

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, D.C. 20268-001

**MARKET TEST OF EXPERIMENTAL PRODUCT-
GIFT CARDS**

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Docket No. MT2011-2

**REPLY COMMENTS OF
THE AMERICAN BANKERS ASSOCIATION**

(February 15, 2011)

I. Introduction

In its Notice and Order Concerning Market Test of Experimental Product, issued January 5, 2011, the Postal Regulatory Commission (Commission) solicited comments pursuant to its determination schedule. Specifically the Commission asked for comments on whether the Postal Service's filing regarding the proposed market test of gift cards is consistent with 39 USC 3641. On February 4, 2011, the American Bankers Association filed comments in response to the determination schedule, and subsequently filed a Motion for Late Acceptance on February 7, 2011. The foregoing is in reply to comments filed by the Public Representative (PR), pursuant to the Commission schedule.

The American Bankers Association (ABA) welcomes the opportunity to provide comment on the USPS proposal to sell gift cards as an experimental product. The American Bankers Association represents banks of all sizes and charters and is the voice for the nation's \$13 trillion banking industry and its two million employees. ABA's

extensive resources enhance the success of the nation's banks and strengthen America's economy and communities.

As stated in its February 4, 2011, filing, the ABA opposes gift cards as a *postal service* as proposed in the original USPS Notice of Market Test of Experimental Product-Gift Cards.¹ Particularly, the ABA opposed the expansion of the statutory definition of *postal service* by likening gift cards to money orders and greeting cards. It was the ABA's position then, and it is the ABA's position now, that the proposed definitional expansion would allow for the offering of postal services that compete with banking and other financial services.

While reasonable minds may have differed whether the USPS analogy between money orders and gift cards is a back door definitional expansion to provide banking services, most would conclude that the Public Representative's comments confirm the ABA's articulated concerns. According to the PR, open loop gift cards as proposed by the USPS, could be used like a Visa or MasterCard, and are "cash equivalents in today's society."² The PR continued that "[i]n many respects, Visa and MasterCard credit and debit cards have replaced the personal check for the purpose of completing business and commercial transactions. The PR concluded:

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

¹ In the ABA's original comments under Docket No. MT2011-2, the ABA took the position that while it opposed gifts cards as a postal service as proposed, the ABA may not oppose gift cards if not identified as a postal service because they are like gifts cards or money orders.

² Comments of the Public Representative, Docket No. MT2011-2 (PR Comments), 2-3.

cards, should also be considered a “postal service” with the meaning of 39 U.S.C. 102(5).³

If gift cards are like money orders, which are like personal checks, then clearly the USPS proposes to issue gift cards as a financial services product. Furthermore, should the Commission approve gift cards based on the USPS’s original Notice and the analysis of the PR, then the door is open for products that are like personal checks and money orders to be offered as a *postal service*.

II. Discussion

A. Experimental Gift Cards as Proposed by the USPS Do Not Meet the Statutory

Definition of a Postal Service Pursuant to 39 USC 3641.

Gift cards, at least as proposed as a *postal service* by the USPS and as recommended by the PR under this docket, expands statutory definitions and would move the USPS beyond its actual purpose. As a government created entity, Congress saw fit in the PAEA to limit the USPS in the offering of postal and non-postal services.⁴ Since passage of the PAEA, the Commission has made various rulings interpreting the statutory provisions.⁵ This is to ensure that the USPS remains committed to its primary mission of binding “the nation together through the personal, educational, literary and business correspondence of the people.”⁶

39 USC 3641 governs the authority of the Postal Service to offer, and the Commission to review, experimental products. Inherent in the statutory provision, is that the experimental product meet the statutory definition of a *postal service*. As provided

³ id. at 3

⁴ See 39 USC 102 (5) and 404 (e).

⁵ See Review of Nonpostal Services Under the Postal Accountability and Enhancement Act, Order No. 154, Docket No. MC2008-1, as discussed herein (Order 154).

⁶ 39 USC 101 (a)

by the USPS in its original Notice of Experimental Product, “[t]o be an ‘experimental product,’ the product must be consistent with the statutory definition of ‘postal service’.”

