Alliance of Nonprofit Mailers

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Postal Regulator Again Proposes Massive Surcharges

New Postal Pricing Proposal Will Threaten Nonprofit Mailers

On December 5, 2019, the Postal Regulatory Commission (PRC) proposed changes to the system that regulates prices for market-dominant mail. The PRC's proposed revised rules and request for public comment were published in the Federal Register on December 11, 2019.

The proposed changes, if implemented, would allow the U.S. Postal Service to charge significantly higher prices for some types of mail on which nonprofit organizations rely. Postal mail is a crucial mode of communication for many nonprofits, which use the mail to send fundraising appeals, thank you or acknowledgment letters, membership appeals, front-end and back-end premiums, invoices, magazines, newsletters, and more. In many cases, mail is the most effective channel through which nonprofits can reach their supporters and members. And, mail generates a significant portion of numerous nonprofits' revenues. We therefore want readers to be aware of proposed postal rate changes that could dramatically harm nonprofits and impair their continued patronage of the U.S. Postal Service.

Background

Since the enactment of the Postal Accountability and Enhancement Act (PAEA) at the end of 2006, U.S. postal products have been divided into two categories: (1) competitive, and (2) market-dominant. Competitive products, as the name suggests, are those sold by the U.S. Postal Service that face competition from private carriers, such as parcels and priority mail.

Market-dominant products are those over which the U.S. Postal Service is effectively a monopolist. Market-dominant products are found in numerous classes of mail that nonprofits frequently use, including first-class letters and postcards, flat-shaped marketing mail, and periodicals.

When Congress passed PAEA, it included an important protection for customers who purchase the U.S. Postal Service's monopoly products. Under the law, and absent "extraordinary or exceptional circumstances," the Postal Service cannot raise prices annually on classes of market-dominant mail by more than inflation (as measured by the Consumer Price Index for All Urban Consumers). The "CPI Cap" has safeguarded all users of market-dominant mail, including nonprofit mailers, from unjust and exorbitant postal price hikes.

PAEA contains other key provisions: it required the Postal Service to prefund postal employees' retirement health benefit and pension accounts (something the USPS has not been able to fully accomplish), it set out specific objectives and factors that must be considered when setting market-dominant prices, and it instructed the PRC to revisit the system of regulations in ten years to see whether they are working well.

The "ten-year review" of PAEA's system for regulating market-dominant rates began three years ago. In December 2017, the PRC issued its *first* proposed changes to the system, which would have allowed the U.S. Postal Service to charge above-inflation price increases on market-dominant mail every year for five years. We estimated the impact would be five-year increases of 28 to 40 percent, depending on the type of mail. Mailers, including the Alliance of Nonprofit Mailers, submitted extensive comments and analysis criticizing the PRC's first proposal. Two years later, we now have the PRC's second proposal. The new proposal would likely be even more harmful to nonprofit mailers than was the first one.

The PRC Proposes, Again, to Bust the CPI Cap

The PRC's revised proposal will also authorize the Postal Service to charge mailers above-CPI price increases for market-dominant products. The new regulations would fundamentally alter the ratemaking system that Congress established in PAEA and represent a serious impending threat to Postal Service customers. The new rules would permit the Postal Service to adjust the prices for each class of market-dominant mail based on:

- Changes to the Consumer Price Index, ***plus***
- A formula that would calculate extra pricing authority for the Postal Service based on declines in mail density; ***plus***
- Another formula that would calculate even more pricing authority for the Postal Service based on its retirement prefunding obligations.

The new rules would also allocate an extra one percentage point of pricing authority to the Postal Service for meeting very modest growth and service standard measures each year. And, the Postal Service would be required to charge an additional two percentage points of pricing authority for mail products that do not cover their costs, such as flat-shaped marketing mail. If an entire class of mail does not collectively cover its costs (*i.e.*, Periodicals), this additional two-percent pricing authority will be optional for the Postal Service rather than mandatory.

What Can Nonprofit Mailers Do?

Comments to the PRC's new proposal are due by February 3, 2020. Reply comments are due by March 4, 2020. Venable is working with the Alliance of Nonprofit Mailers, the leading trade association representing nonprofit organizations on postal issues, to file comments with the PRC. If your organization would like our help preparing your own comments to submit as a declaration included with the Alliance filing, please contact us.

