

**POSTAL REGULATORY COMMISSION****39 CFR Parts 3001 and 3035****[Docket No. RM2013–5; Order No. 2173]****Markets Tests of Experimental Products****AGENCY:** Postal Regulatory Commission.**ACTION:** Final rule.

**SUMMARY:** The Commission is issuing a set of final rules addressing Postal Service filings concerning market tests of experimental products. The rules address the contents of market test filings, review of filings, and related matters. Relative to the proposed rules, some of the changes are substantive and others are minor and non-substantive.

**DATES:** *Effective* October 14, 2014.**FOR FURTHER INFORMATION CONTACT:**

David A. Trissell, General Counsel, at 202–789–6820.

**SUPPLEMENTARY INFORMATION:** Regulatory History: 78 FR 51678, August 21, 2013.**Table of Contents**

- I. Introduction
- II. Background
- III. Changes to the Proposed Rules
- IV. Comments on Commission Analysis
- V. Ordering Paragraphs

**I. Introduction**

In this Order, the Commission adopts final rules that establish procedures for the Postal Service to conduct market tests of experimental products in accordance with 39 U.S.C. 3641.

**II. Background**

On August 9, 2013, the Commission issued a notice of proposed rulemaking to establish rules governing market tests of experimental products.<sup>1</sup> The Postal Accountability and Enhancement Act (PAEA)<sup>2</sup> authorizes the Postal Service to conduct market tests of experimental products. See 39 U.S.C. 3641(a)(1). Such tests are not covered by several other PAEA provisions (such as those in section 3622 concerning rate regulations, those in section 3633 concerning competitive products, and those in section 3642 concerning product list changes) as well as regulations promulgated under those provisions. *Id.* 3641(a)(2). The statute requires that the Postal Service may not test an experimental product unless the product is significantly different from those offered within the past two years, will not cause market disruption, and is

appropriately categorized (as either market dominant or competitive). 39 U.S.C. 3641(b).

Under the statute and final rules, the Postal Service must file notice with the Commission and publish the notice in the **Federal Register** at least 30 days before initiating a market test. *Id.* 3641(c)(1). The notice must describe the nature and scope of the market test and explain why the Postal Service believes that the market test is covered by section 3641. *Id.* 3641(c)(1)(A) and (B). The duration of a market test of an experimental product may not exceed 24 months unless the Commission grants an extension. *Id.* 3641(d). The Commission may extend the market test duration up to an additional 12 months if an extension is necessary to determine the feasibility or desirability of an experimental product. *Id.* 3641(d)(2). The Postal Service must file a request for extension at least 60 days before the market test ends. *Id.*

In general, the Postal Service may conduct a market test only if total revenues anticipated or received by the Postal Service are not more than \$10,000,000 per annum, subject to adjustments for inflation (\$10 Million Adjusted Limitation). *Id.* 3641(e)(1). The Commission may exempt a market test from the \$10 Million Adjusted Limitation as long as revenues from the experimental product are not more than \$50,000,000 per annum, subject to adjustments for inflation (\$50 Million Adjusted Limitation). *Id.* 3641(e)(2). The exemption request shall be approved if the Commission determines that the experimental product meets certain conditions related to public benefit, expected demand, contribution to the Postal Service's financial stability, and market disruption. *Id.*

The PAEA authorizes the Commission to cancel a market test or take other appropriate action on an experimental product if it determines that the market test fails to meet any requirement of section 3641. *Id.* 3641(f). The Commission by regulation must adjust all dollar amounts listed in section 3641 by the change in the Consumer Price Index (CPI) for the applicable year. *Id.* 3641(g). Lastly, the Commission must define the term small business concern consistent with the requirements of section 3 of the Small Business Act. *Id.* 3641(h).

The Postal Service and the Public Representative submitted initial<sup>3</sup> and

reply comments<sup>4</sup> suggesting changes to the rules proposed in Order No. 1803. After consideration of the comments submitted, the Commission adopts the rules as originally proposed, with several modifications.

**III. Changes to the Proposed Rules**

The following rules have been substantively modified from Order No. 1803, and also include some minor, non-substantive changes:

- 3035.3 (Contents of notice)
- 3035.6 (Changes in market test)
- 3035.10 (Duration)
- 3035.11 (Extension of market test)
- 3035.15 (Dollar amount limitation)
- 3035.16 (Exemption from dollar amount limitation)
- 3035.17 (Prevention of market disruption)
- 3035.18 (Filing for permanent product status)
- 3035.20 (Data collection and reporting requirements)

The following rules are being enacted with minor, non-substantive changes:

- 3001.5 (Definition of small business concern)
- 3035.1 (Applicability)
- 3035.4 (Review)
- 3035.5 (Commission action)
- 3035.12 (Cancellation of market test)

**IV. Comments on Commission Analysis**

This section discusses the changes that the Commission adopts, or declines to adopt, in this Order after considering the comments received. Section A contains a discussion of the proposed rules that are substantively modified from those originally proposed.<sup>5</sup> Section B addresses minor clarifications and corrections to the proposed rules that are stylistic and non-substantive. Section C discusses other issues raised in the comments.

**A. Rules With Substantive Changes****1. Section 3035.3—Contents of Notice<sup>6</sup>****a. Section 3035.3(a)(1)(i)**

Paragraph (a)(1)(i) of rule 3035.3 requires that the Postal Service's notice

<sup>4</sup> Reply Comments of the United States Postal Service, October 10, 2013 (Postal Service Reply Comments); Public Representative's Reply Comments Concerning Notice and Order of Proposed Rulemaking, October 17, 2013 (PR Reply Comments). The Public Representative submitted an accompanying Motion of Public Representative for Late Acceptance of Reply Comments. The motion is granted.

<sup>5</sup> Section A also contains a discussion of rule 3035.12. Although rule 3035.12 is adopted with minor, non-substantive changes, the Commission received extensive comments on this rule, which are more appropriately discussed in this section.

<sup>6</sup> The Commission renumbered rule 3035.3 to conform to official publication requirements. See

<sup>1</sup> Notice and Order of Proposed Rulemaking Establishing Rules for Market Tests of Experimental Products, August 9, 2013 (Order No. 1803).

<sup>2</sup> Postal Accountability and Enhancement Act, Pub. L. 109–435, 120 Stat. 3198 (2006).

<sup>3</sup> Public Representative's Comments Concerning Notice and Order of Proposed Rulemaking, September 19, 2013 (PR Comments); Initial Comments of the United States Postal Service, September 20, 2013 (Postal Service Comments).

initiating a market test describe how the experimental product is significantly different from all products offered within the 2 fiscal years preceding the start of the market test. The Public Representative argues that the rule, as written, is problematic because it excludes any products offered during the same fiscal year as the market test. PR Comments at 7. She notes that for a market test beginning in FY 2014, only FY 2012 and FY 2013 products would be considered. *Id.* She contends that this gap could result in a market test offering a product substantially similar to a current product offering. *Id.* As an alternative, she suggests examining the previous eight fiscal quarters rather than the past two fiscal years. *Id.*

The Postal Service does not comment on the Public Representative's suggestion.

The Commission notes that an experimental product must be significantly different from all products offered by the Postal Service within the 2-year period preceding the start of the test. 39 U.S.C. 3641(b)(1). The statute defines the term year as a fiscal year. *Id.* sec. 102(10). If Congress had intended to use quarters instead of years, it would have stated as much in section 3641.<sup>7</sup> Moreover, the scenario the Public Representative posits—offering two substantially similar products within the same fiscal year—is unlikely. For these reasons, the Commission does not adopt the Public Representative's suggestion.

b. Section 3035.3(a)(1)(ii)

Rule 3035.3(a)(1)(ii) requires the Postal Service to establish that the introduction or continued offering of an 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. The Public Representative suggests two changes to this subsection. First, she proposes striking the words (or continued offering) from the rule. PR Comments, Appendix A at 1. She does not provide a rationale for this change.

Second, she argues that additional analysis is necessary to assess whether the market test creates an unfair or otherwise inappropriate competitive advantage for the Postal Service or any

mailer. PR Comments at 7. She suggests adding language to section 3035.3(a)(1)(ii) that would require the Postal Service to: (1) Analyze whether the market test creates an unfair or inappropriate competitive advantage for any mailer and the Postal Service; (2) identify any small business concerns that will likely be affected by the market test; and (3) analyze the impact of the market test on any small business concern identified. *Id.*, Appendix A at 1–2.

