

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Market Test of Experimental)
Product—Gift Cards)

Docket No. MT2011-2

COMMENTS OF THE PUBLIC REPRESENTATIVE

(February 4, 2011)

I. Introduction

On January 5, 2011, the Postal Service filed a notice with the Commission announcing its intention to initiate a market test of an experimental competitive product, gift cards.¹ At the outset, the Public Representative wishes to commend the Postal Service for its outside-the-box thinking with respect to new ways to generate revenue. However, the Public Representative has some concerns with the Postal Service's proposal. Specifically, as discussed below, the Public Representative has concerns regarding the full scope of the proposed product and its ability to be classified as a "postal service" under 39 U.S.C. 102(5). Nonetheless, with appropriate constraints in place, the Public Representative believes that the Postal Service's proposal to initiate the experimental, competitive gift card product should be allowed to proceed. Additionally, the Public Representative makes some suggestions regarding a potential data collection plan for this market test.

¹ Notice of the United States Postal Service of Market Test of Experimental Product – Gift Cards, January 5, 2011 (Notice).

II. Proposed Classification of the Experimental Product as a Postal Service

A brief history of the Postal Service's prior proposal regarding gift cards is instructive. In Docket No. MC2008-1, the Postal Service proposed to continue a program called "stored value cards" as a grandfathered, competitive nonpostal service.² In proposed draft Mail Classification Schedule language, the Postal Service stated, "Stored Value Cards provide customers with payment alternatives that support their mailing, shipping, and purchase needs. They may include phone cards, gift cards, and prepaid debit cards."³ On that basis, the Commission found that the stored value cards program was not a postal service. *Id.* It also found that, because the program was not offered as of January 1, 2006, it could not be allowed to continue as a grandfathered nonpostal service under 39 U.S.C. 404(e). *Id.* at 47.

The experimental product proposed in this case, gift cards, appears to be a smaller subset of the stored value cards program submitted to be classified as a grandfathered, nonpostal service in Docket No. MC2008-1. Specifically, the Postal Service seems to be only seeking permission from the Commission to offer gift cards. Even though the Commission did not allow stored value cards to continue as a nonpostal service, the Public Representative believes that certain gift cards proposed here are different enough from the former stored value cards to be classified as a postal service under 39 U.S.C. 102(5).⁴

The Public Representative considers the "open loop" gift cards proposed by the Postal Service in its Notice—specifically, gift cards like Mastercard and Visa gift cards which can be used for payment virtually anywhere—to be cash equivalents in today's

² United States Postal Service Notice of Submission of Sworn Statement on "Nonpostal Services" Pursuant to 39 U.S.C. Section 404(e), March 19, 2008 at 3.

³ See Order No. 154 (December 19, 2008) at 47, *quoting* Docket No. MC2008-1, United States Postal Service Notice of Filing of Proposed Mail Classification Schedule Language for Six Nonpostal Services Pursuant to Order No. 120 (November 7, 2008).

⁴ As discussed in more detail in Section III below, the Public Representative has concerns regarding the scope of Postal Service's proposed Gift Cards experimental product and whether the proposed scope is too broad to be considered a "postal service" within the meaning of 39 U.S.C. 102(5).

society. Many consumer online and phone business transactions require credit or debit card numbers to be completed.⁵ In many respects, credit and debit cards have replaced the personal check.

As part of its history as a provider of certain governmental services, the Postal Service has offered an equivalent of personal checks to those members of society that did not have access to a personal checking account, in the form of money orders. The Public Representative believes that open loop gift cards, such as Mastercard and Visa gift cards, are the next logical step from money orders in the evolving realm of business transactions. Because money orders are considered a postal service, it makes sense that the logical outgrowth of money orders, open loop gift cards, should also be considered a “postal service” within the meaning of 39 U.S.C. 102(5).⁶

III. Concerns Regarding the Scope of the Proposed Experimental Product

In its Notice, the Postal Service makes two statements that are cause for concern about the scope of the proposed experimental gift card product. First, it states that “[i]nitially, the cards will only be available for purchase at Postal Service retail windows, and will not be sold at Automated Postal Centers (APCs) or on USPS.com.” Notice at 3. Second, the Postal Service states that it “may also test the sale of ‘closed loop’ gift cards (i.e., cards that are specific to a particular merchant) though no plans have been established of this date.” *Id.*⁷

⁵ Other transactions are also difficult to complete without a credit or debit card such as: car rentals, airline tickets, onboard aircraft purchases, and hotel room stays.

⁶ While the Postal Service’s money order offering is currently classified as a “market dominant,” subject to review of such information that the Postal Service may provide in a case to transfer the money order service to the competitive product list, the Public Representative believes that money orders, along with their similar counterpart open loop gift cards, would more appropriately be classified as a competitive service. This preliminary conclusion is based mainly on the fact that money orders appear to have the same characteristics that the Postal Service identifies in this proceeding for classifying the Gift Card experimental product as competitive. See Notice at 8-10.

⁷ See *also id.* at 4 n.4 (“If the Postal Service tests closed loop cards, this financial model may change, because activation fees are generally not levied on closed loop gift cards. Instead, the Postal

At the outset, the Public Representative notes that the Postal Service clearly states that it does not currently have plans to sell gift cards in places other than a postal retail facility or to offer closed loop gift cards. Accordingly, the concerns raised by the Public Representative here might be premature, assuming the Postal Service will return to the Commission for prior approval before making such offerings, if and when its plans become more concrete and solidified.

However, assuming that the Postal Service's Notice in this case is requesting approval for such activities, notwithstanding the fact that they are purely theoretical at this point in time, the Public Representative raises the following concerns regarding (1) the sale of gift cards outside of postal retail facilities and (2) closed loop gift cards. Each of these issues is discussed below.

