

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

COMPLAINT OF GAMEFLY, INC.

Docket No. C2009-1R

**REQUEST OF THE UNITED STATES POSTAL SERVICE  
UNDER SECTION 3642 TO CREATE ROUND-TRIP MAILER PRODUCT  
(July 26, 2013)**

On April 20, 2011, the Postal Regulatory Commission issued Order No. 718 in Docket No. C2009-1, finding that the United States Postal Service failed to establish reasonable and legitimate reasons for the different mail processing methods applied to GameFly, Inc. and other round-trip DVD mailers, and that the Postal Service's mail processing decisions regarding round-trip DVD mail violated 39 U.S.C. § 403(c).<sup>1</sup> As a remedy, the Commission established a "reduced rate for round-trip flat-shaped DVD mailers weighing up to two ounces" equal to the one ounce flat rate.<sup>2</sup> On May 20, 2011, GameFly filed a Petition for Review with the United States Court of Appeals for the District of Columbia Circuit challenging the Commission's remedy in PRC Docket No. C2009-1.<sup>3</sup> On January 11, 2013, the Court issued its opinion vacating the Commission's order and remanding the case.<sup>4</sup>

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<sup>1</sup> Order on Complaint, Order No. 718, Docket No. C2009-1, at 108, ¶¶ 5004-5005 (Apr. 20, 2011).

<sup>2</sup> *Id.* at 113-115, ¶¶ 5022, 5027-5028.

<sup>3</sup> *GameFly, Inc. v. PRC*, Petition for Review, Case No. 11-1179 (May 20, 2011).

<sup>4</sup> *GameFly, Inc. v. PRC*, 704 F.3d 145, 149 (D.C. Cir. 2013).

On June 26, 2013, the Commission issued Order No. 1763, establishing a new remedy that requires the Postal Service “to equalize the rates for letter-shaped and flat-shaped round-trip DVD mailers either by establishing new equalized rates for such letter-shaped and flat-shaped round-trip DVD mailers, or by reducing the price for a two-ounce First-Class flat-shaped round-trip DVD mailer to the price for a one-ounce First-Class letter-shaped round-trip DVD mailer.”<sup>5</sup> After recognizing that the Commission’s new remedy raised complex issues and that compliance would require approval from multiple stakeholder groups, including the Governors, the Postal Service requested an extension of time for compliance.<sup>6</sup> On July 23, 2013, the Commission denied that request.<sup>7</sup>

Yesterday, the Postal Service moved for reconsideration and clarification of Order No. 1763.<sup>8</sup> The Postal Service is filing the instant pleading today to ensure compliance with Order No. 1763 while the Commission considers yesterday’s motion. Order No. 1763 directed the Postal Service to “establish new equalized rates for letter-shaped and flat-shaped DVD mail by filing with the Commission a notice of price adjustment,” with such notice including: (1) proposed rate schedules; (2) an explanation of the new equalized rates; (3) any necessary price cap calculations (or an explanation of why such calculations are unnecessary); (4) proposed appropriate Mail Classification Schedule language; and (5) an effective date not less than 45 days or more than 65 days after the

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<sup>5</sup> Order on Remand, Order No. 1763, Docket No. C2009-1R (June 26, 2013), at 1.

<sup>6</sup> United States Postal Service Motion for Extension of Time in Which to Comply with Order No. 1763, Docket No. C2009-1R (July 19, 2013).

<sup>7</sup> Order Denying Motion for Extension of Time, Order No. 1787, Docket No. C2009-1R (July 23, 2013).

<sup>8</sup> United States Postal Service Motion for Reconsideration and Clarification of Order No. 1763, Docket No. C2009-1R (July 25, 2013).

date of the notice of price adjustment. The instant pleading and its attachments fulfill these five requirements.

As set forth in the Statement of Supporting Justification, at Attachment A, the Postal Service proposes to create a new product, tentatively titled Round-Trip Mailer, on the Competitive product list, to replace the existing First-Class Mail Round-Trip Mailer options on the Market-Dominant side. After considering how to comply with the Commission's order, as well as taking into account the potential price cap implications of equalizing rates on the Market-Dominant side, the Postal Service concluded that the most natural fit for this new product is on the Competitive side. Assuming approval of the proposal, there would exist one set of equalized round-trip DVD rates, regardless of shape. All service standards and processing elements would remain identical to the service currently received by First-Class Mail letters and flats.