The Postal Service objects to striking the wording concerning continued offerings from the rule. Postal Service Reply Comments at 3. It argues that these words assist in implementing rule 3035.11, which addresses Commission review of Postal Service requests to extend market tests beyond their original expiration date. *Id.*

The Postal Service also opposes adding language concerning the Postal Service's competitive advantage as suggested by the Public Representative. First, it contends that the suggested language would impose an additional threshold requirement that the Postal Service's notice also analyze whether the market test itself creates an unfair advantage regarding small business concerns. *Id.* at 4. It asserts that this language is either redundant or unsupported by the statute. *Id.*

Second, the Postal Service argues that the suggested language appears to be based upon a misreading of the intent of 39 U.S.C. 3641(b)(2). *Id.* at 5. It contends that the intent of section 3641(b)(2) is to require consideration of the potential impact of an experimental product on small businesses generally rather than individually. *Id.* It submits that the suggested language is contrary to the longstanding approach to postal product pricing, which requires consideration of the effect of proposed postal rate increases upon business mail users generally. *Id.* It points out that the suggested language also would require the Postal Service to possess information on small business concerns that it does not have nor could readily acquire. *Id.* at 6.

The Commission notes that market tests are of limited duration and are exempt from provisions otherwise applicable to Postal Service products. 39 U.S.C. 3641(a)(2). The phrase concerning continued offerings is in section 3641(b)(2) and is relevant to both extensions and possible cancellation of market tests. See 39 U.S.C. 3641(d)(2) and rule 3035.11; 39 U.S.C. 3641(f) and rule 3035.12, respectively. Furthermore, the phrase bears on modifications to ongoing market tests. See rule 3035.6.

Accordingly, the Commission declines to adopt the Public Representative's suggestion to strike a phrase (or continued offering) from the rule.

The Commission also does not adopt the Public Representative's additional language concerning an unfair or otherwise inappropriate competitive advantage. 39 U.S.C. 3641(b)(2) requires the Postal Service to establish that a product will not create an unfair or inappropriate competitive advantage. Using the term market test instead of the term product would impose a requirement that is not in the statute. In addition, the suggested language would require the Postal Service to analyze the potential impact of the market test on individual small business concerns. Although small business concerns are a particular focus, the analysis of market disruption in section 3641(b)(2) relates to competition generally rather than specific small business concerns. See *United States v. Microsoft Corp.*, 253 F.3d at 58 (D.C. Cir. 2001) (stating that anticompetitive effects must harm the competitive process and thereby harm consumers; harm to one or more competitors will not suffice).

As discussed in more detail below, the Commission adopts the definition of the term small business concern as proposed with style revisions to conform to official publication requirements. See Section IV.B, below. The Commission includes that definition in 39 CFR 3001.5(v). See Section IV.C.1, below. To promote clarity, the Commission provides a cross-reference to rule 3001.5(v) in rule 3035.3(a)(1)(ii) regarding the contents of the notice.

c. Section 3035.3(a)(1)(iii)

Rule 3035.3(a)(1)(iii) requires the Postal Service to identify the experimental product as either market dominant or competitive for purposes of the market test. The Public Representative recommends adding language that would require the Postal Service to explain the reasoning for the categorization in accordance with the criteria set forth in 39 U.S.C. 3642(b). PR Comments, Appendix A at 2. The Postal Service does not comment on this suggestion.

The Commission finds that the Public Representative's suggestion has merit. However, the statute requires the Postal Service to identify the experimental product as market dominant or competitive consistent with the criteria under subsection 3642(b)(1) rather than section 3642(b) in its entirety. 39 U.S.C. 3641(b)(3). Consistent with the statute, the Commission adopts a revised version of the Public Representative's

Section IV.B, below. This Order references subsections in rule 3035.3 as renumbered.

<sup>7</sup> The legislative history also supports the use of the term year rather than quarter. S. Rep. 108–318, at 17 (2004) (Senate Report) (stating that the test used to determine whether market test provisions are applicable is a finding that the proposed product is different from those offered in the prior two years).

suggested language, which replaces the statutory citation of section 3642(b) with section 3642(b)(1). This revision is consistent with past practice as well. In prior market tests, the Postal Service explained its reasons for categorizing experimental products as market dominant or competitive for purposes of the market test.<sup>8</sup>

d. Section 3035.3(a)(2)

*Certified statement.* Rule 3035.3(a)(2)(ii) requires the Postal Service to demonstrate why the market test is not inconsistent with the requirements of 39 U.S.C 3641. The Public Representative states that the rule requires the Postal Service to prove a negative, and Order No. 1803 does not provide additional guidance on how the Postal Service can make the necessary demonstration. PR Comments at 8. She suggests amending the rule to require a certified statement, similar to the certified statement required by 39 CFR 3015.3(c)(2). *Id.* The Postal Service does not comment on this suggestion.

The Commission finds that a certified statement for market tests is unnecessary. The certified statement for competitive products required in 39 CFR 3015.3(c)(2) concerns three quantifiable statutory cost or rate prerequisites. More specifically, the Postal Service must certify that each competitive product covers its attributable costs, is not cross-subsidized by market dominant products, and collectively covers an appropriate share of the Postal Service's institutional costs. The certification is important because part 3015 provides a limited time for Commission review of notices of change in rates for competitive products. By contrast, section 3641 contains no analogous requirements. Furthermore, as noted above, market tests are not subject to the same regulatory oversight applicable to Postal Service products. For these reasons, the Commission does not amend rule 3035.3(a)(2)(ii) to add a certified statement requirement.

*Mail Classification Schedule (MCS).* The proposed rules required the Postal Service to provide proposed MCS language. The Postal Service opposes this requirement and urges the Commission to reconsider this rule. Postal Service Comments at 4. It argues that requiring the Postal Service to

provide MCS language in the market test notice is too restrictive and inconsistent with the framework Congress established for conducting market tests. *Id.* It contends that this requirement appears contrary to 39 U.S.C. 3641(a)(2), which exempts experimental products from the requirements of sections 3622, 3633, and 3642, as well as regulations promulgated under those sections. *Id.* at 3. The Postal Service is concerned that this requirement may obstruct innovation by forcing the Postal Service to innovate in an inflexible manner, without a reasonable opportunity to mold or shape a product during the course of a test. *Id.* at 3–4.

The Public Representative supports the Postal Service's view concerning the required MCS language. PR Reply Comments at 2. She suggests revising the rule to replace the MCS requirement with a description of the experimental product. *Id.*

The Commission has considered the comments and concludes that a requirement to provide MCS language at the outset of a market test is unnecessary. It will suffice for the Postal Service to describe the market test and experimental product in its notice proposing a market test. The Commission previously stated that in general, the proposed rules do not require the Postal Service to provide more information than it currently does for market tests. Order No. 1803 at 5. In prior market test proceedings, the Postal Service has included descriptions of the experimental product in its notice.<sup>9</sup> Those descriptions were sufficient for the Commission to determine compliance with the conditions in 39 U.S.C. 3641(b). In addition, a description of the market test is consistent with section 3641(c)(1)(B), which requires the Postal Service to describe the nature and scope of the market test.

The Commission will continue its current practice of listing market tests in the MCS by providing the name of the experimental product, identifying the docket number and Commission order authorizing its offering, and specifying the current expiration date.<sup>10</sup> To promote clarity, the Commission reorders the subsections under rule 3035.3(a)(2) so that the description of

the market test and experimental product appears first on the list. The other items will be renumbered accordingly.

*Data collection plan.* Rule 3035.3(a)(2)(vi) requires the Postal Service to include a plan for monitoring the performance of the market test, including a description of the specific data items to be collected. The Public Representative suggests replacing a phrase (monitoring the performance of) with data collection plan. PR Comments, Appendix A at 2. She recommends adding a provision that would require the Postal Service to describe the process by which the data will be collected. *Id.* She proposes minor editorial changes as well. *Id.*

The Postal Service objects to the Public Representative's suggestion that the Postal Service describe its data collection process. Postal Service Reply Comments at 6. It requests a measure of flexibility in this area and notes that the data collection methodology could be in flux when the market test notice is filed. *Id.* It argues that the focus of the Commission's review should be on the nature of the data to be collected and reported rather than data collection techniques and administration. *Id.* at 7.

The Commission modifies rule 3035.3(a)(2)(vi) to adopt the Public Representative's suggested language and add minor editorial language regarding the data collection and reporting requirements in rule 3035.20. The Commission declines, however, to adopt the suggestion that the Postal Service describe its data collection process. The rationale for having a data collection plan is that the data form the basis of a Postal Service request to add an experimental product to the market dominant or competitive product list. In addition, if a market test is unsuccessful, the data collected will inform the Postal Service of shortcomings and potential solutions. Identifying the data collection process is unnecessary for purposes of the data collection plan. Moreover, the data collection methodology could be in flux when the Postal Service files the market test notice, but subsequently resolves it at a later date. See Postal Service Reply Comments at 6–7.

