

UNITED STATES OF AMERICA  
POSTAL REGULATORY COMMISSION  
WASHINGTON, DC 20268-0001

Before Commissioners:

Ruth Y. Goldway, Chairman;  
Tony L. Hammond, Vice Chairman;  
Mark Acton;  
Dan G. Blair; and  
Nanci E. Langley

Market Test of Experimental Product  
Samples Co-Op Box

Docket No. MT2010-1

ORDER APPROVING SAMPLES CO-OP BOX MARKET TEST

(Issued May 5, 2010)

I. INTRODUCTION AND SUMMARY

On March 29, 2010, the Postal Service filed notice with the Commission of a proposed market test of an experimental competitive product, Samples Co-Op Box, under 39 U.S.C. 3641.<sup>1</sup> In Order No. 434, the Commission noticed the filing and gave interested persons the opportunity to submit comments on whether the Postal Service's filing is consistent with the policies of 39 U.S.C. 3641.<sup>2</sup> The Commission finds that the market test meets the requirements of section 3641.

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

<sup>2</sup> Notice and Order Concerning Market Test of Experimental Product, March 31, 2010 (Order No. 434).

The Postal Service proposes a market test, consisting of one mailing of the Samples Co-Op Box to consumers in certain test markets. Notice at 1. Section 3641 authorizes the Postal Service to “conduct market tests of experimental products in accordance with this section.” A product may not be tested, however, 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 (section 3641(b)(1));
- (2) The product will not result in undue market disruption, especially for small business concerns (section 3641(b)(2)); and
- (3) The product is correctly characterized as either market dominant or competitive (section 3641(b)(3)).

## II. PROPOSAL

The Postal Service proposes to conduct a market test designed to gain information concerning the operations, costs, and potential market for an experimental product provisionally titled Samples Co-Op Box. *Id.* The Samples Co-Op Box is a parcel box that will contain an assortment of product samples from multiple consumer packaged goods companies (CPGs). The Postal Service states that a partner will prepare Samples Co-Op Boxes for mailing, execute the mailing, and conduct market research. The Postal Service will deliver the co-op boxes without charge; the CPGs will not be charged for inclusion of their samples in the boxes; and the partner will not charge for assembling the samples into the co-op boxes. *Id.* at 8.

The market test will consist of one mailing of several hundred thousand co-op boxes to consumers in two test markets. The Postal Service indicates that it expects the mailing to be completed in a single week. *Id.* The market test also includes research, conducted by the Postal Service or its partner, designed to gain information about the proposed product. *Id.* at 1, 8.

In support of its proposal, the Postal Service contends that the market test is consistent with section 3641.

*Significantly different product.* The Postal Service maintains that it has never offered a product similar to the Samples Co-Op Box. *Id.* at 5. In the past, the Postal Service has delivered samples for individual CPGs. However, it has never offered CPGs the opportunity to combine their samples with other CPGs' samples in a box to be delivered by the Postal Service. The Postal Service adds that it has never provided special packages or rates for such mailing. *Id.*

*Market disruption.* The Postal Service states that it does not believe that the introduction of the Samples Co-Op Box will create an unfair or inappropriate competitive advantage for the Postal Service or any mailer. *Id.* It asserts that the samples distribution market is competitive. Its conclusion is based on research showing that in-store distribution encompasses over one-third of the market, venue distribution encompasses approximately another one-fifth of the market, and direct mail accounts for only one-tenth of the market. Further, the Postal Service asserts that the limited market test should not have any effect on competitors or the samples distribution market. *Id.* at 6.

*Proper categorization as competitive.* The Postal Service characterizes the product as a competitive postal product. *Id.* at 7. Referencing section 3642(b)(1), the Postal Service asserts that, given the significant competition in the samples distribution market, it lacks market power and thus could not arbitrarily set the price of the Samples Co-Op Box or raise it in the future without losing business to other firms offering distribution services. *Id.* It states that because the Samples Co-Op Box weighs at least 12.5 ounces, it is not subject to the Private Express Statutes. *Id.* at 8, citing 39 U.S.C. 3642(b)(2). Finally, the Postal Service indicates that there are numerous alternate sample distribution providers, asserting that they would not be affected significantly, and that the "impact on small businesses would not be significantly harmful (and very well may be favorable)." *Id.*, citing 39 U.S.C. 3642(b)(3).

*Revenue, cost support, and contribution.* The Postal Service stands to gain no revenue from this market test. The Postal Service maintains that the expense will be

considered a research and development cost in connection with new product development. *Id.* at 8.

