**POSTAL REGULATORY COMMISSION**

**39 CFR Part 3010**

**[Docket No. RM2014–3; Order No. 2086]**

## Price Cap Rules for Market Dominant Price Adjustments

**AGENCY:** Postal Regulatory Commission.

**ACTION:** Final rule.

**SUMMARY:** The Commission is issuing a set of final rules addressing the price cap for market dominant price adjustments. This action follows a review of comments on proposed rules. The changes, which concern rate decreases, rate incentives, and *de minimis* rate increases, update and clarify the rules.

**DATES:** *Effective* July 14, 2014.

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

**SUPPLEMENTARY INFORMATION:**

### Regulatory History

72 FR 5230, February 5, 2007
72 FR 29284, May 25, 2007
72 FR 33261, June 15, 2007
72 FR 63622, November 9, 2007
73 FR 22490, April 16, 2013
78 FR 52694, August 26, 2013
78 FR 67951, November 8, 2013
79 FR 5355, January 31, 2014

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### I. Introduction

On November 18, 2013, the Commission issued a notice of proposed rulemaking to continue its review of the rules in 39 CFR part 3010.[1] The notice requested comments regarding the treatment of rate decreases, rate incentives, and *de minimis* rate increases under part 3010. See Order No. 1879 at 1.

The Commission received comments and reply comments from the Postal Service, the Association for Postal Commerce (PostCom), and Pitney Bowes Inc. (Pitney Bowes).[2] The National Association of Presort Mailers, the Major Mailers Association, and the Association for Mail Electronic Enhancement (collectively, Joint Commenters) and the National Postal Policy Council (NPPC) submitted initial comments only.[3] The Public Representative, Valpak Direct Marketing Systems, Inc. and Valpak Dealers' Association, Inc. (collectively, Valpak), and the Association of Magazine Media (MPA) submitted reply comments only.[4]

This Order begins with a discussion of procedural issues raised by the comments. Then, it addresses the substantive comments on each of the following aspects of the proposed rules: Type 1–C rate adjustments; rates of general applicability; adjustments for the deletion of rate cells when no alternate rate cell is available; and *de minimis* rate increases. Next, this Order discusses miscellaneous issues raised by the commenters. Finally, the Commission adopts the proposed rules, modified as described below.

### II. Procedural Issues

The comments filed in this docket raise two procedural issues: (1) The time for filing comments; and (2) the effect of an appeal pending before the United States Court of Appeals for the District of Columbia District (D.C. Circuit) on the implementation of proposed § 3010.23(d)(4).

#### *A. Time for Filing Comments*

Initial comments in this docket were due March 17, 2014. 79 FR 5355. Reply comments were due April 16, 2014. *Id.* Because the federal government was closed due to severe weather on March 17, 2014, comments filed on March 18, 2014, are deemed timely filed. See 39 CFR 3001.15 (providing that in computing a period of time under a Commission notice, the last day of the period is to be included unless it is a Saturday, Sunday, or federal holiday). The Postal Service Reply Comments were accompanied by a motion for late acceptance, citing the press of business and the unavailability of a critical employee.[5] Three other commenters filed reply comments on April 17, 2014, without motions for late acceptance. PR Reply Comments at 1; Pitney Bowes Reply Comments at 1; MPA Reply Comments at 1. Because the period between the date initial comments were filed and the date reply comments were due was shortened by one day, the Commission grants the Postal Service's motion and will consider the comments filed on April 17, 2014, timely filed.

#### *B. Delaying Implementation of Proposed § 3010.23(d)(4)*

The Postal Service requests that the Commission delay the implementation of proposed § 3010.23(d)(4) until the D.C. Circuit issues a decision on the pending appeal of the Commission's decision in Docket No. R2013–10.[6] The Postal Service contends that it is not clear whether the proposed rule would have applied to the Full Service Intelligent Mail Barcode (Full Service IMb) change discussed in Order No. 1890 because ''even the Commission itself could not conclusively determine whether a rate cell has been deleted, or simply been redefined, by implementing the Full-Service IMb requirement.'' Postal Service Comments at 7 (footnote omitted).

The Public Representative, PostCom, Pitney Bowes, and MPA oppose delaying the implementation of the proposed rule. The Public Representative maintains that the application of the proposed rule to a certain rate cell depends on the particular case before the Commission, rendering the outcome of the appeal

[1] Notice of Proposed Rulemaking on the Treatment of Rate Incentives and *De Minimis* Rate Increases for Price Cap Purposes, November 18, 2013 (Order No. 1879); see also 79 FR 5355 (January 31, 2014).

[2] Initial Comments of the United States Postal Service, March 18, 2014 (Postal Service Comments); Reply Comments of the United States Postal Service, April 17, 2014 (Postal Service Reply Comments); Comments of the Association for Postal Commerce, March 18, 2014 (PostCom Comments); Reply Comments of the Association for Postal Commerce, April 16, 2014 (PostCom Reply Comments); Comments of Pitney Bowes Inc., March 18, 2014 (Pitney Bowes Comments); and Reply Comments of Pitney Bowes Inc., April 17, 2014 (Pitney Bowes Reply Comments). On April 18, 2014, the Postal Service filed a supplement to its reply comments. Supplement to Reply Comments of the United States Postal Service, April 18, 2014. The filing does not supplement the substance of the Postal Service's reply comments. Rather, it asserts that ''the Postal Service is delaying some rate and classification proposals, pending the completion of this proceeding'' and requests that the Commission expedite the issuance of a final order in this docket. *Id.* at 1. Neither the Notice nor the Commission's rules provide for the supplementation of comments after the date those comments are due.

[3] Joint Comments of the National Association of Presort Mailers, the Major Mailers Association and the Association for Mail Electronic Enhancement, March 18, 2014 (Joint Commenters Comments); Comments of the National Postal Policy Council, March 18, 2014 (NPPC Comments).

[4] Public Representative Reply Comments, April 17, 2014 (PR Reply Comments); Valpak Direct Marketing Systems, Inc. and Valpak Dealers' Association, Inc. Reply Comments on Notice of Proposed Rulemaking, April 16, 2014 (Valpak Reply Comments); and Reply Comments of MPA—The Association of Magazine Media, April 17, 2014 (MPA Reply Comments).

[5] Motion for Late Acceptance of the Reply Comments of the United States Postal Service, April 17, 2014.

[6] Postal Service Comments at 8. See also Docket No. R2013–10, Order on Price Adjustments for Market Dominant Products and Related Mail Classification Changes, November 21, 2013 (Order No. 1890); *U.S. Postal Serv.* v. *Postal Regulatory Comm'n,* No. 13–1308 (D.C. Cir. filed Dec. 20, 2013).

irrelevant to the application of the proposed rule to future cases. PR Reply Comments at 7. He adds that delaying implementation would not help ''in finalizing several instances where products have been transferred recently to the competitive product list.'' *Id.* PostCom argues that the court's decision in the appeal will have no bearing on the implementation of proposed § 3010.23(d)(4) because the proposed rule would not have applied to the rate cells at issue in Docket No. R2013–10 given that alternate rate cells were available. PostCom Reply Comments at 4–5. As discussed further below, Pitney Bowes urges the Commission to modify proposed § 3010.23(d)(4) to specify that it applies only to transfers of products to the competitive product list and contends that there would be no need for delay if its approach is adopted. Pitney Bowes Reply Comments at 2. MPA supports Pitney Bowes' contention. MPA Reply Comments at 2.

The Commission will not delay the implementation of proposed § 3010.23(d)(4) pending the outcome of the appeal. As discussed in section V, below, the court's decision is unlikely to affect how proposed § 3010.23(d)(4) is implemented.

## III. Type 1–C Rate Adjustments

As set out in the Commission's notice of proposed rulemaking, a Type 1–C rate adjustment is an adjustment to a rate of general applicability that contains only a rate decrease.[7] The Postal Service is not required to calculate an annual limitation for purposes of a Type 1–C rate adjustment. Proposed § 3010.20(e). The Postal Service may choose whether or not to generate unused rate adjustment authority as a result of a Type 1–C rate adjustment. Proposed § 3010.6(b). If it chooses to generate unused rate adjustment authority, it is required to do so in accordance with proposed §§ 3010.23(b)(2) and 3010.27.

Commenters raised two issues relating to Type 1–C rate adjustments. First, commenters expressed views on whether the Postal Service should be required to elect whether it will generate unused rate adjustment authority at the time it files a notice of Type 1–C rate adjustment. Second, two commenters suggested that the proposed rules be modified to specify how unused rate adjustment authority is generated when a Type 1–C rate adjustment follows a Type 3 rate adjustment.

### *A. The Postal Service Is Required To Elect Whether To Generate Unused Rate Adjustment Authority at the Time of Filing a Notice of Type 1–C Rate Adjustment*

Several commenters requested that the Commission clarify whether the Postal Service is required to choose whether a Type 1–C rate adjustment will generate unused rate adjustment authority at the time it files a notice of Type 1–C rate adjustment. Joint Commenters Comments at 3; NPPC Comments at 5. The Joint Commenters and NPPC are concerned that a deferred election would reduce rate predictability and stability. *Id.* In the alternative, the Joint Commenters propose that a rule allowing for deferred election be applied prospectively. Joint Commenters Comments at 3.

The Public Representative does not believe allowing a deferred election would be overly complicated. PR Reply Comments at 7. He opines that a deferred election would provide the Postal Service ''flexibility consistent with administrative convenience.'' *Id.* at 8. The Postal Service asserts that requiring it to choose whether or not to generate unused rate adjustment authority at the time it files a notice of Type 1–C rate adjustment ''would unreasonably restrict the Postal Service's pricing flexibility and needlessly encumber its business planning activities.'' Postal Service Reply Comments at 2. It states that it has not observed any link between the behavior of mailers and its decision to seek additional unused rate adjustment authority as a result of rate incentives. *Id.* at 3. It states that because it is required to use historical billing determinants to calculate the percentage change in rates, it may not have the necessary information to make an election at the time it files its notice of a Type 1–C rate adjustment. *Id.* It cautions that requiring an election at the time of filing would ''provide a perverse incentive for the Postal Service to always request price cap authority for newly introduced rate incentives, since it would not be able to do so later.'' *Id.*

The Commission finds that no change to the proposed rules is necessary. Although the commenters cite proposed §§ 3010.23(a)(1)(iii), 3010.23(e), and 3010.6(b), they do not discuss proposed § 3010.12(b)(10). That proposed section requires that the notice for a Type 1–C rate adjustment specify whether the Postal Service elects to generate unused rate adjustment authority. Requiring the Postal Service to choose whether it will generate unused rate adjustment authority at the time it files its notice of a Type 1–C rate adjustment is an important part of the proposed rules for Type 1–C rate adjustments. It provides predictability for mailers by alerting them to circumstances when unused rate adjustment authority will be generated and allows them the opportunity to comment on the effects of the proposed rate adjustments. It also provides information the Commission requires to accurately calculate the percentage change in rates, reducing the need for information requests to ascertain the Postal Service's intent (which is particularly important in a time-limited rate case).