2. Section 3035.6—Changes in Market Test

Rule 3035.6 addresses filing requirements and Commission action regarding changes in market tests. The Public Representative argues that the rule limits the ability of the Commission to assess continued compliance with 39 U.S.C. 3641. PR Comments at 8. She contends that an after-the-fact review of

<sup>8</sup> See, e.g., Docket No. MT2013–2, Notice of the United States Postal Service of Market Test of Experimental Product—International Merchandise Return Service—Non-Published Rates (IMRS–NPR) and Notice of Filing IMRS–NPR Model Contract and Application for Non-Public Treatment of Materials Filed Under Seal, July 1, 2013, at 5–6 (IMRS–NPR Notice).

<sup>9</sup> See, e.g., Docket No. MT2013–1, Notice of the United States Postal Service of Market Test of Experimental Product—Metro Post—and Notice of Filing Material Under Seal, October 12, 2012, at 2–3; Docket No. MT2012–1, Notice of the United States Postal Service of Market Test of Experimental Product—First-Class Tracer, November 7, 2011, at 2–4.

<sup>10</sup> See, e.g., Mail Classification Schedule sections 2130, 2800.

changes to a market test, along with giving the Postal Service discretion to determine the materiality of changes, could result in changes that would affect compliance with the statute occurring without the Commission's knowledge. *Id.* She suggests revisions that would enable the Commission to determine the materiality of changes before they are adopted. *Id.* She recognizes that an after-the-fact review of a change may be necessary in certain circumstances and suggests an emergency provision addressing that concern. *Id.* The suggested revisions clarify that notices of changes to a market test should be filed in the proceeding's docket. *Id.* at 8–9. The Public Representative also proposes language detailing the Commission's actions upon receiving a notice of a change to a market test. *Id.* at 9.

The Postal Service objects to the Public Representative's suggested revisions to rule 3035.6. Postal Service Reply Comments at 7. It argues that the suggested revisions, if implemented, would require the Postal Service to report and the Commission to adjudicate every change in a market test, regardless of materiality. *Id.* It asserts that the suggested revisions would clog Commission dockets with reports and adjudications about market test changes that have little to no relation to the merits of the experimental product. *Id.* It contends that these proceedings would be further complicated by disputes over whether a change was ordinary or an emergency. *Id.* at 7–8. It states that a more reasonable approach to reporting market test changes is reflected in the rule as currently written. *Id.* at 8.

The Commission declines to adopt the Public Representative's suggested revisions. The intent of 39 U.S.C. 3641 is to increase flexibility and to facilitate a more entrepreneurial approach to product development. Senate Report at 16. The suggested revisions, which would require the Postal Service to report any change to a market test, regardless of materiality, introduce rigidity in an area where the Postal Service is afforded flexibility.

The comments raise questions about determining the materiality of changes to a market test. See PR Comments at 8–9; Postal Service Reply Comments at 7–8. To clarify this issue, the Commission amends rule 3035.6 to define material changes as changes to a market test or services offered under a market test that may affect compliance with 39 U.S.C. 3641. To ensure that the Commission has sufficient time to review material changes before they are implemented, the Commission amends rule 3035.6 to

require that a notice describing any material change must be filed with the Commission at least 10 days before the Postal Service implements such change. Material changes include, *inter alia*, revisions to prices, geographic scope, termination date, and eligibility for service, *i.e.*, eligibility to participate in the market test.

The need to amend the proposed rule can be observed from the following example from a current market test conducted by the Postal Service. As part of the Metro Post market test, the Postal Service entered into relationships with up to 10 qualifying online e-commerce companies to offer same-day local delivery.<sup>11</sup> To participate in the market test, each company was required to have at least 10 physical locations nationally and at least one location within San Francisco. *Id.* A change in the criteria for eligible participants would qualify as a material change because it could, for example, affect the Commission's analysis of an experimental product's impact on small business concerns. See 39 U.S.C. 3641(b)(2).

The Commission incorporates language into rule 3035.6 to explicitly include eligibility for service as a material change. The final rule also clarifies that material changes include changes to either the market test or services offered under the market test.

In a recent notice expanding the Metro Post market test to a new market, the Postal Service included a statement that all other aspects of the market test remain unchanged and in compliance with section 3641 and the Commission's order authorizing the market test.<sup>12</sup> The Commission finds that such a statement would be helpful to include in a notice of change to a market test or services offered under a market test filed under rule 3035.6.

### 3. Section 3035.10—Duration

Rule 3035.10 limits a market test's duration to 24 months unless the Postal Service requests an extension under 39 CFR 3035.11. The Public Representative argues that the rule raises a question as to what condition(s) must be met in order for a market test to be extended. PR Comments at 9. She contends that the rule, as currently written, could automatically extend a market test upon the Postal Service's filing of an extension request and suggests alternative language. *Id.* The Postal

Service does not comment on this suggestion.

The Commission finds that the suggested modification is an improvement to the rule because it clarifies that market test extensions are conditioned upon Commission approval. It revises the rule accordingly.

### 4. Section 3035.11—Extension of Market Test

Rule 3035.11 describes the procedures for extending a market test. The Public Representative suggests expanding subsection (b)(1) to require that a request for extension explain what information or data the Postal Service currently lacks to assess the feasibility or desirability of an experimental product and how the extension will provide the missing information. *Id.* She argues that the request for extension should include any changes to the data collection plan, which will facilitate the collection of any necessary data or information. *Id.* She recommends that the Postal Service include supporting documentation for the calculation of total revenue received from the market test. *Id.* Other proposed changes include replacing the term fiscal year with fiscal quarter in subsections (b)(3) and (b)(4) and, in subsection (b)(4), striking a qualifier (available) from available supporting documentation and rewording a phrase (prior to the conclusion of the extension period of). *Id.*, Appendix A at 5. In addition, the Public Representative recommends amending rule 3035.11(b)(3) to require the Postal Service to provide supporting documentation for the calculations of total revenue received by the Postal Service from the market test. *Id.* at 9.

The Commission notes that the Postal Service opposes most of the Public Representative's suggested changes to rule 3035.11. The Postal Service argues that expanding subsection (b)(1) seems redundant to the requirement that the Postal Service explain why an extension is necessary to determine the feasibility or desirability of the experimental product. Postal Service Reply Comments at 8. It contends that the suggested language appears to demand proof that an extension will provide needed data and that changes to the data collection plan will facilitate collection of needed data. *Id.* It submits that the suggested language unreasonably expects the Postal Service to do more than assert what is expected to occur. *Id.*

The Postal Service objects to replacing the term fiscal year with fiscal quarter in subsections (b)(3) and (b)(4) because this change would require the Postal Service to report revenue quarterly

<sup>11</sup> Docket No. MT2013–1, Order No. 1539, Order Approving Metro Post Market Test, November 14, 2012, at 2.

<sup>12</sup> Docket No. MT2013–1, Notice of the United States Postal Service of Expansion of Metro Post Market Test, December 4, 2013, at 2.

instead of annually. *Id.* at 8–9. It argues that the Postal Service should not be burdened with more frequent reporting without any indication that annual revenue data do not satisfy the Commission's needs. *Id.* at 9. It opposes striking a qualifier (available) from available supporting documentation in subsection (b)(4) because this change could require that a revenue estimate be provided as a table or spreadsheet when a narrative would be more suitable. *Id.*

The Commission finds it unnecessary to expand subsection (b)(1) to include a detailed list of information the Postal Service must provide in a request for extension. The Postal Service may request an extension of a market test for up to an additional 12 months if the request is filed at least 60 days before the market test is scheduled to terminate. 39 U.S.C. 3641(d)(2). The Commission may grant a request for extension if an extension is necessary to determine the feasibility or desirability of an experimental product. *Id.* Extensions of market tests were intended to provide the Postal Service additional flexibility if a more limited duration test will not provide sufficient information to evaluate the market demand and the financial potential of a product. Senate Report at 16.

The Commission notes that the Postal Service previously filed requests for extensions in Docket Nos. MT2009–1, MT2011–1, MT2011–2, and MT2013–2.<sup>13</sup> In support of those requests, the Postal Service detailed its reasons for seeking an extension.<sup>14</sup> Those requests provided sufficient information for the Commission to evaluate the merits of the extension. As long as it meets the requirements of rule 3035.11(b), the Postal Service may structure the request for extension in any way it deems appropriate.

