

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

Before Commissioners:

Ruth Y. Goldway, Chairman;
Robert G. Taub, Vice Chairman;
Mark Acton;
Tony Hammond; and
Nanci E. Langley

Review of Commission's Price
Cap Rules

Docket No. RM2013-2

ORDER ADOPTING FINAL RULES
FOR DETERMINING AND APPLYING THE MAXIMUM AMOUNT
OF RATE ADJUSTMENTS

(Issued July 23, 2013)

I. INTRODUCTION

On March 22, 2013, the Commission issued a notice of proposed rulemaking relating to the Commission's price cap rules.¹ That notice was intended, in part, to clarify and improve the manner in which 39 C.F.R. part 3010 implements statutory directives and policies previously expressed in Commission orders. See Order No. 1678 at 1.

¹ Notice of Proposed Rulemaking Requesting Comments on Proposed Commission Rules for Determining and Applying the Maximum Amount of Rate Adjustments, March 22, 2013 (Order No. 1678). The Commission issued errata several days later. Notice of Errata, March 25, 2013 (Errata). See also 78 Fed. Reg. 22490, April 16, 2013.

The Commission received comments and reply comments from the Public Representative² and the Postal Service,³ as well as the Association of Magazine Media (MPA),⁴ the Association for Postal Commerce (PostCom),⁵ the National Association of Presort Mailers (NAPM),⁶ Pitney Bowes Inc.,⁷ and Valpak Direct Marketing Systems, Inc. and Valpak Dealers' Association, Inc. (Valpak).⁸ The National Postal Policy Council (NPPC) submitted reply comments.⁹

Some of the rules proposed in Order No. 1678 generated opposition. Others were relatively uncontroversial. The Commission finds that it will be beneficial to promptly adopt rules that were unopposed or raised issues that are easily resolved. The Commission will address the other proposed rules in later proceedings.

This Order is organized as follows. First, proposed rules that generated no opposition are described and adopted. Next, proposed rules that raised questions that are easily resolved are described, modified as appropriate, and adopted. Finally,

² Public Representative Comments, May 17, 2013 (Public Representative Comments); Public Representative Reply Comments, May 31, 2013 (PR Reply Comments). The Public Representative Comments were accompanied by a motion for late acceptance asserting that no party is harmed by the delay in filing. Public Representative Motion for Late Acceptance, May 17, 2013. The motion is granted.

³ Initial Comments of the United States Postal Service, May 16, 2013 (Postal Service Comments); Reply Comments of the United States Postal Service, June 3, 2013 (Postal Service Reply Comments). The Postal Service's reply comments were accompanied by a motion for late acceptance of filing asserting that no party is prejudiced by the delay. Motion for Late Acceptance of Reply Comments, June 3, 2013. That motion is granted.

⁴ Comments of MPA—The Association of Magazine Media, May 16, 2013 (MPA Comments).

⁵ Comments of the Association for Postal Commerce, May 16, 2013 (PostCom Comments); Reply Comments of the Association for Postal Commerce, May 31, 2013 (PostCom Reply Comments).

⁶ Comments of the National Association of Presort Mailers, May 16, 2013 (NAPM Comments).

⁷ Comments of Pitney Bowes Inc., May 16, 2013 (Pitney Bowes Comments).

⁸ Valpak Direct Marketing Systems, Inc. and Valpak Dealers' Association, Inc. Comments on Notice of Proposed Rulemaking, May 16, 2013 (Valpak Comments); Valpak Direct Marketing Systems, Inc. and Valpak Dealers' Association, Inc. Reply Comments on Notice of Proposed Rulemaking, May 31, 2013 (Valpak Reply Comments). Valpak also filed a reply to the late-filed reply comments of the United States Postal Service, along with a motion for leave to reply to the Postal Service's comments. Valpak Direct Marketing Systems, Inc. and Valpak Dealers' Association, Inc. Motion for Leave to File Response to Late-Filed Postal Service Reply Comments, June 4, 2013. This motion is granted.

⁹ Reply Comments of the National Postal Policy Council, May 31, 2013 (NPPC Reply Comments).

proposals concerning the treatment of service reductions and promotional and incentive rates that generated significant opposition requiring additional research and analysis are described. Action in these areas is deferred to a later date.

II. UNCONTROVERSIAL RULES

No commenter objected to the reorganization of part 3010. Consequently, the Commission adopts the changes relating to the reorganization of part 3010, including changes to section numbers and cross-references. The balance of this Order refers to provisions of part 3010 by the section and subpart numbers that appear in the final rules, as printed below the signature of this Order.

Many of the rules proposed in Order No. 1678 generated either positive comments or no objections. In particular, commenters expressed approval of proposed sections 3010.11(c) (providing for public comments on consistency with Commission orders and directives);¹⁰ 3010.12(e) (requiring that cost, avoided cost, volume, and revenue figures included in a notice be developed based on the most recent applicable analytical principles);¹¹ 3010.23(b), requiring that the percentage change in rates for a product be calculated in the same manner as the percentage change in rates for a class,¹² and 3010.43 (specifying that the Commission is interested in the change in net financial position resulting from an agreement).¹³

One of the substantive changes proposed by Order No. 1678 received no comment. Section 3010.11(g) reduces the comment period for remanded rates from 10 days to 7 days. This change reflects the Commission's experience in Docket No. R2013-1, in which a 7-day period was sufficient to solicit public comment

¹⁰ Valpak Comments at 2 (“Valpak supports this proposed rule change.”).

¹¹ Pitney Bowes Comments at 2 (“The proposed change is a welcome improvement....”).

¹² Valpak Comments at 2.

¹³ *Id.* at 3 (“Valpak supports this proposed rule change.”).

concerning an amended notice of rate adjustment.¹⁴ The Commission adopts these changes.

Following is a section-by-section list of the changes the Commission finds to be uncontroversial. These changes are adopted and reflected in the final rules that appear below the signature of this Order.

Section 3010.1 defines the terms “annual limitation,” “maximum rate adjustment,” “Type 1-A rate adjustment,” “Type 1-B rate adjustment,” “Type 2 rate adjustment,” “Type 3 rate adjustment,” and “unused rate adjustment authority.” The definition of the term “class” is discussed in section III.A below.

Section 3010.2 reflects revisions that correct a statutory reference and ensure terms are used consistently.

Section 3010.3 reflects revisions that ensure terms are used consistently and move the requirement that the Postal Service maintain a schedule tracking unused rate adjustment authority to section 3010.26(f).

Section 3010.4 reflects revisions that ensure terms are used consistently.

Section 3010.5 reflects revisions that strike duplicative provisions.

Section 3010.6 reflects revisions that ensure terms are used consistently.

Section 3010.7 reflects revisions that ensure terms are used consistently.

Section 3010.8(d) reflects revisions that strike an obsolete transition requirement.

Section 3010.8 reflects revisions that ensure terms are used consistently.

Section 3010.10 reflects revisions that ensure terms are used consistently and a revision to the heading to clarify the contents of the section.

The contents of former sections 3010.11 and 3010.12 are included in sections 3010.20, 3010.21, and 3010.22.

Section 3010.11 reflects revisions throughout that ensure cross-references are correct and terms are used consistently.

¹⁴ Order No. 1678 at 12.

Section 3010.11(c) reflects revisions to clarify that comments on compliance with relevant statutory provisions and Commission orders and directives are permitted.

Section 3010.11(g) reflects revisions that change the comment period from 10 days to 7 days and provide that comments on amended notices may address subjects described in paragraph (c).

Section 3010.12 reflects revisions that strike paragraph headings and ensure terms are used consistently.

Section 3010.12 also reflects revisions that amend paragraph (b)(5) and add a paragraph (e) to require that cost, avoided cost, volume, and revenue figures be developed from the most recent approved analytical principles.

Changes to section 3010.12(c) relating to the filing of information concerning new discounts and surcharges are discussed in section III.B below.

Section 3010.20 incorporates provisions from former section 3010.11 and reflects revisions that ensure terms are used consistently.

Section 3010.22 reflects revisions that specify that it applies to rate adjustments filed less than 12 months apart, incorporate provisions from former section 3010.12, and ensures terms are used consistently.

Section 3010.23 reflects revisions throughout that ensure terms are used consistently. Further changes to this section are discussed in section III.D and IV.C.

Section 3010.23(b) reflects revisions that require the percentage change in rates for a product to be calculated in the same manner as for a class. The remainder of section 3010.23 is discussed at greater length below.

Section 3010.24 reflects revisions that specify that it applies to calculations under section 3010.23.

Section 3010.25 reflects revisions that clarify that unused rate adjustment authority may only be applied after applying the annual limitation.

Section 3010.26(c)(2) reflects revisions to correct cross-references.

Section 3010.27 reflects revisions that ensure terms are used consistently.

Section 3010.28 reflects a revision to the heading to clarify the contents of the section. An additional proposed change to this section is discussed in section III.F.

Former section 3010.29 is stricken as an obsolete transition provision.

Section 3010.41 reflects a revision to the heading to clarify the contents of the section.

Section 3010.42 reflects revisions that ensure consistent formatting and the consistent use of terms.

An additional comment concerning section 3010.42 is discussed in section III G.

Section 3010.43 reflects revisions that specify that both a plan and a report are required and that the net financial position of the Postal Service should be reported.

Section 3010.44 reflects revisions that ensure terms are used consistently.

The heading of subpart E reflects revisions that ensure terms are used consistently.

Section 3010.60 reflects revisions that ensure terms are consistent with 39 U.S.C. 3622(d) and used consistently.

Section 3010.61 reflects revisions that ensure terms are consistent with 39 U.S.C. 3622(d) and used consistently.

Section 3010.62 reflects revisions that ensure terms are consistent with 39 U.S.C. 3622(d) and used consistently.

Section 3010.63 reflects revisions that are consistent with section 3010.12(b)(2) and ensure that terms are used consistently.

Section 3010.65 reflects revisions that ensure terms are used consistently.

Section 3010.66 reflects revisions that ensure terms are used consistently.

III. CHANGES ADOPTED IN THIS ORDER

Interested parties submitted comments suggesting modifications to changes proposed in Order No. 1678 as well as additional changes to 39 C.F.R. part 3010. The Commission has received sufficient information concerning several of these changes to address commenter concerns. This section discusses the changes that the

Commission adopts, or declines to adopt, in this Order. They are grouped by the section of 39 C.F.R. part 3010 they affect or, if no single section of part 3010 is affected, by topic.

A. Section 3010.1(b)—Definition of “class”

One commenter suggests that the definition of the term “class” in section 3010.1(b) should be modified to more closely track the definition of the term “class” from 39 U.S.C. 3622(d)(2)(A). MPA Comments at 2. MPA argues that the proposed definition “is both circular and insufficiently precise.” *Id.* at 1. It asserts that applying the price cap rules at the class level is an essential requirement of the Postal Accountability and Enhancement Act (PAEA) that promotes rate stability and predictability. *Id.* at 2-3. MPA urges that the definition of “class” be modified to read:

Class means a class of mail, as defined in the Domestic Mail Classification Schedule in effect on the date of enactment of the Postal Accountability and Enhancement Act. Id. at 2.

Two commenters object to MPA’s proposed change. Valpak Reply Comments at 10-11; Postal Service Reply Comments at 5-6. Valpak objects to a definition of the term “class” that would apply to rate adjustments that are not subject to an annual limitation, such as negotiated service agreements and exigent rate adjustments. Valpak Comments at 10-11. It cautions that the proposed change has the potential to work against congressional intent when applied outside the context of 39 U.S.C. 3622(d). *Id.* at 11. Finally, it speculates that the proposed change is an attempt to protect mailpieces that were considered part of the Periodicals class at the time the PAEA was enacted from future reclassification to the First-Class Mail or Standard Mail class. *Id.* at 12. The Postal Service objects to MPA’s proposed change on the basis that it would require the Commission to ignore the effects of changes to the market dominant and competitive product lists made pursuant to 39 U.S.C. 3642. Postal Service Reply Comments at 5-6.