The Statement explains the new equalized rates and demonstrates the proposal's compliance with 39 U.S.C. § 3642 and the Commission's regulations at 39 C.F.R. § 3020.30 *et seq.* The rates themselves are contained in the proposed Mail Classification Schedule, at Attachment B. Because the new product is proposed on the Competitive product list, there are no price cap implications. The proposed effective date of the new product is September 30, 2013, which is 65 days from today.

By statute, pricing and product proposals must be approved by the Governors. Unfortunately, as we alluded to in our request for an extension, and as set forth in our request for reconsideration and clarification, the thirty days

afforded to comply with the order was not enough time to craft an informed recommendation and to convene the Governor's for a vote. However, the proposal herein represents the recommendation that postal management will present to the Governors at their July 31st meeting next week. If the Governors do not approve the proposal or choose to amend the proposal, the Postal Service will amend or rescind this filing accordingly.

As set forth in our motion for reconsideration and clarification, The Postal Service has substantial questions concerning the price cap implications of complying with the Commission's order by equalizing rates on the Market-Dominant product list. The Postal Service does not believe that such equalization should require recalculation of the price cap since the resulting price change does not represent an independent exercise by the Postal Service of its pricing authority. In that regard, should the Commission, after its review, choose to deny this Request, the Postal Service would consider creating a new product with equalized rates on the Market-Dominant list, if the Commission clarifies that the creation of such a product would not have price cap implications.<sup>9</sup>

As discussed in yesterday's motion, one potential defect of Order No. 1763 is that the order could be interpreted as having price cap implications that would seriously constrain the Postal Service's options. The order directed the Postal Service to file a notice of price adjustment. One interpretation of the Commission's rules and prior decisions, might lead to the conclusion that any Market-Dominant notice of price adjustment would trigger a recalculation of

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<sup>9</sup> Similarly, the Commission could also clarify its order by delaying any price cap calculations until the filing of the next annual price adjustment.

available CPI pricing authority. Under such an interpretation, the resulting pricing authority must either be used immediately or banked. The Commission is no doubt aware that, in recent years, the Postal Service has filed its Market-Dominant price adjustments in the fall, and that the Postal Service would not be in a position to prepare a comprehensive price adjustment filing within 30 days of a June order.

Thus, under this interpretation of the rules, it was foreseeable that the only practical option available to the Postal Service (if it were to fulfill Order No. 1763 by filing a Market-Dominant notice of price adjustment) would be to bank the unused authority created by the notice of price adjustment. Given the existence of negative CPI authority in the bank (-0.544 percent for First-Class Mail) and the Commission's first-in first-out rule for using banked authority, it would strain credulity if it were actually the Commission's intent to force the Postal Service to forgo more than one-third of its annual price adjustment authority by triggering a recalculation of the price cap. If the Commission intended such a result, then equalizing the rates on the Market-Dominant product list would not be workable for the Postal Service, especially given our swiftly deteriorating financial state.

If the Commission did not intend this result, and if the Commission proves not to be amenable to the new product proposal made herein, then the clarification sought by the Postal Service yesterday is critical. Although the Postal Service continues to believe that an operational remedy would best satisfy the concerns expressed by the Court of Appeals, such a clarification would allow

the Postal Service to consider a sensible proposal for the equalization of rates on the Market-Dominant product list. This equalization could either take place as part of the upcoming annual price adjustment, or through a standalone price adjustment that the Commission determines would not have price cap implications.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

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July 26, 2013

### **Statement of Supporting Justification**

I, Steven W. Monteith, Manager of Transactions & Correspondence, sponsor the Postal Service's request that the Postal Regulatory Commission: (1) remove the Round-Trip Mailer options from the market-dominant First-Class Mail Presorted Letters/Postcards and Flats products ; and (2) create a functionally similar product, called "Round-Trip Mailer, " on the competitive product list. The new competitive product will have an equalized rate of 46 cents for letter and flat-shaped return pieces in accordance with PRC Order No. 1763, and will conform to existing standards for the current Round-Trip Mailer options. These changes are outlined in the proposed Mail Classification Schedule ("MCS") language, included as Attachment B. This Statement supports the request by providing the information required by each applicable subsection of 39 C.F.R. § 3020.32, as indicated below. I attest to the accuracy of the information contained herein.