The Public Representative's proposal to replace the term fiscal year with fiscal quarter in subsections (b)(3) and (b)(4)

<sup>13</sup> Docket No. MT2009–1, Motion of the United States Postal Service for Temporary Extension of Collaborative Logistics Market Test, April 26, 2011 (Collaborative Logistics Motion); Docket No. MT2011–1, Motion of the United States Postal Service for Temporary Extension of Alternate Postage for Greeting Cards Market Test, November 21, 2012 (Greeting Cards Motion); Docket No. MT2011–2, Motion of the United States Postal Service for Temporary Extension of Gift Cards Market Test, June 18, 2013 (Gift Cards Motion); Docket No. MT2013–2, IMRS–NPR Notice at 6.

<sup>14</sup> See Collaborative Logistics Motion at 1 (delay in filing a request to make experimental product permanent due to ongoing reorganization at Postal Service Headquarters); Greeting Cards Motion at 2 (need for additional research time and for market test participant to complete an internal review); Gift Cards Motion at 1 (need for additional time to implement and evaluate new sales efforts); IMRS–NPR Notice at 6–7 (need to satisfy existing contractual obligations under the market test).

appears to relate to her previous suggestion of examining fiscal quarters rather than fiscal years. See Section IV.A.1.a. As explained above, the Commission declines to adopt this change. In addition, annual reporting of total and anticipated revenue received from the market test is consistent with the applicable dollar amount limitations in 39 U.S.C. 3641(e).

The Commission adopts the Public Representative's suggestion to require the Postal Service to provide supporting documentation for the calculations of total revenue received by the Postal Service from the market test. This change will aid the Commission in verifying the Postal Service's calculations. In addition, rule 3035.11(b)(4) will retain a qualifier (available) to describe the type of supporting documentation required. The Commission agrees that expert projections of additional revenue expected from a market test extension can be judgmental and qualitative in nature. See Postal Service Reply Comments at 9. The Postal Service can reasonably be expected to provide available supporting documentation for additional revenue estimates. It will provide more accurate revenue calculations in its data collection reports as required by rule 3035.20.

Final rule 3035.11(b)(4) will also replace a phrase (addressing the duration of a market test before it concludes) with language explaining that the Postal Service must estimate the additional revenue it anticipates receiving for each fiscal year remaining on the market test, including the requested extension period.

##### 5. Section 3035.12—Cancellation of Market Test

Rule 3035.12 outlines the procedures for canceling a market test. The Public Representative suggests amending rule 3035.12(a) to require notices of cancellation to be filed in the proceeding's docket. PR Comments, Appendix A at 6. She asserts that rule 3035.12(b) raises questions concerning how and under what circumstances the Commission will use its cancellation authority under 39 U.S.C. 3641(f). PR Comments at 10. She argues that the rule does not explain what criteria the Commission will use to assess whether to allow public comment or whether public comment will precede or follow the Postal Service's demonstration of compliance. *Id.* She contends that the Commission should consider several issues, including: (1) Who may initiate the cancellation procedures, (2) the parameters and form for the Postal Service's demonstration of compliance

with section 3641, and (3) when comments will be considered. *Id.* She provides suggested language addressing these issues. *Id.*, Appendix A at 6.

The Postal Service opposes the Public Representative's suggested revisions, arguing that they add nothing to the more concise version proposed by the Commission. Postal Service Reply Comments at 9–10. It maintains that rule 3035.12 does not need to codify every conceivable step in the Commission's reasonable exercise of its cancellation authority. *Id.* at 10. The Postal Service favors adopting the rule as originally proposed to avoid a set of redundant rules. *Id.*

The Commission declines to adopt the Public Representative's suggestion to require notices of cancellation to be filed in the particular market test's docket. The Commission's rules and many of its orders direct the Postal Service and participants to file documents such as notices, comments, and replies with the Commission. It is unnecessary to state that such documents must be filed in the relevant docket, just as it is unnecessary to state how they are to be filed.<sup>15</sup>

The Commission adopts rule 3035.12(b) as proposed, with minor non-substantive changes. 39 U.S.C. 3641(f) was established as an ultimate safeguard for consumers and competitors of the Postal Service. Senate Report at 17. The rule provides a reasonable and flexible framework to implement that section. The Public Representative's suggested amendments to rule 3035.12(b) are largely procedural in nature and can be accommodated in Commission orders as past practice demonstrates. Moreover, pursuant to the Commission's rules of practice, any person may ask the Commission to investigate whether to cancel a market test. See 39 CFR 3001.21. For these reasons, the Commission declines to adopt the Public Representative's suggested revisions to rule 3035.12(b).

##### 6. Section 3035.15—Dollar Amount Limitation

Rule 3035.15 sets forth the requirements for the \$10 Million Adjusted Limitation. The Public Representative suggests two changes to the rule. First, she recommends clarifying that the CPI used for calculations under part 3035 is the Consumer Price Index All Urban (CPI–U) index. PR Comments at 11. She

<sup>15</sup> For example, when it terminated the Collaborative Logistics market test, the Postal Service appropriately filed a termination notice in Docket No. MT2009–1. See Docket No. MT2009–1, Notice of the United States Postal Service of Termination of Market Test, August 19, 2011.

suggests defining the term CPI-U index for those who may be less familiar with economic terminology or Commission practice. *Id.* Second, she proposes adding language under subsection (c) that states when the Commission will publish the \$10 Million Adjusted Limitation. *Id.*, Appendix A at 7.

The Public Representative also notes that neither 39 U.S.C. 3641(g) nor rule 3035.15 considers how the \$10 Million Adjusted Limitation would be adjusted during a deflationary period. *Id.* at 11. She recommends revising the rule if the Commission intends to adjust the \$10 Million Adjusted Limitation solely for inflation. *Id.* The Postal Service does not comment on the Public Representative's suggested revisions to rule 3035.15.

The Commission revises rule 3035.15 to adopt some of the Public Representative's recommendations. First, the Commission finds that switching subsections (a) and (b) would improve the rule by setting forth the description of CPI-U index at the beginning. New subsection (a) specifies that the CPI used for calculations under part 3035 is the CPI-U index, as specified in 39 CFR 3010.21(a) and 3010.22(a). To ensure consistency with regulations in part 3010 that also refer to the CPI-U index, the Commission declines to define the term CPI-U index in rule 3035.15. If the Commission modifies the definition of the CPI-U index in part 3010, those changes would also apply to rule 3035.15.

Consistent with new subsection (a), new subsection (b) replaces a term (Consumer Price Index) with an abbreviation (CPI-U index). Subsection (c) states that the Commission will publish the \$10 Million Adjusted Limitation each year on its Web site.

The Commission clarifies that the \$10 Million Adjusted Limitation and \$50 Million Adjusted Limitation will be reduced during deflationary periods. 39 U.S.C. 3641(g) states that each dollar amount contained in section 3641 must be adjusted by the change in the CPI index for such year. This provision is reflected in rules 3035.15 and 3035.16. The term adjusted implies any change in the CPI-U index. Thus, the \$10 Million Adjusted Limitation and \$50 Million Adjusted Limitation would either increase or decrease depending on whether the previous fiscal year was an inflationary or deflationary period.

#### 7. Section 3035.16—Exemption from Dollar Amount Limitation

Rule 3035.16 describes the procedures for requesting an exemption from the \$10 Million Adjusted Limitation. Similar to rule 3035.15, the Public Representative suggests amending the

rule to reflect the CPI-U index and to state when the Commission will publish the \$50 Million Adjusted Limitation. PR Comments, Appendix A at 8.

The Public Representative comments on several aspects of subsection (f). First, she reiterates her recommendation to define a phrase (unfair or otherwise inappropriate competition). *Id.* at 11–12. Second, she argues that subsection (f)(2) is problematic because it requests revenue on a fiscal year rather than fiscal quarter basis. *Id.* at 12. She contends that if the Postal Service requests an exemption for a market test that has been in operation for less than one full fiscal year, the total revenue received from the market test would not be required under the rule. *Id.* She suggests amending subsections (f)(2) and (f)(3) to require the Postal Service to report revenue for each fiscal quarter and provide supporting documentation. *Id.* Third, she requests clarification in subsection (f)(3) of language concerning the duration of a market test before it concludes, suggesting alternative language. *Id.* The Postal Service does not comment on these recommendations.