Detailed Analysis of the PRC Proposal

PRC's 10-Year Review

After a two-year hiatus, the Postal Regulatory Commission has finally taken action in Docket No. RM2017-3, the "ten-year review" of the system for regulating market-dominant rates under the Postal Accountability and Enhancement Act. On December 5, 2019, the PRC issued Order No. 5337 – a Revised Notice of Proposed Rulemaking. This means that, rather than issuing a final decision, the PRC is soliciting further comments on a new proposal. Comments to the PRC's revised proposal are due by February 3, 2020. Reply comments are due by March 4, 2020.

Changes to the PRC's Proposal

You will recall that, on December 1, 2017, the Commission proposed several major changes to the postal rate regulation system that would enable it to set above-CPI prices for market-dominant products. We outlined the most important of these proposed changes in our July 2018 Litigation Report, and will repeat them here to refresh your memory:

- Allow the Postal Service to raise average rates for each market-dominant class of mail by two percentage points above CPI each year for five consecutive years (thus, imposing a rate increase over five years of as much as twenty-eight (28) percent on market-dominant products that cover their attributable costs);

- Provide the Postal Service with additional so-called "performance-based" supplemental rate authority that would:

    - Permit the USPS to raise market-dominant rates by another 0.75 percent per year if the Service maintained its recent (low) rates of productivity growth; and

  - Permit the USPS to raise market-dominant rates by an additional 0.25 percent per year if the Service maintained published nominal service performance standards;

- *Require* the USPS to raise its average prices on noncompensatory market-dominant products (*e.g.*, Marketing Mail flats) by an additional amount of at least two percentage points per year until the revenue from the product covers its attributable costs. If an entire class is noncompensatory (*i.e.*, Periodicals Mail), the USPS was to raise overall rates for the class by an additional amount equal to two percentage points per year. This proposal would have imposed a cumulative price increase over five years of up to *forty percent* on mail that disproportionately impacts ANM's members – Marketing Mail Flats and Periodicals Mail.

The PRC's new proposal would similarly grant the Postal Service above-CPI rate authority over market-dominant products. It contains several notable differences, however:

- Rather than grant the Postal Service static CPI+2% rate authority for each of the next five years, the Commission now proposes to modify PAEA's price cap using formula-based approaches targeting two chronic challenges to the Service's financial health: (1) declining mail density (that is, mail volume divided by delivery points) that is raising the per-unit cost of mail, and (2) Congressionally-required amortization payments for retirement health benefit and pension costs. Specifically:

  - The PRC proposes to implement a formula tying the Postal Service's above-CPI rate authority to increases in the cost-per-mailpiece that are driven by measured declines in year-over-year density, and

  - The PRC proposes to implement a separate formula that would grant the Postal Service above-CPI rate authority equal to the percentage by which total revenue (for both market-dominant and competitive products) would have to increase in order to for the USPS to be able to make the statutorily-mandated retirement payments. This additional rate authority would be phased in over five years, recalculated annually, and – importantly – would be contingent on the USPS applying the additional revenue toward the required retirement payments.

- The Commission's new proposal would continue to grant the Postal Service authority to raise market-dominant rates by an additional one percentage point per year for meeting "performance-based" requirements. The new proposal, however, eliminates the unequal weighting between productivity growth (0.75) and nominal service standard (0.25) metrics, and modifies the benchmark against which productivity growth will be measured.

- The Commission's new proposal would make the Postal Service's authority to raise overall prices for noncompensatory classes of mail (Periodicals) by an additional two percentage points per year *optional* rather than mandatory. This is perhaps the most significant difference between the PRC's 2017 proposal and its current one for nonprofit Periodicals mailers, and would place the ultimate decision of whether to impose the surcharge in the hands of the Postal Service and the Governors rather than the Commission.

Summary of the Two PRC Proposals

	Order No. 4258 (Dec. 1, 2017)	**Order No. 5337 (Dec. 5, 2019)**
General Above-CPI Rate Authority	CPI+2%; every year for five years for all market-dominant products	Formula-based "density rate" authority; tied to per-piece cost increases caused by measured year-over-year declines in density Formula-based "retirement obligation" authority; tied to extra revenue needed for USPS to make amortized retirement health and pension benefit payments
"Performance-based" Above-CPI Rate Authority	CPI+0.75% annual surcharge for maintaining productivity rates; measured against rolling 5-year average CPI+0.25% annual surcharge for maintaining nominal service standards	CPI+1% annual surcharge if both productivity and service standards are met (productivity no longer weighted more) Productivity must exceed previous year's (by any amount) rather than meet specified 5-year average target
Noncompensatory Products	USPS *must* raise price of noncompensatory products by at least 2 percentage points above class average. If entire class is noncompensatory, USPS *must* raise overall rates for the class by 2 percentage points per year.	Additional rate authority for noncompensatory classes (*i.e.,* Periodicals) now optional rather than mandatory. For noncompensatory products within compensatory classes (*e.g.,* Marketing Mail Flats), USPS shall raise product rate by at least 2 percentage points above the percentage increase of the class.