*(a) Demonstrate why the change is in accordance with the policies and the applicable criteria of chapter 36 of title 39 of the United States Code.*

As demonstrated below in subsections (b) through (i), the change complies with the applicable statutory provisions.

*(b) Explain why, as to market dominant products, the change is not inconsistent with each requirement of 39 U.S.C. 3622(d), and that it advances the objectives of 39 U.S.C. 3622(b), taking into account the factors of 39 U.S.C. 3622(c).*

Section 3622 establishes the system for regulating rates and classes for market-dominant products. Subsection (b) sets forth the regulatory system's objectives. Subsection (c) describes the factors the Commission shall take into account in establishing or revising the system. Subsection (d) delineates the process for raising rates. Since the proposed modification involves the creation of a new competitive product, the requirements outlined in subsections (b), (c), or (d) are not implicated.

*(c) Explain why, as to competitive products, the addition, deletion, or transfer will not result in the violation of any of the standards of 39 U.S.C. 3633.*

Section 3633 sets forth three standards for competitive products.

Subsection (a)(1) prohibits the subsidization of competitive products by market-dominant products. Subsection (a)(2) requires that each competitive product cover its attributable costs. Finally, subsection (a)(3) requires that all competitive products collectively cover an appropriate share of Postal Service institutional costs, which the Commission has determined to be 5.5 percent.

Using FY12 cost data for First-Class Mail letters and flats, the Postal Service has determined that, so long as flats constitute less than 40 percent of the Round-Trip Mailer product's total volume, the product will cover its attributable costs.<sup>10</sup> Though the Postal Service does not require mailers to identify whether their First-Class Mail pieces contain DVD or game discs, it is

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<sup>10</sup> This analysis assumes that: a) each item mailed out to a customer will be returned to the mailer; b) that outbound pieces will be mailed at presort rates; c) that inbound pieces will be returned at single piece rates; and d) that the current presort mix for First-Class Mail letters and flats will remain unchanged. These assumptions were necessary, because the Postal Service does not have data at a sufficient level of detail to determine the precise financial impact of reducing the price of one and two-ounce flats to 46-cents.



confident that well over 70 percent of round-trip DVD mailers are letter-shaped pieces. The Postal Service does not expect a large number of DVD mailers to switch to flats as a result of this proposal. Thus, the creation of a Round-Trip Mailer product should satisfy subsections (a)(1) and (a)(2) of Section 3633.

Given that the new Round-Trip Mailer product should cover its attributable costs, the Postal Service sees no reason why competitive products should not continue to cover 5.5 percent of the Postal Service's institutional costs. Thus, the creation of a Round-Trip Mailer product on the competitive product list should also satisfy subsection (a)(3) of Section 3633.

*(d) Verify that the change does not classify as competitive a product over which the Postal Service exercises sufficient market power that it can, without risk of losing a significant level of business to other firms offering similar products: (1) set the price of such product substantially above costs; (2) raise prices significantly; (3) decrease quality; or (4) decrease output.*

The market-dominant Round-Trip Mailer product provides a convenient way for mailers to send optical discs (primarily DVDs and game discs) to subscribers, with the intent that the subscriber will return the discs via Business Reply Mail<sup>®</sup> (BRM) or Permit Reply Mail (PRM). The primary users of the market-dominant Round-Trip Mailer product are movie and video game rental companies such as Netflix<sup>®</sup>, Blockbuster<sup>®</sup>, and GameFly<sup>®</sup>.

Though the Postal Service does not know of another shipping company that provides door-to-door delivery of optical discs such as DVDs (DVD-by-mail), the Postal Service is keenly aware of the precipitous decline in DVD-by-mail volumes in recent years. News reports suggest that this trend is largely due to

the availability of other technological methods for delivering access to digital movie and game content.<sup>11</sup> Such alternatives include online streaming and/or download services provided by companies such as Amazon®, Blockbuster, iTunes®, and Netflix, and other physical DVD rental services such as Redbox®.<sup>12</sup>

Indeed, in its most recently filed Form 10-K, Netflix reported a 27 percent decline in its year-over-year DVD subscription base,<sup>13</sup> something it attributes to new streaming alternatives and changing consumer preferences.<sup>14</sup> As evidence that this decline will continue, Netflix has also publically stated that it plans to “[shift] spending away from the Domestic DVD segment to invest more in streaming content and marketing our steaming services.”<sup>15</sup>

Taken together, this evidence suggests that newer and increasingly dominant forms of digital content delivery compete against the Postal Service’s Round-Trip Mailer product. Thus, were the Postal Service to raise prices, degrade service, or decrease output, it would likely suffer declines in volume. Therefore, the Postal Service does not exercise de facto monopoly power over the delivery of digital movie and video game content to consumers.