It is important to note that electing not to generate unused rate adjustment authority in a Type 1–C rate adjustment does not prevent the Postal Service from electing to include the effects of a rate decrease in a future Type 1–A or Type 1–B rate adjustment.[8] Proposed § 3010.23(a)(1)(iii) allows the Postal Service to include in the calculation of the percentage change in rates for a Type 1–A or Type 1–B rate adjustment a rate incentive that was excluded from the calculation of the percentage change in rates for a previous rate adjustment. In that situation, the effects of the rate decrease are included in the percentage change in rates calculation for the current Type 1–A or Type 1–B rate adjustment. As a result, the Postal Service would have the option to increase other rates within the class during that Type 1–A or Type 1–B rate adjustment or to generate unused rate adjustment authority in that Type 1–A or Type 1–B rate adjustment.

In Order No. 1879, the Commission provided the following example of how unused rate adjustment authority would be calculated in a Type 1–C rate adjustment where the Postal Service elects to generate unused rate adjustment authority:

*Example A:*

**Docket No. R201X–1: Type 1–A Rate Adjustment**

Date of Notice of Rate Adjustment: January 1, 201X

Annual Limitation: 3.000 percent

Percentage Change in Rates for the Class: 2.500 percent

Generated Unused Rate Adjustment Authority: 0.500 percent

[7] Proposed § 3010.6(a). The use of the singular ''decrease'' in this rule does not prevent the Postal Service from including multiple rate decreases in a single Type 1–C rate adjustment.

[8] See Docket No. C2009–1R, Order on Reconsideration and Clarification, August 13, 2013, at 10 (Order No. 1807) (''If the Postal Service chooses to extend a price decrease into a future year, it may opt to incorporate the reduced price into the calculation of the percentage change in rates at that time.''); Docket No. R2013–6, Order Approving Technology Credit Promotion, June 10, 2013, at 16–17 (Order No. 1743); Docket No. R2013–1, Order on Price Adjustments for Market Dominant Products and Related Mail Classification Changes, November 16, 2012, at 17 (Order No. 1541).

**Docket No. R201X–2: Type 1–C Rate Adjustment**
Date of Notice of Rate Adjustment: July 1, 201X
Annual Limitation: N/A
Amended Percentage Change in Rates for the Class: 2.250 percent
Additional Generated Unused Rate Adjustment Authority: 0.250 percent
Amended Unused Rate Adjustment Authority Generated in Docket No. R201X–1: 0.750 percent

Order No. 1879 at 5. If the Postal Service elected not to generate unused rate adjustment authority in Docket No. R201X–2 but then determined to include the effects of the rate decrease in a Type 1–A rate adjustment filed the following fiscal year (Docket No. R201Y–1), the example would change as follows:

*Example B:*
**Docket No. R201X–1: Type 1–A Rate Adjustment**
Date of Notice of Rate Adjustment: January 1, 201X
Annual Limitation: 3.000 percent
Percentage Change in Rates for the Class: 2.500 percent
Generated Unused Rate Adjustment Authority: 0.500 percent
**Docket No. R201X–2: Type 1–C Rate Adjustment**
Date of Notice of Rate Adjustment: July 1, 201X
Annual Limitation: N/A
Percentage Change in Rates for the Class: N/A
Additional Generated Unused Rate Adjustment Authority: N/A
Unused Rate Adjustment Authority Generated in Docket No. R201X–1: 0.500 percent
Unused Rate Adjustment Authority Generated in Docket No. R201X–2: N/A
**Docket No. R201Y–1: Type 1–A Rate Adjustment**
Date of Notice of Rate Adjustment: January 30, 201Y
Annual Limitation: 2.400 percent
Percentage Change in Rates for the Class: 2.250 percent
Unused Rate Adjustment Authority Generated in Docket No. R201X–1: 0.500 percent
Unused Rate Adjustment Authority Generated in Docket No. R201X–2: N/A
Unused Rate Adjustment Authority Generated in Docket No. R201Y–1: 0.150 percent

In Example B, the amount of unused rate adjustment authority generated in Docket No. R201X–1 does not change. Instead, the Postal Service generates unused rate adjustment authority in Docket No. R201Y–1 by including the undiscounted rate as the current rate and the discounted rate as the proposed rate in the calculation of the percentage change in rates. Historical billing determinants, adjusted in accordance with proposed § 3010.23(d)(2), are used. Proposed § 3010.23(d)(3). In other words, if the Postal Service elects to generate unused rate adjustment authority in Docket No. R201X–2, the discounted rate is included in the calculation of the percentage change in rates for Docket No. R201X–1 as if it had been proposed in Docket No. R201X–1. This results in additional unused rate adjustment authority being ascribed to Docket No. R201X–1. In subsequent notices of rate adjustment, the current rate will be the discounted rate approved in Docket No. R201X–2.

In contrast, if the Postal Service elects not to generate unused rate adjustment authority in Docket No. R201X–2, there is no effect on the percentage change in rates for, or amount of unused rate adjustment authority generated in, Docket No. R201X–1. If the Postal Service chooses to begin including the discount in the calculation of the percentage change in rates in Docket No. R201Y–1, the discount is treated as if it had first been proposed in Docket No. R201Y–1 (rather than in Docket No. R201X–2).

*A. The Postal Service May Not Choose To Generate Unused Rate Adjustment Authority in a Notice of Type 1–C Rate Adjustment Filed Immediately After a Type 3 Rate Adjustment*

The Postal Service requests that the Commission modify proposed § 3010.27(a) to allow the Postal Service to add unused rate adjustment authority generated by a Type 1–C rate adjustment to ''the most recent calculation of its total unused rate authority, regardless of whether that calculation resulted from a Type 1–A, Type 1–B, or Exigent rate case.'' Postal Service Comments at 2–3. It points out that if the Postal Service filed a notice of Type 1–C rate adjustment after a Type 3 rate adjustment (but before another Type 1–A or 1–B rate adjustment), ''the new Type 1–C rate authority would not be applied to the most recent calculation of the unused rate authority.'' *Id.* at 2. The Public Representative supports the Postal Service's request. PR Reply Comments at 10.

The Commission declines to modify its proposed rules for Type 1–C rate adjustments as requested by the Postal Service. Generating unused rate adjustment authority in a Type 1–C rate adjustment by referring to the most recent Type 1–A or Type 1–B rate adjustment is consistent with the Postal Service's authority to change rates within a given class in that Type 1–A or Type 1–B rate adjustment, so long as the adjustments do not exceed the maximum rate adjustment calculated under 39 CFR 3010.20.[9] If the Postal Service makes rate adjustments for a class that add up to less than the annual limitation on the percentage change in rates, 39 U.S.C. 3622(d)(2)(C) allows it generate unused rate adjustment authority equal to the difference between the annual limitation and the actual rate adjustments.

In a Type 3 rate adjustment, by contrast, the Postal Service does not change rates within the confines of the maximum rate adjustment. Rather, it increases rates to a level that exceeds the maximum rate adjustment. Because there is no maximum rate adjustment in a Type 3 rate adjustment, it is not possible to generate unused rate adjustment authority. In fact, the Commission requires that the Postal Service exhaust all available unused rate adjustment authority before imposing a rate increase in a Type 3 rate adjustment. 39 CFR 3010.63(c).

Because it is not consistent with 39 U.S.C. 3622(d)(2)(C) to generate unused rate adjustment authority as a result of a Type 3 rate adjustment, the Commission will not modify its proposed Type 1–C rules to allow the Postal Service to do so. The Postal Service is free to file a Type 1–C rate adjustment immediately after a Type 3 rate adjustment. However, that Type 1–C rate adjustment may not generate unused rate adjustment authority. If the Postal Service wishes to generate unused rate adjustment authority in a rate adjustment filed immediately after a Type 3 rate adjustment, it must file a notice of Type 1–A rate adjustment and calculate the annual limitation on the percentage change in rates.[10]

Although proposed § 3010.27, as contained in the notice of proposed rulemaking, does not allow the Postal Service to calculate unused rate adjustment authority in a Type 1–C rate adjustment filed immediately after a Type 3 rate adjustment (that is, with no intervening Type 1–A or Type 1–B rate adjustment), the Commission finds it prudent to include additional clarification in proposed § 3010.6. Therefore, it modifies proposed § 3010.6 to specify that a Type 1–C rate

[9] As the Commission explained in its notice of proposed rulemaking, a Type 1–C rate adjustment is designed to take into consideration a proposed rate reduction that would be in effect during the same period as the rates proposed in the most recent Type 1–A or Type 1–B rate adjustment. Order No. 1879 at 4–5.

[10] A Type 1–B rate adjustment uses unused rate adjustment authority. See proposed § 3010.5. Because a Type 3 rate adjustment exhausts all unused rate adjustment authority, it would be impossible for the Postal Service to file a successful notice of Type 1–B rate adjustment immediately after a Type 3 rate adjustment.

adjustment filed immediately after a Type 3 rate adjustment does not generate unused rate adjustment authority.

## IV. Rates of General Applicability

Several commenters request clarification of the definition of the term ''rate of general applicability'' set out in proposed § 3010.1(g). See PostCom Comments at 3–6; Joint Commenters Comments at 4; Valpak Reply Comments at 1; NPPC Comments at 3–4; PR Reply Comments at 4–5; Postal Service Comments at 3–6. Two commenters assert that the definition is not clear and needs improvement, without pointing to specific areas in need of clarification or improvement. Joint Commenters Comments at 4; Valpak Reply Comments at 1. Other commenters request clarification in the final order about how the definition would be applied to particular promotions or rates. NPPC Comments at 3–4; PR Reply Comments at 4–5; PostCom Comments at 3–6; Postal Service Comments at 3–6. No commenter proposed language to modify the definition.