The Commission does not propose to apply the annual limitation under subpart B of part 3010 at anything other than the class level, consistent with the clear language of 39 U.S.C. 3622(d)(2)(A). However, the Commission does not intend to expand the annual limitation requirements to negotiated service agreements or exigent requests. Because the term “class” appears in the rules concerning exigent requests, particularly sections 3010.61(a)(2) and 3010.63, the definition of that term for purposes of part 3010 should not be limited to the 39 U.S.C. 3622(d)(2)(A) definition. Additionally, the Commission does not intend to limit the ability of the Postal Service to seek transfers of products between the market dominant and competitive product lists under 39 U.S.C. 3642 or to create, change, or remove products.

Rather, it seeks to use the definition of the term “class” to limit the scope of the part 3010 rules to market dominant postal products (as opposed to competitive products or nonpostal products). This approach is consistent with chapter 36 of title 39, United States Code, as a whole, not just 39 U.S.C. 3622(d)(2)(A). To that end, the Commission modifies its proposed definition of the term “class” to specify that it only refers to postal products. The revised section 3010.1(b) will read:

(b) *Class* means a class of market dominant postal products.

B. Section 3010.12(c)—Filing of Information for Discounts and Surcharges

Two commenters object to the proposed changes to section 3010.12(c) concerning information provided for workshare discounts and other discounts and surcharges. Valpak Comments at 6-7; NPPC Reply Comments at 8-9. Valpak argues that the proposed changes are “too broad” to address the workshare issues identified in Order No. 1678 and hints that the resulting requirement exceeds the Commission’s statutory authority. Valpak Comments at 6. It also contends that the proposed rule would unnecessarily increase the administrative burden of the Postal Service in preparing notices of rate adjustments. *Id.* at 6-7. NPPC concurs with the Valpak Comments, arguing that Congress did not intend to impose the heightened standards for workshare discounts under 39 U.S.C. 3622(e)(4)(C) on other types of discounts or

surcharges. NPPC Reply Comments at 6-7. NPPC goes further, though, positing that the proposed rule creates a substantive restriction on the Postal Service's ability to offer discounts, limiting it only to discounts that would not "adversely affect either the rates or the service levels' of postal users that do not use the discount." *Id.* at 8. NPPC suggests that the Commission should "simply defer, as an initial matter," to the Postal Service's judgment about what constitutes a workshare discount and then request supplemental information if necessary. *Id.* at 8-9.

The Commission, not the Postal Service, has the responsibility to determine what constitutes a workshare discount. See 39 U.S.C. 3622(e)(1); see also *U.S. Postal Service v. Postal Regulatory Commission*, 717 F.3d 209,209 (D.C. Cir. 2013) citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 US 837 (1984). When faced with a Type 1-A or Type 1-B rate adjustment that must be approved or denied within 45 days, the Commission may not be able to easily identify the discounts and surcharges that qualify as workshare discounts. On the other hand, the Commission has no desire to create an unnecessary administrative burden for the Postal Service.

Consistent with these goals, the Commission modifies proposed section 3010.12(c) to remove references to discounts and surcharges. It also adds a new paragraph (d) concerning the information that the Postal Service must file with respect to any discount or surcharge that it believes is not a workshare discount. Namely, the Postal Service must file an explanation of the basis for its belief that the discount or surcharge is not a workshare discount and a certification that its treatment of the discount or surcharge conforms with approved analytical principles. This information will enable the Commission to quickly determine whether it is necessary to request supplemental information concerning the discount in order to carry out the Commission's responsibilities under 39 U.S.C. 3622(e).

C. Sections 3010.21 and 3010.26—Calculation of Annual Limitation and Interim Unused Rate Adjustment Authority When Notices of Rate Adjustments are 12 or More Months Apart

Commenters focused on two issues concerning the calculation of the annual limitation under section 3010.21. One of these issues, a proposal to incorporate reductions in service standards into the calculation of the annual limitation, is discussed in section IV.A below. The second issue concerns the appropriateness of using a 12-month period to calculate the annual limitation when notices of rate adjustment are more than 12 months apart. This issue is related to the questions of how and when interim unused rate adjustment authority that accrues between notices of rate adjustment may be used under section 3010.26.

The Postal Service requests that the Commission reconsider existing rules that require the annual limitation to be calculated using only the most recent 12 months of available data and interim unused rate adjustment authority to be calculated using data from the period preceding the most recent 12-month period. Postal Service Comments at 2. It argues that the proposed rules (as well as current Commission practices) create a “disincentive to waiting beyond twelve months to raise rates.” *Id.* at 1. The Postal Service’s objections seem to arise chiefly in two contexts: (1) in periods of deflation, or (2) in periods of high inflation. The Postal Service asserts that the Commission’s reading of 39 U.S.C. 3622(d)(1)(A)—which requires that the annual limitation be equal to the change in the Consumer Price Index for All Urban Consumers (CPI-U) “over the most recent available 12-month period”—is “overly literal” and at odds with the Commission’s rules allowing for calculation of a partial year limitation. *Id.* at 3. It proposes that the Commission use data from the entire period between notices of rate adjustment to calculate the annual limitation, not just from the most recent 12 months, and allow the Postal Service to decide whether to adjust rates to the full extent permissible consistent with the annual limitation. *Id.* at 3-4.

Two commenters object to proposed section 3010.26(d) and to the Postal Service's proposal to revisit the calculation of the annual limitation and interim unused rate adjustment authority.

The Public Representative argues that sections 3010.21 and 3010.26 are contrary to both Order No. 606 and the requirement under 39 U.S.C. 3622(d)(2)(C)(iii)(III) that unused rate adjustment authority be used on a first-in, first-out (FIFO) basis. Public Representative Reply Comments at 2-4. He reads Order No. 606 to require that "interim [unused rate adjustment authority] be added to annual [unused rate adjustment authority], and both [...] become available for use by the Postal Service in future rate cases on a FIFO basis by the terms of 39 U.S.C. § 3622(d)(2)(C)(iii)(III)." *Id.* at 3. He contends that proposed section 3010.26(d) allows the Postal Service to use interim unused rate adjustment authority immediately, a practice that he views as allowing the use of unused rate adjustment authority on a last-in, first-out basis. *Id.* at 4.

Valpak agrees that "it is not clear that the Commission's proposal is correct under PAEA." Valpak Reply Comments at 9. It argues that 39 U.S.C. 3622(d)(1)(D) prevents a rate adjustment that uses "more than 12 months of CPI increase plus the earliest available banked authority," because the statute only allows rate adjustments that are "not in excess of the **annual limitations**." *Id.* (emphasis in original). Valpak reads the plural "limitations" to refer to both the annual limitation (based on CPI-U) established under 39 U.S.C. 3622(d)(1)(A) and the limitation on the use of unused rate adjustment authority under 39 U.S.C. 3622(d)(2)(C). It argues that because section 3622(d)(2)(C)(iii)(III) specifies that unused rate adjustment authority may only be used on a first-in, first-out basis, interim unused rate adjustment authority may not be used in the same case in which it is generated. *Id.* at 9-10.

The Commission agrees that section 3622(d)(2)(C)(iii)(III) requires the Postal Service to use unused rate adjustment authority on a first-in, first-out basis. However, Valpak's argument conflates the annual limitations under subparagraph (A) (i.e. the annual limitations based on CPI-U) with the unused rate adjustment authority permitted under 39 U.S.C. 3622(d)(2)(C). Section 3622(d)(1)(D) clearly refers only to the CPI-U

limitation established “under subparagraph (A)” (that is, under subparagraph (A) of section 3622(d)(1)). It would be a distortion of the statute to infer that the use of the plural “limitations” rather than the singular “limitation” in paragraph (1)(D) was meant to encompass both the annual limitation based on CPI-U and the unused rate adjustment authority calculated under paragraph (2)(C). That construction would require the Commission to ignore the modifiers surrounding the word “limitations” both “annual” that precedes it, and importantly, the “under subparagraph (A)” that follows.

Interim unused rate adjustment authority calculated pursuant to section 3010.26(c) is distinct from the annual unused rate adjustment authority calculated pursuant to section 3010.26(b). It allows the Postal Service to accrue some rate adjustment authority in the period between notices of rate adjustments that are more than 12 months apart while respecting the statutory directive that the annual limitation be calculated on a 12-month basis.

The plain language of section 3622(d)(1)(A) (“the most recent available 12-month period”) prevents the Commission from accepting the Postal Service’s request that it be allowed to include more than 12 months of data in the calculation of the annual limitation. Unused rate adjustment authority, on the other hand, is intended to take into consideration the amount of the rate adjustment that the Postal Service “actually makes” in a given year. 39 U.S.C. 3622(d)(2)(C)(i)(II). In instances where notices of rate adjustments are filed 12 or more months apart, the annual limitation does not allow the Postal Service to make a rate adjustment that would take into account the period in excess of 12 months.¹⁵ Interim unused rate adjustment authority is a means of addressing the difference between the period over which the statute allows the annual limitation to be calculated and the actual period between notices of rate adjustment.

Section 3010.26(d) allows the Postal Service to use interim rate adjustment authority in the same case in which it is generated in order to take into consideration the

¹⁵ For example, when notices of rate adjustment are filed 14 months apart, the “annual limitation” excludes the first 2 months of that period.

economic events of the entire period between notices of rate adjustment. This authority is, of course, limited by the FIFO requirements of 39 U.S.C. 3622(d)(2)(C)(iii)(III) and 39 C.F.R. 3010.27. In times of inflation, this practice has generally worked to the Postal Service's advantage, allowing it to use interim unused rate adjustment authority to increase prices consistent with the change in CPI-U over the entire period between notices of rate adjustment. Now, the Postal Service proposes that the Commission allow it to ignore periods of deflation (which can result in negative unused rate adjustment authority), but continue to calculate interim unused rate adjustment authority for periods of inflation. The Commission finds no legal basis for the Postal Service's proposed approach. Just as the Postal Service benefits from positive interim unused rate adjustment authority in periods of inflation, it must accept that in periods of deflation, interim unused rate adjustment authority will be negative.

The Commission does not find the use of interim unused rate adjustment authority to violate the FIFO principle of 39 U.S.C. 3622(d)(2)(C)(iii)(III). Contrary to the assertions of the Public Representative and Valpak, 39 C.F.R. part 3010 does not permit the Postal Service to use interim unused rate adjustment authority before unused rate adjustment authority generated during the previous 5 years. When the Postal Service files a notice of rate adjustment more than 12 months after the previous notice of rate adjustment, the Commission immediately calculates both interim and annual unused rate adjustment authority under section 3010.26(c). The interim unused rate adjustment is immediately added to the schedule of unused rate adjustment authority described in section 3010.26(f) (commonly referred to as "the bank"). Section 3010.26(d) allows the Postal Service to use that interim unused rate adjustment authority in the same case in which it is generated, but only *after* it uses all unused rate adjustment authority from the previous 5 years.¹⁶ This is consistent with the

¹⁶ This is assuming the sum of the unused rate adjustment authority from the previous five years does not exceed 2 percentage points. If the sum of the unused rate adjustment authority from the previous five years exceeds 2 percentage points, the Postal Service could be prevented from using the interim unused rate adjustment authority generated in a case by operation of section 3010.28.

requirement under section 3010.27 that the unused rate adjustment authority used for a class to make a Type 1-B rate adjustment “shall be subtracted from the existing unused rate adjustment authority for the class, using a first-in, first-out (FIFO) method, beginning 5 years before the instant notice.”

