



7710-12

POSTAL SERVICE

39 CFR Part 501

Revisions to the Requirements for Authority to Manufacture and Distribute Postage Evidencing Systems; Customized Postage Products

AGENCY: Postal Service.

ACTION: Final rule.

SUMMARY: In January, 2017, the Postal Service proposed to amend its Postage Evidencing Systems regulations to standardize requirements for the authorization to produce Customized Postage, a Special Service approved by the Postal Regulatory Commission. Comments were received by all authorized providers of Customized Postage products and the Alliance of Nonprofit Mailers. The Postal Service considered these comments and addresses them below.

Customized Postage products are provided through authorized Postage Evidencing System manufacturer-distributors or through companies affiliated with authorized Postage Evidencing System manufacturer-distributors and approved by the Postal Service. During the development of the Customized Postage program, requirements for authorization to produce Customized Postage products were described in *Federal Register* notices and in individual approval letters issued to providers. These final rules give regulatory form to the existing requirements for authorization to produce Customized Postage products, and incorporate procedures for the protection of Postal Service business interests. Existing providers of Customized Postage products may continue provision of Customized Postage products subject to these final rules upon

their effective date, which coincides with renewal of the product year, and any requirements set forth in individual authorization letters.

DATES: These amendments take effect on May 15, 2018.

FOR FURTHER INFORMATION CONTACT: Christy Noel, Legal Policy & Legislative Advice, U.S. Postal Service, (202) 268-3484.

SUPPLEMENTARY INFORMATION: The Postal Reorganization Act authorizes the Postal Service to provide such evidence of postage payment “as may be necessary or desirable.” 39 U.S.C. 404(a)(4). The Postal Service exercises this authority through 39 CFR part 501, which protects postal revenues by regulation of manufacturer-distributors of Postage Evidencing Systems. Customized Postage products were developed through market tests allowing Authorized Postage Evidencing System providers to combine evidence of prepayment of postage with a customer-selected or customer-provided graphic image for printing and fulfillment. See, 70 FR 21821 (April 27, 2005); 71 FR 12718 (March 13, 2006). Subsequently, Customized Postage was approved as a Special Service by the Postal Regulatory Commission. See, 75 FR 11452, 11459 (March 11, 2010). The amendments to 39 CFR part 501 create standardized definitions, requirements, and procedures applicable to the authorization to provide Customized Postage products, and incorporate protections for the Postal Service’s legal, financial, and brand interests.

All comments received in response to the proposed rules published at 82 FR 1294 (January 5, 2017) requested the creation of a nonprofit category of content in addition to the strictly commercial or limited social categories of content designated as eligible for customer-provided or customer-selected images. All comments claimed that

the inclusion of an eligible nonprofit content category would increase program revenues, and the Alliance of Nonprofit Mailers specifically alleged that excluding nonprofit content from the categories of eligible content would constitute unlawful discrimination against nonprofit mailers. The Postal Service disagrees on both counts. Customized Postage products are not U.S. stamps; they are a specialized form of evidence of prepayment of postage offered through statutory authority contained in 39 U.S.C. 404(a)(4). Because they share the function and appearance of U.S. stamps, however, the Postal Service must limit eligible private content to protect its own business and brand interests against dilution, false attribution, appearances of endorsement, and other potential impacts. The First Amendment requires that such content- or speaker-based restrictions be reasonable and viewpoint-neutral. *See, Matal v. Tam*, 137 S.Ct. 1744, 1763 (2017). Selective acceptance of only those nonprofit causes or organizations that do not present threats to the Postal Service's brand would constitute impermissible viewpoint discrimination, which would endanger the entire program. Such legal risks would offset any potential revenue increases attributable to the eligibility of nonprofit content. Excluding entire categories of content altogether to help avoid unlawful viewpoint discrimination is an eminently reasonable limitation made in accordance with First Amendment principles. This exclusion does not constitute unlawful discrimination against nonprofit mailers, who may purchase Customized Postage products subject to the same terms and conditions as other users of the mail.

Comments from existing providers argued that Customized Postage restrictions should be uniformly applied across other Postal Service programs or products that allow some degree of customization. However, tailoring content restrictions to the unique

context of each of its various customizable products or programs is necessary to serve the Postal Service's diverse interests and goals and is consistent with First Amendment forum analysis.

Comments from Authorized Postage Evidencing System providers also requested acceptance of otherwise eligible images containing incidental depictions of certain prohibited content. For alcohol, tobacco, gambling, and weapons, the Postal Service agrees that allowing incidental depictions of these prohibited categories of content contained within otherwise eligible images would be consistent with program purposes while maintaining or increasing revenues. For example, an image of toasting wedding celebrants may remain eligible despite depictions of alcohol, an image of an armed services member may remain eligible despite depictions of weaponry, and so on. However, for religious, violent, or political content, the Postal Service does not agree that incidental depictions of these prohibited categories of content contained within otherwise eligible images would be consistent with program purposes. Such an expansion would delegate unduly fine-grained distinctions to providers and increase First Amendment and brand liability.