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<sup>11</sup> Bloomberg.com, *Online Film Viewing in U.S. to Top Discs in 2012, IHS Says*, Mar. 22, 2012. <http://www.bloomberg.com/news/2012-03-22/online-movie-viewing-in-u-s-to-top-discs-in-2012-ih-says.html>

<sup>12</sup> Netflix, Inc., *Form 10-K*, at 2 (Febraury 1, 2013) (listing Neflix’s primary competitors)

<sup>13</sup> *Id.* at 22.

<sup>14</sup> *Id.* at 2.

<sup>15</sup> *Id.* at 21.

*(e) Explain whether or not each product that is the subject of the request is covered by the postal monopoly as reserved to the Postal Service under 18 U.S.C. 1696 subject to the exceptions set forth in 39 U.S.C. 601.*

As demonstrated by the attached MCS language, the content of a Round-Trip Mailer piece will be outside the scope of the letter monopoly because it is not a letter, or because the letter content is within the scope of one of the exceptions/suspensions to the Private Express Statutes. As set forth in the MCS, Round-Trip Mailer pieces may only contain: (1) optical disks containing encoded computer data to be run on compatible computer devices; (2) invoices or other documents as provided in 39 C.F.R. 310.3(a); and (3) advertisements which satisfy the criteria of 39 C.F.R. § 320.7. Each of these three elements is independently exempt from the Private Express Statutes and thus outside the scope of the letter monopoly.

First, the optical disc is merchandise and not a letter, and is thereby exempt from the Private Express Statutes. 39 C.F.R. § 310.1(a)(3) highlights the difference between a letter and merchandise when it defines "selective delivery plans" to include "piggy-backed" delivery of a letter with the delivery of merchandise. The regulations governing the Private Express Statutes thus necessarily create a distinction between a letter and merchandise in determining whether the mailings are subject to the Private Express Statutes. Furthermore, even if the optical disc containing a movie or video game were considered to be a letter, the optical disc is specifically excluded from the definition of letter under the Private Express Statutes by 39 C.F.R. § 310.1(a)(7)(xii) as a "computer program recorded on media suitable for direct input." An optical disc containing

encoded data representing a movie or video game is a computer program capable of being run on a computer system (such as a video game console or DVD player) which is contained on media suitable for input from the user of the device. The optical disc thus satisfies the regulatory definition of a computer program exception to the Private Express Statutes. This conclusion is consistent with the Postal Service's Private Express Statutes Advisory Opinion 85-3 (included as Attachment C), in which the Postal Service opined that computer software on electronic media was excluded from the definition of letter and, thus, outside the scope of the PES. As such, the optical discs in the Round-Trip Mailer product are excluded from the letter monopoly.

Second, the invoice or documents related to the optical discs (including any instruction manuals) are also excluded from the Private Express Statutes pursuant to 39 C.F.R. § 310.3(a) as accompanying and relating "in all substantial respect to some part of the cargo or to the ordering, shipping, or delivering of the cargo." In this instance, the invoice accompanying the optical disc is a document that relates in all substantial respect to the ordering and sale/rental of the item. Likewise, any instruction manual accompanying the optical disc would be excluded from the Private Express Statutes, because it relates in all substantial respect to operation of the disc and its contents. Again, this analysis is supported by Private Express Statutes Opinion 85-3, in which the Postal Service opined that pursuant to the cargo exception of 39 C.F.R. § 310.3(a), "documents, manuals and various forms of instruction, including letters of instruction" which accompany and substantially relate to the cargo are excluded from the Private

Express Statutes. As such, any invoice or related documents included in a Round-Trip Mailer would be excluded from the letter monopoly.