The Postal Service objects to this approach because it creates a “disincentive to waiting beyond twelve months to raise rates.” Postal Service Comments at 1. The Commission’s rules and past practice are based on 39 U.S.C. 3622, which was carefully crafted to foster the objective of predictable and stable rates. Increases are limited to the percentage change in CPI over the preceding 12 months plus up to 2 percent of previously unused authority. The Commission’s current rules were designed to be consistent with this statutory scheme, as are the amendments approved in this Order.

For these reasons, the Commission declines to alter its approach to the calculation and use of interim unused rate adjustment authority. However, the comments indicate that proposed section 3010.26(d) did not clearly convey the Commission’s intent with respect to the use of interim unused rate adjustment authority. Accordingly, the Commission modifies section 3010.26(d) to read as follows:

(d) Interim unused rate adjustment authority may be used to make a rate adjustment pursuant to the notice of rate adjustment that led to its calculation. If interim unused rate adjustment authority is used to make such a rate adjustment, the interim unused rate adjustment authority generated pursuant to the notice shall first be added to the schedule of unused rate adjustment authority devised and maintained under paragraph (f) as the most recent entry. Then, any interim unused rate adjustment authority used in accordance with this paragraph shall be subtracted from the existing unused rate adjustment authority using a first-in, first-out (FIFO) method, beginning five years before the instant notice.

D. Section 3010.23(d)—Anticipated Changes in Mailer Behavior

Two commenters suggest that section 3010.23(d) be altered to allow adjustments to billing determinants based on anticipated changes in mailer behavior. PostCom at 8-9; Postal Service Comments at 4-5. PostCom argues that a “complete

prohibition on relying on anticipated changes in mailer behavior is too restrictive.” PostCom Comments at 8. It points to Standard Mail Flats as an example of a product for which the Postal Service should be allowed to take into consideration the effect of potential mailer behavior on the ability of the product to cover costs. *Id.* Although it acknowledges that the Commission disapproved of this approach to Standard Mail Flats in Order No. 1541,¹⁷ it argues the Postal Service could “inadvertently drive volume to less profitable categories or out of the system entirely” if it does not take mailer behavior into consideration in setting rates. PostCom Comments at 8-9. PostCom advocates allowing the Postal Service to make adjustments to billing determinants based on anticipated changes in mailer behavior in particular cases if it can demonstrate that the changes are “reasonably likely to occur.” *Id.* at 9.

The Postal Service proposes that the Commission establish a prohibition on the use of anticipated changes in mailer behavior to make adjustments to billing determinants as its “default approach” but also allow exceptions to the rules for “particular circumstances.” Postal Service Comments at 4. The Postal Service points to two cases as examples of the Commission using anticipated changes in mailer behavior to make adjustments to billing determinants: the Full-Service Intelligent Mail barcode (IMb) discounts in Docket No. R2009-2 and the Mobile Barcode Promotion approved in Docket No. R2013-1. *Id.* at 4-5. It argues that these cases prove that the Commission should allow the Postal Service to use projections of mailer behavior “where it believes using historical volumes would either understate volumes or otherwise be inappropriate.” *Id.* at 5.

Valpak opposes the use of anticipated changes in mailer behavior to make adjustments to billing determinants in any situation and supports the proposed rule as written. Valpak Reply Comments at 4-8. It quotes extensively from Order No. 1541 to support its contention that cost projections are not appropriate in a rate case. *Id.* at 4-6.

¹⁷ Docket No. R2013-1, Order on Price Adjustments for Market Dominant Products and Related Mail Classification Changes, November 16, 2012, at 39-41 (Order No. 1541).

It asserts that projections of mailer behavior are necessarily based on “assumptions, speculation, and uncertainty” that “should be open to challenge.” *Id.* at 7. It further asserts that such challenges are not feasible under the “accelerated timetable” of a market dominant rate case. *Id.*

As the commenters point out, the Commission’s experience with projections based on forecasts of anticipated mailer behavior has not been positive. As was the case with the Postal Service’s projection of future volume changes associated with Standard Mail Flats, projections of mailer behavior carry the risk of relying on assumptions that are “unfounded,” “unsupported,” or “erroneous.” See Order No. 1541 at 40. In Docket No. R2011-1, the Commission disapproved of the use of projections of mailer behavior.¹⁸

In contrast, the Commission found that the calculation of percentage change in rates for the Mobile Barcode Promotion did not rely on “forecasts of expected volume.” Order No. 1541 at 17. Rather, the Postal Service permissibly used “actual volumes...” from the promotion to make adjustments to billing determinants in Docket No. R2013-1. *Id.* The Commission does not intend for section 3010.23(d) to prevent adjustments to billing determinants similar to the adjustments made for the Mobile Barcode Promotion, “where historical volumes [were] available for the calculation of the effect of the price change resulting from the promotions on the price cap.” *Id.* To the contrary: an adjustment that uses actual historical volumes to account for the effects of a classification change ameliorates the problems anticipated by Valpak.

A brief review of the development of section 3010.23(d) in Docket No. RM2007-1 demonstrates that the additional language is consistent with how the rule was originally intended to operate. In response to the Commission’s initial advance notice of proposed rulemaking inviting comments on 39 U.S.C. section 3622,¹⁹ the Postal

¹⁸ Docket No. R2011-1, Order Approving Market Dominant Classification and Price Changes, and Applying Price Cap Rules, December 10, 2010, at 19 (Order No. 606).

¹⁹ Docket No. RM2007-1, Order No. 2, Advance Notice of Proposed Rulemaking on Regulations Establishing a System of Ratemaking, January 30, 2007 (Order No. 2).

Service outlined the basic concept that eventually formed the basis of section 3010.23(d).²⁰ The Postal Service proposed a method of calculating the average price change for each class using a fixed rate index of prices, where the prior year's billing determinants served as the weight for each rate cell that was proposed by the Postal Service, and allowing for adjustments to reflect changes in the rate design structure. *Id.*

To explore some of the important issues raised by commenters in the responses to Order No. 2, the Commission issued a second advance notice of proposed rulemaking, which asked parties to comment on several questions.²¹ The Commission specifically requested additional discussion about how adjustments to billing determinants might be developed in circumstances where historical billing determinants were not available. *Id.* at 5.

The Postal Service replied with an extended discussion of the issue.²² It distinguished between “mail characteristics which appear in the mailstream, but for which billing determinants are not available because those characteristics previously were not associated with distinct rate treatment” and “those characteristics which do not appear at all within the existing mailstream.” *Id.* at 6-7. The Postal Service explained that in either case, “[t]o maintain consistency with historical billing determinants, of course, the focus must remain on the volume proportions as they exist without any rate distinction.”²³ *Id.* at 8. It described the adjustments as a process whereby “the Postal Service would ‘map’ the historical volumes to the noticed price structure using the best data available. These data could include historical volume data (e.g., for shape

²⁰ Docket No. RM2007-1, Reply Comments of the United States Postal Service, May 7, 2007, Appendix C at 7-8.

²¹ Docket No. RM2007-1, Second Advance Notice of Proposed Rulemaking on Regulations Establishing a System of Ratemaking, May 17, 2007 (Order No. 15).

²² Docket No. RM2007-1, Initial Comments of the United States Postal Service on the Second Advance Notice of Proposed Rulemaking, June 18, 2007, at 7-10 (Postal Service Second Notice Comments).

²³ The Postal Service further explained that estimating the volume change in response to new price incentives may be useful for other purposes, but that such an exercise should not be used “for purposes of calculating compliance with the cap.” *Id.* at n.3.

distribution) that were not previously needed for postage calculation; the results of mail characteristics or market research studies; or, observed volume patterns for a recent period (shorter than a full year) for which the price structures were in effect.” *Id.* at 9. The Postal Service anticipated that “all ‘adjustments’ to billing determinants would be explained...with the materials submitted with the Notice of Price Adjustment.” *Id.*

PostCom initially expressed concern that the use of adjustments by the Postal Service might entangle the process in the difficulties of forecasting or rolling forward volumes.²⁴ The Alliance of Nonprofit Mailers (ANM) and the Magazine Publishers of America, Inc. (MPA) raised an additional concern that the Postal Service’s approach would need to allow an exception to account for the price cap implications of “changes in mail preparation requirements” that require an adjustment “to reflect the impact of the rule change on rate eligibility.”²⁵

The Postal Service explained that the concerns expressed by these commenters were founded on a misunderstanding of both the Postal Service’s intent and its proposed method of developing the billing determinant adjustments.²⁶ It emphasized that its approach represented “a sensible way to calculate compliance for new rate structures by the use of historical volumes, without the need for forecasts and rollforwards.” *Id.* at 4 (footnote omitted). The Postal Service also described how billing determinant adjustments would be applied to ensure that a change in mail preparation requirements that shifts some mail into a different price category is fairly evaluated for compliance with the cap. *Id.* at 3.

²⁴ Docket No. RM2007-1, Comments of PostCom in Response to Second Advance Notice of Proposed Rulemaking on Regulations Establishing a System of Ratemaking, June 18, 2007. After the Postal Service provided further clarification that forecasts and rollforwards would be unnecessary, PostCom found the approach “entirely reasonable”. Docket No. RM2007-1, Reply Comments of PostCom in Response to Second Advance Notice of Proposed Rulemaking, July 3, 2007, at 4 (2007 PostCom Reply Comments).

²⁵ Docket No. RM2007-1, Initial Comments of Alliance of Nonprofit Mailers and Magazine Publishers of America, Inc. on Further Advance Notice of Proposed Rulemaking (Order No. 15), June 18, 2007, at 1-3.

²⁶ Docket No. RM2007-1, Reply Comments of the United States Postal Service on the Second Advance Notice of Proposed Rulemaking, July 3, 2007, at 3-6.

Nearly all parties who commented on the issue in Docket No. RM2007-1 ultimately supported the Postal Service's proposed weighting system.

Many of the comments in support of this approach cited the fact that it would avoid "the complexity and practical difficulty of projected volume data" as an important element that would help ensure the speed and simplicity of the system of regulation envisioned by the PAEA.²⁷

With the broad support for the approach among commenters and the detailed explanations from the Postal Service of how it would be applied in various scenarios, the Commission's final rule adopted the concept of weighting the current and new rates by a fixed set of historical billing determinants, with adjustments based on additional historical mail characteristics data where necessary to reflect changes in the rate and classification structure.

Consistent with the original design of the rule and its past practice, the Commission finds that section 3010.23(d) should be modified to clarify that adjustments to billing determinants may not be based on forecasts of mailer behavior.

²⁷ Docket No. RM2007-1, Reply Comments of Pitney Bowes Inc. in Response to Second Advance Notice of Proposed Rulemaking on Regulations Establishing a System of Ratemaking, July 3, 2007, at 4; *see also* Initial Comments of Pitney Bowes Inc. in Response to Second Advance Notice of Proposed Rulemaking on Regulations Establishing a System of Ratemaking, June 18, 2007, at 3-4; Comments of ADVO, Inc. in Response to Second Advance Notice of Proposed Rulemaking on Regulations Establishing a System of Ratemaking, June 18, 2007, at 3; Valpak Direct Marketing Systems, Inc. and Valpak Dealers' Association, Inc. Reply Comments on Regulations Establishing a System of Ratemaking in Response to Commission Order No. 15, July 3, 2007, at 12-3; Initial Comments of the American Postal Workers Union AFL-CIO, in Response to Second Advance Notice of Proposed Rulemaking on Regulations Establishing a System of Ratemaking, June 18, 2007, at 3; 2007 PostCom Reply Comments at 4.