Immediate Reaction

We are continuing to study the PRC's nearly 400-page Order and collaborate with allied trade associations to develop our response to the PRC's proposal. The transition from a fixed annual surcharge on all market-dominant products and a mandatory additional surcharge on noncompensatory products to formula-based surcharges and optional Periodicals Mail surcharges makes it difficult to predict what impact the new proposal will have on ANM members. For example, depending on annual changes to the Postal Service's mail volume and number of delivery points, the USPS's density rate authority alone could exceed two percentage points above the CPI. In the event of a recession, or some other cause of accelerated mail volume decline, the density rate authority could be even larger.

In addition, if legislation were enacted that eliminates part or all of the Postal Service's retirement health benefit and pension obligations – as we and others have long advocated – that could potentially curtail the Commission's proposed "retirement obligation" authority. In its Order, the PRC states that "should Congress enact legislation that impacts the retirement liability of the Postal Service or fundamentally alters the structure of the Postal Service's retiree obligations, the Commission will reevaluate the additional retirement rate authority and consider equitable remedies that may be appropriate to ensure that mailers are protected. The timeframe for reevaluation and the potential remedies will be based on the specific details of any enacted legislation." *See* Order No. 5337, at p. 94.

The revised "performance-based" proposal does not appear to be a positive development for nonprofit mailers. Under the PRC's new formula, it should be easier for the Postal Service to obtain the additional one percent of rate authority because the Service merely has to increase productivity (by any amount) from the previous year and maintain its published service standards. Under the previous proposal, the USPS would have had to meet a specific productivity growth benchmark. We do not yet know whether the Postal Service will have grown its productivity in FY2019.

Finally, when handicapping the likelihood that the PRC will issue a final decision enacting its new proposal following the comment period, we must be mindful that the Commission's leadership has changed over the past two years. Commissioner Tony Hammond wrote a forceful dissenting statement to Order No. 4258, criticizing the PRC for placing the USPS's financial stability on a pedestal above all other objectives (a major ANM talking point in our comments) and advocating for the continued use of the CPI price cap. Commissioner Nanci Langley wrote a separate statement and noted that the Commission's then-proposal was "only one of many possible approaches" to regulating market dominant rates, and she encouraged mailers to propose alternative solutions. Mr. Hammond and Ms. Langley are no longer on the Commission, while Michael Kubayanda, Ann Fisher, and Ashley Poling have joined it.

Suffice it to say, we will ensure that ANM members' voices are heard by the Commission. ANM plans to file comments in response to the PRC's proposal and we will remain a strong advocate for nonprofit mailers as we have been throughout this proceeding.

Alliance Notes

December 5, 2019 -- Postal Regulators Lay Out New Proposal to Enable Larger USPS Rate Hikes - Mailers say the new system could create uncertainty and drive customers away from the Postal Service. – Government Executive

Excerpt:

> "We remain opposed because we think the [inflation-based] cap is not the problem," Kearney said. "In fact, it is exactly what the Postal Service needs to survive," as customers will migrate away from the mail if prices increase too dramatically. He added that PRC was unlawfully overruling the federal statute calling for an inflation-based cap. The new formula approach, he said, would create more uncertainty and "it's hard to rule out the possibility of larger increases than the first proposal."
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> For some customers already on the ropes, Kearney said, pointing to hard-copy periodicals as an example, this increase "could be the straw that breaks them."

December 5, 2019 – Regulators Revise Market Dominant Mail Proposal – The NonProfit Times

Excerpt:

> In an email to members of the Alliance of Nonprofit Mailers, Executive Director Stephen Kearney wrote that "at first blush the new proposal looks much like the first. The theme is allowing USPS to raise rates much higher than inflation." He said that the Alliance be an active participant "and strong advocate for the rights and needs of nonprofit mailers who make up 10 percent of the USPS customer base."

December 11, 2019 -- PRC proposes giving USPS greater freedom to raise stamp prices – Linn's.com

Excerpt:

> "At first blush the new proposal looks much like the first proposal [from 2017]" said Stephen Kearney, executive director of the Alliance of Nonprofit Mailers.
> "The theme is allowing USPS to raise rates much higher than inflation," he added in a bulletin to his members.