Third, pursuant to 39 C.F.R. § 320.7, any advertisements accompanying the optical disc are required to be excluded from the Private Express Statutes. Section 320.7(a) suspends the PES for advertisements enclosed with merchandise as long as:

(1) The advertisement does not bear the names or addresses of the intended recipients; and

(2) The advertisement is incidental to the shipment of the merchandise

Section 320.7(a)(2)(i) further explains that an "advertisement is incidental to the shipment of the accompanying merchandise . . . when the merchandise . . . has been ordered by or would otherwise be sent to the recipient even without the accompanying advertisement." In contrast, "an advertisement is not incidental to the merchandise when the pertinent circumstances, such as the nominal value of the merchandise, its shipment on an unsolicited basis, or its status as a sample, reasonably indicate that the shipper's primary purpose is the conveyance of the advertisement itself and that the merchandise is merely an adjunct to the advertisement." 39 C.F.R. § 320.7(a)(2)(ii). To include any advertisement in a DVD mailer, the advertisement must satisfy 39 C.F.R. § 320.7(a) and must be incidental to the merchandise being mailed pursuant to 39 C.F.R. § 320.7(a)(2)(i). As such, any advertisements enclosed in a Round-Trip Mailer would be exempt from the Private Express Statutes and excluded from the letter monopoly.

*(f) Provide a description of the availability and nature of enterprises in the private sector engaged in the delivery of the product.*

Subsection (d) above describes the availability and nature of private sector competitors. The primary competitors of the new Round-Trip Mailer product are online streaming/download services provided by Netflix, Blockbuster, Amazon, and Apple, and physical DVD delivery services such as Redbox.

*(g) Provide any information available on the views of those who use the product on the appropriateness of the proposed modification.*

Given that service standards will remain the same after the proposed transfer, customers' concern would likely be the effect of the modification on prices. Since the price of the Round-Trip Mailer product will mirror the existing presort and single-piece First-Class Mail prices, and since the availability of competitive alternatives limits the Postal Service's ability to raise prices, customers should not have major price concerns.

*(h) Provide a description of the likely impact of the proposed modification on small business concerns.*

The addition of a Round-Trip Mailer product to the competitive product list is unlikely to impact small business concerns. To the extent that small businesses are currently using the Round-Trip Mailer product, the proposed modification will not affect their current service or increase any of their current prices. Similarly, those small businesses who subscribe to services using the

Round-Trip Mailer product should not experience any changes to their current mail service.

*(i) Include such information and data, and such statements of reasons and bases, as are necessary and appropriate to fully inform the Commission of the nature, scope, significance, and impact of the proposed modification.*

Making the requested modifications to the market-dominant and competitive product lists would simply recognize that the Round-Trip Mailer product exists within a competitive market. Further, by creating a new competitive Round-Trip Mailer product, the Commission would provide the Postal Service with the same pricing and negotiation flexibility that its competitors enjoy and use to their advantage. At the same time, mail users will still be protected by the competitive realities of the movie and video game rental market, which will prevent the Postal Service from significantly raising prices. For these reasons, the Postal Service requests that the Commission approve this Request.

ATTACHMENT B

MAIL CLASSIFICATION CHANGES  
(Additions are underlined and deletions are marked with strike-through)

PART A MARKET DOMINANT PRODUCTS

\* \* \* \* \*

**1100 First-Class Mail**

\* \* \* \* \*

1110.3 Price Categories

\* \* \* \* \*

- ~~• Letter Round-Trip Mailer~~

\* \* \* \* \*

1110.5 Prices

\* \* \* \* \*

~~Letter Round-Trip Mailer~~

- ~~a. Letter Round-Trip Mailer service allows a mailer to send a letter-shaped mailpiece to a subscriber at the applicable Presorted Letters/Postcards price and pay postage for the return of the contents of that mailpiece at the Single Piece Machinable Letters price.~~
- ~~b. A mailer may either prepay postage for the return mailpiece by using Permit Reply Mail or only pay for mailpieces actually returned by using Business Reply Mail.~~
- ~~c. Qualifying pieces must contain a standard 12-cm or smaller optical disc.~~
- ~~d. Qualifying pieces must weigh no more than one (1) ounce.~~
- ~~e. Returned pieces must be picked up by the mailer at designated Postal Service facilities.~~
- ~~f. Letter Round-Trip Mailers are not subject to prices for:  
(i) the Nonmachinable Letters price category of Presorted Letters/Postcards,  
or  
(ii) the Single-Piece Nonmachinable Letters price category of Single-Piece Letters/Postcards.~~