It is worth noting that, consistent with the discussion above, an adjustment that “maps” historical volume data to a noticed price structure, using the best available data, is not considered an adjustment based on forecasts of mailer behavior.²⁸ Paragraph (d) of section 3010.23 will be modified to read as follows:

(d) The volumes for each rate cell shall be obtained from the most recent available 12 months of Postal Service billing determinants. The Postal Service shall make reasonable adjustments to the billing determinants to account for the effects of classification changes such as the introduction, deletion, or redefinition of rate cells. Whenever possible, adjustments shall be based on known mail characteristics or historical volume data, as opposed to forecasts of mailer behavior. The Postal Service shall identify and explain all adjustments. All information and calculations relied upon to develop the adjustments shall be provided together with an explanation of why the adjustments are appropriate.

E. Section 3010.26(f)—Clarify that Unused Rate Adjustment Authority is a Series of Numbers Rather than a Single Number

The Public Representative expressed concern that Order No. 1678 appears to refer to a single “calculation” of unused rate adjustment authority, rather than separate calculations for each class in each rate case. Public Representative Comments at 2. He notes, however, that proposed section 3010.26(f) properly reflects the complexity of unused rate adjustment authority calculations by requiring a table that tracks the establishment and subsequent use of unused rate adjustment authority by class.²⁹ The Public Representative is correct that unused rate adjustment is calculated for each class, in each rate case.

²⁸ The Postal Service indicated that it may wish to use “the results of mail characteristics or market research studies” to make adjustments to billing determinants. Postal Service Second Notice Comments at 9. If the Postal Service intends to use such studies to make adjustments to billing determinants in a particular rate case, the Commission encourages it to submit such studies to the Commission in advance of its notice of proposed rate adjustment, to provide the Commission and interested parties with additional time for review.

²⁹ *Id.* Section 3010.12(b)(2) also requires the Postal Service to submit with each notice of Type 1-A or Type 1-B rate adjustment a “schedule showing unused rate adjustment authority available for each class of mail displayed by class and available amount for each of the preceding 5 years.”

The Public Representative also expresses concern that the Commission “essentially treats [unused rate adjustment authority] for a class as a single, cumulative number—the sum of five years of [unused rate adjustment authority].” Public Representative Comments at 2. He correctly points out that 39 U.S.C. 3622(d)(2)(C) requires the Postal Service to use the oldest unused rate adjustment authority first, and does not require it to use the sum of the unused rate adjustment authority generated during the previous five years all at once. *Id.* at 2-3. The Commission finds that the proposed rules adequately express the nature of unused rate adjustment authority. Section 3010.20(d)(2) allows for a maximum rate adjustment that consists, in part, of “the unused rate adjustment authority for the class that the Postal Service elects to use, subject to the limitation under § 3010.28.” Section 3010.27 provides that the unused rate adjustment authority used in a case for a class “shall be subtracted from the existing unused rate adjustment authority for the class, using a first-in, first-out (FIFO) method, beginning 5 years before the instant notice.” In combination, these rules allow the Postal Service to elect to use all, part, or none of its available unused rate adjustment authority, provided that it uses the oldest unused rate adjustment authority first.

Neither of the Public Representative’s concerns appear to require a modification of the proposed rules.

F. Section 3010.28—Maximum Size of Unused Rate Adjustment Authority Rate Adjustment

One commenter argues that section 3010.28 “creates an ambiguity that arguably might allow the Postal Service to raise rates by two percent even when it lacks the unused rate authority necessary to do so.” NPPC Reply Comments at 2. It suggests that section 3010.28 be revised to read:

Unused rate adjustment authority, if available, used to make a Type 1-B rate adjustment for any class in any 12-month period may not exceed 2 percentage points. *Id.*

The Commission finds this suggested change to be unnecessary. Section 3010.28 establishes the maximum amount of unused rate adjustment authority that may be used for a class in any one 12-month period. Nothing in the plain language of this section creates (or allows for the creation of) unused rate adjustment authority not generated pursuant to section 3010.26. A simple limitation on the amount of unused rate adjustment authority used in any one 12-month period is not enough to create additional authority.

G. Section 3010.42(f)—Projections of Changes in Net Financial Position Resulting from Market Dominant Negotiated Service Agreements

Valpak suggests that the Commission modify section 3010.42(f) to require that the Postal Service’s projection of the change in net financial position resulting from a market dominant negotiated service agreement be based on “the Commission’s methodology, including its choice of proxy.” Valpak Comments at 11. In addition, Valpak proposes that the Commission detail how market dominant negotiated service agreements are reported in the Postal Service’s Annual Compliance Report. *Id.* Valpak’s concerns stem from the Postal Service’s reporting concerning the Discover Financial Services 1 product. *Id.*

Requirements relating to the Annual Compliance Report are found in 39 C.F.R. part 3050 and are outside the scope of this docket. The Commission will not address them here.

As for section 3010.42(f), the Commission reaffirmed its accepted analytical principle for the assessment of the financial effects of price incentives (including negotiated service agreements) designed to increase mail volume or shift mail volume between products in Docket No. RM2010-9.³⁰ In that docket, the Postal Service proposed a new methodology for calculating the financial impact of pricing incentive programs based on “trend analysis” to replace the Commission’s elasticity-based

³⁰ Docket No. RM2010-9, Order Terminating Proceeding, May 27, 2011 (Order No. 738).

methodology. *Id.* at 1. The Commission rejected the Postal Service’s proposed methodology in favor of its accepted analytical principle that the financial effect of price incentive programs should be “based on the Postal Service’s best estimate of the price elasticity of the discounted product.” *Id.* at 3 (quotation marks omitted). However, the Commission also encouraged the Postal Service to continue to examine other methods for evaluating the financial impact of pricing incentive programs that would be based on “accurate and reliable data.” *Id.* at 16.

Consistent with Order No. 738, the Commission finds that, although in many cases, the Commission’s accepted analytical principles will provide the best available model for evaluating the net financial impact of a market dominant negotiated service agreement, part 3010 should not unnecessarily limit the Postal Service’s ability to supplement its filing with an alternative analysis of the net financial impact. However, if the Postal Service elects to include a methodology that differs from the Commission’s accepted analytical principles, it should include an explanation of why it believes its model produces a more accurate estimate than the Commission’s. Including an alternative model does not remove the obligation to provide the Commission with a calculation of net financial impact that is based on the Commission’s approved analytical principles. Finally, the Commission reminds the Postal Service that, as a general matter, if it develops improved methodologies it may propose them in a separate docket in accordance with 39 C.F.R. 3050.11. Generally speaking, a petition under 39 C.F.R. 3050.11 will provide the Commission and interested persons with a better opportunity to evaluate proposed methodologies thoroughly without delaying the consideration of a notice of a market dominant negotiated service agreement filed under 39 C.F.R. 3010 subpart D.

In light of the foregoing considerations, the Commission modifies section 3010.42(f) to read as follows:

(f) Details regarding the expected improvements in the net financial position or operations of the Postal Service. The projection of change in net financial position as a result of the agreement shall be based on accepted analytical principles. The

projection of change in net financial position as a result of the agreement shall include for each year of the agreement:

- (1) The estimated mailer-specific costs, volumes, and revenues of the Postal Service absent the implementation of the negotiated service agreement;
- (2) The estimated mailer-specific costs, volumes, and revenues of the Postal Service which result from implementation of the negotiated service agreement;
- (3) An analysis of the effects of the negotiated service agreement on the contribution to institutional costs from mailers not party to the agreement;
- (4) If mailer-specific costs are not available, the source and derivation of the costs that are used shall be provided, together with a discussion of the currency and reliability of those costs and their suitability as a proxy for the mailer-specific costs; and
- (5) If the Postal Service believes the Commission's accepted analytical principles are not the most accurate and reliable methodology available, (A) an explanation of the basis for that belief; and (B) a projection of the change in net financial position resulting from the agreement made using the Postal Service's alternative methodology.

H. Library of Commission-approved Cost Models

Two commenters support the establishment of an online, indexed library of the Commission's approved cost models. Pitney Bowes Comments at 2-3. Postal Service Reply Comments at 6. Pitney Bowes argues that such a library would be consistent with the goals of this docket, aid the Postal Service in complying with section 3010.12(e), and result in pricing decisions based on the most recent and accurate cost data. Pitney Bowes Comments at 3. It notes that the Postal Service previously requested similar information in connection with its FY 2012 Annual Compliance Report. *Id.* at 2. The Postal Service expresses its support for Pitney Bowes' recommendation. Postal Service Reply Comments at 6.

The development of rules to establish a library of Commission-approved cost models is beyond the scope of this rulemaking. Such regulation would more properly

be considered in the context of 39 C.F.R. part 3050 rules. The Commission will not address the ramifications of such rules here. However, the Commission agrees that such a library would be useful for the Postal Service and postal customers. It earlier made available on its website a chart identifying the most recent Commission-approved workshare cost avoidance models.³¹ The Commission will endeavor to provide additional and updated cost models as appropriate.

IV. REMAINING ISSUES

Several of the proposed rules generated significant opposition or additional suggestions from commenters. The issues raised by the comments concerning these rules are discussed in this section. They include a proposal to include reductions in service quality in the calculation of the maximum rate adjustment, a proposal to alter the contents of notices concerning market dominant negotiated service agreements, and a number of proposals concerning the treatment of promotions and incentives. The Commission finds that these issues require additional research and analysis that exceed the scope of this docket and will defer consideration of them to a later date.

A. Reductions in Service

Two commenters support modifying 39 C.F.R. part 3010 to take reductions in service quality into consideration when calculating the maximum rate adjustment for each notice. Valpak Comments at 7-11, NPPC Reply Comments at 9. Valpak alleges that “[u]ntil Commission rules state that some reductions in service, depending upon their severity or egregiousness, will be given consideration when determining the maximum price cap adjustment in any given year, the Postal Service each year will have unrestrained license to increase operating profitability by reducing the quality of

³¹ PRC Workshare Cost Avoidance Models, Last Update: 05/07/2013, available http://www.prc.gov/prc-docs/home/whatsnew/Directory%20of%20PRC%20Workshare%20Cost%20Avoidance%20Models_3155.pdf.

service being provided to mailers and the public.” Valpak Comments at 8. Both Valpak and NPPC assert that this is a problem common to price cap regimes generally. Valpak Comments at 7; NPPC Reply Comments at 9-12.

Valpak points to three actions by the Postal Service that it asserts have reduced (or have the potential to reduce) quality of service: post office closings, reductions in hours of operation at post offices, and the proposal to eliminate Saturday delivery. Valpak Comments at 7. Valpak also uses the conversion to Full-Service IMb as an example of a change the Postal Service can make to “reduce its costs while increasing costs to mailers.” *Id.* at 9. Valpak asserts that such changes should result in a reduction in the maximum rate adjustment that the Postal Service could make in a particular rate case. *Id.* In addition to echoing Valpak’s concerns about network rationalization and Full-Service IMb, NPPC alleges that First-Class Mail service standards have already been reduced and that changes to Periodicals service standards are expected in the future. NPPC Reply Comments at 10.