Below, the Commission provides a more detailed discussion of the application of the proposed definition to the promotions and types of mail identified by the commenters, including international mail, volume-based incentives, niche classifications, rates that require ''ministerial approval'' by the Postal Service, and particular rates identified by the parties. However, except as noted in section A below, it concludes that no changes to the proposed definition are necessary at this time. Although the Commission understands and appreciates the concerns of the commenters, it finds that the proposed rule accurately summarizes the Commission's treatment of the thousands of rates previously proposed by the Postal Service without limiting its flexibility to give individualized consideration to the wide variety of rates that could be proposed in the future.

### *B. Modification of the Definition of Rate of General Applicability To Include International Mail Rates*

The Postal Service requests that the Commission clarify how international rates will be treated under the definition of the term ''rate of general applicability.'' Postal Service Comments at 3. It notes that the proposed section omits ''rates published in the International Mail Manual (IMM), as well as inbound international rates,'' raising questions about how international rates will be treated in the calculation of the annual limitation on the percentage change in rates. *Id.*

In previous rate cases, the Commission has treated rates applicable to all mail meeting standards established by the IMM as rates of general applicability. See, *e.g.,* Order No. 1890 at 61–62. It has treated rates that are only available upon the written agreement of the Postal Service and a foreign postal operator as rates that are not rates of general applicability.[11] Rates for inbound international mailpieces that are subject to the provisions of the Universal Postal Convention of the Universal Postal Union (UPU) are rates of general applicability that are included in the calculation of the annual limitation on the percentage change in rates. For instance, the terminal dues rates for inbound Letterpost described in section 1130.6 of the Mail Classification Schedule (MCS) are set by the UPU. They are considered rates of general applicability within the meaning of § 3010.1(g) because they are available to all mail meeting the standards established by section 1130 of the MCS. Similarly, rates for outbound international mail and special services that apply to all mailpieces and service transactions meeting standards established by the IMM are rates of general applicability.[12] Currently, rates for inbound special services are not included in the calculation of the percentage change in rates, so the Commission need not determine whether individual rates for inbound special services are rates of general applicability. *Id.*

In contrast, the Commission treats rates established by written agreements with foreign postal operators in the same manner as negotiated service agreements (that is, not as rates of general applicability). For example, rates established pursuant to the Inbound Market Dominant Multi-Service Agreements with Foreign Postal Operators 1 agreement with the Australian Postal Corporation are not considered rates of general applicability.[13] Although the agreement is listed at section 1602.3.5 of the MCS, the rates are only available upon the written agreement of the Postal Service and a foreign postal operator (in this case, the Australian Postal Corporation). Similarly, rates established under the Inbound Market Dominant Exprès Service Agreement approved in Docket No. R2011–6 are not rates of general applicability because they are only available upon the written agreement of the Postal Service and approximately two dozen signatories of the Exprès Service Agreement.[14] Although the Universal Postal Convention is itself a multilateral agreement, the Commission has consistently treated rates established pursuant to that convention as rates of general applicability.[15] However, multilateral agreements that do not include all members of the UPU (such as the Exprès Service Agreement) have consistently been treated like negotiated service agreements.[16]

In order to clarify the application of the definition of the term ''rate of general applicability'' to international mail, the Commission will modify proposed § 3010.1(g) to include references to the IMM and foreign postal operators.

### *C. Volume-Based Incentives Can Be Rates of General Applicability*

PostCom requests that the Commission clarify whether the volume sent by a mailer would be considered a characteristic of the mail to which a rate applies. PostCom Comments at 4. It suggests that excluding rates that are ''dependent on factors other than the characteristics of the mail to which the rate applies'' might mean that volume incentive rates can never be considered rates of general applicability. *Id.* The Public Representative argues that because volume discounts vary in purpose and effect, a rule to cover all volume discounts would not be practical. PR Reply Comments at 5.

It is not the Commission's intent to suggest that volume incentives can never be considered rates of general applicability. The volume of mail sent by a mailer under an incentive program is a characteristic of the mail to which the rates under the incentive program apply. Thus, a promotional rate that provides a 5 percent rebate on a mailing that includes 1,000 or more pieces could

[11] See, *e.g.,* Docket No. R2014–3, Order Approving an Additional Inbound Market Dominant Multi-Service Agreement with Foreign Postal Operators 1 Negotiated Service Agreement (with Canada Post Corporation), December 31, 2013 (Order No. 1940).

[12] See, *e.g.,* Docket No. R2013–10, Library Reference PRC–LR–2013–10/5, November 21, 2013.

[13] Docket No. R2014–2, Order Approving an Additional Inbound Market Dominant Multi-Service Agreement with Foreign Postal Operators 1 Negotiated Service Agreement (with Australian Postal Corporation), December 30, 2013 (Order No. 1931).

[14] See Docket No. R2011–6, Order Adding Inbound Market Dominant Exprès Service Agreement 1 to the Market Dominant Product List, September 26, 2011 (Order No. 876).

[15] See, *e.g.,* Order No. 1890 at 64 (using UPU terminal dues rates in the calculation of the percentage change in rates for Inbound Letter Post).

[16] See Docket No. R2011–6, Notice of United States Postal Service of Type 2 Rate Adjustment, and Notice of Filing Functionally Equivalent Agreement, August 12, 2011 (filing Exprès Service Agreement as a Type 2 rate adjustment).

be a rate of general applicability (assuming all other factors are met). The promotional rate applies to pieces included within the mailing meeting the volume threshold. Similarly, a promotion that provided a 1-cent per piece discount for Standard Mail once a mailer sends 100,000 pieces could be a rate of general applicability, if the promotional rate applies to Standard Mail pieces sent during the promotional period.

In contrast, volume sent by a mailer in a previous year is not a characteristic of the mail to which rates under the incentive program apply. For instance, a promotional rate that provided a 2-cent discount for First-Class letters weighing more than 2 ounces to any mailer that in the previous year sent more than 100,000 First-Class letters weighing more than 2 ounces would not be a rate of general applicability. In that case, eligibility for the discount hinges on the volume of mail sent by the mailer before the incentive program begins. Because historic volumes are not characteristics of the mail to which the discount applies, the discount would not be considered a rate of general applicability.

The Technology Credit Promotion proposed in Docket No. R2013–6 was not a rate of general applicability because eligibility for the discount hinged on the past behavior of mailers rather than the characteristics of mail sent under the promotion. Order No. 1743 at 15. The fact that the Technology Credit Promotion was a volume-based promotion was not what prevented the Commission from treating it as a rate of general applicability. Rather, it was the fact that certain mailers would not be able to qualify for the promotion, no matter how much or what kind of mail they sent going forward. *Id.* The universe of mailers that could qualify for the promotion was determined in advance. No matter what they did, no matter how they altered their business model or mailings to respond to the Postal Service's incentives, some mailers would not be able to participate in the Technology Credit Promotion.

*D. Niche Classifications Can Be Rates of General Applicability*

NPPC requests that the Commission clarify whether a niche classification designed to be available in practice to ''only a very small number of mailers'' and for which no contract is available would be considered a rate of general applicability. NPPC Comments at 4. A niche classification with rates that are only available to a small number of mailers can be a rate of general applicability.

For instance, the Commission recently provided clarification on the price cap treatment of the rates for the round-trip DVD mailer product. Order No. 1807 at 7–10. Only a few mailers qualify for the round-trip DVD mailer rates.[17] Nevertheless, the Commission explained that if the Postal Service had chosen to increase rates for letter-shaped round-trip DVD mail within that product, the increase ''would have required the filing of a notice of price adjustment that triggered a recalculation of available CPI pricing authority. . . .'' Order No. 1807 at 9. There would have been little sense in requiring a recalculation of the annual limitation on the percentage change in rates if the Commission intended to exclude the hypothetical rate increase for letter-shaped round-trip DVD mail from the calculation of the percentage change in rates.

There is some evidence that mailers also view niche classifications as being more generally applicable than negotiated service agreements.[18] In Docket No. RM2013–2, Valpak requested that the Commission include an explanation in each notice of Type 2 rate adjustment of why the Postal Service was entering into a negotiated service agreement rather than establishing a niche classification.[19] It based this request on former 39 CFR 3001.195(a)(1), which required the Postal Service to provide a written justification for entering into a negotiated service agreement ''as opposed to a more generally applicable form of classification.'' *Id.*

*E. Rates That Require Mailers To Obtain ''Ministerial Approval'' From the Postal Service Can Be Rates of General Applicability*

NPPC also requests that the Commission clarify whether a rate that depends on ''at least a ministerial approval by that Postal Service'' that is ''discretionary to some degree'' could be considered a rate of general applicability. NPPC Comments at 4. It cites non-profit and Periodicals mail rates as examples of rates that require the Postal Service to exercise this kind of discretion.

The opportunity for the Postal Service to exercise discretion in determining which mail is eligible for a rate does not, without more, prevent the rate from being considered a rate of general applicability. Postal Service employees routinely make determinations about mailability, machinability, and eligibility for rates of general applicability. In each of these circumstances, the Postal Service exercises its discretion within statutory and regulatory boundaries described in the MCS, the Domestic Mail Manual (DMM), or the IMM. For instance, letters and cards must meet the dimensional, weight, and automation compatible standards in DMM section 201 in order to be eligible for the machinable rate. Some of these standards are objective (such as weight). Others require the exercise of discretion. See, *e.g.,* DMM section 201.3.10 (permitting ''reasonably flexible items'' to be deemed automation compatible). If mailpieces are deemed nonmachinable, a nonmachinable surcharge is imposed. That discretion does not prevent changes in the amount of the nonmachinable surcharge from being included in the calculation of the percentage change in rates.[20] Similarly, the Postal Service has the discretion to determine whether a mailpiece is a periodical publication as described in 39 U.S.C. 3626(b). That discretion does not prevent rates for periodicals from being included in the calculation of the percentage change in rates.[21]

Rates for which mailers are eligible only when Postal Service employees exercise discretion outside the boundaries of the MCS, the DMM, or the IMM are less likely to be considered rates of general applicability. For example, in Docket No. R2013–10, the Postal Service proposed a coupon program that would give $50 or $100 coupons to new Every Door Direct Mail (EDDM) customers. Order No. 1890 at 75–76. Postal Service sales representatives would determine the amount of the coupon ''based on an understanding of customer needs.'' *Id.* at 75. The sales representatives would determine which customers received a coupon, but not every customer eligible for a coupon would receive one. *Id.* The Postal Service elected not to include the EDDM coupon program in its calculation of the percentage change in rates, so the Commission did not reach

[17] See Docket Nos. MC2013–57 and CP2013–75, Response of the United States Postal Service to Chairman's Information Request No. 1, January 17, 2014, question 1 (asserting that two mailers represent the overwhelming majority of round-trip DVD mail).

