



**BAC 7710-FW-P**

## **POSTAL REGULATORY COMMISSION**

### **39 CFR Part 3010**

**[Docket No. RM2016-6; Order No. 4850]**

#### **Mail Preparation Changes**

**AGENCY:** Postal Regulatory Commission.

**ACTION:** Final rule.

**SUMMARY:** The Commission adopts a final rule concerning mail preparation changes. The rule as adopted removes reference to procedures relying on the existence of a substantive standard for mail preparation changes in response to the recent decision in *United States Postal Serv. v. Postal Reg. Comm'n*, 886 F.3d 1253 (D.C. Cir. 2018).

**DATES:** *Effective* [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**FOR FURTHER INFORMATION CONTACT:** David A. Trissell, General Counsel, at 202-789-6820.

#### **SUPPLEMENTARY INFORMATION:**

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## **I. Introduction**

In this Order, the Commission adopts a final rule concerning mail preparation changes. The final rule partially rescinds an existing Commission rule and is located at 39 CFR part 3010. The rule as adopted removes reference to procedures relying on the existence of a substantive standard for mail preparation changes in response to the recent decision in *United States Postal Serv. v. Postal Reg. Comm'n*, 886 F.3d 1253 (D.C. Cir. 2018).

## **II. Background**

In Order No. 3047, the Commission developed a substantive standard to determine when a mail preparation change would constitute a “change in rates” under 39 U.S.C. 3622.<sup>1</sup> The standard established by the Commission in Order No. 3047 provided that mail preparation changes could have rate effects when they resulted in the deletion or redefinition of a rate cell as set forth by § 3010.23(d)(2).

In conjunction with Order No. 3047, the Commission initiated a rulemaking proceeding to develop procedures to ensure that the Postal Service properly

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<sup>1</sup> The standard in Order No. 3047 was developed in response to remand from the United States Court of Appeals for the District of Columbia (the Court) in *United States Postal Serv. v. Postal Reg. Comm'n*, 785 F.3d 740 (D.C. Cir. 2015). For a complete history of the proceedings underlying the Commission’s promulgation of a standard for mail preparation changes, see Docket No. R2013-10, Order on Price Adjustments for Market Dominant Products and Related Mail Classification Changes, November 21, 2013, at 5-35 (Order No. 1890); Docket No. R2013-10R, Order Resolving Issues on Remand, January 22, 2016 (Order No. 3047); Docket No. R2013-10R, Order Resolving Motion for Reconsideration of Commission Order No. 3047, July 20, 2016 (Order No. 3441).

applies the Commission's standard when making a determination of whether a mail preparation change has a rate effect.<sup>2</sup> The final rule created a process that required the Postal Service to: (1) provide public notice of all mail preparation changes in a single source; (2) affirmatively designate whether or not a change to a mail preparation requirement implicates the price cap; and (3) show by a preponderance of the evidence, if the designation is challenged, that the price cap does not apply to the change.<sup>3</sup> The Postal Service filed petitions for review challenging the Commission's standard in Order No. 3047 and the final rule in Order No. 4393.

Shortly after the Commission adopted the final rule in this docket, the Court issued its decision in *United States Postal Serv. v. Postal Reg. Comm'n*, 886 F.3d 1253 (D.C. Cir. 2018) vacating the Commission's standard in Order No. 3047. In response to the Court's decision, the Commission and the Postal Service filed a joint motion to remand the petition for review of the final rule back to the Commission for further proceedings.<sup>4</sup>

On August 9, 2018, the Commission issued the notice of proposed rulemaking (NPR), setting forth a proposed rescission to the rule set forth in §

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<sup>2</sup> Order Adopting Final Procedural Rule for Mail Preparation Changes, January 25, 2018, at 22-23 (Order No. 4393). The Order Adopting Final Procedural Rule for Mail Preparation Changes was published in the **Federal Register** on February 1, 2018. See 83 FR 4585 (Feb. 1, 2018).

<sup>3</sup> See Petition for Review, *United States Postal Serv. v. Postal Reg. Comm'n*, 886 F.3d 1253 (D.C. Cir. 2018); Petition for Review, *United States Postal Serv. v. Postal Reg. Comm'n*, No. 18-1059 (D.C. Cir. Feb. 26, 2018).

<sup>4</sup> See Unopposed Motion to Remand Case, *United States Postal Serv. v. Postal Reg. Comm'n*, No. 18-1059 (D.C. Cir. May 10, 2018).

3010.23(d)(5) that created procedures concerning mail preparation changes.<sup>5</sup>

The NPR also provided an opportunity for public comment. Order No. 4751 at 5.