39 USC 102 (5) defines *postal service* as one that “refers to the delivery of letters, printed matter, or mailable packages, including acceptance, collection, sorting, transportation, or *other functions ancillary thereto*.”⁷ The Commission has previously opined that if a service “relates to any of these functions, broadly, the carriage of mail, it may properly be classified as a postal service.”⁸ The Commission has further ruled that ancillary services are those that are subordinate or subsidiary to primary services.⁹ As a result, it has adopted the standard that ancillary services are those that “enhance the value of service rendered under one of the substantive classes by providing such features as added security, added convenience or speed, indemnity against loss, correct information as to the current address of the recipient, etc.”¹⁰

Gift cards as proposed by the USPS do not meet the statutory definition or the Commission’s interpretation of sections 102 (5) of the PAEA. While gift cards as products are certainly convenient for consumers, it is difficult to envision the subordinate or subsidiary role gift cards play to the carriage of mail. Moreover, gift cards do not carry the qualities of added security, indemnity against loss, etc., envisioned by the Commission under Order 154.

⁷ Emphasis added.

⁸ Order No. 154, 30.

⁹ *id.*

¹⁰ *id.*

B. Gift Cards are Not Like Money Orders or Personal Checks and Are Not a Postal Service.

Gift cards are not comparable to money orders or personal checks and are not a *postal service*. The USPS argues that gift cards are similar to money orders, which previously have been identified as a *postal service*, “**on the basis that they are likely to be mailed when purchased.**”¹¹ The Public Representative would expand the gift card analogy beyond money orders, and would argue that gift cards are like personal checks.¹²

In order 154, referencing the decision in Associated Third Class Mail Users v. U.S. Postal Service, 405 F. Supp. 1109, (D.D.C. 1975), the Commission concluded that although money orders may be identified as a *postal service* under a Postal Regulatory Act (PRA) analysis, the conclusion might be different under the PAEA.¹³ In Associated Third Class Mail Users, the court wrote:

It is clear that all these other services are very closely related to the delivery of mail. The single possible exception is the selling of money orders, since they can be used equally as well without being delivered by mail. ***But it does seem that the vast majority of money orders sold at post offices are actually sent by mail. Therefore it appears safe to say that all of these services would be considered ‘postal services’ in ordinary parlance (emphasis added).***¹⁴

The ATCMU case dates back to 1975, and was vacated by the US Supreme Court, though on other grounds.¹⁵ Moreover, the court’s analysis was completed under the Postal Regulatory Act and not the now operative Postal Accountability and

¹¹ Notice of United States Postal Service of Market Test of Experimental Products- Gift Cards (January 5, 2011 (USPS Notice), 7 (emphasis added).

¹² PR Comments, 3.

¹³ Order 154, 31.

¹⁴ *id.* (Quoting ATCMU at 115).

¹⁵ United States Postal Services v. Associated Third Class Mail Users, 434 U.S. 884

Enhancement Act (PAEA). Under the latter, the term *postal service* is specifically defined, whereas this was not the case under the PRA. A dated case and now defunct statute notwithstanding, it is questionable in 2011, whether the vast majority of money orders purchased at post offices today would be sent via the mail.

The nexus drawn by the USPS between gift cards and money orders is that gift cards, like money orders, are cash equivalents, and both are likely to be mailed when purchased.¹⁶ The USPS provides no data to support that gift cards will be mailed, and further provides no data that all, many, or most money orders are mailed when purchased. Moreover, gift cards do not operate like money orders purchased at post offices. Money orders purchased at post offices have historically been used for the purpose of paying bills and satisfying debt obligations, which is likely why the court in ATCMU concluded that most money orders purchased at post offices are mailed. Open loop gift cards on the other hand, though they may sometimes be redeemed for cash value, do not serve the same purpose as money orders, particularly considering the history of money orders sold at post offices. While open loop gift cards could possibly be used to pay bills, ironically payments would be diverted from regular mail to electronic methods, potentially lessening the impact of any sought after revenue gains from the selling of gift cards.

The PR's conclusion that gift cards are like personal checks is also misplaced. Personal checks are offered by banks and are connected directly with financial accounts that are governed by a host of regulatory standards and requirements. Neither Commission precedent nor the PAEA provide that the USPS may offer personal checks or their equivalents as a postal service. Furthermore, a ruling that gift cards are like

¹⁶ See USPS Notice at 8: "It is logical to believe that gift cards purchased from the Postal Service will also generally be mailed."

personal checks would set a dangerous precedent, expanding the definition of *postal services* to include banking and financial services products.