[18] See Docket No. RM2013–2, Order Adopting Final Rules for Determining and Applying the Maximum Amount of Rate Adjustments, July 23, 2013, at 27–28 (Order No. 1786).

[19] Docket No. RM2013–2, Valpak Direct Marketing Systems, Inc. and Valpak Dealers' Association, Inc. Comments on Notice of Proposed Rulemaking, May 16, 2013, at 13.

[20] See Docket No. R2008–1, Library Reference PRC–R2008–1–LR1, March 17, 2008, FCM_cap_calculations, lines 13–15.

[21] See, *e.g.,* Docket No. R2013–10, Library Reference USPS–LR–R2013–10/3, September 26, 2013.

the question of whether the program constituted a rate of general applicability. However, as proposed by the Postal Service,[22] the program would appear not to be a rate of general applicability because it was not available to all mail meeting standards established in the MCS, the DMM, or the IMM. It was available only to mail meeting standards established in the MCS, the DMM, or the IMM that was sent by a select number of mailers chosen by Postal Service representatives.

*F. Applying the Proposed Definition to Previously-Approved Rates*

Several commenters requested that the Commission discuss whether certain previously-approved rates would be considered rates of general applicability. PostCom Comments at 3–6; Postal Service Comments at 3–5; Valpak Reply Comments at 2.

At the outset, it is important to emphasize that not every rate incentive that meets the definition of ''rate of general applicability'' will be included in the calculation of the percentage change in rates. As discussed in proposed § 3010.23(e)(2), in order to be included in the calculation of the percentage change in rates, a rate incentive must meet three tests. First, it must be in the form of a discount or easily translated into a discount. Proposed § 3010.23(e)(2)(i). Second, there must be sufficient billing determinants available. Proposed § 3010.23(e)(2)(ii). Finally, the rate incentive must be a rate of general applicability. Proposed § 3010.23(e)(2)(iii). If a rate incentive is not in the form of a discount (or easily translated to a discount), it will not be included in the percentage change in rates. Likewise, if sufficient billing determinants are not available, the rate incentive will not be included in the percentage change in rates.

Additionally, not every promotion listed below was included in the calculation of the percentage change in rates. In some instances, the Postal Service chose not to include a rate incentive that is a rate of general applicability in the calculation of the percentage change in rates. This choice is consistent with proposed § 3010.23(e)(1).

A discussion of each rate identified by the commenters is provided below. For each rate, the Commission provides a brief description of the rate and a short discussion of whether the rate would be considered a rate of general applicability, as that term is defined in proposed § 3010.1(g). For each rate, the Commission also explains any adjustments to billing determinants and indicates whether the Postal Service chose to include the effects of the rate in the calculation of the percentage change in rates.

*Summer sales.* Mailers who participated in the summer sales approved in Docket Nos. R2009–3 and R2010–3 received a 30-percent rebate based on mail volume that exceeded predetermined thresholds.[23] Eligibility for these incentives was based on the volume of mail sent by a mailer in the previous year. *Id.* As discussed in section B above, the volume sent by a mailer in a previous year is not a characteristic of the mail to which the rate applies. Therefore, the summer sales would not be considered rates of general applicability and would be subject to proposed § 3010.24. The Postal Service chose not to include the summer sales in the calculation of the percentage change in rates. Order No. 219 at 9; Order No. 439 at 12.

*Standard Mail High Density Flats.* In Docket No. R2009–4, the Postal Service requested a rate decrease for all Standard Mail High Density Flats in order to address mailer concerns about detrimental impacts on businesses.[24] Because the rate decrease applied to all mailpieces, the rate would be considered a rate of general applicability.[25] The Postal Service chose not to include the rate decrease in the calculation of the percentage change in rates. *Id.* at 6.

*First-Class Mail Incentive Program.* Under the First-Class Mail Incentive Program, mailers received a 20-percent rebate for mailpieces sent over a predetermined threshold.[26] Eligibility for the incentive was based on the volume of mail sent by a mailer in the previous year. *Id.* As discussed in section B above, the volume sent by a mailer in a previous year is not a characteristic of the mail to which the rate applies. The First-Class Mail Incentive Program would not be considered a rate of general applicability. Thus, it would have been subject to proposed § 3010.24. The Postal Service chose not to include the First-Class Mail Incentive Program in the calculation of the percentage change in rates. *Id.* at 9.

*Reply Rides Free Promotion and Saturation and High Density Incentive.* The Reply Rides Free Promotion allowed eligible mailers to send a mailpiece that included a reply card or envelope at the 1-ounce rate as long as the mailpiece's weight did not exceed 1.2 ounces.[27] Only customers who mailed First-Class Mail Presort and Automation Letters in the previous two fiscal years qualified for the promotion. *Id.* The Saturation and High Density Incentive provided a rebate to mailers who increased current mail volumes over a predetermined threshold. *Id.* at 24. Only customers with at least six mailings in the previous fiscal year were eligible for the incentive. *Id.* Eligibility for both promotions was based on the volume of mail sent by a mailer in the previous year. *Id.* at 22, 24. As discussed in section B above, the volume sent by a mailer in a previous year is not a characteristic of the mail to which the rate applies. Therefore, neither rate would be considered a rate of general applicability and both rates would have been subject to proposed § 3010.24.

This outcome is consistent with the Commission's actual treatment of these two promotions. The Postal Service requested that the Reply Rides Free Promotion and Saturation and High Density Incentive Program be included in the calculation of the percentage change in rates. *Id.* at 17–18. The Commission rejected the Postal Service's proposal to include the Promotion and Incentive in the price cap calculation, finding that ''[m]ailers that are not eligible to participate should not have negative consequences resulting from the incentive.'' *Id.* at 19.

*2011 Mobile Barcode Promotion.* The 2011 Mobile Barcode Promotions offered a 3-percent discount for mailpieces that included a mobile

[22] This paragraph discusses the EDDM coupon as proposed by the Postal Service. Section E below, discusses the application of proposed § 3010.1(g) to the rate as approved by the Commission.

[23] Docket No. R2009–3, Order Approving Standard Mail Volume Incentive Pricing Program, June 4, 2009, at 2–3 (Order No. 219); Docket No. R2010–3, Order Approving Standard Mail Volume Incentive Pricing Program, April 7, 2010, at 7 (Order No. 439).

[24] Docket No. R2009–4, Order Approving Price Adjustment for Standard Mail High Density Flats, July 1, 2009, at 2–3 (Order No. 236).

[25] PostCom points out that footnote 14 of Order No. 1879 (incorrectly) implies that the Standard Mail High Density Flats rates and the Mobile Barcode promotions were not rates of general applicability. PostCom Comments at 4. This was an error on the Commission's part. The dockets listed in footnote 14 involved rates that were not included in the calculation of the percentage change in rates. The footnote should have distinguished between rates that were excluded because they were not rates of general applicability and rates that the Postal Service chose not to include in the calculation of the percentage change in rates.

[26] Docket No. R2009–5, Order Approving First-Class Mail Incentive Pricing Program, September 16, 2009, at 5 (Order No. 299).

[27] Docket No. R2011–1, Order Approving Market Dominant Classification and Price Changes, and Applying Price Cap Rules, December 10, 2010, at 22 (Order No. 606).

barcode.[28] The presence of a mobile barcode is a characteristic of the mail to which the discounted rate applied. Thus, the rate would be considered a rate of general applicability. The Postal Service did not include the 2011 Mobile Barcode Promotion in the calculation of the percentage change in rates and the Commission found such treatment reasonable given the uncertainty over the number of mailers that would use the discount. *Id.* at 9. However, the Commission noted in that docket that the 2011 Mobile Barcode Promotion was generally applicable. *Id.*

*2012 Mobile Barcode Promotion and Mobile Shopping Promotion.* The 2012 Mobile Barcode Promotion in Docket No. R2012–6 and the Mobile Shopping Promotion in Docket No. R2012–9 offered a 2-percent discount to any mailpieces that included a mobile barcode.[29] The mobile barcode was required to direct the recipient to a Web site that would allow the recipient to purchase a product. *Id.* The presence of a mobile barcode is a characteristic of the mail to which the rate applies. Thus, these rates would be considered rates of general applicability. The Postal Service did not include either of these promotions in the calculation of the percentage change in rates and the Commission found such treatment reasonable given the uncertainty over the number of mailers that would use the discount. Order No. 1296 at 6–7; Order No. 1424 at 7. However, the Commission noted that both rates were generally applicable. *Id.*

*Mail to Mobile Promotions.* In Docket No. R2013–1, the Postal Service combined the Mobile-Coupon/Click-to-Call Promotion, Emerging Technology Promotion, and Mobile Buy-It-Now Promotion into a category called Mail to Mobile Promotions.[30] The Mail to Mobile Promotions sought to enhance the long term value of mail through barcodes and other innovative technologies that foster Web site interactions. *Id.* Mailpieces that included a specified type of barcode or technology received a 2-percent discount. *Id.* The presence of mobile barcodes and other technologies are characteristics of the mail to which the rate applies. Thus, these promotions would be considered rates of general applicability. In Order No. 1541, the Commission approved the Postal Service's request to include these promotions in the calculation of the percentage change in rates. *Id.* at 17. Billing determinants from the 2011 Barcode Promotion were used as a proxy for the Mail to Mobile category when calculating price cap adjustments. *Id.*

*Picture Permit Promotion and Product Samples Promotion.* The Picture Permit Promotion temporarily eliminated the Picture Permit charge for registered mailers that included a logo, trademark, or brand in the indicia of a mailpiece.[31] Any mailer could register for the promotion and participants were encouraged to register in advance. *Id.* The Product Samples Promotion provided a 5-percent discount for any package that included product samples. *Id.* at 12. Both promotions offered a discount to any mailer that mailed pieces with the appropriate characteristics. Thus, the rates would be considered rates of general applicability. The requirement to register in advance would not prevent these promotions from being considered rates of general applicability. Registration was not limited to particular mailers; it was merely an administrative requirement. The Postal Service chose not to include these promotions in the calculation of the percentage change in rates.