The Commission revises rules 3035.16(a) and (b) to reflect the Public Representative's suggestions concerning the CPI-U index and time of publication for the reasons discussed in Section IV.A.6. However, the Commission finds it unnecessary to define the term unfair or otherwise inappropriate competition for the reasons discussed in Section IV.C.1, below. In addition, the Commission declines to adopt the Public Representative's suggestion of reporting revenue for each fiscal quarter. As previously explained, the term fiscal year is more appropriate than fiscal quarter for purposes of the rules. See Section IV.A.1.a; see also Order No. 1803 at 9.

The Commission notes that the requirements of rule 3035.16(f) for market tests in effect for less than one fiscal year parallel those applicable to extensions. With regard to the latter, the Commission stated that a request for extension must both calculate the total revenue received by the Postal Service from the market test and estimate the additional revenue anticipated by the Postal Service for each fiscal year (or part thereof) before the market test ends, including any extension period. Order No. 1803 at 7. Similarly, if the Postal Service requests an exemption under rule 3035.16 for a market test that has been in operation for less than one full fiscal year, it must also report revenue received to date in that fiscal year.

The Commission adopts the Public Representative's suggestion in

subsection (f)(2) to require the Postal Service to provide supporting documentation for its calculations of total revenue received from the market test. This change, which parallels the change to rule 3035.11(b)(3), will help the Commission verify the information provided.

The Commission notes that the phrase concerning the duration of a market test extension period in the proposed rules is intended to cover the duration of the market test, including any extensions. In final subsection (f)(3), the Commission adopts the Public Representative's revisions, which conveys this concept more clearly.

The Commission also revises rule 3035.16(f) to require requests for an exemption to include product specific costs associated with the development of the market test; that is, costs incurred before the market test is implemented. The proposed rules contained a requirement that the Postal Service quantify start-up costs in its data collection reports. As further explained in Section IV.A.10.a, below, the Commission revises the rules to require the Postal Service to quantify start-up costs in two situations, one of which is when the Postal Service applies for an exemption from the \$10 Million Adjusted Limitation under rule 3035.16(f). The other situation in which the Postal Service must quantify start-up costs is when the Postal Service files a request to make an experimental product permanent. See 39 CFR 3020.32(b) and (c); Section IV.A.10.a, below.

In applications for exemptions, the identification of start-up costs is necessary for the Commission to determine whether an experimental product will likely contribute to the Postal Service's financial stability. See 39 U.S.C. 3641(e)(2)(B). The Postal Service also requested clarification of the type of information the Commission was seeking for these start-up costs. Postal Service Comments at 6–7. As discussed in more detail below, in the final rules, the term start-up costs is replaced with product specific costs, a term that is well known and has long been used to attribute costs to specific products. See Section IV.A.10.a, below.

Examples of product specific costs required by rule 3035.16(f) can be found in other proceedings. For example, in Docket No. MT2012–1, the Postal Service reported that the costs incurred in conducting the First-Class Tracer market test included the production and fulfillment of displays in addition to manufacturing the product (Tracer

barcode stickers).<sup>16</sup> Similarly, in Docket Nos. MC2011–20, R2009–5, and R2009–3, the Postal Service reported that costs for the Reply Rides Free Volume Incentive Program, the First-Class Mail Incentive Program, and the Standard Mail Volume Incentive Pricing Program included the registration and creation of Web sites.<sup>17</sup> If such costs were incurred before the market test or incentive programs began, they are examples of product specific costs that must be reported under rule 3035.16(f).

#### 8. Section 3035.17—Prevention of Market Disruption

Rule 3035.17 authorizes the Commission to limit the amount of revenues received by the Postal Service from any geographic market as necessary to prevent market disruption as defined in 39 U.S.C. 3641(b)(2). The Public Representative recommends defining the terms geographic market and market disruption. PR Comments at 12. She argues that the rule should define market disruption rather than refer to section 3641(b)(2). *Id.* at 3. She contends that the rule should also provide additional information concerning how and when the Commission plans to exercise its authority to limit revenues from any geographic market. *Id.* at 12–13. She recommends that the rule explain: (1) The circumstances under which the Commission will consider exercising its authority; (2) the procedures used, including whether the Commission will notice the issue, solicit comments, and provide the Postal Service an opportunity to respond; and (3) the criteria used to assess whether to limit revenues from particular geographic markets. *Id.* at 13.

The Postal Service opposes the Public Representative's recommendation to define the terms geographic market and market disruption. Postal Service Reply Comments at 1–2, 10–11; see Section IV.C.1, below.

The Commission finds it unnecessary to define these terms for the reasons explained in Section IV.C.1, below. To avoid confusion, rule 3035.17 is revised to identify each of the elements of market disruption in 39 U.S.C. 3641(b)(2) rather than simply cite the relevant statutory provision. Otherwise, the Commission declines to revise the

rule as suggested by the Public Representative.

#### 9. Section 3035.18—Filing for Permanent Product Status

##### a. Suggested Amendments to Regulations

Rule 3035.18 outlines the procedures for making an experimental product permanent. The Public Representative notes that experimental products are added to either the market dominant or competitive product list. PR Comments at 13. Thus, she argues that the definition of modifications in 39 CFR 3020.30 should be amended to include changing an experimental product to a permanent offering. *Id.* In addition, she states that 39 CFR 3015.2, 3015.3, and 3015.5 apply to changes in rates or class of general applicability, but not to new products. *Id.* at 14. She recommends revising 39 CFR part 3015 and/or rule 3035.18 to ensure that the rates for any competitive experimental product considered for permanent product status are evaluated for compliance with 39 U.S.C. 3633. *Id.*

The Postal Service does not respond to these comments.

The Commission finds it unnecessary to amend section 3020.30 at this time. 39 CFR 3020.13 requires the market dominant and competitive product lists to identify a product as an experimental product undergoing a market test.<sup>18</sup> Although permanent and experimental products both appear on the product lists, they are distinct and serve different purposes. Experimental products undergoing market tests are subject to unique regulatory treatment under the PAEA. Order No. 26 ¶ 4017. They are identified on the product lists to facilitate transparency during the market tests. *Id.* ¶ 4002. They also are included because the Postal Service must identify experimental products as either market dominant or competitive for purposes of a market test. See 39 U.S.C. 3641(b)(3).

However, experimental products, unlike permanent products, are not subject to the requirements of 39 U.S.C. 3622, 3633, or 3642, or regulations promulgated under those sections. *Id.* 3641(a)(2). If the Postal Service determines to make an experimental product permanent it must file a request—pursuant to 39 U.S.C. 3642 and 39 CFR part 3020, subpart B—to add a new product or price category to the market dominant or competitive

product list. The Commission revises rule 3035.18 to make this requirement clear.

The Commission declines to amend 39 CFR part 3015 and rule 3035.18 as recommended by the Public Representative. If the Postal Service determines to make an experimental product a permanent competitive product of general applicability, the statute and the Commission's rules contain sufficient safeguards that ensure that the rates for the new competitive product are evaluated for compliance with 39 U.S.C. 3633. Costs and revenues attributable to an experimental competitive product must be included in any determination under 39 U.S.C. 3633(a)(3). 39 U.S.C. 3641(b)(3). As part of its request to add a new product to the product list, the Postal Service must provide supporting justification, including an explanation of why the addition, deletion, or transfer of a competitive product will not violate any of the standards of 39 U.S.C. 3633. 39 CFR 3020.32(c).

##### b. Procedures for Filing Request

The Public Representative proposes procedural changes to rule 3035.18. First, she suggests that when the Postal Service requests to make an experimental product permanent, the Postal Service file a notice of application for permanent product status in the market test proceeding's docket, which should include the docket number(s) for the proceeding evaluating request. PR Comments at 14. Second, she recommends setting a finite deadline for filing the request. *Id.* at 15. She suggests 45 days, but does not have a strong opinion on the length of time required for review. *Id.* at 15 n.19. She states that tying the deadline to the date on which the Postal Service wishes the product to become permanent would provide additional flexibility. *Id.* at 15.

The Postal Service commends the Public Representative for her observation regarding the limited nature of tying the deadline for filing a permanent product request to the date on which the revenue cap would be exceeded. Postal Service Reply Comments at 12. It notes that reasons unrelated to the revenue cap may trigger the decision to request permanent product status. *Id.* However, it objects to the 45-day deadline suggested by the Public Representative and prefers the more flexible standard reflected in rule 3035.18. *Id.*

The Commission adopts the Public Representative's suggestion to require the Postal Service to file a notice of its request to make an experimental product permanent in the market test

<sup>16</sup> Docket No. MT2012–1, First-Class Tracer Data Collection Report FY 12, Q1–4 and FY 13, Q1–2 April 19, 2013, at 1–2.