The Commission sought clarification on the Postal Service’s plan to collect cost data for the proposed market test.<sup>3</sup> CHIR No. 1, Question 1. In its response, the Postal Service explains that it does not have any plans to “undertake systematic data collection at this stage” of the market research.<sup>4</sup> Response to CHIR No. 1 at 1. In addition, the Postal Service states the primary purpose of the instant market research test is to understand the value that the Samples Co-Op Box provides to CPGs. For the instant market research proposal, the Postal Service plans to conduct pre-mailing and post-mailing surveys, obtain empirical sales data regarding purchases of the CPGs products included in the co-op box in the geographic areas where the boxes are mailed, and to “observe the operations of the mailings to evaluate whether any deviations from normal procedures for existing products might be warranted or advantageous.” *Id.*

### III. COMMENTS

Comments were filed by the Newspaper Association of America (NAA)<sup>5</sup> and the Public Representative.<sup>6</sup>

NAA urges the Commission to cancel the proposal contending that it involves an illegal use or licensing of the Postal Service’s brand name on packaging. NAA Comments at 1. NAA argues that in Order No. 392, the Commission prohibited the Postal Service from licensing its trademarks to third parties for use in mailing and shipping products related to postal operations. *Id.* at 8.

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<sup>3</sup> Chairman’s Information Request No. 1, April 9, 2010 (CHIR No. 1).

<sup>4</sup> Response of the United States Postal Service to Chairman’s Information Request No. 1, April 15, 2010 (Response to CHIR No. 1).

<sup>5</sup> Comments of the Newspaper Association of America, April 20, 2010 (NAA Comments).

<sup>6</sup> Public Representative Comments in Response to United States Postal Service Filing of the Samples Co-Op Box Experimental Product Market Test, April 20, 2010 (Public Representative Comments).

NAA argues that the Postal Service incorrectly classifies the Samples Co-Op Box as a competitive product. *Id.* at 5. NAA maintains that currently the Postal Service delivers product samples at market dominant Standard Regular rates, and placing more than one sample in a single box does not make this a competitive product. *Id.*

NAA also argues that the Postal Service has failed to provide information on various aspects of the proposal, e.g., the financial terms between the parties, the cost of producing the co-op mailing boxes, and the cost of processing and delivery. *Id.* at 3-4. It argues that the proposal should be disallowed until these questions are answered. *Id.* at 4.

The Public Representative endorses the Postal Service's proposal with several reservations. Public Representative Comments at 1. The Public Representative notes that the market test may not create an unfair competitive advantage for the Postal Service or any mailer. The Public Representative maintains that there are risks of several instances of unfair competition in the market test. *Id.* at 6. Since the Postal Service is not charging manufacturers to include their sample, participating manufacturers may receive a competitive advantage over non-participating manufacturers. *Id.*

The Public Representative expresses concern that the market test will not generate any revenue for the Postal Service. *Id.* at 8. The Public Representative questions the structure of the market test and suggests that a nominal fee be charged for the product, contending that it would demonstrate that customers are willing to pay for the product. *Id.* The Public Representative contends that the Postal Service failed to provide reasonable commercial assurances that its envisioned market test will be likely to generate revenues that exceed the costs of the product generally. *Id.* at 4. Notwithstanding its reservations, the Public Representative concludes that on balance the merits of the short-term market test outweigh any potential shortcomings. *Id.* at 10.

The Postal Service responded to NAA's comments taking issue with its claims that the market test is illegal and should be cancelled.<sup>7</sup> The Postal Service argues that, contrary to NAA's argument, Order No. 392 is inapplicable since the experimental product is a postal product, not a nonpostal product. Postal Service Response at 2-4. Further, the Postal Service reiterates its arguments that the product is properly characterized as competitive, but notes that even if, as NAA contends, it is characterized as market dominant, that would not be a reason to prohibit the market test. *Id.* at 4-5.

#### IV. COMMISSION ANALYSIS

This is the second market test proposal the Postal Service has submitted to the Commission for review. The Postal Service's Notice addresses many of the concerns raised by the Commission in Order No. 199.<sup>8</sup> There, the Commission requested the Postal Service to provide supplemental information regarding the proposed market test. The Postal Service's market test proposal raises several issues to be determined by the Commission. Based on the information provided, the Commission concludes that the proposed market test meets the requirements of section 3641.

As noted above, section 3641(b) requires each experimental product to satisfy a three-pronged test. Each is considered in turn.

*Significantly different product.* The Postal Service distinguishes between the experimental product and CPGs' samples mailed currently, noting that it has never provided special packaging or rates for such mailings. Notice at 5. No party contests that the Samples Co-Op Box is a significantly different product. The Public Representative finds the weight of the co-op box dispositively different, while NAA does

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<sup>7</sup> Response of the United States Postal Service to Comments of the Newspaper Association of America, April 23, 2010 (Postal Service Response). Concurrently, the Postal Service filed a motion for leave to respond to NAA. Motion for Leave to Respond to the Comments of the Newspaper Association of America, April 23, 2010. The motion is granted.

<sup>8</sup> Notice and Order Concerning Market Test of Experimental Product, April 7, 2009.

not directly address the issue. The Commission concludes that the proposed product, which combines multiple samples into a single box, is significantly different from any product offered by the Postal Service in the preceding 24 months. See 39 U.S.C. 3641(b)(1).