*Branded Color Mobile Technology Promotion and Mail and Digital Personalization Promotion.* The Branded Color Mobile Technology Promotion and Mail and Digital Personalization Promotion were categorized as continuations of previous technology promotions (Continuing Promotions). Order No. 1890 at 58. The Branded Color Mobile Technology Promotion provides a 2-percent discount for any mailpiece that includes a multi-color mobile barcode inside or on the mailpiece. *Id.* at 53. The Mail and Digital Personalization Promotion provides a 2-percent discount for any mailpiece that includes a personalized or customized Web page link and uses a mailpiece customized to the recipient. *Id.* at 54. Both promotions offer a discount for any mail with the appropriate mailpiece characteristics. Thus, the promotional rates would be considered rates of general applicability. The Commission stated that these promotions are not limited-availability promotions. *Id.* at 59. The combined billing determinants from the Direct Mail Mobile Coupon and Click-to-Call Promotion, the Emerging Technology Promotion, and the Mobile Buy-It-Now Promotion in Docket No. R2013–1 are used as a proxy for these Continuing Promotions. *Id.* at 60. The Commission further explained that the promotions were included in the calculation of the percentage change in rates in order to ensure ''that the Postal Service will be accountable for the price cap effects of terminating these promotions in the future.'' *Id.* at 59.

*Earned Value Reply Mail Promotion.* The Earned Value Reply Promotion provides any mailer sending First-Class Mail Business Reply and Courtesy Reply Mail enclosures a 2-cent credit for each mailpiece returned during the promotion period. *Id.* at 55. The promotions are available uniformly to any mailer sending a First-Class Mail Business Reply or Courtesy Reply Mail enclosure. Thus, this aspect of the promotion would be considered a rate of general applicability.

However, the Postal Service also offered a 3-cent discount to mailers that participated in the 2013 Earned Value Reply Mail Promotion and had higher total return counts in 2014 compared to 2013. *Id.* The 3-cent discount depends on volume in a previous year, which is not a characteristic of the mail to which the rate applies. Thus, the 3-cent discount portion of the promotion would not qualify as a rate of general applicability. Billing determinants from the 2013 Earned Value Reply Mail promotion were used as a proxy for this promotion. *Id.* at 55–56. The Postal Service calculated an average of the 2-cent and 3-cent discounts for the promotional rate, but was directed by the Commission to use only the 2-cent rate in order to avoid speculation about participation in the program. *Id.* at 61.

*Emerging Technology Featuring Near Field Communication (NFC) Promotion and Mail Drives Mobile Commerce Promotion.* The Emerging Technology Featuring NFC Promotion and Mail Drives Mobile Commerce Promotion (Continuing Promotions) are continuations of similar promotions that encourage the use of technology and barcodes to enhance the value of mail. *Id.* at 76. The Emerging Technology Featuring NFC Promotion provides a 2-percent discount on mailpieces that incorporate a near field communication or similar technology.[32] The Mail Drives Mobile Commerce Promotion provides a

[28] Docket No. R2011–5, Order Approving Market Dominant Price Adjustment, May 17, 2011, at 3 (Order No. 731).

[29] Docket No. R2012–6, Order Approving Market Dominant Price Adjustment, March 26, 2012, at 3 (Order No. 1296); Docket No. R2012–9, Order Approving Market Dominant Price Adjustment, August 7, 2012, at 3 (Order No. 1424).

[30] Docket No. R2013–1, Order on Price Adjustments for Market Dominant Products and Related Mail Classification Changes, November 16, 2012, at 14 (Order No 1541).

[31] Docket No. R2013–1, United States Postal Service Notice of Market-Dominant Price Adjustment, October 11, 2012, Attachment D at 10 (Docket No. R2013–1 Notice).

[32] Docket No. R2013–10, United States Postal Service Notice of Market-Dominant Price Adjustment, September 26, 2013, Attachment D at 7.

2-percent discount to any mailpiece that includes a mobile barcode that directs a recipient to a shopping Web site accompanied by instructions. *Id.* at 8. Both promotions offered a discount to any mail meeting the appropriate mailpiece characteristics. Thus, the rates would be considered rates of general applicability. The Postal Service used the Holiday Mobile Shopping Promotion, the 2013 Emerging Technology Promotion, and the Mobile Coupon Click to Call Promotion as proxies for these Continuing Promotions. Order No. 1890 at 76. The Commission allowed the Continuing Promotions to be included in the calculation of the percentage change in rates after correcting for the termination of the Emerging Technology Promotion for First-Class Mail. *Id.* at 61.

*EDDM Coupon Program.* The EDDM Coupon Program provides new EDDM customers with a coupon. *Id.* at 75. The program is limited by a redemption cap set at $3 million. *Id.* at 75–76. Eligibility for the program is restricted to new customers who receive the coupon on a first-come, first-served basis. Existing customers would not be eligible for the coupon. Like the Technology Credit Promotion, eligibility for the coupon is based on the mailer's behavior during the period before the promotion begins, which is not a characteristic of the mail to which the rate applies. Thus, the rate would not be considered a rate of general applicability. The Postal Service did not include the program in the price cap calculation. *Id.* at 76.

*Premium Advertising Promotion and High Density and Saturation Incentive.* The Premium Advertising Promotion provided a 15-percent discount to eligible mailers for mailing pure marketing and advertising content. *Id.* at 55. Eligibility was restricted to mailers who generated a certain amount of revenue in the previous year. *Id.* The High Density and Saturation Incentive provided mailers with a rebate if they increased mail volume over a customer-specific threshold. *Id.* at 75. Both promotions are based on previous mailings and volumes and thus would not be considered rates of general applicability.

*Color Print in First-Class Mail Transactions Promotion.* The Color Print in First-Class Mail Transactions Promotion provides a 2-percent discount to any mailpiece that includes dynamic variable color messaging on financial bills and statements and complies with the Full Service IMb requirements. *Id.* at 54. The color messaging and Full Service IMb compliance are characteristics of the mail to which the rate applies. Thus, the rates would be considered rates of general applicability. The Postal Service chose not to include the promotion in the calculation of the percentage change in rates. *Id.*

*F. Incentives and Discounts That Are Not Rates of General Applicability Will Be Treated Like Negotiated Service Agreements*

The Postal Service objects to proposed § 3010.24, which would require that discounts and incentives that are not rates of general applicability be treated like negotiated service agreements for purposes of calculating the percentage change in rates. Postal Service Comments at 5–6. It argues that the proposed section would limit ''how the Postal Service could use price cap authority generated by reducing rates for the many mailers who would be eligible to participate in rate incentives not of general applicability.'' *Id.* at 6. It asserts that the proposed section would prevent the Postal Service from using all of its pricing authority and discourage it from ''developing targeted rate incentives that could more effectively drive beneficial mailer behaviors.'' *Id.*

PostCom, Pitney Bowes, the Joint Commenters, NPPC, the Public Representative, and Valpak support proposed § 3010.24. PostCom believes that the proposed section appropriately prevents price cap authority from being created when an incentive rate is available only to a subset of mailers. PostCom Comments at 3. Pitney Bowes asserts that the proposed section addresses its concern that it would be inequitable or unjust to allow non-participating mailers to pay higher rates as a result of a temporary promotion. Pitney Bowes Comments at 4. The Joint Commenters characterize the proposed rule as reasonable and equitable. Joint Commenters Comments at 2. NPPC finds the proposed section proper because a rate that is not a rate of general applicability allows the Postal Service ''to discriminate in favor of a limited number of mailers by offering to them a reduced rate, and to control the access to that rate.'' NPPC Comments at 2. The Public Representative also posits a ''discriminatory impact of increasing price cap authority for mailers ineligible for incentive or promotional rates.'' PR Reply Comments at 2. Valpak argues that the Postal Service's opposition to the proposed section disregards 39 U.S.C. 101(d), which requires that postal rates apportion costs of postal operations to all users of the mail on a fair and equitable basis. Valpak Reply Comments at 3.

Pitney Bowes and the Joint Commenters point out the similarities between negotiated service agreements and incentives and discounts that are not rates of general applicability, including the limited number of participants and the shared purpose of increasing revenue and contribution. Pitney Bowes Comments at 3; Joint Commenters Comments at 2.

The Commission declines to modify proposed § 3010.24. Subjecting mailers to the risk that the Postal Service may increase rates as a result of additional cap room created by a promotion or incentive that is not generally applicable is inappropriate. In its annual price adjustment filings, the Postal Service is free, within the confines of the price cap, to change rates of general applicability as it sees fit. To that end, the Postal Service routinely offers discounts and incentives that are targeted at a certain type of mail but available to all mailers.[33] While it may be true that, in practice, some mailers will not choose to take advantage of such targeted discounts or incentives, the decision lies solely with the mailer.

In contrast, a discount or incentive that is not a rate of general applicability precludes certain mailers from participating, whether they want to or not. The Commission does not wish to prevent discounts or incentives that target certain types of mail from being included in the calculation of the percentage change in rates. It does, however, wish to prevent discounts or incentives that are limited to certain mailers from being included in the calculation of the percentage change in rates. For instance, the Postal Service chose to target First-Class Mail Business Reply and Courtesy Reply Mail in its Earned Value Reply Mail Promotion. Order No. 1890 at 55. Those promotional rates were included in the calculation of the percentage change in rates. *Id.* at 61. The Technology Credit Promotion, on the other hand, was limited to mailers who had sent a certain volume from the previous fiscal year. Order No. 1743 at 15. The Commission excluded the Technology Credit Promotion from the calculation of the percentage change in rates. *Id.* at 17.

## V. Adjustment for the Deletion of Rate Cells When No Alternate Rate Cell Is Available

Under the Commission's existing rules, when the Postal Service proposes a classification change that introduces, deletes, or redefines a rate cell, it must make reasonable adjustments to its

[33] See, *e.g.*, Order No. 1424 at 3–4 (Mobile Shopping Promotion); Docket No. R2013–1 Notice, Attachment D at 12 (Product Samples Promotion); Order No. 1890 at 54 (Color Print in First-Class Mail Transactions Promotion).

billing determinants. 39 CFR 3010.23(d). Proposed § 3010.23(d)(4) specifies that, in the case of a classification change that deletes a rate cell for which no alternate rate cell is available, the billing determinants should be adjusted to zero. If the Postal Service does not adjust the billing determinants to zero in this circumstance, it must explain how it proposes to treat the rate cell.