1115.3 Price Categories

The following price categories are available for the product specified in this section:



## ATTACHMENT B

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### ~~● Flat Round-Trip Mailer~~

\* \* \* \* \*

1115.5 Prices

\* \* \* \* \*

### ~~Flat Round-Trip Mailer~~

- ~~a. Flat Round-Trip Mailer service allows a mailer to send a flat-shaped mailpiece to a subscriber at the applicable one (1) ounce Flats price and pay postage for the return of the contents of that mailpiece at the one (1) ounce Single-Piece Flats price.~~
- ~~b. A mailer may either prepay postage for the return mailpiece by using Permit Reply Mail or only pay for mailpieces actually returned by using Business Reply Mail.~~
- ~~c. Qualifying pieces must contain a standard 12 cm or smaller optical disc.~~
- ~~d. Pieces weighing no more than two (2) ounces qualify for the one (1) ounce price.~~
- ~~e. Returned pieces must be picked up by the mailer at designated Postal Service facilities.~~

\* \* \* \* \*

### **1505.3 Business Reply Mail**

1505.3.1 Description

- a. Business Reply Mail service allows a permit holder or its representative to distribute postcards, envelopes, cartons and labels that can be used to send First-Class Mail, ~~or Priority Mail (except Critical Mail), or Round Trip Mailer~~ pieces to an address chosen by the distributor without prepayment of postage.

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ATTACHMENT B

PART B COMPETITIVE PRODUCTS

2000 COMPETITIVE PRODUCT LIST

DOMESTIC PRODUCTS

\* \* \* \* \*

Standard Post  
Round-Trip Mailer

\* \* \* \* \*

**2140** **Round-Trip Mailer**

2140.1 Description

- a. Round-Trip Mailer service allows a mailer to send a letter-shaped or flat-shaped mailpiece to a subscriber and pay postage for the return of the contents of that mailpiece.
- b. A mailer may either prepay postage for the return mailpiece by using Permit Reply Mail or only pay for mailpieces actually returned by using Business Reply Mail.
- c. Qualifying pieces must include a standard 12 cm or smaller optical disc (containing encoded computer data to be run on compatible computer devices), and may include an invoice, receipt, instructional document, or advertisement that conforms to the exceptions/suspensions in the Private Express Statutes.
- d. Qualifying pieces must weigh no more than two (2) ounces.
- e. Round Trip Mailer items are not sealed against postal inspection. The mailing of matter as Round Trip Mailer items constitutes consent by the mailer to postal inspection of the contents, regardless of the physical closure.
- f. Returned pieces must be picked up by the mailer at designated Postal Service facilities.

2140.2 Size and Weight Limitations

	<u>Length</u>	<u>Height</u>	<u>Thickness</u>	<u>Weight</u>
<u>Minimum</u>	<u>7.25 inches</u>	<u>5.5 inches</u>	<u>0.009 inch</u>	<u>none</u>
<u>Maximum</u>	<u>11.5 inches</u>	<u>8.5 inches</u>	<u>0.25 inch</u>	<u>2 ounces</u>

ATTACHMENT B

2140.3      Minimum Volume Requirements

<u>Minimum Volume Requirements</u>	
<u>Outbound Pieces</u>	<u>500 pieces</u>
<u>Return Pieces</u>	<u>None</u>

2140.4      Price Categories

Outbound Pieces  
Return Pieces

2140.5      Optional Features

The following additional services may be available in conjunction with Round Trip Mailer:

- Ancillary Services (1505)
  - Business Reply Mail (1505.3)

2140.6      Prices

Outbound Pieces

	<u>(\$)</u>
<u>Residual Pieces</u>	<u>0.48</u>
<u>Nonautomation Presort</u>	<u>0.433</u>
<u>Automation</u>	
<u>Mixed AADC</u>	<u>0.405</u>
<u>AADC</u>	<u>0.384</u>
<u>3-Digit</u>	<u>0.384</u>
<u>5-Digit</u>	<u>0.360</u>