<sup>17</sup> Docket No. MC2011–20, Amended Reply Rides Free Data Collection Report, June 11, 2012, at 3; Docket No. R2009–5, United States Postal Service Notice of Market-Dominant Price Adjustment, August 11, 2009, at 7; Docket No. R2009–3, United States Postal Service Notice of Market-Dominant Price Adjustment, May 1, 2009, at 6.

<sup>18</sup> Docket No. RM2007–1, Order Proposing Regulations to Establish a System of Ratemaking, August 15, 2007, ¶ 4017 (Order No. 26); see Order No. 27, Errata to Order No. 26, August 16, 2007; 39 CFR 3020.13(a)(5), (b)(4).

proceeding's docket. This requirement will help mailers and the general public track the progress of a market test from an experimental product to a permanent product. It will also provide more transparency into the Commission's review of both experimental and permanent products. The notice must include the applicable docket number(s) for the proceeding evaluating the request. Rule 3035.18 is revised to add this requirement.

The Postal Service recently filed notices requesting that two experimental products—Alternate Postage Payment Method and Gift Cards—become permanent price categories.<sup>19</sup> Based on these proceedings, the Commission finds it appropriate to clarify and revise the procedures and deadline for filing requests to make an experimental product permanent. First, the Commission amends rule 3035.18 to clarify that future requests to make an experimental product permanent must be filed pursuant to 39 U.S.C. 3642 and 39 CFR part 3020, subpart B. This rule applies whether the Postal Service is adding an experimental product as a new product or price category. This requirement is consistent with the Commission's directive in its order granting classification and price changes for Alternate Postage Payment.<sup>20</sup> The Postal Service complied with this order in its request to add Gift Cards to the competitive product list as a new price category. Gift Cards Request at 1 n.1.

Second, the Commission amends rule 3035.18 to clarify the deadline for filing requests to make an experimental product permanent. In Docket No. MC2014–26, the Postal Service filed its request to add Gift Cards as a new price category 18 days before the Gift Cards market test was scheduled to expire.<sup>21</sup> This did not provide sufficient time for the Commission to review the Postal Service's request before the market test expired. Discontinuing the market test during the pendency of the proceeding would have been inefficient and

inconvenient to gift card customers. *Id.* at 4. To avoid the disruption of service and inconvenience, the Commission conditionally approved the addition of Gift Cards to the competitive product list as a price category of the Greeting Cards, Gift Cards, and Stationery competitive product. *Id.* It noted, however, that the Postal Service jeopardized the continuation of the Gift Cards service by filing the permanent product request so close to the expiration date of the market test. *Id.* at 4 n.6. It noted that this risk was unnecessary and could have been easily cured by a more timely filing. *Id.*

The Commission revises rule 3035.18 to avoid this situation in future filings. In general, the Postal Service may file a request for permanent product status any time it wishes. However, if the Postal Service determines to make an existing experimental product<sup>22</sup> permanent before the market test terminates, it must submit a request for permanent product status at least 60 days before the market test terminates. For the Commission to approve a request for permanent product status before a market test terminates, the Postal Service must file the request sufficiently in advance of the market test termination date to provide adequate time for public input and Commission review of the request. A market test must terminate if: (1) It reaches the end of the market test duration period (24 months or up to 36 months if an extension is granted); or (2) the revenues received by the Postal Service from a market test reach any applicable authorized adjusted limitation in any fiscal year. The Commission finds that 60 days' notice before either event occurs is an appropriate time period because it is consistent with the 60-day deadline for requesting a market test extension under 39 U.S.C. 3641(d)(2).

The final rules require that 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 exceeds any authorized adjusted limitation in any fiscal year, whichever is earlier. The 60-day notice period under rule 3035.18 applies to Postal Service requests to make existing experimental products permanent. The Postal Service may file requests to make former experimental products permanent any time after the market test terminates.

<sup>22</sup> Existing experimental products are experimental products that the Postal Service is currently testing under a market test.

The Commission also revises rule 3035.18 to require requests for permanent product status to include product specific costs associated with the development of the market test; that is, costs incurred before the market test is implemented. The proposed rules contained a requirement that the Postal Service quantify start-up costs in its data collection reports. As further explained in Section IV.A.10.a, below, the Commission revises the rules to require the Postal Service to quantify start-up costs in two situations, one of which is when the Postal Service files a request to make an experimental product permanent. The other situation in which the Postal Service must quantify start-up costs is when the Postal Service applies for an exemption from the \$10 Million Adjusted Limitation under rule 3035.16(f). See 39 U.S.C. 3641(e)(2); Section IV.A.10.a, below.

A quantification of start-up costs is necessary for the Commission to evaluate whether a competitive product covers its attributable costs and whether a market dominant product assures adequate revenues, including retained earnings, to maintain financial stability. See 39 CFR 3020.32(b) and (c); 39 U.S.C. 3622(b)(5).<sup>23</sup> The Postal Service also requested clarification of the type of information the Commission was seeking for these start-up costs. Postal Service Comments at 6–7. As discussed in more detail below, the final rules replace the term start-up costs with product specific costs, a term that is well known and has long been used to attribute costs to specific products. See Section IV.A.10.a, below. Examples of product specific costs required by rule 3035.18(b) are discussed in Section IV.A.7, above.

#### 10. Section 3035.20—Data Collection and Reporting Requirements

##### a. Administrative, Ancillary, and Start-Up Costs

The proposed rules required the Postal Service to periodically report several types of costs associated with each market test: Administrative, ancillary, and start-up costs. The Postal Service does not propose definitions for these terms but instead requests that the

<sup>23</sup> While an experimental product might be initially categorized as market dominant under 39 U.S.C. 3641(b)(3), experience or changes to the market test may dictate that the Commission find that the experimental product should be added to the competitive product list under 39 U.S.C. 3642 if the Postal Service files a request to make the experimental product permanent. Thus, start-up cost information could also be important for proposals to add a market dominant experimental product to the competitive product list.

<sup>19</sup> Docket No. R2014–1, United States Postal Service Notice of Market Dominant Classification and Price Changes for the Alternative Postage Payment Method, November 5, 2013; Docket No. MC2014–26, Request of the United States Postal Service to Add Gift Cards as a New Price Category in the Greeting Cards and Stationery Product, June 9, 2014 (Gift Cards Request).

<sup>20</sup> Docket No. R2014–1, Order No. 1917, Order Granting Classification and Price Changes for Alternate Postage Payment, December 20, 2013, at 8.

<sup>21</sup> Docket No. MC2014–26, Order No. 2091, Notice and Order of Filing Request to Add Gift Cards to the Competitive Product List and Conditionally Authorizing the Sale of Gift Cards Pending Conclusion of Proceeding, June 13, 2014, at 1–2.

Commission clarify their meanings. Postal Service Comments at 5–8. The Postal Service asserts that it has responded in good faith to Commission orders requiring the reporting of available administrative costs, but it was not confident that the information provided met Commission expectations. *Id.* at 5. Likewise, it provided available ancillary cost data, but notes it lacked a clear understanding of the types of costs the Commission deems to fall within this category. *Id.* at 5–6. It argues that distinguishing start-up from administrative costs may be difficult and describes the challenges involved in calculating start-up costs. *Id.* at 6–7.

The Postal Service requests that the Commission's cost data reporting requirements recognize the limitations on the Postal Service's ability to record perfectly complete information that may vary on a case-by-case basis. *Id.* at 7. It states that identifying specific cost line items in which the Commission has an interest would be helpful. *Id.* The Public Representative concurs that further clarification of these types of costs will help the Postal Service and the public better understand the Commission's expectations. PR Reply Comments at 2.

In this Order, the Commission clarifies the types of costs that are to be reported under this section. The objective of the rules is to ensure that the Postal Service tracks relevant costs associated with a market test, including the costs incurred in conceiving of and initiating a market test.

The Commission clarifies that start-up costs are costs incurred by the Postal Service to implement a new service or offer a new product. These costs include contractor costs, if applicable; administrative costs, *i.e.*, salary and fringe benefits of employees working on the project, including senior management review;<sup>24</sup> costs to acquire materials, supplies, or equipment relevant to the proposed market test; and costs associated with implementing the market test pursuant to section 3641.

The Commission further clarifies that, generally, administrative costs are a subset of product specific costs and include expenses associated with the general administration of the market test. As discussed below, they include, for example, the cost of employees assigned to the market test, marketing, and materials and supplies. In this context, the Commission intends for ancillary cost to represent all other costs that may be incurred in connection with

the market test. They may include certain miscellaneous or unexpected expenses.

