

§§ 3032.2–3032.4 [Reserved]

Subpart B—Requirements and Defenses**§ 3032.5 Postal Service rules that create an unfair competitive advantage.**

(a) A complaint alleging a violation of 30 U.S.C. 404(a)(1) must show that a Postal Service rule, regulation, or standard has the effect of:

(1) Precluding competition; or

(2) Establishing the terms of competition.

(b) As an affirmative defense to a complaint under 39 U.S.C. 404(a)(1), the Postal Service may demonstrate that the rule, regulation, or standard at issue does not create an unfair competitive advantage for itself or any entity funded, in whole or in part, by the Postal Service.

(c) As used in this section, the term *rule, regulation, or standard* includes, among other things, documents or policies issued by the Postal Service to exercise its regulatory authority or otherwise act as a governmental entity.

§ 3032.6 Disclosure, transfer, and licensing of intellectual property.

(a) A complaint alleging a violation of 39 U.S.C. 404(a)(2) must show that the Postal Service has compelled or attempted to compel the disclosure, transfer, or licensing of the intellectual property of the person filing the complaint to a third party.

(b) As used in this section, the term *intellectual property* includes, among other things, patents, copyrights, trademarks, trade secrets, and proprietary information.

(c) As used in this section, the term *disclosure, transfer, or licensing of intellectual property* includes, among other things, an action that has an adverse effect on the value of intellectual property.

§ 3032.7 Unlawfully obtaining information.

(a) A complaint alleging a violation of 39 U.S.C. 404(a)(3) must show that:

(1) The person filing the complaint has provided or sought to provide a product;

(2) The Postal Service obtained information about such product from the person filing the complaint; and

(3) The Postal Service offers or offered a postal service that uses or is based, in whole or in part, on the information obtained from the person filing the complaint.

(b) As an affirmative defense to a complaint under 39 U.S.C. 404(a)(3), the Postal Service may demonstrate that substantially the same information was obtained (or was obtainable) from an independent source or is otherwise obtained (or obtainable) through lawful means.

(c) As an affirmative defense to a complaint under 39 U.S.C. 404(a)(3), the Postal Service may show that the information obtained was provided by written consent.

§ 3032.8 Statutorily authorized affirmative defense.

(a) As an affirmative defense to an allegation of a violation of 39 U.S.C. 404(a), the Postal Service may demonstrate that it is specifically authorized by law to take the action or inaction alleged to be a violation of that section.

(b) Authority under 39 U.S.C. 401 or 39 U.S.C. 404 may not form the basis of an affirmative defense under paragraph (a) of this section.

(c) Paragraph (b) of this section does not preclude the Postal Service from arguing that a particular Postal Service regulation or other action (or inaction) does not have the requisite effect to violate 39 U.S.C. 404(a).

PART 3035—RULES FOR MARKET TESTS OF EXPERIMENTAL PRODUCTS

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§ 3035.1 Applicability.

The rules in this part apply to market tests of experimental products undertaken pursuant to 39 U.S.C. 3641.

§ 3035.2 Advance notice.

The Postal Service shall file notice with the Commission of its determination to initiate a market test at least 30 days before initiating the market test.

§ 3035.3 Contents of notice.

(a) Notices of proposed market tests shall include:

(1) The basis for the Postal Service's determination that the market test is governed by 39 U.S.C. 3641, which shall:

(i) Describe, from the viewpoint of mail users, how the experimental product is significantly different from all products offered by the Postal Service within the 2 fiscal years preceding the start of the market test;

(ii) Establish that the introduction or continued offering of the experimental product will not create an unfair or otherwise inappropriate competitive advantage for the Postal Service or any mailer, particularly in regard to small business concerns, as defined in § 3001.5(v) of this chapter; and

(iii) Identify the experimental product as either market dominant or competitive for purposes of the market test, and explain the reasoning for the categorization in accordance with the criteria set forth in 39 U.S.C. 3642(b)(1).