This docket has not produced the information the Commission would need to amend its rules to include reductions in service quality in the calculation of the maximum rate adjustment. For instance, it is not clear whether such reductions can or should be considered when calculating the annual limitation under section 3010.21 or 3010.22, when calculating the percentage change in rates under section 3010.23, or even when calculating the available amount of unused rate adjustment authority under section 3010.26. Although Valpak provides examples of changes, it believes reduce the quality of service provided by the Postal Service, it does not suggest a definition or other framework that the Commission could use to determine which changes result in a reduction in service quality that would necessitate an adjustment to the maximum rate adjustment. NPPC proposes that adjustments to the maximum rate adjustment be made when “the Postal Service makes changes that reduce service quality, raise mailer costs, or force mailers into higher priced products” but does not specify how the Commission should determine when those conditions have been met. NPPC Reply Comments at 12. Additionally, as Valpak notes, its proposal does not address “the

issue of what data to use when determining the extent” of a reduction in service quality. *Id.* at 10.

Finally, the Commission notes that neither Valpak nor NPPC discusses whether and how the price cap calculations might be adjusted to reflect improvements in service.

The Commission, therefore, does not proceed with these suggestions.

B. NSA Notice Contents

In addition to the change to section 3010.42(f) discussed in section III.G above, Valpak proposes two requirements relating to market dominant negotiated service agreements. Valpak Comments at 12-13. The first would be a requirement that the Postal Service identify the mailers it believes to be “similarly situated” to the mailer that is a party to the proposed negotiated service agreement. *Id.* at 12. This proposal is related to the Commission’s consideration of the Valassis 1 product in Docket Nos. MC2012-14 and R2012-8. During that case, the Commission issued a Notice of Inquiry to obtain clarification concerning similarly situated mailers.

The second proposal is a requirement that the Postal Service explain why it would be “impracticable” to establish a niche classification instead of entering into a negotiated service agreement. *Id.* at 13. Valpak asserts that this requirement is similar to a regulation in effect before the enactment of the PAEA, and that it would address “systemic problems” with negotiated service agreements, including “preferences and discrimination.” *Id.*

Both proposals present potential difficulties that are not fully explored in the Valpak Comments. For instance, the first proposal would require the Postal Service to make an initial complex determination about the universe of similarly situated mailers. Adding such a requirement could make the notice requirements under 39 C.F.R. 3010 subpart D unduly burdensome. Such a burden may be contrary to the goals of the PAEA, which requires the Commission to consider the desirability of the Postal Service entering into appropriate market dominant negotiated service agreements. See 39 U.S.C. 3622(c)(10).

The second proposal, to require the Postal Service to justify its decision to enter into a negotiated service agreement rather than establish a niche classification, could infringe on the Postal Service's discretion with respect to the structure of its products. Nothing in 39 U.S.C. 3622(c)(10) requires the Postal Service to make "special classifications" generally available to mailers that are not similarly situated. Title 39 permits the Postal Service to make the reasonable business decision to use a negotiated service agreement rather than a niche classification in order to better understand the implications of new strategies before broadening those strategies to affect a wide range of customers. The choice to offer a negotiated service agreement instead of a niche classification is a reasonable way to limit the potential adverse effects of an unsuccessful initiative to the benefit of postal customers generally. Valpak fails to offer sufficient justification to support adding either of these requirements to the subpart D rules.

C. Promotions and Incentive Programs

Many of the comments filed in this docket concern the treatment of promotions and incentive programs. One commenter supported the rules as proposed. Several other commenters raised general objections to the idea of allowing the Postal Service to include temporary promotional rates in the calculation of the percentage change in rates.

Commenters also suggested a range of possible modifications to the proposed rules. Several of them focused on proposed paragraph (e) of section 3010.23, suggesting that the Commission change "may" to "shall" in order to require the Postal Service to exclude temporary promotional rates from the calculation of the percentage change in rates. PostCom suggests several alternative methods of accounting for temporary promotions which generated additional reply comments. The Postal Service suggests two alternatives to the proposed rules as well. These comments indicate that the treatment of promotional rates and incentive programs is likely to be crucial to the Commission's calculation of maximum rate adjustments in future rate cases. In order to

allow for the development of a more complete record on this important issue, the Commission will open a separate docket to solicit targeted comments from interested persons.

1. General Comments

Alone among the commenters, the Public Representative supports proposed section 3010.23(e) and (f) without modification. Public Representative Reply Comments at 4. In particular, he argues that allowing the Postal Service to exclude some temporary promotions and incentives from the calculation of the percentage change in rates is appropriate. *Id.* Some promotions (like summer sales) are more like negotiated service agreements: their primary goal is to generate volume. *Id.* These promotions should be excluded from the calculation of percentage change in rates. Some promotions, on the other hand, are more like investments. In these cases, the Public Representative argues that the Postal Service should be permitted to include promotional rates in the calculation of the percentage change in rates, in order to generate unused rate adjustment authority that would allow it to “recover” the investment from all mailers. *Id.*

The Postal Service generally supports the treatment of temporary promotions under the proposed rules, but suggests additional modifications to specifically provide for the treatment of mid-year promotions. Postal Service Reply Comments at 3-4. Those suggestions are discussed below.

Other commenters object to the inclusion of any temporary promotional rate in the calculation of the percentage change in rates. Three commenters claim that proposed section 3010.23(e) represents an arbitrary reversal of the Commission’s past practice. Valpak Comments at 3-5; Valpak Reply Comments at 2-3; NAPM Comments at 3-4; NPPC Reply Comments at 2-3. The Valpak Comments cite seven dockets that excluded temporary promotions from the calculation of percentage change in rates. Valpak Comments at 3-4; see *also* NAPM Comments at 3-4. Valpak argues that the Commission failed to provide a reasoned analysis for what Valpak views as the

Commission's change in position in Docket No. R2013-1. Valpak Comments at 5; see *a/so* NAPM Comments at 5. NPPC further objects that in Order No. 1541, the Commission did not announce that its treatment of promotional discounts represented a new approach. NPPC Reply Comments at 3. NAPM asserts that many of the objections raised in Docket No. R2013-1 were due to the treatment of temporary promotions, which "was a substantial departure from past practice." NAPM Comments at 4.

Two commenters assert that subsections 3010.23(e) and (f) are inequitable. Valpak argues that the proposed rules are inequitable because they would allow the Postal Service to provide discounts to some mailers while increasing rates for other mailers. Valpak Comments at 5. It cites Docket No. R2013-6, the technology credit promotion, as an example of an attempt by the Postal Service to do just that. *Id.* at 5-6. Pitney Bowes focuses on the "inequitable" effects of a failed promotional program, and argues that under the proposed section 3010.23 "the Postal Service is held harmless... but the nonparticipating mailers pay." Pitney Bowes Comments at 3. Additionally, NPPC questions whether "requiring other (or future) mailers to pay higher rates to recover temporary promotional rates is just and reasonable under the PAEA...." NPPC Reply Comments at 5.

One commenter expresses concern that proposed section 3010.23(e) could allow the Postal Service to raise rates above the maximum rate adjustment. NPPC Reply Comments at 5. NPPC asserts that excluding temporary promotional rates from the calculation of the percentage change in rates has, until Docket No. R2013-1, been the Commission's safeguard against the possibility of exceeding the maximum rate adjustment. *Id.*

2. Changing "may" to "shall"

Proposed paragraphs (e) and (f) of section 3010.23 would have permitted the Postal Service to exclude temporary promotional rates and incentive programs from the calculation of percentage change in rates if they resulted in an overall rate decrease.

Four commenters propose modifying the Commission-proposed paragraph (e) to change the option to exclude temporary promotions into a requirement to exclude temporary promotions. PostCom Comments at 2-4; NAPM Comments at 4; Valpak Reply Comments at 2-3; NPPC Reply Comments at 6. They support substituting “shall” for “may” in proposed paragraph (e). PostCom characterizes this change as a codification of the Postal Service’s past approach to temporary promotions. PostCom Comments at 3. It also argues that the change will provide additional certainty for mailers by making it easier for small mailers to evaluate the impact of a proposed temporary promotion. *Id.* at 4. PostCom suggests that it could support a “good cause” exception to its proposed general rule that temporary promotional rates must be excluded from the calculation of the percentage change in rates. *Id.* at 5.

NPPC supports the change from “may” to “shall,” without a good cause exception, on the basis that the Commission’s approach in Docket No. R2013-1 was “mistaken.” NPPC Reply Comments at 6. Valpak and NAPM support this approach as well. Valpak Reply Comments at 3; NAPM Comments at 5. NAPM also proposes to strike paragraph (f) of section 3010.23. NAPM Comments at 5.

Although it does not explicitly support the suggestion to change “may” to “shall,” Pitney Bowes proposes that the Commission “conform proposed rule 3010.23(e) to the analogous rule for NSAs, rule 3010.24(a).” Pitney Bowes Comments at 4. This approach would likely lead to the same results as changing “may” to “shall” in proposed section 3010.23(e) because it would require the Postal Service to exclude temporary promotional rates from the calculation of the percentage change in rates. Valpak supports this alternative approach. Valpak Reply Comments at 3.

3. PostCom Alternative and Additional Modifications

PostCom suggests an alternative to proposed section 3010.23(e): clarifying that the Postal Service may include temporary promotional rates in the calculation of the percentage change in rates for a mid-year rate case if it uses section 3010.26(b) to calculate unused rate adjustment authority for that case. PostCom Comments at 5.

This approach differs from the Postal Service’s proposal in Docket No. R2013-6. In that docket, the Postal Service sought (unsuccessfully) to generate unused rate adjustment authority without adding it to the schedule of unused rate adjustment authority. *Id.* Valpak states that it prefers the change from “may” to “shall” to this alternative approach. Valpak Reply Comments at 2.

In addition, PostCom proposes two modifications to the proposed rules. The first would be to require that any unused rate adjustment authority resulting from a temporary promotion be used only to adjust rates for the product to which the temporary promotion applied. PostCom Comments at 6-7. Valpak dismisses this proposal as “an impossibility,” due to the Postal Service’s authority to set its own rates. Valpak Reply Comments at 12-13.

The second modification would be to “require the Postal Service to reconcile the volume sent at promotional rates with the adjustment authority it claims in its next scheduled price adjustment.” PostCom Comments at 7. That is, the Commission should re-calculate the unused rate adjustment authority resulting from a temporary promotion once it receives data concerning the actual volumes associated with the temporary promotion.

4. Postal Service Alternatives

The Postal Service objects to the approaches described above. Postal Service Reply Comments at 1. Instead, it proposes that the Commission “expand its proposed rules” to specifically address mid-year promotions. *Id.* at 3. The Postal Service’s preferred method to address mid-year promotions is essentially the approach it proposed in Docket No. R2013-6: allow the Postal Service “to forgo a full-scale rate adjustment authority calculation and simply calculate the authority resulting specifically from the promotion or rate decrease, and then use such authority in the next annual

price adjustment, when a full rate adjustment authority calculation would be made.” *Id.* The Commission rejected this approach in Order No. 1743.³²

As an alternative, the Postal Service proposes that the Commission modify its proposed rules to allow it “to convert revenue foregone in promotions as well as any other rate decreases into unused rate adjustment authority, without conducting a full-scale calculation of all the rate adjustment authority that has accrued since the last annual price adjustment.” Postal Service Reply Comments at 4.

The Postal Service also notes the difficulty in isolating the effects of temporary promotions from the effects of other rate adjustments in the context of an “annual price change,” where rates are adjusted for many products, often in several classes at once. *Id.*

5. Conclusion

The comments received in this docket indicate that the treatment of promotional rates and incentive programs is likely to continue to be a point of contention in future rate cases. The Commission recognizes the need for certainty for the mailing community and the Postal Service in this regard. In order to allow for the development of a complete record on this important issue, the Commission will open a separate docket to consider the treatment of promotional rates and incentive programs. Consequently, proposed paragraphs (e) and (f) will not be included in section 3010.23. Section 3010.23(b) is revised to remove the reference to paragraph (f).

