only one or a few private partners as the samples co-op box develops further. The limited nature of the present market research test only necessitated one partner. This partner will not receive preferential treatment if the samples co-op box is developed into a permanent product.

3642).⁸ In addition, simply because there are other, non-mail means to distribute samples does not mean that the Postal Service cannot introduce a product that seeks to encourage the use of the mail for such distribution. To conclude otherwise would be to hold that the Postal Service is forbidden from introducing any new products that seek to encourage and rejuvenate the use of the mail for advertising or other purposes for which there exist alternative means of distribution. The Postal Service's authority is not limited in this fashion.⁹

Classifying the Samples Co-Op Box as a Competitive Product

The NAA argues that the Postal Service has incorrectly characterized the samples co-op box as a competitive product. The NAA bases its argument on a perceived distinction between sample delivery and sample distribution. According to the NAA, the Postal Service has a monopoly on sample delivery, while sample distribution is a highly competitive space best left to private firms.

The Postal Service's characterization of the samples co-op box as competitive is based on an analysis of the three factors set forth in 39 U.S.C. § 3642(b). To summarize that analysis, the samples co-op box falls in the competitive category because: (1) the high level of competition for sample distribution prevents the Postal Service from arbitrarily setting the price for the samples co-op box; (2) the samples co-op box is excluded by weight from any possible application of the postal monopoly

⁸ Under the NAA's reasoning, the Postal Service could seemingly never introduce a new competitive product.

⁹ See, e.g., SEN. REP. NO. 108-318 at 17 (2004) (noting that "the intent of the market test rules is ... to encourage the Postal Service to expand the scope of its products to maintain the attractiveness of the mails generally"). The purpose of "maintain[ing] the attractiveness of the mails" presumes that there are alternative means of distributing content which compete with the use of the mail.

provided for in the Private Express Statutes; and (3) the additional considerations of Section 3642(b)(3) do not demonstrate any reason for the samples co-op box to be classified as market-dominant rather than competitive.

In the context of this Section 3642(b) analysis, the NAA's distinction between sample delivery and sample distribution does not appear to make any practical difference. Indeed, the NAA itself claims that the samples co-op box would be highly disruptive to the competitive sample distribution market in the two test markets that will be the focus of the market test.¹⁰ If sample delivery by the Postal Service has a competitive effect on sample distribution by other parties, it is unclear why there should be any distinction between delivery and distribution.

Furthermore, even assuming that the Postal Service's analysis of the three factors in Section 3642(b) is faulty, it is unclear why this should result in the market test being cancelled. The market test framework set forth in 39 U.S.C. § 3641 does not require that an experimental product be classified as competitive; it only requires that such product be correctly classified as either market-dominant or competitive. Even if the samples co-op box were to be found (erroneously in the view of the Postal Service) to be a market-dominant product, this should not be reason to cancel the market research test.

¹⁰ The NAA has offered no evidence that the Postal Service's limited market research test will divert sample distribution business that would have otherwise flowed to newspapers and other private parties. The consumer packaged goods companies whose samples are being included in the market research test were solicited by the Postal Service and are themselves interested in the test's survey results.

Conclusion

For the reasons outlined above, the Postal Service believes that the NAA's assertions are mistaken. More generally, however, the Postal Service would like to note that the samples co-op box market research test is an example of the kind of innovative thinking that the Commission and Congress have encouraged the Postal Service to undertake.¹¹ Given the early, exploratory nature of the product, a number of its details remain to be finalized, which is precisely one of the reasons why the market test process was implemented by the PAEA and is being utilized here. The Postal Service believes that the present market research test will help the Postal Service determine the best course to take in developing the samples co-op box into a permanent postal service.

Respectfully submitted,

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¹¹ See, e.g., SEN. REP. NO. 108-318 at 16 (noting that “developing an organizational culture of innovation and market responsiveness, can help the Postal Service to address its financial difficulties by increasing the attractiveness of the mail to both new and existing customers”); Testimony of Chairman Ruth Y. Goldway, Postal Regulatory Commission, Before the U.S. Senate Homeland Security and Governmental Affairs Committee’s Subcommittee on Federal Financial Management, Government Information, Federal Services, and International Security (April 22, 2010) (stating that “[m]ore ideas for expanding ... or other innovations should be developed by the Postal Service as soon as possible and, where appropriate, submitted to the Commission for review. The Commission’s record of positive approval [of] Postal Service innovations speaks for itself”).

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