The Commission proposed removing the components of the rule that require existence of a standard in order to be enforced, specifically: (1) the affirmative designation requirement; and (2) the evidentiary standard. *Id.* at 4. As explained in the NPR, both the affirmative designation and evidentiary burden parts of the rule were predicated on the existence of a substantive standard. *Id.* As that standard was vacated and a new standard does not yet exist, the proposed rule removed the affirmative designation requirement and evidentiary burden component from paragraph (d)(5) of this section. In the NPR, the Commission proposed to retain the publication requirement of the rule as it would remain independent of any standard. *Id.*

### **III. Review of Comments**

On September 13, 2018, the Commission received comments in response to the NPR from the Association for Postal Commerce (PostCom), the Postal Service, and the Public Representative.<sup>6</sup>

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<sup>5</sup> Notice of Proposed Rulemaking, August 9, 2018 (Order No. 4751). On the same day, the Commission filed an advance notice of proposed rulemaking (ANPR) to seek proposals for a new standard and process to determine when a mail preparation change requires price cap compliance in accordance with the Court's decision vacating the standard. Docket No. RM2018-11, Advance Notice of Proposed Rulemaking, August 9, 2018 (Order No. 4750). The ANPR was published in the **Federal Register**, see 83 FR 40485 (Aug. 15, 2018).

<sup>6</sup> Comments of the Association for Postal Commerce, September 13, 2018 (PostCom Comments); United States Postal Service Comments on Notice of Proposed Rulemaking, September 13, 2018 (Postal Service Comments); Public Representative Comments on Notice of Proposed Rulemaking, September 13, 2018 (PR Comments).

*PostCom Comments.* PostCom supports the premise behind partial rescission of the rule, acknowledging that the rule referencing a standard “cannot be enforced in the absence of a standard.” PostCom Comments at 1. However, PostCom does not support rescission of the rule at this time. *Id.* Instead, PostCom suggests the Commission “temporarily suspend enforcement of the portion of the rule that the Commission is proposing to eliminate.” *Id.*

To support its request for the Commission to temporarily suspend enforcement of the rule as opposed to rescission through rulemaking, PostCom points to the Commission’s intention to develop an appropriate standard in a separate rulemaking.<sup>7</sup> PostCom submits that elimination of the portion of the rule relying on a substantive standard is unnecessary because the current procedures “will apply equally well to the final standard established by the Commission.” PostCom Comments at 2. PostCom states that the procedures only rely on the “existence of” a substantive standard and not the contents of that substantive standard. *Id.* at 3. PostCom points to the fact that the Commission itself indicated the separation between the substantive standard and the applicability of the final procedural rule, noting that the Commission stated that the Court’s disagreement with the substantive standard would not affect the final rule. *Id.* As a result, PostCom submits that it is “imprudent to eliminate these procedures at this time” and that elimination of the rule now will only require more rulemaking in the future should the Commission set a new standard. *Id.*

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<sup>7</sup> *Id.* at 2 (citing Order No. 4751 at 4; Order No. 4750).

*Postal Service Comments.* The Postal Service supports partial rescission of the rule that relies on existence of a substantive standard. Postal Service Comments at 1-3. In the Postal Service's view, "compliance with the procedural rule necessarily would require application of the substantive standard" for mail preparation changes. *Id.* at 2. The Postal Service agrees with the Commission's proposal to rescind the portion of the rule that "requires the Postal Service affirmatively to designate whether a given mail preparation change requires compliance with the price cap rules" and the portion concerning the evidentiary burden. *Id.*

The Postal Service also indicates that it has already complied with the publication requirement that the Commission proposes to retain in the rule. *Id.* at 3.

*Public Representative Comments.* The Public Representative supports the Commission's proposal to rescind portions of the procedural rule concerning mail preparation changes "subject to reinstatement depending upon the outcome of the Commission's review of the applicable standard for determining whether a rate increase is in compliance with § 3010.23(d)(2)." PR Comments at 1-2.

He notes that it would be futile to require the Postal Service to affirmatively designate whether a change requires compliance with § 3010.23(d)(2) when there is no standard to measure compliance. *Id.* at 7. With respect to the evidentiary portion of the rule, requiring the Postal Service to provide by a preponderance of the evidence that a mail preparation change does not require compliance with § 3010.23(d)(2), he contends that compliance with this provision

would be “a very difficult proposition without any standard to serve as a target.” *Id.* at 8. Further, parties would be “unable to determine the information needed to rebut the Postal Service’s determination” without an operative standard. *Id.*

The Public Representative also supports the Commission’s retention of the single source reporting requirement. *Id.* at 5-6.