³² Docket No. R2013-6, Order Approving Technology Credit Promotion, June 10, 2013 (Order No. 1743).

V. ORDERING PARAGRAPHS

It is ordered:

1. Part 3010 of title 39, Code of Federal Regulations, is revised as set forth below the signature of this Order, effective 30 days after publication in the *Federal Register*.
2. The Secretary shall arrange for publication of this Order in the *Federal Register*.

By the Commission.

Shoshana M. Grove
Secretary

39 CFR Part 3010

Revise part 3010 to read as follows:

PART 3010—REGULATION OF RATES FOR MARKET DOMINANT PRODUCTS

Subpart A—General Provisions

Sec.

3010.1 Definitions.

3010.2 Applicability.

3010.3 Types of rate adjustments for market dominant products.

3010.4 Type 1-A rate adjustment – in general.

3010.5 Type 1-B rate adjustment – in general.

3010.6 Type 2 rate adjustment – in general.

3010.7 Type 3 rate adjustment – in general.

3010.8 Schedule for Regular and Predictable Rate Adjustments.

Subpart B—Rules for Rate Adjustments for Rates of General Applicability (Type 1-A and 1-B Rate Adjustments)

3010.10 Notice.

3010.11 Proceedings for Type 1-A and Type 1-B rate adjustment filings.

3010.12 Contents of notice of rate adjustment.

Subpart C—Rules for Determining the Maximum Rate Adjustment

3010.20 Calculation of maximum rate adjustment.

3010.21 Calculation of annual limitation when notices of rate adjustment are 12 or more months apart.

3010.22 Calculation of annual limitation when notices of rate adjustment are less than 12 months apart.

3010.23 Calculation of percentage change in rates.

3010.24 Treatment of volume associated with negotiated service agreements.

3010.25 Limitation on application of unused rate adjustment authority.

3010.26 Calculation of unused rate adjustment authority.

3010.27 Application of unused rate adjustment authority.

3010.28 Maximum size of Type 1-B rate adjustments.

Subpart D—Rules for Rate Adjustments for Negotiated Service Agreements (Type 2 Rate Adjustments)

3010.40 Negotiated service agreements.

3010.41 Notice.

3010.42 Contents of notice of agreement in support of a Type 2 rate adjustment.

3010.43 Data collection plan and report.

3010.44 Proceedings for Type 2 rate adjustments.

Subpart E—Rules for Rate Adjustments in Extraordinary and Exceptional Circumstances (Type 3 Rate Adjustments)

3010.60 Applicability.

- 3010.61 Contents of exigent requests.**
- 3010.62 Supplemental information.**
- 3010.63 Treatment of unused rate adjustment authority.**
- 3010.64 Expeditious treatment of exigent requests.**
- 3010.65 Special procedures applicable to exigent requests.**
- 3010.66 Deadline for Commission decision.**

Authority: 39 U.S.C. 503, 3622.

Subpart A—General Provisions

§3010.1 Definitions.

In this subpart:

(a) *Annual limitation* means:

(1) In the case of a notice of a Type 1-A or Type 1-B rate adjustment filed 12 or more months after the last Type 1-A or Type 1-B notice of rate adjustment, the full year limitation on the size of rate adjustments calculated pursuant to §3010.21; and

(2) In the case of a notice of a Type 1-A or Type 1-B rate adjustment filed less than 12 months after the last Type 1-A or Type 1-B notice of rate adjustment, the partial year limitation on the size of rate adjustments calculated pursuant to §3010.22.

(b) *Class* means a class of market dominant postal products.

(c) *Maximum rate adjustment* means the maximum rate adjustment that the Postal Service may make for a class pursuant to a notice of Type 1-A or Type 1-B rate adjustment. The maximum rate adjustment is calculated in accordance with §3010.20.

(d) *Type 1-A rate adjustment* means a rate adjustment described in §3010.4.

(e) *Type 1-B rate adjustment* means a rate adjustment described in §3010.5.

(f) *Type 2 rate adjustment* means a rate adjustment described in §3010.6.

(g) *Type 3 rate adjustment* means a rate adjustment described in §3010.7.

(h) *Unused rate adjustment authority* means the percentage calculated pursuant to §3010.26.

§ 3010.2 Applicability.

The rules in this part implement provisions in 39 U.S.C. chapter 36, subchapter I, establishing ratesetting policies and procedures for market dominant products. With the exception of Type 3 rate adjustments, these procedures allow a minimum of 45 days for advance public notice of the Postal Service's planned

rate adjustments. Type 3 rate adjustments require the Postal Service to file a formal request with the Commission and are subject to special procedures.

§ 3010.3 Types of rate adjustments for market dominant products.

(a) There are four types of rate adjustments for market dominant products. A Type 1–A rate adjustment is authorized under 39 U.S.C. 3622(d)(1)(D). A Type 1–B rate adjustment is authorized under 39 U.S.C. 3622(d)(2)(C). A Type 2 rate adjustment is authorized under 39 U.S.C. 3622(c)(10). A Type 3 rate adjustment is authorized under 39 U.S.C. 3622(d)(1)(E).

(b) The Postal Service may combine Type 1–A, Type 1–B, and Type 2 rate adjustments for purposes of filing with the Commission.

§ 3010.4 Type 1–A rate adjustment—in general.

(a) A Type 1–A rate adjustment is a rate adjustment based on the annual limitation.

(b) A Type 1–A rate adjustment may result in a rate adjustment that is less than or equal to the annual limitation, but may not exceed the annual limitation.

(c) A Type 1–A rate adjustment for any class that is less than the applicable annual limitation results in unused rate adjustment authority associated with that class. Part or all of the unused rate adjustment authority may be used in a subsequent rate adjustment for that class, subject to the expiration terms in §3010.26(e).

§ 3010.5 Type 1–B rate adjustment—in general.

A Type 1–B rate adjustment is a rate adjustment which uses unused rate adjustment authority in whole or in part.

§ 3010.6 Type 2 rate adjustment—in general.

A Type 2 rate adjustment is based on a negotiated service agreement. A negotiated service agreement entails a rate adjustment negotiated between the Postal Service and a customer or group of customers.

§ 3010.7 Type 3 rate adjustment—in general.

(a) A Type 3 rate adjustment is a rate adjustment that is authorized only when justified by exceptional or extraordinary circumstances.

(b) A Type 3 rate adjustment is not subject to the annual limitation or the restrictions on the use of unused rate adjustment authority, and does not implement a negotiated service agreement.

(c) A Postal Service request for a Type 3 rate adjustment is subject to public participation and Commission review within 90 days.

§ 3010.8 Schedule for Regular and Predictable Rate Adjustments.

(a) The Postal Service shall maintain on file with the Commission a Schedule for Regular and Predictable Rate Adjustments. The Commission shall display the Schedule for Regular and Predictable Rate Adjustments on the Commission Web site, *http://www.prc.gov*.

(b) The Schedule for Regular and Predictable Rate Adjustments shall provide mailers with estimated implementation dates for future Type 1–A rate adjustments for each separate class of mail, should such adjustments be necessary and appropriate. Rate adjustments will be scheduled at specified regular intervals.

(c) The Schedule for Regular and Predictable Rate Adjustments shall provide an explanation that will allow mailers to predict with reasonable accuracy the amounts of future scheduled rate adjustments.

(d) The Postal Service should balance its financial and operational needs with the convenience of mailers of each class of mail in developing the Schedule for Regular and Predictable Rate Adjustments.

(e) Whenever the Postal Service deems it appropriate to change the Schedule for Regular and Predictable Rate Adjustments, it shall file a revised schedule and explanation with the Commission.

(f) The Postal Service may, for good cause shown, vary rate adjustments from those estimated by the Schedule for Regular and Predictable Rate Adjustments. In such case, the Postal Service shall provide a succinct explanation for such variation with its Type 1–A filing. No explanation is required for variations involving smaller than predicted rate adjustments.

Subpart B—Rules for Rate Adjustments for Rates of General Applicability (Type 1–A and 1–B Rate Adjustments)

§ 3010.10 Notice.

(a) The Postal Service, in every instance in which it determines to exercise its statutory authority to make a Type 1–A or Type 1–B rate adjustment for a class shall:

(1) Provide public notice in a manner reasonably designed to inform the mailing community and the general public that it intends to adjust rates no later than 45 days prior to the intended implementation date of the rate adjustment; and

(2) Transmit a notice of rate adjustment to the Commission no later than 45 days prior to the intended implementation date of the rate adjustment.

(b) The Postal Service is encouraged to provide public notice and to submit its notice of rate adjustment as far in advance of the 45-day minimum as practicable, especially in instances where the intended rate adjustments include classification changes or operations changes likely to have a material impact on mailers.

§ 3010.11 Proceedings for Type 1–A and Type 1–B rate adjustment filings.

(a) The Commission will establish a docket for each notice of Type 1-A or Type 1-B rate adjustment filing, promptly publish notice of the filing in the Federal Register, and post the filing on its Web site. The notice shall include:

- (1) The general nature of the proceeding;
- (2) A reference to legal authority under which the proceeding is to be conducted;
- (3) A concise description of the planned changes in rates, fees, and the Mail Classification Schedule;
- (4) The identification of an officer of the Commission to represent the interests of the general public in the docket;
- (5) A period of 20 days from the date of the filing for public comment; and
- (6) Such other information as the Commission deems appropriate.

(b) Public comments should focus primarily on whether planned rate adjustments comply with the following mandatory requirements of 39 U.S.C. chapter 36, subchapter I:

(1) Whether the planned rate adjustments measured using the formula established in §3010.23(c) are at or below the annual limitation calculated under §3010.21 or §3010.22, as applicable; and

(2) Whether the planned rate adjustments measured using the formula established in §3010.23(c) are at or below the limitation established in §3010.28.

(c) Public comments may also address other relevant statutory provisions and applicable Commission orders and directives.

(d) Within 14 days of the conclusion of the public comment period the Commission will determine, at a minimum, whether the planned rate adjustments are consistent with the annual limitation calculated under §3010.21 or §3010.22, as applicable, the limitation set forth in §3010.28, and 39 U.S.C. 3626, 3627, and 3629 and issue an order announcing its findings.

(e) If the planned rate adjustments are found consistent with applicable law by the Commission, they may take effect pursuant to appropriate action by the Governors.

(f) If planned rate adjustments are found inconsistent with applicable law by the Commission, the Postal Service will submit an amended notice of rate adjustment that describes the modifications to its planned rate adjustments that will bring its rate adjustments into compliance. An amended notice of rate adjustment shall be accompanied by sufficient explanatory information to show that all deficiencies identified by the Commission have been corrected.

(g) The Commission will post any amended notice of rate adjustment filing on its Web site and allow a period of 7 days from the date of the filing for public comment. Comments in the amended notice of rate

adjustment should address the subjects identified in paragraph (b) and may address the subjects identified in paragraph (c).

(h) The Commission will review any amended notice of rate adjustment together with any comments filed for compliance and within 14 days issue an order announcing its findings.

(i) If the planned rate adjustments as amended are found to be consistent with applicable law, they may take effect pursuant to appropriate action by the Governors. However, no rate shall take effect until 45 days after the Postal Service files a notice of rate adjustment specifying that rate.

(j) If the planned rate adjustments in an amended notice of rate adjustment are found to be inconsistent with applicable law, the Commission shall explain the basis of its determination and suggest an appropriate remedy.