Return Pieces

	<u>(\$)</u>
<u>Single-Piece</u>	<u>0.46</u>



UNITED STATES POSTAL SERVICE  
475 L'Enfant Plaza, SW  
Washington, DC 20260

May 17, 1985

Mr. Henry P. Lee  
President  
Overseas Mail Service, Inc.  
1080 N. Woodward Avenue  
Birmingham, MI 48011

PES No. 85-3

Dear Mr. Lee:

This responds to three of your letters, dated February 25, 1985, requesting advisory opinions concerning the private carriage internationally of various types of material. The items would be carried by your service from locations in the United States and Puerto Rico to various locations around the world where they would be mailed through foreign postal authorities to destinations outside the United States. The specific inquiries to which this letter responds are those related to (1) electronic messages; (2) computer software and related documents; and (3) newspapers, periodicals and books.

The Federal civil and criminal laws collectively known as the Private Express Statutes (39 U.S.C. §§ 601-606; 18 U.S.C. §§1693-1699) make it generally unlawful for any person other than the Postal Service in any manner to send or carry a "letter" on a "post route" unless the same postage is paid that would have been charged if the letter had been sent through the Postal Service. The Statutes are implemented by Postal Service regulations contained in 39 Code of Federal Regulations, Parts 310 and 320. Pertinent sections of the regulations are cited below.

"Post routes" include, but are not limited to, public roads, highways, railroads, water routes, air routes and letter-carrier routes within the territorial boundaries of the United States on which mail is carried by the Postal Service.

39 C.F.R. 310.1(d). Partly in consequence of the definition of "post routes," the restrictions do not apply to a carriage of letters which occurs wholly outside the territory of the United States. Letters which enter or leave the United States, regardless of origin or destination, necessarily travel over post routes and are subject to the restrictions.

"Letter" is defined in section 310.1(a) as a message--any information or intelligence--directed to a specific person or address and recorded in or on a tangible object. Tangible objects include, but are not limited to, paper, recording disks and magnetic tapes. A number of items are specifically excluded from the definition of letter. These items are listed in section 310.1(a)(7). The excluded items are not subject to the Statutes or implementing regulations.

In addition, there are a number of exceptions (section 310.3) and suspensions (sections 320.2 through 320.7) which specify the circumstances under which items that are letters may nevertheless be carried, without payment of postage, by means other than the Postal Service.

Finally, the private carriage of letters which do not qualify for any of the exceptions or suspensions is permitted only if postage is paid in accordance with section 310.2(b).

We turn now to a discussion of your specific inquiries.

#### I. Electronic Messages

Messages would be transmitted from this country electronically by means of telex, computer, telephone lines, or satellite to foreign locations where your service would have the messages printed out and either placed into the mailstream of a foreign postal administration or hand delivered by your agents.

The restrictions do not apply to the transmission of messages electronically or by wire for the reason that the messages are not recorded on tangible objects, and so do not constitute "letters." With respect to printed copies of the messages, the restrictions would apply only to such carriage over post routes as occurred within the territorial boundaries of the United States, subject, of course, to any applicable exceptions or suspensions. Hand delivery by your agents in other countries of messages transmitted electronically to those locations would not implicate the Private Express Statutes. We do not comment, however, upon the effect of the laws or regulations of other countries upon such carriage.

## II. Computer Software and Related Documents

Computer software in the form of magnetic media such as diskettes, cassettes, and tapes, and accompanying related documents, manuals and various forms of instruction, including letters of instruction, would be carried by your service to foreign locations for mailing to points outside the United States.

Section 310.1(a)(7)(xii) excludes from the definition of letter "computer programs recorded on media suitable for direct input." If by "software" you refer to computer programs or similar procedural materials, the carriage of such software is permitted without payment of postage in accordance with this exclusion. The restrictions do apply, however, to other substantive information recorded on magnetic media which is not otherwise subject to an exclusion, exception or suspension.

Pursuant to the Cargo exception, section 310.3(a), it is permissible to carry letters which accompany and relate in all substantial respects to some part of the cargo. This exception would permit the carriage of letters which accompany and relate in all substantial respects to computer programs and similar material not considered letters by virtue of the exclusion set out in section 310.1(a)(7)(xii).