Pitney Bowes asserts that proposed § 3010.23(d)(4) is ''intended to address adjustments for deleted rate cells that result from the transfer of a product to the competitive products category.'' Pitney Bowes Comments at 2. It suggests that the Commission modify the proposed rule to explicitly refer to product transfers, ''to ensure it is applied only in the intended circumstance. . . .'' *Id.* It proposes language to accomplish this goal. *Id.* at 3. The Joint Commenters also request that the Commission modify the proposed section to ''make clear that this rule *only* applies to situations in which a rate cell is deleted because of a product transfer, but for no other reason.'' Joint Commenters Comments at 2–3 (emphasis in original). MPA supports the approach proposed by Pitney Bowes and the Joint Commenters. MPA Reply Comments at 2.

The Public Representative argues that proposed § 3010.23(d)(4) should not be limited to product transfers. PR Reply Comments at 6. He points out that a rate cell can be deleted ''for any one of several reasons apart from product transfers.'' *Id.*

NPPC and PostCom do not express an opinion on whether the Commission should limit the application of proposed § 3010.23(d)(4) to product transfers. NPPC Comments at 6; PostCom Reply Comments at 4–5. Rather, they ask the Commission to state that proposed § 3010.23(d)(4) would not apply to the Full Service IMb change described in Order No. 1890. *Id.* In that docket, the Postal Service proposed a classification change that resulted in the modification or deletion of a rate cell. Order No. 1890 at 15. However, NPPC and PostCom point out that the Commission did not require the Postal Service to adjust the billing determinants to zero because alternate rate cells were available. NPPC Comments at 6; PostCom Reply Comments at 4–5.

Pitney Bowes and MPA also seek reassurance that proposed § 3010.23(d)(4) would not have applied in Docket No. R2013–10, although they do so on the basis of their understanding that proposed § 3010.23(d)(4) applies only to product transfers. See Pitney Bowes Reply Comments at 2; MPA Reply Comments at 2. The Public Representative believes that Docket No. R2013–10 presented an unusual situation and that the question of how to adjust billing determinants is best handled on a case-by-case basis. PR Reply Comments at 6–7.

Although it supports proposed § 3010.23(d)(4) in the context of the Parcel Post example given in Order No. 1786, the Postal Service ''is concerned about what the Commission means by 'deletion of a rate cell.' '' Postal Service Comments at 7. It believes that in circumstances like those in Docket No. R2013–10, it would not be clear when the proposed section would apply because it was not clear whether a rate cell was redefined or deleted. *Id.* at 7–8. It asserts that a case on appeal to the D.C. Circuit ''includes the issue of whether a mail preparation requirement can result in the deletion of a rate cell'' and requests that the Commission delay the implementation of proposed § 3010.23(d)(4) until the D.C. Circuit issues a decision in that case. *Id.* at 8. PostCom, Pitney Bowes, the Public Representative, and MPA do not support delaying the implementation of the proposed rules. PostCom Reply Comments at 5; Pitney Bowes Reply Comments at 2; PR Reply Comments at 7; MPA Reply Comments at 2.

The Commission declines to limit the application of proposed § 3010.23(d)(4) to deletions resulting from transfers of products to the competitive product list. The Parcel Post case cited in the notice of proposed rulemaking was an example of the Commission requiring the Postal Service to adjust billing determinants to zero as a result of a classification change that led to the deletion of a rate cell. However, transfers of products from the market dominant product list to the competitive product list are not the only classification changes that could result in the deletion of a rate cell. For example, the Postal Service could remove a product from the market dominant product list without moving it to the competitive product list. See 39 CFR 3020.30. The Postal Service could also update size or weight limitations in a manner that resulted in the deletion of a rate cell (for example, by reducing the maximum weight of Bound Printed Matter Parcels from 15 pounds to 10 pounds). See 39 CFR 3020.111.

In addition, the Commission does not intend to require the Postal Service to adjust billing determinants to zero whenever it transfers a product from the market dominant product list to the competitive product list, as described in the language proposed by Pitney Bowes. If alternate rate cells are available for a rate cell deleted due to the transfer of a product to the competitive product list, the Commission expects the Postal Service to use those alternate rate cells to make reasonable adjustments to its billing determinants instead of adjusting the billing determinants to zero. See proposed § 3010.23(d)(2).

In order for proposed § 3010.23(d)(4) to apply to a classification change, the classification change must meet two criteria. First, it must result in the deletion of a rate cell. Second, there must be no alternate rate cells available. In the case of the Full Service IMb change described in Order No. 1890, alternate rate cells were available and the Postal Service could make reasonable adjustments to the billing determinants to take into account the effects of the classification change. Because alternate rate cells were available, proposed § 3010.23(d)(4) would not have applied. This is true regardless of whether the Full Service IMb change is characterized as resulting in the redefinition of rate cells or the deletion of rate cells. Consequently, the Commission declines to delay the implementation of proposed § 3010.23(d)(4) pending the appeal of Order No. 1890.

Given the issues raised by commenters, the Commission finds it would be useful to modify the heading of proposed § 3010.23(d)(4) to specify that it describes how adjustments to billing determinants are to be made in the case of the deletion of a rate cell when an alternate rate cell is not available. It makes no other modifications to proposed § 3010.23(d)(4).

## VI. *De Minimis* Rate Increases

The Postal Service requests that the Commission raise the proposed threshold for *de minimis* rate increases under proposed § 3010.30 from 0.001 percent to ''at least 0.05 percent.'' Postal Service Comments at 8–9, n.18. It argues that the 0.001 percent threshold is too low to afford it meaningful pricing flexibility. *Id.* at 9. It asserts that a threshold of 0.001 percent would not be sufficient to correct the nonprofit passthrough for Standard Mail 5-Digit Automation Flats, as directed by the Commission in Order No. 1890, or to correct errors discovered after the close of a rate case. *Id.* The Public Representative and Pitney Bowes support raising the *de minimis* threshold. PR Reply Comments at 10; Pitney Bowes Reply Comments at 3. The Public Representative supports raising the threshold to an amount ''as large as practical.'' PR Reply Comments at 10. He supports a limit of 0.05 percent ''if the rate adjustment is for the correction

of calculation errors or pursuant to Commission directive.'' *Id.* Pitney Bowes supports a ''modest increase'' in the threshold. Pitney Bowes Reply Comments at 3. PostCom opposes the Postal Service's proposal, asserting that the 0.001 percent limitation is necessary to ensure that the Postal Service does not circumvent the annual limitation. PostCom Reply Comments at 5.

Congress directed the Commission to establish a system for regulating rates and classes for market dominant products that includes an annual limitation on the percentage change in rates equal to the change in the Consumer Price Index for All Urban Consumers [CPI–U] unadjusted for seasonal variation over the most recent available 12-month period. . . . 39 U.S.C. 3622(d)(1)(A). The Bureau of Labor Statistics (BLS) reports the CPI–U index to three digits.[34] Because Congress linked the calculation of the annual limitation to the change in the CPI–U, and the CPI–U is calculated to three digits, it is reasonable to conclude that Congress did not intend to limit the Postal Service's ability to make rate increases of less than 0.001 percent.

Although the Postal Service and the Public Representative describe circumstances when a higher *de minimis* threshold may have some appeal, they have not articulated a compelling basis for establishing the threshold at a level that is greater than the smallest change in CPI–U that can be calculated using BLS data. Consequently, the Commission makes no change to the *de minimis* threshold under proposed § 3010.30.

## VII. Miscellaneous Issues

### *A. Seasonal and Temporary Rates Will Continue To Be Identified and Treated as Rate Cells Separate and Distinct From Permanent Rates When Calculating the Percentage Change in Rates*

NPPC requests that the Commission confirm its understanding that seasonal and temporary rates will continue to be identified and treated as rate cells separate and distinct from permanent rates when calculating the percentage change in rates. NPPC Comments at 7. NPPC's understanding is correct. Proposed § 3010.23(a)(2) continues the Commission's practice of assigning seasonal and temporary rates to separate rate cells. Under the proposed rules, the ''current rate'' for a seasonal or temporary rate would be the most recent rate in effect for the rate cell, regardless of whether the seasonal or temporary rate is available at the time the Postal Service files the notice of rate adjustment. Proposed § 3010.23(a)(1)(ii). For a seasonal or temporary promotion, the most recent rate in effect for the rate cell is the rate under the seasonal or temporary promotion. For example, if the Postal Service offers a 2-cent Mother's Day discount for 1-ounce stamped mail sent during the month of May 2014, there will be two separate rate cells for 1-ounce stamped mail: One rate cell for volume sent at the normal, undiscounted rate and a separate rate cell for volume sent at the Mother's Day rate. If the Postal Service files a notice of Type 1–A rate adjustment in October 2014, the rate for the undiscounted rate cell will be 49 cents (the undiscounted rate in effect in October 2014) and the rate for the Mother's Day rate cell will be 47 cents (the most recent rate in effect for the Mother's Day rate cell).

### *B. Unused Rate Adjustment Authority Generated By a Mid-Year Promotion or Incentive Program May Be Applied to Any Rate in the Same Class*

PostCom argues that any additional unused rate adjustment authority generated by a mid-year promotion or rate incentive program should be applied only to the products that were eligible for the promotion or incentive, to ensure that promotional and incentive pricing is non-discriminatory. PostCom Comments at 7; PostCom Reply Comments at 4. It asserts that the Commission recognized the principle that rate adjustment authority should be tied to individual products in Order No. 1541, which it contends allowed the Postal Service ''to account for revenue forgone from promotions only 'so long as volumes are properly ascribed to the appropriate products.''' PostCom Comments at 7; PostCom Reply Comments at 4 (both citing Order No. 1541 at 18).