A. Issues With Offering Gift Cards Outside Postal Retail Facilities

One of the main reasons that the Postal Service has been allowed, historically, to offer money orders as a postal service is due to the assumption that the vast majority of money orders sold by the Postal Service will be placed into the mailstream. Simply, if a customer is purchasing a money order at a postal retail facility, the person is expected, in the vast majority of circumstances, to mail the money order. Otherwise, the customer would not likely seek out the Postal Service to provide him or her with a money order; rather, the individual would likely purchase the money order at a more convenient competitor location. Money orders have been offered, traditionally, at postal retail facilities for this convenience to the customer.

If the Postal Service were to offer money orders or gift cards through non-postal retail facilities, there would be a much lower chance of the item entering the

Service may enter into a revenue sharing arrangement with the supplier of the closed loop cards, with the purchaser paying no fee.”).

mailstream.⁸ Postal money orders are not offered outside of postal retail facilities. Allowing such a result for either money orders or gift cards would undercut the foundation of the argument that such activities are postal services. Accordingly, since the basis for the Public Representative's support of the experimental gift card product as a postal service is its similarity to money orders, those limitations that apply to money orders should also apply to the proposed experimental product.

Allowing the Postal Service to offer gift cards outside of postal retail facilities clearly does not foster the use of the mails and is not a "function[] ancillary" to the "delivery of letters, printed matter, or mailable packages." 39 U.S.C. 102(5). To remedy this potential problem, the Commission should adopt a constraint similar to the one it adopted regarding the sale of greeting cards and stationery in a prior Commission proceeding.⁹ Accordingly, to ensure that this service remains a "postal service" as defined in 39 U.S.C. 102(5), the Commission should clearly state, if it approves the proposed experimental gift card product, that the Postal Service is not authorized to sell such gift cards outside of its retail facilities.

B. Issues With Offering Closed Loop Gift Cards

While the Public Representative believes that the offering of its open loop gift cards at postal retail facilities conforms with 39 U.S.C. 102(5), as discussed above, the basis of that belief is their functional equivalency to money orders. As a corollary, because closed loop gift cards are only eligible to be used for payment at a particular merchant, they are not a cash equivalent in the same manner as open loop gift cards (which can be redeemed for purchases at a wide variety of retailers). This inability to be

⁸ Additionally, if the Postal Service were to offer a combined open or closed loop gift card and greeting card mailing service directly to a recipient, that might also be considered a postal service under 39 U.S.C. 102(5). See, e.g., <http://www.trolleycards.com/>.

⁹ See MC2009-19, Order No. 391, at 24 (Jan 13, 2010) (finding that "the Commission approves adding sales of Greeting Cards and Stationery to the Competitive Product List. However, the proposed draft MCS language will be revised to limit the availability of this product to retail postal locations and the Postal Service's website.").

used like currency makes them dissimilar enough from money orders to make them a nonpostal service under 39 U.S.C 404(e).

The sale of closed loop gift cards is much more similar to selling an item for a particular merchant than it is to a form of currency.¹⁰ For example, if the Postal Service sells a BestBuy gift card, that gift card can only be redeemed for the purchase of items available at BestBuy, typically electronics.¹¹ Since the Postal Service is barred under 39 U.S.C. 404(e) from selling Bestbuy's electronics products directly, it is likewise not allowed under either 39 U.S.C. 404(e) or 102(5) to sell Bestbuy's gift cards, which will undoubtedly be used for purchasing such electronics.

On the one hand, the Public Representative is sympathetic to the Postal Service's severe fiscal problems and its attempts to find new sources of revenue through broadening the definition of "postal service" under 39 U.S.C. 102(5). On the other hand, the Public Representative has serious concerns with interpreting the term "postal service" under 39 U.S.C. 102(5) too broadly. If the definition of "postal service" is stretched too far, it could create a slippery slope and render 39 U.S.C. 404(e)'s ban on offering new, nonpostal services virtually meaningless.

For various reasons, Congress decided, in passing the Postal Accountability and Enhancement Act, to ban the Postal Service from offering new, nonpostal services and focus on its core business. It is a decision to be left up to Congress¹² – not the Commission – to determine whether the current ban on offering new postal services should be altered in light of the Postal Service's dire financial condition and need for new sources of revenue.

¹⁰ The Postal Service seems to recognize as much when it states, "Gift cards are ... oftentimes more convenient (and more desired by recipients) than purchasing and shipping an article of merchandise." Notice at 7.

¹¹ At least one closed loop gift card might be acceptable under 39 U.S.C. 102(5) and 404(e). On a preliminary basis and subject to the Public Representative's ability to review the evidence provided in potential proceeding on the topic, the Postal Service would likely be able to offer Postal Service gift cards – gift cards that may be used to purchase items or services from the Postal Service – as a postal service under 39 U.S.C. 102(5).

¹² See *e.g.*, POST Act of 2010, S. 3831, 111 Cong. §3 (2010).

V. Data Collection Plan Suggestions

The Postal Service's Notice states that it intends to collect certain data during the market test to better understand the retail costs incurred in selling the product and the value of particular types of cards, card packaging, and card locations to postal customers. Notice at 13. The Notice also states that the Postal Service is willing to report this cost, volume, and revenue data to the Commission "upon request." *Id.* To ensure compliance with applicable laws, the Public Representative suggests that the Commission require the Postal Service to collect and report data similar to that required by the Commission with respect to the market test approved in Docket No. MT2010-1 and explain how such data is derived.¹³

VI. Conclusion

The Public Representative respectfully submits the preceding comments for the Commission's consideration.

Respectfully Submitted,

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¹³ See Docket No. MT2010-1, Order No. 452 at 9-10, May 5, 2010.