*Market disruption.* The Postal Service candidly acknowledges that the impact of the market test on the sample distribution market is unclear. Notice at 5. It notes, however, that given the diverse competition in the samples distribution market, introduction of the Samples Co-Op Box is unlikely to create an unfair or inappropriate competitive advantage for the Postal Service or any mailer. *Id.* at 5-6. Further, it asserts that the limited nature of the proposed market test will have no effect on competitors or the competition. *Id.* at 6.

NAA contends that the market test “could have a direct, immediate impact” on the two test markets it identifies. NAA Comments at 6. First, it suggests that the distribution of samples at no charge will likely impact the market. Second, it criticizes the Notice as lacking sufficient detail, and suggests that the vendor may have an inappropriate competitive advantage going forward. *Id.* at 7.

In its response to NAA, the Postal Service clarified that it would not restrict itself to only one or a few partners if the co-op box develops further. Postal Service Response at 3, n.7. The results of the market test may also be instructive on the potential impact of the product should it develop beyond the test stage. Notice at 5.

The market test will be conducted on a limited basis in targeted demographic markets over the course of one week. Notice at 4, 8. Due to the brevity of the market test and limited availability of the product, the Commission finds that the proposed market test will not create an unfair competitive advantage for the Postal Service or any mailer. See 39 U.S.C. 3641(b)(2).

*Correct characterization.* The Postal Service characterizes the Samples Co-Op Box as a competitive postal product, asserting that classification is consistent with section 3642(b). Notice at 7-8; see also *supra* at 2-3. NAA contests this

characterization arguing that the co-op box should be characterized as market dominant. NAA Comments at 5-6.

NAA contends that the upstream market is competitive (citing, *e.g.*, direct mailers, in-store displays, and newspapers), while the downstream market, *i.e.*, delivery, with respect to advertising matter is a market dominant product. NAA then argues that no entity other than the Postal Service can deliver the Samples Co-Op Box, making it a market dominant product. *Id.*

The Commission is not persuaded by this argument. The alternatives cited by NAA, in-store displays and newspapers, reflect a way to deliver a sample and each competes without a Postal Service-branded container. Branding may increase the ultimate response rate, but that does not mean there is no competition. The Samples Co-Op Box will offer CPGs another method for disseminating their samples to the public. Furthermore, there are numerous firms engaged in the delivery of parcels. Thus, the Commission concludes that the product is properly characterized as competitive.

*Legality of proposed product.* NAA contends that the Postal Service is illegally licensing its brand to third parties for use on mailing and shipping supplies. *Id.* at 8-9. In describing the experimental product, the Postal Service explains that the definition of “postal service”...refers to the delivery of...mailable packages, including acceptance, collection, sorting, transportation, or other functions ancillary thereto.” Notice at 7, citing 39 U.S.C. 102(5). Accordingly, the Postal Service asserts that the Samples Co-Op Box is a postal service. In response to NAA’s comments, the Postal Service argues that Order No. 392 concerned only nonpostal services and therefore is inapplicable to the Samples Co-Op Box. Postal Service Response at 2-3.

The Commission finds that the Postal Service has properly classified the Samples Co-Op Box as a “postal service” as defined by section 102(5). Order No. 392 pertains to the treatment of “non-postal services” and therefore is not applicable to the proposed product.

*Market test costs.* The market test is being conducted without charge to the parties involved. The Postal Service indicates that the costs associated with the market test will be booked as a research and development cost in connection with new product development. Notice at 8. Section 3641(b)(3) requires that competitive product costs be included in any determination under section 3633, relating to the provisions applicable to competitive products collectively. The Postal Service is directed to keep track of all expenses associated with this market experiment and report them as group-specific costs for competitive products. The information is to be reported in sufficient detail to identify those costs as research and development costs related to the Samples Co-Op Box market experiment.

*Future filings.* The Commission is sensitive to the Postal Service's efforts to obtain market research on the Samples Co-Op Box product prior to proposing to add the product to the Competitive Product List. The Postal Service indicates that depending on the results of the market test, it may propose to conduct an additional market test to determine the appropriate rates for mailing the co-op boxes. Notice at 10. Furthermore, in lieu of proposing another market test, the Postal Service may propose to add Samples Co-Op Box to the Competitive Product List. *Id.* Should the Postal Service want to add the product to the Competitive Product List, its filing should include adequate cost and revenue data demonstrating that the proposed product covers its attributable cost.

*It is Ordered:*

1. Based on the record before it, the Commission finds that the proposed Samples Co-Op Box market test is consistent with 39 U.S.C. 3641.

2. As discussed in the body of this Order, the Postal Service is to report expenses associated with this market experiment as group-specific costs for competitive products.

By the Commission.

Shoshana M. Grove  
Secretary