The Postal Service opposes this proposal. Postal Service Reply Comments at 4. It argues that 39 U.S.C. 3622(d)(2)(A) makes clear that the annual limitation on the percentage change in rates is calculated at the class level, not the product level. *Id.* It cites two dockets where the Commission allowed unused rate adjustment authority to be generated for the whole Special Services class as a result of rate reductions applicable only to specific products. *Id.* at 5 (citing Order No. 1756 at 3, 8; Order No. 987 at 44–47). It asserts that the language from Order No. 1541 cited by PostCom relates to how volumes should be treated for purposes of calculating the percentage change in rates, not how the Postal Service can apply unused rate adjustment authority.

The Postal Service is correct. Section 3622(d)(2)(A) of title 39, United States Code, expressly applies the annual limitation on the percentage change in rates at the class level. Section 3622(d)(2)(C) limits the maximum amount of unused rate adjustment authority the Postal Service can exercise in any one year ''for any class or service.'' Furthermore, 39 CFR 3010.28 limits the maximum amount of unused rate adjustment authority that may be used to make a Type 1–B rate adjustment ''for any class.'' In Order No. 1786, the Commission declined to apply the annual limitation ''at anything other than the class level, consistent with the clear language of 39 U.S.C. 3622(d)(2)(A).'' Order No. 1786 at 8. In that same order, the Commission specified that unused rate adjustment authority is also calculated ''for each class.'' *Id.* at 20.

The language from Order No. 1541 cited by PostCom relates to how the Postal Service accounted for volumes relating to First-Class Mail promotions. There, the Commission determined that the Postal Service could account for the promotions by applying a separate adjustment when calculating the percentage change in rates. It did not speak to the appropriate use of unused rate adjustment authority in subsequent rate cases. The Commission declines to make the change proposed by PostCom.

### *C. The Postal Service Will Not Be Required To Reconcile Volume Sent at Promotional Rates With Unused Rate Adjustment Authority Claimed in Its Next Scheduled Rate Adjustment*

PostCom requests that the Commission require the Postal Service to reconcile volume sent at promotional rates with pricing authority claimed on its next scheduled rate adjustment. PostCom Comments at 7–9. It refers to its proposal as a ''true-up'' requirement. *Id.* PostCom reasons that the Postal Service ''should only be permitted to account for revenue foregone from promotional prices if it in fact foregoes that revenue.'' *Id.* at 8. It again cites Order No. 1541, this time for the proposition that if volumes for promotional rates are overstated, the rate authority created by the promotion would be overstated as well. *Id.* (citing Order No. 1541 at 17). It asserts that its proposal would ensure the accuracy of the amount of any unused rate adjustment authority created by promotions. *Id.* at 8–9. The Public Representative supports this proposal,

[34] Order No. 1879 at 13; Docket No. RM2009–8, Notice of Proposed Rulemaking to Amend the Cap Calculation in the System of Ratemaking, July 10, 2009, at 2 (Order No. 246); Docket No. RM2009–8, Order Amending the Cap Calculation in the System of Ratemaking, September 22, 2009, at 1 (Order No. 303).

opining that it would be ''useful and not an onerous requirement for the Postal Service.'' PR Reply Comments at 8. He notes that the proposal could require revisions to proposed § 3010.23(d) but does not specify what those revisions would be. *Id.*

The Postal Service objects to the proposal. Postal Service Reply Comments at 6–8. It views the proposal as an attempt to treat unused rate adjustment authority generated as a result of a rate incentive ''differently from any other pricing authority available to the Postal Service.'' *Id.* at 7. It argues that if it is required to reconcile volumes sent at promotional rates, it should also be permitted to reconcile volumes sent at non-promotional rates, for which it was required to use historical billing determinants that may have underestimated volumes actually sent in subsequent years. *Id.*

The Commission will not require the Postal Service to reconcile volumes sent at promotional rates as proposed by PostCom. As the Commission explained at length in Order No. 1786, the percentage change in rates is calculated by using a fixed set of historical billing determinants to weight current rates and proposed rates. Order No. 1786 at 14–20. The true-up requirement proposed by PostCom is inconsistent with the current backward-weighted index used to calculate price changes. In Docket No. RM2013–2, the Commission rejected requests to allow the Postal Service to use anticipated changes in mailer behavior to weight proposed rates, on the basis that they were inconsistent with the use of a fixed rate index of prices, where the prior year's billing determinants serve as the weight for each rate cell.

The Commission finds no rational basis for requiring the Postal Service to reconcile volumes sent at promotional rates without also allowing it to reconcile volumes sent at non-promotional rates. If the Postal Service would be at risk of a reduction in unused rate adjustment authority if volumes sent at promotional rates in a particular year are lower than those sent at promotional rates during the previous year, it should also be eligible for an increase in unused rate adjustment authority if volumes sent at non-promotional rates during a particular year exceed the volumes sent at non-promotional rates during the previous year.

However, such an approach runs the risk of creating substantial uncertainty about the amount of unused rate adjustment authority available to the Postal Service. This level of uncertainty is inconsistent with 39 U.S.C. 3622(b)(2), which requires that the system for regulating rates for market dominant classes of mail be designed to, among other things, ''create predictability and stability in rates.'' Additionally, the Commission does not have sufficient data at this time to determine that a true-up requirement would result in a more accurate calculation of the percentage change in rates. Each year in its Annual Compliance Determination (ACD), the Commission undertakes an empirical analysis of the price cap. This review is designed to monitor the effectiveness of the price cap rules, particularly with respect to whether a backward-weighted index accurately reflects the actual change in rates. In carrying out its review, the Commission compares the percentage change in rates for each class of mail when calculated using a backward-weighted (Laspeyres) index with the percentage change in rates calculated using a forward-weighted (Paasche) index. In the two most recent ACDs, for FY 2012 and FY 2013, the Commission noted the difficulty of using a forward-weighted index to take into account major classification changes, rates that are in effect for only part of a year, and rate increases that are more than 12 months apart.[35]

The Commission declines to adopt PostCom's proposal.

*D. The Commission Will Not Require the Postal Service To Show Good Cause for Including Temporary and Promotional Rates in the Calculation of the Percentage Change in Rates*

PostCom requests that the Commission ''establish a default rule requiring the Postal Service to exclude temporary promotional rates and incentive programs from its percentage change in rates calculations unless it demonstrates good cause to account for promotional and incentive programs in another manner.'' PostCom Comments at 9. It argues that such a rule is necessary because additional rate adjustment authority resulting from a promotion or incentive becomes a permanent part of the Commission's future calculations of the percentage change in rates. *Id.* at 8–9.

The Public Representative opposes this proposal, arguing that it would create controversy about the adequacy of the Postal Service's showing of good cause and inappropriately place the burden of justification on the Postal Service. PR Reply Comments at 9.

PostCom's proposal is inconsistent with past Commission treatment of promotional rates and incentive programs. The Commission has repeatedly allowed the Postal Service to include temporary promotional rates and incentive programs in its calculation of the percentage change in rates, so long as the rates were in the form of a discount (or could easily be translated into a discount), had sufficient billing determinants available, and were rates of general applicability. As the Commission explained in the notice of proposed rulemaking, this approach ensures that non-participating mailers are not harmed by promotions and incentives that are not rates of general applicability while preserving the Postal Service's pricing flexibility. Order No. 1879 at 10–12. For instance, in Docket No. R2013–10, the Commission included rates for the Branded Color Mobile Technology Promotion, the Mail and Digital Personalization Promotion, and the Earned Value Reply Mail Promotion in its calculation of the percentage change in rates. Order No. 1890 at 41. In Docket No. R2013–1, the Commission also allowed promotional rates for First-Class Mail to be included in the calculation of the percentage change in rates, provided that volumes associated with the promotion were ascribed to the correct rate cells (*i.e.,* the separate rate cells for the promotional rates). Order No. 1541 at 17–18.

*E. Technical Amendment to Proposed § 3010.30*

The Public Representative suggests that proposed § 3010.30 be modified to include a provision for *de minimis* rate adjustments that follow Type 3 rate adjustments. PR Reply Comments at 10. The Commission agrees that it would be reasonable to modify paragraphs (a)(2) and (e) of proposed § 3010.30 to ensure that, for an affected class, the sum of all rate increases included in *de minimis* rate adjustments since the most recent Type 1–A, Type 1–B, or Type 3 rate adjustment that was not a *de minimis* rate increase does not exceed 0.001 percent. This modification will ensure that the Postal Service accurately accounts for *de minimis* rate adjustments that occur in between omnibus rate cases. Because the Commission's rules do not require that the annual limitation on the percentage change in rates or the percentage change in rates be calculated in connection with a Type 3 rate adjustment, there is no need to modify proposed § 3010.30(d).

[35] Docket No. ACR2012, Fiscal Year 2012 Annual Compliance Determination Report, March 28, 2013 (revised May 7, 2013), at 181; Docket No. ACR2013, Fiscal Year 2013 Annual Compliance Determination Report, March 27, 2014, at 133–34.

## VIII. Explanation of Final Rules

Following is a section-by-section analysis of the final rules.

Section 3010.1 adds a definition of the term ''rate of general applicability.'' It also includes definitions and amendments to existing definitions relating to Type 1–C rate adjustments and *de minimis* rate adjustments. Finally, it specifies that the definitions apply to the entire part, not just subpart A.

Section 3010.2 is revised to correct a typographical error.

Section 3010.3(a) specifies that Type 1–C rate adjustments are consistent with 39 U.S.C. 3622.

Section 3010.3(b)(2) specifies that a Type 1–C rate adjustment may not be combined with any other type of rate adjustment.

Section 3010.4(a) eliminates a superfluous word.

Section 3010.5 specifies that a Type 1–B rate adjustment is based on both the annual limitation and unused rate adjustment authority.

Previous §§ 3010.6, 3010.7, and 3010.8 are redesignated as §§ 3010.7, 3010.8, and 3010.9, respectively.

Section 3010.6, as so redesignated, contains a general description of a Type 1–C rate adjustment.

Section 3010.10(a) includes a conforming change.

Section 3010.11 contains conforming changes in the heading and in paragraphs (a), (b)(2), (d), and (k).

Section 3010.12(a) contains a conforming change.

Section 3010.12(b) specifies the contents of notices that include rate incentives and of Type 1–C notices of rate adjustments.

Section 3010.12(e) contains a conforming change.

Section 3010.20 contains conforming changes in paragraphs (b) and (d).

Section 3010.20(e) specifies that there is no limit on the amount of a rate decrease under a Type 1–C rate adjustment.