(2) A description of the nature and the scope of the market test that:

(i) Describes the market test and experimental product;

(ii) Demonstrates why the market test is not inconsistent with the requirements of 39 U.S.C. 3641;

(iii) Identifies the beginning and ending dates of the market test;

(iv) Describes the geographic market(s) where the market test may be conducted;

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(v) Estimates the total revenue that is anticipated by the Postal Service for each fiscal year of the market test, including available supporting documentation; and

(vi) Includes a data collection plan for the market test, including a description of the specific data items to be collected. The minimum data collection plan requirements are described in § 3035.20.

§ 3035.4 Review.

(a) The Commission will establish a docket for each market test initiated under this part, promptly publish a notice in the FEDERAL REGISTER, and post the filing on its Web site. The notice shall:

(1) Describe the general nature of the proceeding;

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

(3) Identify an officer of the Commission to represent the interests of the general public in the docket;

(4) Specify a period for public comment; and

(5) Include such other information as the Commission deems appropriate.

(b) [Reserved]

§ 3035.5 Commission action.

(a) The Commission shall review the Postal Service notice together with any comments for initial compliance with the statutory requirements of 39 U.S.C. 3641, and:

(1) Find that the market test is consistent with the requirements of 39 U.S.C. 3641;

(2) Find that the market test is inconsistent with the requirements of 39 U.S.C. 3641 and provide an opportunity to correct the identified deficiencies;

(3) Find that the market test is inconsistent with the requirements of 39 U.S.C. 3641 and order that the market test not go into effect; or

(4) Direct other action as the Commission may consider appropriate.

(b) [Reserved]

§ 3035.6 Changes in market test.

(a) The Postal Service shall file a notice with the Commission describing each material change made to the market test or services offered under the

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market test at least 10 days before implementing such changes. Material changes are changes that may affect compliance with 39 U.S.C. 3641 and include, without limitation, adjustments to prices, geographic scope, eligibility for service, and termination date.

(b) The Commission may, in its discretion, notice the filing and provide an opportunity for comment.

§§ 3035.7–3035.9 [Reserved]

§ 3035.10 Duration.

A market test may not exceed 24 months in duration unless the Commission authorizes an extension pursuant to a request filed by the Postal Service under § 3035.11.

§ 3035.11 Extension of market test.

(a) The Postal Service may request an extension of the duration of a market test, not to exceed an additional 12 months, if such an extension is necessary to determine the feasibility or desirability of a product being tested. The Postal Service must file a written request for extension with the Commission at least 60 days before the market test is scheduled to terminate.

(b) The request for extension shall:

(1) Explain why an extension is necessary to determine the feasibility or desirability of the experimental product;

(2) List the new end date for the market test;

(3) Calculate the total revenue received by the Postal Service from the market test for each fiscal year the market test has been in operation and provide supporting documentation for the calculations;

(4) Estimate the additional revenue that is anticipated by the Postal Service for each fiscal year remaining on the market test, including the requested extension period, and provide available supporting documentation; and

(5) Provide any additional information necessary for the Commission to evaluate the continued consistency with the requirements of 39 U.S.C. 3641.

(c) The Commission shall review the Postal Service request for extension to ensure that an extension is necessary in order to determine the feasibility or

desirability of the experimental product and:

(1) Find that the extension is consistent with the requirements of 39 U.S.C. 3641;

(2) Find that the extension is inconsistent with the requirements of 39 U.S.C. 3641 and provide an opportunity to correct the identified deficiencies;

(3) Find that the extension is inconsistent with the requirements of 39 U.S.C. 3641 and deny the extension; or

(4) Direct other action as the Commission considers appropriate.

§ 3035.12 Cancellation of market test.

(a) The Postal Service may cancel a market test at any time. It shall file notice of cancellation with the Commission within 10 days of cancelling the market test.