The eligibility of alcoholic beverage logos in the commercial content category was requested. Although allowing incidental depictions of alcohol in a commercial or social context, as explained above, is acceptable under the final rules, allowing the non-incidental display of logos promoting alcoholic beverage sales creates more brand risks, and arguably opens other commercial categories that the Postal Service may be compelled to accept by First Amendment principles, *e.g.*, logos promoting tobacco, weapons, or gambling enterprises.

Comments from Authorized Postage Evidencing System providers sought elimination of the “not suitable for minors” restriction in the proposed regulations, arguing that the phrase is too subjective and impractical to apply. The final rules replace “not suitable for minors” with “not suitable for all-ages audiences” and clarify that the phrase applies to all eligible content. The Postal Service believes that original program purposes are better served by this phrase, which seeks to limit content to family-friendly images or text that would not cause concern among mainstream, multi-generational users of the mail. To further comport with program purposes, the Postal Service intends that the list of specific content prohibitions (alcohol, tobacco, gambling, weapons, controlled substances, politics, religion, sex, violence, etc.) be read as illustrative and not exhaustive, making ineligibility the default presumption for all content considered under the Eligibility Criteria. In other words, if proposed content is not a commercial or social image that is suitable for all-ages audiences, it is not eligible, even if not explicitly included in the list of prohibitions. To emphasize this restrictive nature, the final rules include a statement indicating that content that is not expressly allowed is presumed to be prohibited.

The Authorized Postage Evidencing System provider Stamps.com expressed concern that the regulations as proposed would require alteration of Stamps.com’s trademarks. Neither the proposed nor the final rules require alteration of provider trademarks. The requirement that providers disassociate Customized Postage products from U.S. stamps is intended to protect official USPS stamps and philatelic products and programs from consumer confusion related to the status of Customized Postage products, which are a specialized form of evidence of prepayment of postage. The final

rules simply require providers not to “promote” Customized Postage products as being official U.S. postage stamps.

Authorized Postage Evidencing System providers argued that violations of Customized Postage requirements should not constitute grounds for suspension or revocation of authorization to provide Postage Evidencing Systems. The Postal Service agrees that Customized Postage is a Special Service distinct from Postage Evidencing Systems, and these final rules separate the procedures for suspension or revocation of authorization accordingly. Furthermore, because Customized Postage products have potential to create significant risks for Postal Service philatelic programs and brand interests, the final rules allow for immediate suspension of authority to provide Customized Postage products in the event that the Postal Service determines that unacceptable business risks are posed by the provider’s Customized Postage products or infrastructure.

Additionally, the final rules specify that providers must publish the USPS Eligibility Criteria for customers. Although comments did not raise this issue, the inconsistency of publicly available provider content guidelines has caused confusion over Customized Postage products. Because these amendments are intended to standardize and formalize program requirements, the final rules clarify that, in addition to adhering to USPS Eligibility Criteria, providers must publish the USPS Eligibility Criteria for customers.

Finally, existing providers requested that Customized Postage products be authorized for Forever status or rates outside of First Class postage, *e.g.*, Marketing or

Nonprofit rates. These issues fall outside the scope of the current rulemaking, and the Postal Service does not address them here.

List of Subjects in 39 CFR Part 501

Administrative practice and procedure.

For the reasons discussed above, the Postal Service amends 39 CFR part 501 as follows:

PART 501 – AUTHORIZATION TO MANUFACTURE AND DISTRIBUTE POSTAGE EVIDENCING SYSTEMS

1. The authority citation for 39 CFR part 501 continues to read as follows:

Authority: 5 U.S.C. 552(a); 39 U.S.C. 101, 401, 403, 404, 410, 2601, 2605, Inspector General Act of 1978, as amended (Pub. L. 95-452, as amended); 5 U.S.C. App. 3.

§ 501.7 [Amended]

2. Amend § 501.7(c) introductory text by adding, after “The provider must ensure that”, the clause “, with the exception of Customized Postage products,”.

3. Add § 501.21 to read as follows:

§ 501.21 Customized Postage products.

(a) *Definitions.* (1) As used in this section, a *provider* is:

(i) A Postage Evidencing System provider as defined under § 501.1(d) that is authorized by the Postal Service to produce Customized Postage products in accordance with this section and subject to any additional requirements set forth in individual approval letters; or

(ii) An entity that is affiliated under conditions respecting postage revenue security with a Postage Evidencing System provider and authorized by the Postal

Service to produce Customized Postage products in accordance with this section and subject to any additional requirements set forth in individual approval letters.