The proposed rules contained a requirement that the Postal Service report start-up costs in data collection reports. After considering the comments received, see Postal Service Comments at 6–7, the Commission finds that a quantification of start-up costs is not necessary before a market test is offered. Rather, start-up costs should be reported in certain cases as the market test progresses. This will help display a complete financial picture of whether the market test has a net positive or net negative impact on the Postal Service's finances.<sup>25</sup> A quantification of start-up costs is important to stakeholders because it promotes financial transparency. Moreover, if start-up cost information is not captured early in the process, it may be difficult to recreate start-up costs later on if, for example, the Postal Service proposes to make an experimental product permanent.

Thus, the Commission finds that a quantification of start-up costs associated with market tests is necessary in two situations: (1) The Postal Service applies for an exemption from the \$10 Million Adjusted Limitation under 39 U.S.C. 3641(e)(2) and rule 3035.16; and (2) the Postal Service files a request to make an experimental product permanent under 39 U.S.C. 3642 and rule 3035.18. In applications for an exemption, a quantification of start-up costs is necessary for the Commission to determine whether an experimental product will likely contribute to the Postal Service's financial stability. See 39 U.S.C. 3641(e)(2)(B). Similarly, in requests to make an experimental product permanent, a quantification of start-up costs is necessary for the Commission to evaluate whether a competitive product covers its attributable costs and whether a market dominant product assures adequate revenues, including retained earnings, to maintain financial stability.<sup>26</sup> See 39 CFR 3020.32(b) and (c); 39 U.S.C. 3622(b)(5).

The Commission revises rules 3035.16 and 3035.18 to require the Postal Service to report start-up costs when applying for exemptions from the \$10 Million Adjusted Limitation and when

filing requests for permanent product status. See Sections IV.A.7 and IV.A.9, above. However, the Postal Service is not required to report start-up costs in ongoing data collection reports under rule 3035.20.

Administrative, ancillary, and start-up costs could also be characterized as product specific costs, *i.e.*, costs exclusively incurred by a single product that do not vary by volume (*e.g.*, costs to advertise only Priority Mail or, in this context, research and development costs associated with a market test). Because the term product specific costs is well known and has long been used to attribute costs to specific products, the Commission will substitute that term for start-up, administrative, and ancillary costs. The requirement to report product specific costs is intended to reflect those costs unique to market tests before and after implementation of such tests.

Final rule 3035.20(a) requires the Postal Service to track attributable costs incurred in conducting the market test, including product specific costs related to the administration of the market test. The Commission observes that examples of the product specific costs required by rule 3035.20(a) can be found in other proceedings. For example, in Docket No. R2013–6, the Postal Service stated that the costs of implementing the Technology Credit Promotion included the cost of implementing software changes in the PostalOne! system, as well as customer support and headquarters administrative costs.<sup>27</sup> These costs are examples of product specific costs related to the administration of the Technology Credit Promotion. They are the types of product specific costs related to the administration of a market test that must be reported under rule 3035.20.

#### b. Data Collection Plans and Reports

The Public Representative argues that the proposed rules do not clearly distinguish between the requirements for the data collection plan and data collection reports. PR Comments at 15. She suggests that rule 3035.3 regarding the contents of the notice set forth expectations for the data collection plan. *Id.* She recommends that rule 3035.20 set forth requirements for the data collection reports. *Id.* at 15–16. Her suggested revisions to rule 3035.20 include requiring data collection reports to be filed no more than 40 days after the close of each fiscal quarter during which the market test is offered. *Id.*, Appendix A at 10. She proposes adding

<sup>24</sup> The Commission appreciates the difficulty in isolating the costs related to staff time given that Postal Service employees may be assigned to more than one project. Reasonable good faith estimates should suffice.

<sup>25</sup> See, *e.g.*, United States General Accounting Office, U.S. Postal Service: Development and Inventory of New Products (GAO/GGD–99–15), November 24, 1998, at 4 (stating that new products generally take several years to become established and recover their start-up costs).

<sup>26</sup> Start-up cost information could also be important for proposals to add a market dominant experimental product to the competitive product list. See footnote 23, above.

<sup>27</sup> Docket No. R2013–6, Responses of the United States Postal Service to Chairman's Information Request No. 1, May 7, 2013, question 4.

a requirement that the Postal Service report volumes of the experimental product by fiscal quarter. *Id.*

The Postal Service objects to the Public Representative's suggestion that data collection reports be filed no more than 40 days from the end of the preceding quarter. It argues that the Commission should preserve the flexibility reflected in the proposed rule. Postal Service Reply Comments at 12. The Postal Service takes no position on the Public Representative's suggestion that data collection reports also include volume figures.

The Commission agrees that the distinction between data collection plans and data collection reports in the proposed rules is unclear, and the revised rules clarify these terms. As discussed above, revised rule 3035.3(a)(2)(vi) requires notices of proposed market tests to include a data collection plan, which is a plan for monitoring the performance of a market test. See Section IV.A.1.d. The Commission modifies rule 3035.20(a) to reiterate this requirement and list the specific items that must be included in the data collection plan. These items will also include volumes of the experimental product by fiscal quarter, as suggested by the Public Representative. This requirement is consistent with Commission orders in past market tests and thus codifies present Commission practice.<sup>28</sup> Rule 3035.20(d) requires the Postal Service to file the information required by the data collection plan in the data collection reports.

The Commission declines to adopt the Public Representative's suggestion concerning the timing of data collection reports. In general, the Postal Service must file data collection reports no more than 40 days after the close of each fiscal quarter during which the market test is offered. However, in some cases the Commission may find it appropriate to prescribe a reporting deadline other than 40 days if circumstances warrant. The final rules provide the Commission that flexibility.

### B. Rules With Non-Substantive Changes

The Public Representative suggests several non-substantive stylistic and editorial changes to the rules. PR Comments at 1; see Appendix A. The Postal Service does not comment on these suggestions. As set forth below, the Commission adopts the following

non-substantive stylistic and editorial changes suggested by the Public Representative (in addition to others) to promote consistency and clarity in the rules:

- Rule 3001.5(v) contains style revisions to conform to official publication requirements.
- Rule 3035.1 contains a minor editorial revision.
- Rule 3035.3 was renumbered to conform to official publication requirements. In addition, rule 3035.3 contains minor editorial revisions.
- Rules 3035.4 and 3035.5 contain style revisions and renumbered sections to conform to official publication requirements.
- Rule 3035.10 contains a style revision to conform to official publication requirements.
- Rule 3035.11 contains a style revision to conform to official publication requirements and minor editorial changes.
- Rule 3035.12 contains style revisions to conform to official publication requirements.
- Rule 3035.15 contains style revisions to conform to official publication requirements.
- Rule 3035.16 contains style revisions to conform to official publication requirements.
- Rule 3035.17 contains style revisions to conform to official publication requirements.
- Rule 3035.18 adds subsections to incorporate new provisions.
- Rule 3035.20 contains a style revision to conform to official publication requirements.

### C. Other Issues

#### 1. Definitions

The Public Representative contends that the Commission should clarify several ambiguous terms in the proposed rules. PR Comments at 2. She recommends defining market disruption rather than referencing 39 U.S.C. 3641(b)(2). *Id.* at 3. She argues that a phrase (unfair or otherwise inappropriate competitive advantage) should be clarified in the rules. *Id.* She asserts that because the Commission explained the concept of unfair competitive advantage in Order No. 1739 (concerning the proposed rules applicable to 39 U.S.C. 404a), the Commission should use its prior analysis to develop a clear definition of the phrase unfair or otherwise inappropriate competitive advantage.<sup>29</sup>

The Public Representative also recommends defining the term

geographic market. PR Comments at 4. Citing Black's Law Dictionary and federal statutes, she defines the relevant geographic market as an area of effective competition or the locale in which consumers of a product or service can turn for alternative sources of supply. *Id.* at 4–5. She argues that the Commission should follow this approach when it (1) evaluates whether the market test creates an unfair or otherwise inappropriate competitive advantage and (2) limits revenues in a geographic market to abate anticompetitive behavior. *Id.* at 5.

In addition, the Public Representative recommends defining several other terms: CPI-U index, experimental product, market test, and unfair or otherwise inappropriate competition. *Id.* at 6. She suggests placing these terms in a separate definitions section in part 3035, which would also include the definition of small business concern. *Id.* at 5–6. She notes that the term small business concern is also used in 39 CFR part 3020 and suggests amending part 3020 to add a cross-reference to the definition of small business concern in part 3035. *Id.* at 6–7.