(b) Pursuant to 39 U.S.C. 3641(f), the Commission may direct the Postal Service to demonstrate that the market test continues to meet the requirements of 39 U.S.C. 3641 and the Commission's rules. The Commission, in its discretion, may provide an opportunity for comments.

(c) Based upon its review, the Commission may:

(1) Find that the market test is consistent with the requirements of 39 U.S.C. 3641;

(2) Find that the market test is inconsistent with the requirements of 39 U.S.C. 3641 and provide an opportunity to correct the identified deficiencies;

(3) Find that the market test is inconsistent with the requirements of 39 U.S.C. 3641 and cancel the market test; or

(4) Direct other action as the Commission may consider appropriate.

§§ 3035.13–3035.14 [Reserved]

§ 3035.15 Dollar amount limitation.

(a) The Consumer Price Index used for calculations under this part is the CPI-U index, as specified in §§ 3010.21(a) and 3010.22(a) of this chapter.

(b) An experimental product may only be tested if total revenues that are anticipated or received by the Postal Service do not exceed \$10,000,000 in any fiscal year, as adjusted for the change in the CPI-U index, as specified in paragraph (d) of this section (\$10

Million Adjusted Limitation). Total revenues anticipated or received may exceed the \$10 Million Adjusted Limitation in any fiscal year if an exemption is granted pursuant to § 3035.16.

(c) For each fiscal year, the \$10 Million Adjusted Limitation shall reflect the average CPI result during the previous fiscal year calculated as described in paragraph (d) of this section. The Commission shall publish this figure annually, after the close of the fiscal year, on its Web site at <http://www.prc.gov>.

(d) The calculation of the \$10 Million Adjusted Limitation involves the following steps. First, a simple average CPI-U index was calculated for fiscal year 2008 by summing the monthly CPI-U values from October 2007 through September 2008 and dividing the sum by 12 (Base Average). The resulting Base Average is 214.5. Then, a second simple average CPI-U index is similarly calculated for each subsequent fiscal year by summing the 12 monthly CPI-U values for the previous fiscal year and dividing the sum by 12 (Recent Average). Finally, the annual limitation for the current fiscal year is calculated by multiplying \$10,000,000 by the Recent Average divided by 214.5. The result is expressed as a number, rounded to the nearest dollar.

(e) The formula for calculating the \$10 Million Adjusted Limitation is as follows: \$10,000,000 * (Recent Average/214.5).

§ 3035.16 Exemption from dollar amount limitation.

(a) The Postal Service may request an exemption from the \$10 Million Adjusted Limitation by filing a written request with the Commission. In no instance shall the request for exemption exceed the market test dollar amount limitation of \$50,000,000 in any fiscal year, as adjusted for the change in the CPI-U index, as specified in paragraph (c) of this section (\$50 Million Adjusted Limitation).

(b) For each fiscal year, the \$50 Million Adjusted Limitation shall reflect the average CPI result during the previous fiscal year calculated as described in paragraph (c) of this section. The Commission shall publish this fig-

ure annually, after the close of the fiscal year, on its Web site at <http://www.prc.gov>.

(c) The calculation of the \$50 Million Adjusted Limitation involves the following steps. First, a simple average CPI-U index was calculated for fiscal year 2008 by summing the monthly CPI-U values from October 2007 through September 2008 and dividing the sum by 12 (Base Average). The resulting Base Average is 214.5. Then, a second simple average CPI-U index is similarly calculated for each subsequent fiscal year by summing the 12 monthly CPI-U values for the previous fiscal year and dividing the sum by 12 (Recent Average). Finally, the annual limitation for the current fiscal year is calculated by multiplying \$50,000,000 by the Recent Average divided by 214.5. The result is expressed as a number, rounded to the nearest dollar.

(d) The formula for calculating the \$50 Million Adjusted Limitation is as follows: \$50,000,000 * (Recent Average/214.5).