(2) *Customized Postage products* are products combining barcode indicia of postage payment with digital, graphic, or pictorial images or text. Customers select or provide images or text that meet Eligibility Criteria established by the Postal Service, and the image or text is combined with the barcode indicia of postage payment by providers and produced under controlled conditions for mailing to customers.

(3) As used in this section, a *customer* is a person or entity seeking to purchase Customized Postage products from a provider.

(b) *Eligibility Criteria*. The Eligibility Criteria contained in this section restrict Customized Postage content by identifying allowable images, text, or categories of images or text. Any content not identified by the Eligibility Criteria is prohibited. To be eligible for use in Customized Postage products, images and/or text must meet criteria established by the Postal Service, which are:

(1) Images or text must be “commercial” or “social,” as defined below:

(i) *Commercial* means intended for no purpose other than the sale of goods or services in commerce.

(ii) *Social* means promoting or depicting people, animals, items, or events commonly associated with community relations or companionship and likely to generate invitations, announcements, notices, thank-you notes, RSVPs, or similar correspondence.

(2) Acceptable commercial or social images or text must not contain content that is unsuitable for all-ages audiences, including but not limited to:

(i) Any non-incident depiction of alcohol, tobacco, gambling, or firearms or other weapons;

(ii) Any depiction of controlled substances, including but not limited to marijuana;

(iii) Any depiction of political, religious, violent or sexual content; or

(iv) Any depiction of subject matter prohibited for display under U.S. law.

(3) Acceptable commercial or social images or text must not contain content that the customer or provider does not have the right to use either directly or under license, including but not limited to images or text that may be the subject of third party rights such as copyright, trademarks, or rights of publicity or privacy.

(4) The Postal Service reserves the right to determine independently whether any image, text, or category of images or text meets any of the Eligibility Criteria contained in this section.

(c) *Customized Postage provider authorization* is conditioned on the following requirements:

(1) *Publication of Eligibility Criteria.* Providers must make the Eligibility Criteria set forth in paragraph (b) of this section available to customers on provider websites or in any other medium through which Customized Postage products are purchased.

(2) *Use of Eligibility Criteria in purchases.* Providers must maintain a process in providing or accepting images and/or text for Customized Postage products that uses only the Eligibility Criteria set forth in paragraph (b) of this section.

(i) Providers may not use any other eligibility criteria, represent the use of any other eligibility criteria to customers, or otherwise give the appearance that any eligibility

criteria other than the Eligibility Criteria set forth in paragraph (b) of this section is used in providing or accepting images and/or text for Customized Postage products.

(ii) In the event that full and good faith administration of the process required by this paragraph (c)(2) of this section fails to determine eligibility of an individual image, text, or category of images or text, providers may seek clarification from the Postal Service.

(3) *Use of Eligibility Criteria in promotional material.* Providers must ensure that any images and/or text used in providing or promoting Customized Postage products, for individual sale or as part of a category of images and/or text provided or made available for customer selection, displayed on provider websites or in any medium, including without limitation exemplars, ordering templates, customization options, or customer correspondence:

(i) Are fully compatible with the Eligibility Criteria set forth in paragraph (b) of this section; and

(ii) Do not give the appearance that images that are not fully compatible with the Eligibility Criteria set forth in paragraph (b) of this section are available or offered for purchase through providers or otherwise.

(4) *Disassociation from U.S. stamps.* Providers must not promote Customized Postage products as “U.S. stamps” or make any representations tending to imply that Customized Postage products are related in any way to official U.S. postage stamps or to any aspect of the Postal Service philatelic program.

(5) *Authorization fee and Eligibility Criteria audit.* Providers must pay an annual authorization fee and participate in any audit conducted by the Postal Service to ensure

that the customer-selected or -provided images or text displayed on Customized Postage products or in the promotion in any medium of Customized Postage products are in compliance with the Eligibility Guidelines set forth in paragraph (b) of this section.

(6) *Individual authorization letters.* Additional conditions and requirements for provider authorization may be set forth in individual provider authorization letters.

(7) *Suspension and revocation of Authorization.* The Postal Service may suspend or revoke authorization to produce Customized Postage products if the provider engages in any unlawful scheme or enterprise; fails to comply with any provision in this part, or any provision in an individual approval letter; fails to implement instructions issued by the Postal Service within its authority over Customized Postage products; misrepresents to customers of the Postal Service any decisions, actions, or proposed actions of the Postal Service respecting its regulation of Customized Postage products; or if Customized Postage products or infrastructure of the provider is determined to constitute an unacceptable risk to Postal Service business interests, including legal, financial, or brand interests.

(8) *Correspondence.* The Postal Service office responsible for administration of this part is the Office of Brand Marketing or its successor organization. All correspondence with the Postal Service required by this part is to be made to this office in person or via mail to 475 L'Enfant Plaza SW., Room 5117, Washington, DC 20260-0004.

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