(k) A Commission finding that a planned Type 1-A or Type 1-B rate adjustment is in compliance with the annual limitation calculated under §3010.21 or §3010.22, as applicable; the limitation set forth in §3010.28; and 39 U.S.C. 3626, 3627, and 3629 is decided on the merits. A Commission finding that a planned Type 1-A or Type 1-B rate adjustment does not contravene other policies of 39 U.S.C. chapter 36, subchapter I is provisional and subject to subsequent review.

§ 3010.12 Contents of notice of rate adjustment.

(a) A Type 1-A or Type 1-B notice of rate adjustment must include the following information:

(1) A schedule of the planned rates;

(2) The planned effective date(s) of the planned rates;

(3) A representation or evidence that public notice of the planned changes has been issued or will be issued at least 45 days before the effective date(s) for the planned rates; and

(4) The identity of a responsible Postal Service official who will be available to provide prompt responses to requests for clarification from the Commission.

(b) The notice of rate adjustment shall be accompanied by the following information:

(1) The annual limitation calculated as required by §3010.21 or §3010.22, as appropriate. This information must be supported by workpapers in which all calculations are shown and all input values, including all relevant CPI-U values, are listed with citations to the original sources.

(2) A schedule showing unused rate adjustment authority available for each class of mail displayed by class and available amount for each of the preceding 5 years. This information must be supported by workpapers in which all calculations are shown.

(3) The percentage change in rates for each class of mail calculated as required by §3010.23. This information must be supported by workpapers in which all calculations are shown and all input values, including current rates, new rates, and billing determinants, are listed with citations to the original sources.

(4) The amount of new unused rate adjustment authority, if any, that will be generated by the rate adjustment calculated as required by §3010.26. All calculations are to be shown with citations to the original sources. If new unused rate adjustment authority will be generated for a class of mail that is not expected to cover its attributable costs, the Postal Service must provide the rationale underlying this rate adjustment.

(5) A schedule of the workshare discounts included in the planned rates, and a companion schedule listing the avoided costs that underlie each such discount. This information must be supported by workpapers in which all calculations are shown and all input values are listed with citations to the original sources.

(6) Separate justification for all proposed workshare discounts that exceed avoided costs. Each such justification shall reference applicable reasons identified in 39 U.S.C. 3622(e)(2) or (3). The Postal Service shall also identify and explain discounts that are set substantially below avoided costs and explain any relationship between discounts that are above and those that are below avoided costs.

(7) A discussion that demonstrates how the planned rate adjustments are designed to help achieve the objectives listed in 39 U.S.C. 3622(b) and properly take into account the factors listed in 39 U.S.C. 3622(c).

(8) A discussion that demonstrates the planned rate adjustments are consistent with 39 U.S.C. 3626, 3627, and 3629.

(9) A schedule identifying every change to the Mail Classification Schedule that will be necessary to implement the planned rate adjustments.

(10) Such other information as the Postal Service believes will assist the Commission to issue a timely determination of whether the planned rate adjustments are consistent with applicable statutory policies.

(c) Whenever the Postal Service establishes a new workshare discount rate, it must include with its filing:

(1) A statement explaining its reasons for establishing the discount;

(2) All data, economic analyses, and other information relied on to justify the discount; and

(3) A certification based on comprehensive, competent analyses that the discount will not adversely affect either the rates or the service levels of users of postal services who do not take advantage of the discount.

(d) Whenever the Postal Service establishes a new discount or surcharge it does not believe is a workshare discount, it must include with its filing:

(1) An explanation of the basis for its belief that the discount or surcharge is not a workshare discount; and

(2) A certification that the Postal Service applied approved analytical principles to the discount or surcharge.

(e) The notice of rate adjustment shall identify for each affected class how much existing unused rate adjustment authority is used in the planned rates calculated as required by §3010.27. All calculations are to be shown, including citations to the original sources.

(f) All cost, avoided cost, volume, and revenue figures submitted with the notice of rate adjustment shall be developed from the most recent applicable Commission approved analytical principles.

Subpart C—Rules for Determining the Maximum Rate Adjustment

§ 3010.20 Calculation of maximum rate adjustment.

(a) Rate adjustments for each class of market dominant products in any 12-month period are limited.

(b) Rates of general applicability are subject to an inflation-based annual limitation computed using CPI-U values as detailed in §3010.21(a) and §3010.22(a).

(c) An exception to the annual limitation allows a limited annual recapture of unused rate adjustment authority. The amount of unused rate adjustment authority is measured separately for each class.

(d) In any 12-month period the maximum rate adjustment applicable to a class is:

(1) For a Type 1-A notice of rate adjustment, the annual limitation for the class; and

(2) For a combined Type 1-A and Type 1-B notice of rate adjustment, the annual limitation for the class plus the unused rate adjustment authority for the class that the Postal Service elects to use, subject to the limitation under §3010.28.

§ 3010.21 Calculation of annual limitation when notices of rate adjustment are 12 or more months apart.

(a) The monthly CPI-U values needed for the calculation of the full year limitation under this section shall be obtained from the Bureau of Labor Statistics (BLS) Consumer Price Index—All Urban Consumers, U.S. All Items, Not Seasonally Adjusted, Base Period 1982–84 = 100. The current Series ID for the index is “CUUR0000SA0.”

(b) If a notice of a Type 1-A or Type 1-B rate adjustment is filed 12 or more months after the last Type 1-A or Type 1-B notice of rate adjustment applicable to a class, then the calculation of an annual limitation for the class (referred to as the *full year limitation*) involves three steps. First, a simple average CPI-U index is calculated by summing the most recently available 12 monthly CPI-U values from the date the Postal Service files its notice of rate adjustment and dividing the sum by 12 (Recent Average). Then, a second simple average CPI-U index is similarly calculated by summing the 12 monthly CPI-U values immediately preceding the Recent Average and dividing the sum by 12 (Base Average). Finally, the full year limitation is calculated by dividing the Recent Average by the Base Average and subtracting 1 from the quotient. The result is expressed as a percentage, rounded to three decimal places.

(c) The formula for calculating a full year limitation for a notice of rate adjustment filed 12 or more months after the last notice is as follows: Full Year Limitation = (Recent Average/Base Average)–1.

§ 3010.22 Calculation of annual limitation when notices of rate adjustment are less than 12 months apart.

(a) The monthly CPI-U values needed for the calculation of the partial year limitation under this section shall be obtained from the Bureau of Labor Statistics (BLS) Consumer Price Index—All Urban Consumers, U.S. All Items, Not Seasonally Adjusted, Base Period 1982–84 = 100. The current Series ID for the index is “CUUR0000SA0.”

(b) If a notice of a Type 1-A or Type 1-B rate adjustment is filed less than 12 months after the last Type 1-A or Type 1-B notice of rate adjustment applicable to a class, then the annual limitation for the class (referred to as the *partial year limitation*) will recognize the rate increases that have occurred during the preceding 12 months. When the effects of those increases are removed, the remaining partial year limitation is the applicable restriction on rate increases.

(c) The applicable partial year limitation is calculated in two steps. First, a simple average CPI-U index is calculated by summing the 12 most recently available monthly CPI-U values from the date the Postal Service files its notice of rate adjustment and dividing the sum by 12 (Recent Average). The partial year limitation is then calculated by dividing the Recent Average by the Recent Average from the most recent previous notice of rate adjustment (Previous Recent Average) applicable to each affected class of mail and subtracting 1 from the quotient. The result is expressed as a percentage, rounded to three decimal places.

(d) The formula for calculating the partial year limitation for a notice of rate adjustment filed less than 12 months after the last notice is as follows: $\text{Partial Year Limitation} = (\text{Recent Average} / \text{Previous Recent Average}) - 1$.

§ 3010.23 Calculation of percentage change in rates.

(a) In this section, the term *rate cell* means each and every separate rate identified in any applicable notice of rate adjustment for rates of general applicability. A seasonal or temporary rate shall be identified and treated as a rate cell separate and distinct from the corresponding non-seasonal or permanent rate.

(b) For each class of mail and product within the class, the percentage change in rates is calculated in three steps. First, the volume of each rate cell in the class is multiplied by the planned rate for the respective cell and the resulting products are summed. Then, the same set of rate cell volumes are multiplied by the corresponding current rate for each cell and the resulting products are summed. Finally, the percentage change in rates is calculated by dividing the results of the first step by the results of the second step and subtracting 1 from the quotient. The result is expressed as a percentage.

(c) The formula for calculating the percentage change in rates for a class described in paragraph (b) of this section is as follows:

Percentage change in rates =

$$\left(\frac{\sum_{i=1}^N (R_{i,n})(V_i)}{\sum_{i=1}^N (R_{i,c})(V_i)} \right) - 1$$

Where,

N = number of rate cells in the class

i = denotes a rate cell (i = 1, 2, ..., N)

R_{i,n}= planned rate of rate cell i

R_{i,c}= current rate of rate cell i

V_i= volume of rate cell i

(d) The volumes for each rate cell shall be obtained from the most recent available 12 months of Postal Service billing determinants. The Postal Service shall make reasonable adjustments to the billing determinants to account for the effects of classification changes such as the introduction, deletion, or redefinition of rate cells. Whenever possible, adjustments shall be based on known mail characteristics or historical volume data, as opposed to forecasts of mailer behavior. The Postal Service shall identify and explain all adjustments. All information and calculations relied upon to develop the adjustments shall be provided together with an explanation of why the adjustments are appropriate.

§ 3010.24 Treatment of volume associated with negotiated service agreements.

(a) Mail volumes sent at rates under negotiated service agreements are to be included in the calculation of percentage change in rates under §3010.23 as though they paid the appropriate rates of general applicability. Where it is impractical to identify the rates of general applicability (e.g., because unique rate categories are created for a mailer), the volumes associated with the mail sent under the terms of the negotiated service agreement shall be excluded from the calculation of percentage change in rates.

(b) The Postal Service shall identify and explain all assumptions it makes with respect to the treatment of negotiated service agreements in the calculation of the percentage change in rates and provide the rationale for its assumptions.

§ 3010.25 Limitation on application of unused rate adjustment authority.

Unused rate adjustment authority may only be applied after applying the annual limitation calculated pursuant to §3010.21 or §3010.22.

§ 3010.26 Calculation of unused rate adjustment authority.

(a) Unused rate adjustment authority accrues during the entire period between notices of Type 1-A and Type 1-B rate adjustments. When notices of Type 1-A or Type 1-B rate adjustments are filed 12 months apart or less, the unused rate adjustment authority is the annual unused rate adjustment authority calculated under paragraph (b). When notices of Type 1-A or Type 1-B rate adjustments are filed more than 12 months apart, unused rate adjustment authority is the sum of the annual unused rate adjustment authority calculated under paragraph (b) plus the interim unused rate adjustment authority calculated under paragraph (c)(2), less any interim unused rate adjustment authority used in accordance with paragraph (d).

(b) When notices of Type 1-A or Type 1-B rate adjustments are filed 12 months apart or less, annual unused rate adjustment authority will be calculated. Annual unused rate adjustment authority for a class is equal to the difference between the annual limitation calculated pursuant to §3010.21 or §3010.22 and the actual percentage change in rates for the class.

(c) (1) When notices of Type 1-A or Type 1-B rate adjustments are filed more than 12 months apart, annual unused rate adjustment authority will be calculated for the 12-month period ending on the date on which the second notice is filed and interim unused rate adjustment authority will be calculated for the period beginning on the date the first notice is filed and ending on the day before the date that is 12 months before the second notice is filed.

(2) Interim unused rate adjustment authority is equal to the Base Average applicable to the second notice of rate adjustment (as developed pursuant to §3010.21(b)) divided by the Recent Average utilized in the first notice of rate adjustment (as developed pursuant to §3010.21(b)) and subtracting 1 from the quotient. The result is expressed as a percentage.