(e) The Postal Service shall file its request for exemption at least 45 days before it expects to exceed the \$10 Million Adjusted Limitation.

(f) The request for exemption shall:

(1) Explain how the experimental product will:

(i) Benefit the public and meet an expected demand;

(ii) Contribute to the financial stability of the Postal Service; and

(iii) Not result in unfair or otherwise inappropriate competition;

(2) Calculate the total revenue received by the Postal Service from the market test for each fiscal year the market test has been in operation, and provide supporting documentation;

(3) Estimate the additional revenue that is anticipated by the Postal Service for each fiscal year remaining on the market test, including any extension period granted by the Commission in accordance with § 3035.11(c), and provide available supporting documentation; and

(4) Quantify the product specific costs associated with the development of the market test; that is, costs incurred before the market test is implemented.

(g) The Commission shall review the request for exemption for consistency with the statutory requirements of 39 U.S.C. 3641 and:

(1) Find that the exemption is consistent with the requirements of 39 U.S.C. 3641;

(2) Find that the exemption is inconsistent with the requirements of 39 U.S.C. 3641 and provide an opportunity to correct the identified deficiencies;

(3) Find that the exemption is inconsistent with the requirements of 39 U.S.C. 3641 and deny the exemption; or

(4) Direct other action as the Commission may consider appropriate.

§ 3035.17 Prevention of market disruption.

Notwithstanding the \$10 Million Adjusted Limitation or any adjustment granted pursuant to §3035.16, the Commission may limit the amount of revenues the Postal Service may obtain from any particular geographic market as necessary to prevent the creation of an unfair or otherwise inappropriate competitive advantage for the Postal Service or any mailer, particularly in regard to small business concerns, as defined in §3001.5(v) of this chapter.

§ 3035.18 Filing for permanent product status.

(a) If the Postal Service determines to make an experimental product permanent, it shall file a request, pursuant to 39 U.S.C. 3642 and part 3020, subpart B of this chapter, to add a new product or price category to the market dominant or competitive product list. Requests to make existing experimental products permanent must be filed at least 60 days before the market test expires (including any extension period granted) or the market test exceeds any authorized adjusted limitation in any fiscal year, whichever is earlier.

(b) A request to make an experimental product permanent must, among other things, quantify the product specific costs associated with the development of the market test; that is, costs incurred before the market test is implemented.

(c) The Postal Service shall also file a notice of its request to make an experimental product permanent in the

market test proceeding's docket. The notice shall include the applicable docket number(s) for the proceeding evaluating the request.

§ 3035.19 [Reserved]

§ 3035.20 Data collection and reporting requirements.

(a) A notice of a market test shall include a data collection plan for the market test as required by §3035.3(a)(2)(vi). Data collection plans shall include, at a minimum:

(1) The revenue by fiscal quarter received to date by the Postal Service from the market test;

(2) Attributable costs incurred in conducting the market test, including product specific costs related to the administration of the market test; and

(3) Volumes of the experimental product by fiscal quarter.

(b) The Commission may request additional information or data as it deems appropriate.

(c) To assess the potential impact of a market test in a particular geographic market, the Commission may require the Postal Service to report the revenues from the market test for specified geographic markets.

(d) The Postal Service shall file the information required by the data collection plan in data collection reports. Data collection reports must be filed within 40 days after the close of each fiscal quarter during which the market test is offered, or such other period as the Commission may prescribe.

(e) The Postal Service shall file in its Annual Compliance Report information on each market test conducted during the fiscal year pursuant to §3050.21(h) of this chapter.

PART 3050—PERIODIC REPORTING

Sec.

3050.1 Definitions applicable to this part.

3050.2 Documentation of periodic reports.

3050.3 Access to information supporting Commission reports or evaluations.

3050.10 Analytical principles to be applied in the Postal Service's annual periodic reports to the Commission.

3050.11 Proposals to change an accepted analytical principle applied in the Postal Service's annual periodic reports to the Commission.