#### **IV. Commission Analysis**

The comments reflect general support for the removal of portions of the procedural rule concerning mail preparation changes that rely on the existence of a substantive standard. PostCom suggests an alternative procedure to temporarily suspend enforcement of the rule as opposed to formally rescinding portions of this rulemaking.

When promulgating the final rule concerning mail preparation changes, the Commission intended for it to apply regardless of how the Court modified the standard. Order No. 4393 at 14. However, the Court did not modify the standard, it vacated it in its entirety. The components of the procedural rule in § 3010.23(d)(5) requiring the Postal Service to provide an affirmative designation of compliance and setting an evidentiary burden require the existence of a standard. While the Commission has initiated an advance notice of proposed rulemaking to gather proposals for a new standard, the Commission cannot predict the outcome of those proceedings. See Order No. 4750.

Although PostCom may be correct that a temporary suspension of a procedural rule is within the Commission’s authority, a rulemaking is more appropriate for the present situation. As this procedural rule was promulgated

via notice and comment rulemaking, the Commission will use the same process to rescind a major portion of the rule.<sup>8</sup>

Accordingly, the Commission adopts a final rule that rescinds two components of the rule requiring an affirmative designation and evidentiary burden. For the affirmative designation portion of the rule, the Postal Service would be unable to designate whether a particular mail preparation change requires compliance with § 3010.23(d)(2) because it no longer has a standard to apply to determine compliance. Similarly, the Postal Service could not show it made a correct determination by a preponderance of the evidence without having a standard. Parties would also be unable to rebut the Postal Service's determination with information absent a standard. For these reasons, removing those portions of the rule is appropriate.

The remaining part of the rule requires the Postal Service to provide published notice of all mail preparation changes in a single source. The Commission retains this portion of the rule because it provides notice and transparency for all mail preparation changes and does not rely on existence of a standard.<sup>9</sup> As noted in the NPR, the Postal Service has complied with this requirement and the Postal Service states in its comments that it will continue to comply with this portion of the rule. Accordingly, the Commission revises §

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<sup>8</sup> See *Perez v. Mortgage Bankers Ass'n*, 135 S.Ct. 1199, 1206 (2015) (citing *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (Section 1 of the Administrative Procedure Act mandates that "agencies use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance.")).

<sup>9</sup> See also Order No. 4393 at 8-10 (justification for the reporting requirement).



3010.23(d)(5) to require the Postal Service to publish notice of all mail preparation changes in a single, publically available source.

## **V. Regulatory Flexibility Act Analysis**

The Regulatory Flexibility Act requires federal agencies, in promulgating rules, to consider the impact of those rules on small entities. See 5 U.S.C. 601, *et seq.* (1980). If the proposed or final rules will not, if promulgated, have a significant economic impact on a substantial number of small entities, the head of the agency may certify that the initial and final regulatory flexibility analysis requirements of 5 U.S.C. 603 and 604 do not apply. See 5 U.S.C. 605(b).

The Commission's primary responsibility is in the regulatory oversight of the United States Postal Service. The rules that are the subject of this rulemaking have an impact on participation in Commission proceedings, but impose no further financial obligation upon any entity. For entities other than the United States Postal Service, participation is strictly voluntary. Based on these findings, the Chairman of the Commission certifies that the rules that are the subject of this rulemaking will not have a significant economic impact on a substantial number of small entities. Therefore, pursuant to 5 U.S.C. 605(b), this rulemaking is exempt from the initial and final regulatory flexibility analysis requirements of 5 U.S.C. 603 and 604.

## **VI. Ordering Paragraphs**

*It is ordered:*

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

2. The Secretary shall arrange for publication of this Order in the **Federal Register**.

By the Commission.

**Stacy L. Ruble,**

*Secretary.*

## List of Subjects in 39 CFR Part 3010

Administrative practice and procedure, Postal Service.

For the reasons discussed in the preamble, the Commission amends chapter III of title 39 of the Code of Federal Regulations as follows:

### **Part 3010—REGULATION OF RATES FOR MARKET DOMINANT PRODUCTS**

1. The authority citation of part 3010 continues to read as follows:

**Authority:** 39 U.S.C. 503; 3662.

2. Amend § 3010.23 by revising paragraph (d)(5) to read as follows:

#### **§ 3010.23 Calculation of percentage change in rates.**

\* \* \* \* \*

(d) \* \* \*

(5) *Procedures for mail preparation changes.* The Postal Service shall provide published notice of all mail preparation changes in a single, publicly available source. The Postal Service shall file notice with the Commission of the single source it will use to provide published notice of all mail preparation changes.

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