## III. Newspapers, Periodicals and Books

Your service would carry periodicals such as newsletters, newspapers and magazines to foreign locations for mailing to addresses outside the United States. You state that "in some instances" the publishers of the material may have been granted second-class domestic mailing privileges.

In seeking clarification of what constitutes "a periodical or newspaper" you ask, specifically:

1. What is a periodical or newspaper?
2. When is a newsletter a periodical?
3. Are periodicals and newsletters excluded from the definition of letter under section 310.1(a)(7)(iv)?
4. Under what circumstances would an item which does not satisfy the requirements of section 310.1(a)(7)(iv) qualify for the book and catalog exclusion set out in section 310.1(a)(7)(v)?

The terms "newspapers" and "periodicals" are not defined by the Private Express Statutes or regulations. In interpreting section 310.1(a)(7)(iv), we have relied primarily on the conventional meanings of these terms as defined in dictionaries and as construed in prior Advisory Opinions. We have also looked to Postal Service regulations pertaining to the qualification of material for second-class rates since these regulations sometimes provide useful analogies. We do not consider, however, that the regulations pertaining to rates and classifications are necessarily dispositive with respect to Private Express matters.

In making a determination whether published material is a "newspaper" or "periodical" for the purposes of the exclusion, we take into consideration a number of factors, including format, content, frequency and regularity of issuance, and distribution. Principal among the characteristics we look for are whether the publication contains items of news in the journalistic sense or items of general interest to the reading public, whether the publication is issued on a regular basis, and whether it is intended for distribution to the general public. How the sender chooses to characterize the publication, whether as a "newsletter" or as a "newspaper" is immaterial to this determination. Further, format and periodicity are not, alone, deciding factors.

One factor of particular significance to the general circulation requirement is whether the publication is distributed to a paid list of subscribers or is otherwise offered for sale to the public. We place considerable importance in this factor when the publication is distributed by a business firm or organization whose primary activity is not publishing, and the main purpose of the publication appears to be the communication of information relating to the business interests of the firm or organization to its employees or members.

Enclosed is a copy of Advisory Opinion PES No. 82-10 in which the characteristics of newspapers and periodicals are discussed in depth. In this opinion, we determined that a newsletter published by a teacher's union and distributed periodically to the members of the union on the basis of their membership, rather than as subscribers, is not a newspaper or periodical for the purpose of the exclusion. The publication lacked, in our view, two essential characteristics: general interest content and general circulation. Similarly, in Advisory Opinion PES No. 77-6, we concluded that the exclusion does not apply to a newsletter or bulletin published weekly and sent by a business firm to its employees and clients for the purpose of advancing the business interests of the sender. If, after considering the enclosed opinion, you have questions concerning the applicability of the exclusion to

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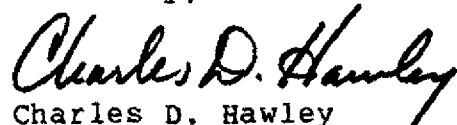
specific items, we would be happy to review samples of those items.

The exclusion set out in section 310.1(a)(7)(v) is intended to apply only to books and catalogs, as those terms are commonly understood, and which, in addition, meet the criteria set out in the regulation for number of bound and printed pages and copies distributed. As is indicated in the regulation, books and catalogs ordinarily "deal with matters of interest to, and are intended for, a substantial number of recipients." In addition, they "generally contain a substantial number of pages." The terms "books" or "catalogs," as used in the regulation, imply the publication of a number of identical copies. If you question the applicability of the exclusion to particular items, you may submit examples of those items for our review.

#### Conclusion

The Private Express Statutes do not restrict the electronic transmission of messages and do not pertain to the carriage of letters occurring wholly outside the territorial limits of the United States. Carriage of computer programs and related documents are permitted without payment of postage pursuant to the exclusion for computer programs and the Cargo exception, respectively. The exclusion for newspapers and periodicals is intended to apply to periodic publications the primary purpose of which is to convey news in the journalistic sense or information of general interest to a broad segment of the reading public. Items which contain the requisite number of bound and printed pages and are published in significant quantities may be carried without payment of postage pursuant to the exclusion for books and catalogs. Our opinion with respect to the applicability of the exclusions for "newspapers and periodicals" and "books and catalogs" to particular items must be based upon either a description, or our own examination, of the items in question.

Sincerely,



Charles D. Hawley  
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Division

Enclosures