The Postal Service argues that a detailed and technically precise definition of the term market disruption may be difficult to achieve in the abstract given the narrow purpose of the market test policy guidelines and the fact-specific nature of determining market disruption under 39 U.S.C. 3641(b)(2). Postal Service Reply Comments at 10–11. It encourages the Commission to proceed by viewing each market test on a case-by-case basis without pre-determined constraints that could stifle the investigation of potential product concepts and product innovation. *Id.* at 11.

The Postal Service questions whether a prophylactic rule can be drafted to define the term geographic market relevant to every market test. *Id.* at 2. It notes that relevant factors include the types and numbers and proximity of available channels through which postal customers can access an experimental product. *Id.* It prefers that the Commission not establish a definition for geographic market based solely on its limited experience with market tests. *Id.*

The Commission finds it unnecessary to define additional terms at this time. The market test rules are designed to increase flexibility and to facilitate a more entrepreneurial approach to product development. See Senate Report at 16. To that end, 39 U.S.C. 3641 envisions a relatively simple process for the Postal Service to engage in experimental market tests. Three

<sup>28</sup> See, e.g., Docket No. MT2013–2, Order No. 1806, Order Authorizing Market Test to Proceed and Granting Extension, August 12, 2013, at 5; Docket No. MT2013–1, Order No. 1539, Order Approving Metro Post Market Test, November 14, 2012, at 12.

<sup>29</sup> *Id.* at 4; see Docket No. RM2013–4, Notice of Proposed Rulemaking Establishing Rules Pursuant to 39 U.S.C. 404a, June 5, 2013 (Order No. 1739).

conditions must be satisfied: (1) The experimental product must be significantly different from all Postal Service products offered within the past two fiscal years; (2) the introduction or continued offering of the experimental product will not provide an unfair or otherwise inappropriate competitive advantage for the Postal Service or any mailer; and (3) the Postal Service identifies the experimental product as either market dominant or competitive. 39 U.S.C. 3641(b). While the term market disruption is defined in 39 U.S.C. 3641(b)(2), each market test raises fact-specific inquiries that militate against attempting to define terms such as geographic market and unfair or otherwise inappropriate competitive advantage in a vacuum.

The Commission finds that the best course of action is to proceed on a case-by-case basis to evaluate these terms. In discussing the benefits of adjudication of statutory standards on a case-by-case basis, the Supreme Court noted that not every principle essential to administering a statute can or should be turned into a general rule.<sup>30</sup> For several reasons, some principles must develop on their own, while others must be adjusted to meet particular, unforeseeable situations. *Id.* First, problems may arise in a case an agency could not reasonably foresee. *Id.* Those problems must be solved without a relevant general rule. *Id.* Second, an agency may not have had sufficient experience with a particular problem to justify creating a hard and fast rule. *Id.* Third, a problem may be so specialized and different that it cannot be solved within the boundaries of a general rule. *Id.* at 203. In those situations, an agency must retain the authority to address problems on a case-to-case basis if the administrative process is to be effective. *Id.*

As a result of these considerations, the Supreme Court concluded that the choice between proceeding by general rule or individual order lies primarily in the informed discretion of the agency. *Id.* For purposes of these market test rules, the Commission declines to define geographic market and unfair or otherwise inappropriate competitive advantage in the rules. It will consider each market test on its own merits, including whether it causes an unfair or otherwise inappropriate competitive advantage for the Postal Service or any mailer.

As the Public Representative suggests, in Order No. 1739, the Commission did outline in general terms how it might

evaluate or consider allegations of unfair competition by the Postal Service under section 404a. In Order No. 1739, the Commission stated that it would apply analogous federal precedent concerning claims of unfair competition to adjudicate claims under 39 U.S.C. 404a(a)(1). Order No. 1739 at 8. The Commission noted that federal claims of unfair competition are reviewed under the rule of reason analysis, which focuses on whether the behavior unreasonably restricts competition. *Id.* at 7. In making such a determination, the decision maker reviews the anticompetitive effects of the action, which must harm the competitive process and harm consumers. *Id.* Harm to one or more competitors will not suffice. *Id.* While unnecessary to define the term unfair or otherwise inappropriate competitive advantage for purposes of these rules, the Commission undoubtedly will be guided by analogous precedent concerning claims of unfair competition when reviewing specific market tests.

As discussed above, the Commission adopts the definition of small business concern with minor style revisions and places that definition in 39 CFR 3001.5. See Section IV.A.1.b. The Commission declines to adopt the Public Representative's proposals to place that term in a separate definitions section in 39 CFR part 3035 and add a cross-reference to that definition in 39 CFR part 3020. The Public Representative correctly observes that the term is also used in 39 CFR part 3020. However, adopting the Public Representative's suggestions would require amending part 3020. Leaving the term in section 3001.5 ensures that the definition applies to all parts of title 39 of the Code of Federal Regulations (CFR) administered by the Commission, including parts 3020 and 3035.

## 2. Deadlines

The Public Representative suggests adding a rule to 39 CFR part 3035 if the Commission plans to waive deadlines of rules related to market tests. PR Comments at 2. She notes that in several recent market test proceedings, the Commission waived the 60 day statutory deadline for requesting extensions of market tests. *Id.*; see 39 U.S.C. 3641(d)(2). The Postal Service does not comment on this suggestion.

The Commission declines to adopt the Public Representative's suggestion regarding deadlines. The Commission reiterates the importance of filing by the appropriate deadlines required under 39 U.S.C. 3641 and the Commission's market test rules. All future filings must be submitted in conformance with the

applicable deadline. Future requests for waivers of deadlines will be assessed on a case-by-case basis. However, the Postal Service should not assume that waivers will be granted absent exceptional circumstances.<sup>31</sup>

## V. Ordering Paragraphs

*It is ordered:*

1. Part 3001 of title 39, Code of Federal Regulations, is amended as set forth below the signature of this Order, effective 30 days after publication in the **Federal Register**.

2. Part 3035 of title 39, Code of Federal Regulations, is adopted as set forth below the signature of this Order, effective 30 days after publication in the **Federal Register**.

3. The Secretary shall arrange for publication of this order in the **Federal Register**.

## List of Subjects

### 39 CFR Part 3001

Administrative practice and procedure; Freedom of information; Postal Service; Sunshine Act.

### 39 CFR Part 3035

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 3001—RULES OF PRACTICE AND PROCEDURE

■ 1. The authority citation for part 3001 continues to read as follows:

**Authority:** 39 U.S.C. 404(d); 503; 504; 3661.

■ 2. In § 3001.5, add paragraph (v) to read as follows:

### § 3001.5 Definitions.

\* \* \* \* \*

(v) *Small business concern* means a for-profit business entity that:

- (1) Is independently owned and operated;
- (2) Is not dominant in its field of operation;
- (3) Has a place of business located in the United States;
- (4) Operates primarily within the United States or makes a significant contribution to the United States economy by paying taxes or using American products, materials, or labor; and

<sup>31</sup> See Docket No. MT2011–2, Order No. 1781, Order Granting Extension of Gift Card Market Test, July 19, 2013, at 3; Docket No. MC2014–26, Order No. 2145, Order Granting Request to Add Gift Cards to the Competitive Product List, August 8, 2014, at 15.

<sup>30</sup> *Securities and Exchange Comm'n v. Chenery Corp.*, 332 U.S. 194, 202 (1947).

(5) Together with its affiliates, qualifies as *small* in its primary industry under the criteria and size standards established by the Small Business Administration in 13 CFR 121.201 based on annual receipts or number of employees.

■ 3. Add part 3035 to read as follows:

**PART 3035—RULES FOR MARKET TESTS OF EXPERIMENTAL PRODUCTS**

- Sec.
- 3035.1 Applicability.
  - 3035.2 Advance notice.
  - 3035.3 Contents of notice.
  - 3035.4 Review.
  - 3035.5 Commission action.
  - 3035.6 Changes in market test.
  - 3035.7–3035.9 [Reserved]
  - 3035.10 Duration.
  - 3035.11 Extension of market test.
  - 3035.12 Cancellation of market test.
  - 3035.13–3035.14 [Reserved]
  - 3035.15 Dollar amount limitation.
  - 3035.16 Exemption from dollar amount limitation.
  - 3035.17 Prevention of market disruption.
  - 3035.18 Filing for permanent product status.
  - 3035.19 [Reserved]
  - 3035.20 Data collection and reporting requirements.

**Authority:** 39 U.S.C. 3641.

**§ 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;

(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 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 Million Adjusted Limitation = \$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 figure 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 = \$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.

By the Commission.

**Shoshana M. Grove,**  
*Secretary.*

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