Finally, the USPS proposes that gift cards are a *postal service* because they meet a USPS-developed two-part test: (1) Gift cards are like greeting cards and will be mailed with greeting cards, and (2) Gift cards are like money orders as cash equivalents.¹⁷ What the USPS does not make clear is whether both parts of the test have to be met or only one. Though the ABA disagrees that either test would qualify gift cards as a *postal service*, clarification from the Commission is essential on this point in that if only one part must be met, then conceivably any cash equivalent likely to be sent through the mail could qualify as a postal service. The ABA asks that the USPS clarify its assertion, and that the Commission reject the proposal that cash equivalents sold at post offices qualify those equivalents as *postal services*.

There is no need to define a postal service by analogy in that the PAEA and subsequent relevant interpretations are clear as to what a *postal service* is and what it is not. Surely if the USPS hopes to rely on the Commission's use of the ATCMU case, then the USPS's rationale that gift cards are like money orders is misplaced. The ABA agrees with the Commission that the past is not prologue, and that the PAEA offers sufficient guidance for determining what a postal service is and what it is not. Gift cards

¹⁷ Though not part of the ABA Reply Comments, the ABA is on record in its original comment as being opposed to gift cards becoming a postal service by analogy to greeting cards. The Commission identified its rationale for concluding that greeting cards are a postal service in Docket No. MC2008-1. Specifically, the Commission approved the selling of greeting cards as a *postal service*, and identified five basic rationale for qualification: (1) Greeting cards are a "valued form of personal communication commemorating special events in peoples' lives." (2) Greeting cards "serve to bind the nation together through personal correspondence," pursuant 39 USC 101(a). (3) Greeting cards offer customer convenience. (4) There is a degree of assurance that greeting cards satisfy the Postal Service's processing requirement, and (5) No party objected to classifying greeting cards as a *postal service*. (Order 154 at 34-35). Open-loop gift cards as proposed do not meet this test.

are not analogous to money orders sold at post offices, and they clearly are not like personal checks.

C. The Commission has Previously Reviewed and Rejected Stored Value Cards as a Non-Postal or Postal Product.

In 2008, the Commission considered and rejected the notion that the Postal Service should sell stored value cards, as a non-postal product. Beginning in 1996, the USPS sold stored value cards but solely for the purchase of postal products, or closed looped cards as opposed to open loop gift cards as proposed here. The USPS ceased selling the Postal stored value card in 2003 due to declining sales.¹⁸ The Commission declined to accept stored value cards as a non-postal product and further opined in footnote that, at least based on the record before it, it would not reach the conclusion that stored value cards are a postal service.¹⁹ The Commission continued that if properly supported, it could conclude otherwise.

Although the Commission did not articulate precisely what support would be required, clearly it did not intend to abandon previously identified standards, i.e., added security, added convenience or speed, indemnity against loss, correct information as to the current address of the recipient, etc.²⁰ That said, gift cards for the purchase of postal products, or closed loop gift cards, would be an easy case in which gift cards would qualify as a *postal service*, allowing the USPS to identify properly supported factors to justify the *postal service* classification.

¹⁸ See Order 154 at 46.

¹⁹ *id.* 48 #(Footnote 90).

²⁰ Order 154 at 30.

IV. Conclusion

The ABA is opposed to establishing the precedent that gift cards are like greeting cards, personal checks, and money orders, and are therefore a *postal service*. Neither the PAEA nor the Commission's interpretation of the same support the interpretation and analysis of the Postal Service or Public Representative. If approved, it would be an unauthorized expansion of Congressional intent behind 39 USC 102 (5), and an encroachment into banking and financial services.

The proposed definitional extension of *postal service* does more than simply provide the opportunity for the USPS to sell gift cards. The proposal creates the opportunity for the USPS to offer other products, including financial services, as *postal services*. The USPS cannot use 39 USC 3641 as a vehicle to achieve statutory changes in its mission, but must seek the consult and approval of Congress.

The ABA thanks the Commission for the opportunity to provide comments, and is available for further comment should the Commission deem appropriate.

Respectfully Submitted

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