(d) Interim unused rate adjustment authority may be used to make a rate adjustment pursuant to the notice of rate adjustment that led to its calculation. If interim unused rate adjustment authority is used to make such a rate adjustment, the interim unused rate adjustment authority generated pursuant to the notice shall first be added to the schedule of unused rate adjustment authority devised and maintained under paragraph (f) as the most recent entry. Then, any interim unused rate adjustment authority used in accordance with this paragraph shall be subtracted from the existing unused rate adjustment authority using a first-in, first-out (FIFO) method, beginning 5 years before the instant notice.

(e) Unused rate adjustment authority lapses 5 years after the date of filing of the notice of rate adjustment leading to its calculation.

(f) Upon the establishment of unused rate adjustment authority in any class, the Postal Service shall devise and maintain a schedule that tracks the establishment and subsequent use of unused rate adjustment authority for that class.

§ 3010.27 Application of unused rate adjustment authority.

When the percentage change in rates for a class is greater than the applicable annual limitation, then the difference between the percentage change in rates for the class and the annual limitation shall be subtracted from the existing unused rate adjustment authority for the class, using a first-in, first-out (FIFO) method, beginning 5 years before the instant notice.

§ 3010.28 Maximum size of Type 1-B rate adjustments.

Unused rate adjustment authority used to make a Type 1-B rate adjustment for any class in any 12-month period may not exceed 2 percentage points.

Subpart D—Rules for Rate Adjustments for Negotiated Service Agreements (Type 2 Rate Adjustments)

§ 3010.40 Negotiated service agreements.

(a) In administering this subpart, it shall be the objective of the Commission to allow implementation of negotiated service agreements that satisfy the statutory requirements of 39 U.S.C. 3622(c)(10). Negotiated service agreements must either:

- (1) Improve the net financial position of the Postal Service (39 U.S.C. 3622(c)(10)(A)(i)); or
- (2) Enhance the performance of operational functions (39 U.S.C. 3622(c)(10)(A)(ii)).

(b) Negotiated service agreements may not cause unreasonable harm to the marketplace (39 U.S.C. 3622(c)(10)(B)).

(c) Negotiated service agreements must be available on public and reasonable terms to similarly situated mailers.

§ 3010.41 Notice.

The Postal Service, in every instance in which it determines to exercise its statutory authority to make a Type 2 rate adjustment for a market dominant postal product shall provide public notice in a manner reasonably designed to inform the mailing community and the general public that it intends to change rates not later than 45 days prior to the intended implementation date; and transmit a notice of agreement to the Commission no later than 45 days prior to the intended implementation date.

§ 3010.42 Contents of notice of agreement in support of a Type 2 rate adjustment.

Whenever the Postal Service proposes to establish or change rates, fees, or the Mail Classification Schedule based on a negotiated service agreement, the Postal Service shall file with the Commission a notice of agreement that shall include at a minimum the following information:

- (a) A copy of the negotiated service agreement.
- (b) The planned effective date(s) of the planned rates.
- (c) A representation or evidence that public notice of the planned rate adjustments has been issued or will be issued at least 45 days before the effective date(s) for the planned rates.

(d) The identity of a responsible Postal Service official who will be available to provide prompt responses to requests for clarification from the Commission.

(e) A statement identifying all parties to the agreement and a description clearly explaining the operative components of the agreement.

(f) Details regarding the expected improvements in the net financial position or operations of the Postal Service. The projection of change in net financial position as a result of the agreement shall be based on accepted analytical principles. The projection of change in net financial position as a result of the agreement shall include for each year of the agreement:

(1) The estimated mailer-specific costs, volumes, and revenues of the Postal Service absent the implementation of the negotiated service agreement;

(2) The estimated mailer-specific costs, volumes, and revenues of the Postal Service which result from implementation of the negotiated service agreement;

(3) An analysis of the effects of the negotiated service agreement on the contribution to institutional costs from mailers not party to the agreement;

(4) If mailer-specific costs are not available, the source and derivation of the costs that are used shall be provided, together with a discussion of the currency and reliability of those costs and their suitability as a proxy for the mailer-specific costs; and

(5) If the Postal Service believes the Commission's accepted analytical principles are not the most accurate and reliable methodology available, (A) an explanation of the basis for that belief; and (B) a projection of the change in net financial position resulting from the agreement made using the Postal Service's alternative methodology.

(g) An identification of each component of the agreement expected to enhance the performance of mail preparation, processing, transportation, or other functions in each year of the agreement, and a discussion of the nature and expected impact of each such enhancement.

(h) Details regarding any and all actions (performed or to be performed) to assure that the agreement will not result in unreasonable harm to the marketplace.

(i) Such other information as the Postal Service believes will assist the Commission to issue a timely determination of whether the requested changes are consistent with applicable statutory policies.

§ 3010.43 Data collection plan and report.

(a) The Postal Service shall include with any notice of agreement a detailed plan for providing data or information on actual experience under the agreement sufficient to allow evaluation of whether the negotiated service agreement operates in compliance with 39 U.S.C. 3622(c)(10).

(b) A data report under the plan is due 60 days after each anniversary date of implementation and shall include, at a minimum, the following information for each 12-month period the agreement has been in effect:

(1) The change in net financial position of the Postal Service as a result of the agreement. This calculation shall include for each year of the agreement:

(A) The actual mailer-specific costs, volumes, and revenues of the Postal Service;

(B) An analysis of the effects of the negotiated service agreement on the net overall contribution to the institutional costs of the Postal Service; and

(C) If mailer-specific costs are not available, the source and derivation of the costs that are used shall be provided, including a discussion of the currency and reliability of those costs, and their suitability as a proxy for the mailer-specific costs.

(2) A discussion of the changes in operations of the Postal Service that have resulted from the agreement. This shall include, for each year of the agreement, identification of each component of the agreement known to enhance the performance of mail preparation, processing, transportation, or other functions in each year of the agreement.

(3) An analysis of the impact of the negotiated service agreement on the marketplace, including a discussion of any and all actions taken to protect the marketplace from unreasonable harm.

§ 3010.44 Proceedings for Type 2 rate adjustments.

(a) The Commission will establish a docket for each notice of Type 2 rate adjustment filed, promptly publish notice of the filing in the Federal Register, and post the filing on its Web site. The notice shall include:

(1) The general nature of the proceeding;

(2) A reference to legal authority under which the proceeding is to be conducted;

(3) A concise description of the planned changes in rates, fees, and the Mail Classification Schedule;

(4) The identification of an officer of the Commission to represent the interests of the general public in the docket;

(5) A period of 10 days from the date of the filing for public comment; and

(6) Such other information as the Commission deems appropriate.

(b) The Commission shall review the planned Type 2 rate adjustments and the comments thereon, and issue an order announcing its findings. So long as such adjustments are not inconsistent with 39 U.S.C. 3622, they may take effect pursuant to appropriate action by the Governors. However, no rate shall take effect until 45 days after the Postal Service files a notice of rate adjustment specifying that rate.

(c) Commission findings that a planned Type 2 rate adjustment is not inconsistent with 39 U.S.C. 3622 are provisional and subject to subsequent review.

Subpart E—Rules for Rate Adjustments in Extraordinary and Exceptional Circumstances (Type 3 Rate Adjustments)

§ 3010.60 Applicability.

The Postal Service may request to adjust rates for market dominant products in excess of the maximum rate adjustment due to extraordinary or exceptional circumstances. In this subpart, such requests are referred to as *exigent requests*.

§ 3010.61 Contents of exigent requests.

(a) Each exigent request shall include the following:

- (1) A schedule of the proposed rates;
- (2) Calculations quantifying the increase for each affected product and class;
- (3) A full discussion of the extraordinary or exceptional circumstances giving rise to the request, and a complete explanation of how both the requested overall increase and the specific rate adjustments requested relate to those circumstances;
- (4) A full discussion of why the requested rate adjustments are necessary to enable the Postal Service, under best practices of honest, efficient, and economical management, to maintain and continue the development of postal services of the kind and quality adapted to the needs of the United States;
- (5) A full discussion of why the requested rate adjustments are reasonable and equitable as among types of users of market dominant products;
- (6) An explanation of when, or under what circumstances, the Postal Service expects to be able to rescind the exigent rate adjustments in whole or in part;
- (7) An analysis of the circumstances giving rise to the exigent request, which should, if applicable, include a discussion of whether the circumstances were foreseeable or could have been avoided by reasonable prior action; and
- (8) Such other information as the Postal Service believes will assist the Commission to issue a timely determination of whether the requested rate adjustments are consistent with applicable statutory policies.

(b) The Postal Service shall identify one or more knowledgeable Postal Service official(s) who will be available to provide prompt responses to Commission requests for clarification related to each topic specified in §3010.61(a).

§ 3010.62 Supplemental information.

The Commission may require the Postal Service to provide clarification of its request or to provide information in addition to that called for by §3010.61 in order to gain a better understanding of the circumstances leading to the request or the justification for the specific rate adjustments requested.

§ 3010.63 Treatment of unused rate adjustment authority.

(a) Each exigent request will identify the unused rate adjustment authority available as of the date of the request for each class of mail and the available amount for each of the preceding 5 years.

(b) Pursuant to an exigent request, rate adjustments may use existing unused rate adjustment authority in amounts greater than the limitation described in §3010.28.

(c) Exigent increases will exhaust all unused rate adjustment authority for each class of mail before imposing additional rate adjustments in excess of the maximum rate adjustment for any class of mail.

§ 3010.64 Expeditious treatment of exigent requests.

Requests under this subpart seek rate relief required by extraordinary or exceptional circumstances and will be treated with expedition at every stage. It is Commission policy to provide appropriate relief as quickly as possible consistent with statutory requirements and procedural fairness.

§ 3010.65 Special procedures applicable to exigent requests.

(a) The Commission will establish a docket for each exigent request, promptly publish notice of the request in the Federal Register, and post the filing on its Web site. The notice shall include:

(1) The general nature of the proceeding;

(2) A reference to legal authority under which the proceeding is to be conducted;

(3) A concise description of the proposals for changes in rates, fees, and the Mail Classification Schedule;

(4) The identification of an officer of the Commission to represent the interests of the general public in the docket;

(5) A specified period for public comment; and

(6) Such other information as the Commission deems appropriate.

(b) The Commission will hold a public hearing on the Postal Service request. During the public hearing, responsible Postal Service officials will appear and respond under oath to questions from the Commissioners or their designees addressing previously identified aspects of the Postal Service's request and the supporting information provided in response to the topics specified in §3010.61(a).

(c) Interested persons will be given an opportunity to submit to the Commission suggested relevant questions that might be posed during the public hearing. Such questions, and any explanatory materials submitted to clarify the purpose of the questions, should be filed in accordance with §3001.9, and will become part of the administrative record of the proceeding.

(d) The timing and length of the public hearing will depend on the nature of the circumstances giving rise to the request and the clarity and completeness of the supporting materials provided with the request.

(e) If the Postal Service is unable to provide adequate explanations during the public hearing, supplementary written or oral responses may be required.

(f) Following the conclusion of the public hearings and submission of any supplementary materials, interested persons will be given the opportunity to submit written comments on:

(1) The sufficiency of the justification for an exigent rate adjustment;

(2) The adequacy of the justification for adjustments in the amounts requested by the Postal Service; and

(3) Whether the specific rate adjustments requested are reasonable and equitable.

(g) An opportunity to submit written reply comments will be given to the Postal Service and other interested persons.

§ 3010.66 Deadline for Commission decision.

The Commission will act expeditiously on the Postal Service request, taking into account all written comments. In every instance, a Commission decision will be issued within 90 days of the filing of an exigent request.