Section 3010.21 contains conforming changes in the heading and in paragraph (b).

Section 3010.22 contains conforming changes in the heading and in paragraphs (a) and (b).

Section 3010.23(a) includes definitions of the terms ''current rate,'' ''rate cell,'' and ''rate incentive.''

Section 3010.23(b)(1) contains a conforming change.

Section 3010.23(b)(2) provides for the calculation of the percentage changes in rates for Type 1–C rate adjustments.

Section 3010.23(c) contains conforming changes.

Section 3010.23(d) changes the format, but not the content, of existing § 3010.23(d) and adds a provision specifying the treatment of deleted rate cells when no alternate rate cells are available.

Section 3010.23(e) provides for the treatment of rate incentives.

Section 3010.24 specifies that rate incentives that are not rates of general applicability will be treated in the same manner as negotiated service agreements.

Section 3010.26 contains conforming changes.

Sections 3010.27 and 3010.28 are redesignated as §§ 3010.28 and 3010.29, respectively.

New § 3010.27 describes how unused rate adjustment authority is calculated for Type 1–C rate adjustments.

Section 3010.30 contains the requirements for *de minimis* rate increases.

## VII. Ordering Paragraphs

It is ordered:

1. Part 3010 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. The Secretary shall arrange for publication of this order in the **Federal Register**.

## List of Subjects in 39 CFR Part 3010

Administrative practice and procedure; Postal Service.

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

## PART 3010—REGULATION OF RATES FOR MARKET DOMINANT PRODUCTS

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

**Authority:** 39 U.S.C. 503; 3622.

■ 2. Revise § 3010.1 to read as follows:

### § 3010.1 Definitions.

(a) The definitions in paragraphs (b) through (m) of this section apply in this part.

(b) *Annual limitation* means:

(1) In the case of a notice of a Type 1–A or Type 1–B rate adjustment filed 12 or more months after the last Type 1–A or Type 1–B notice of rate adjustment, the full year limitation on the size of rate adjustments calculated pursuant to § 3010.21;

(2) In the case of a notice of a Type 1–A or Type 1–B rate adjustment filed less than 12 months after the last Type 1–A or Type 1–B notice of rate adjustment, the partial year limitation on the size of rate adjustments calculated pursuant to § 3010.22; and

(3) In the case of a notice of a Type 1–C rate adjustment, the annual limitation calculated pursuant to § 3010.21 or § 3010.22, as applicable, for the most recent notice of a Type 1–A or Type 1–B rate adjustment.

(c) *Class* means a class of market dominant postal products.

(d) *De minimis rate increase* means a rate adjustment described in § 3010.30.

(e) *Maximum rate adjustment* means the maximum rate adjustment that the Postal Service may make for a class pursuant to a notice of Type1–A or Type 1–B rate adjustment. The maximum rate adjustment is calculated in accordance with § 3010.20.

(f) *Most recent Type 1–A or Type 1–B notice of rate adjustment,* when used in reference to a notice of rate adjustment for a class, means the most recent Type 1–A or Type 1–B notice of rate adjustment for that class.

(g) *Rate of general applicability* means a rate applicable to all mail meeting standards established by the Mail Classification Schedule, the Domestic Mail Manual, and the International Mail Manual. A rate is not a rate of general applicability if eligibility for the rate is dependent on factors other than the characteristics of the mail to which the rate applies. A rate is not a rate of general applicability if it benefits a single mailer. A rate that is only available upon the written agreement of both the Postal Service and a mailer, a group of mailers, or a foreign postal operator is not a rate of general applicability.

(h) *Type 1–A rate adjustment* means a rate adjustment described in § 3010.4.

(i) *Type 1–B rate adjustment* means a rate adjustment described in § 3010.5.

(j) *Type 1–C rate adjustment* means a rate adjustment described in § 3010.6.

(k) *Type 2 rate adjustment* means a rate adjustment described in § 3010.7.

(l) *Type 3 rate adjustment* means a rate adjustment described in § 3010.8.

(m) *Unused rate adjustment authority* means:

(1) In the case of a Type 1–A or Type 1–B rate adjustment, the percentage calculated pursuant to § 3010.26; and

(2) In the case of a Type 1–C rate adjustment, the percentage calculated pursuant to § 3010.27.

■ 3. In § 3010.2, revise the first sentence to read as follows:

### § 3010.2 Applicability.

The rules in this part implement provisions in 39 U.S.C. chapter 36, subchapter I, establishing rate setting policies and procedures for market dominant products. * * *

■ 4. Revise § 3010.3 to read as follows:

**§ 3010.3 Types of rate adjustments for market dominant products.**

(a) There are five types of rate adjustments for market dominant products. A Type 1–A rate adjustment is authorized under 39 U.S.C. 3622(d)(1)(D). A Type 1–B rate adjustment is authorized under 39 U.S.C. 3622(d)(2)(C). A Type 1–C rate adjustment is authorized under 39 U.S.C. 3622. A Type 2 rate adjustment is authorized under 39 U.S.C. 3622(c)(10). A Type 3 rate adjustment is authorized under 39 U.S.C. 3622(d)(1)(E).

(b)(1) The Postal Service may combine Type 1–A, Type 1–B, and Type 2 rate adjustments for purposes of filing with the Commission.

(2) The Postal Service may not combine a Type 1–C rate adjustment with any other type of rate adjustment. The Postal Service may file a Type 1–C rate adjustment and a *de minimis* rate increase contemporaneously, but the Type 1–C rate adjustment and the *de minimis* rate increase must be contained in separate notices of rate adjustment.

■ 5. In § 3010.4, revise paragraph (a) to read as follows:

**§ 3010.4 Type 1–A rate adjustment—in general.**

(a) A Type 1–A rate adjustment is an adjustment based on the annual limitation.

* * * * *

■ 6. Revise § 3010.5 to reads as follows:

**§ 3010.5 Type 1–B rate adjustment—in general.**

A Type 1–B rate adjustment is an adjustment that is based on the annual limitation and that uses unused rate adjustment authority in whole or in part.

**§§ 3010.6, 3010.7, and 3010.8 [Redesignated as §§ 3010.7, 3010.8, and 3010.9]**

■ 7. Redesignate §§ 3010.6, 3010.7 and 3010.8 as §§ 3010.7, 3010.8 and 3010.9, respectively.

■ 8. Add new § 3010.6 to read as follows:

**§ 3010.6 Type 1–C rate adjustment—in general.**

(a) A Type 1–C rate adjustment is an adjustment to a rate of general applicability that contains only a decrease. A rate adjustment that includes both an increase and a decrease in rates of general applicability is a Type 1–A or Type 1–B rate adjustment; it is not a Type 1–C rate adjustment.

(b)(1) Except as provided in paragraph (b)(2) of this section, a Type 1–C rate adjustment may generate unused rate adjustment authority, as described in § 3010.27.

(2) A Type 1–C rate adjustment filed immediately after a Type 3 rate adjustment (that is, with no intervening Type 1–A or Type 1–B rate adjustment) may not generate unused rate adjustment authority.

(3) The Postal Service may elect not to generate unused rate adjustment authority in a Type 1–C rate adjustment.

■ 9. In § 3010.10, revise paragraph (a) to read as follows:

**§ 3010.10 Notice.**

(a) The Postal Service, in every instance in which it determines to exercise its statutory authority to make a Type 1–A, Type 1–B, or Type 1–C rate adjustment for a class shall:

(1) Provide public notice in a manner reasonably designed to inform the mailing community and the general public that it intends to adjust rates no later than 45 days prior to the intended implementation date of the rate adjustment; and

(2) Transmit a notice of rate adjustment to the Commission no later than 45 days prior to the intended implementation date of the rate adjustment.

* * * * *

■ 10. In § 3010.11, revise the section heading and paragraphs (a) introductory text, (b)(2), (d), and (k) to read as follows:

**§ 3010.11 Proceedings for Type 1–A, Type 1–B, and Type 1–C rate adjustment filings.**

(a) The Commission will establish a docket for each notice of Type 1–A, Type 1–B, or Type 1–C rate adjustment filing, promptly publish notice of the filing in the **Federal Register**, and post the filing on its Web site. The notice shall include:

* * * * *

(b) * * *

(2) Whether the planned rate adjustments measured using the formula established in § 3010.23(c) are at or below the limitation established in § 3010.29.

* * * * *

(d) Within 14 days of the conclusion of the public comment period the Commission will determine, at a minimum, whether the planned rate adjustments are consistent with the annual limitation calculated under § 3010.21 or § 3010.22, as applicable, the limitation set forth in § 3010.29, and 39 U.S.C. 3626, 3627, and 3629 and issue an order announcing its findings.

* * * * *

(k) A Commission finding that a planned Type 1–A, Type 1–B, or Type 1–C rate adjustment is in compliance with the annual limitation calculated under § 3010.21 or § 3010.22, as applicable; the limitation set forth in § 3010.29; and 39 U.S.C. 3626, 3627, and 3629 is decided on the merits. A Commission finding that a planned Type 1–A, Type 1–B, or Type 1–C rate adjustment does not contravene other policies of 39 U.S.C. chapter 36, subchapter I is provisional and subject to subsequent review.

■ 11. In § 3010.12, revise paragraphs (a) introductory text, (b)(4), and (e), redesignate paragraphs (b)(9) and (10) as (b)(11) and (12), respectively, and add new paragraphs (b)(9) and (10) to read as follows:

**§ 3010.12 Contents of notice of rate adjustment.**

(a) A Type 1–A, Type 1–B, or Type 1–C notice of rate adjustment must include the following information:

* * * * *

(b) * * *

(4) The amount of new unused rate adjustment authority, if any, that will be generated by the rate adjustment calculated as required by § 3010.26 or § 3010.27, as applicable. All calculations are to be shown with citations to the original sources. If new unused rate adjustment authority will be generated for a class of mail that is not expected to cover its attributable costs, the Postal Service must provide the rationale underlying this rate adjustment.

* * * * *

(9) For a notice that includes a rate incentive:

(i) If the rate incentive is a rate of general applicability, sufficient information to demonstrate that the rate incentive is a rate of general applicability; and

(ii) Whether the Postal Service has excluded the rate incentive from the calculation of the percentage change in rates under § 3010.23(e) or § 3010.24.

(10) For a Type 1–C rate adjustment, whether the Postal Service elects to generate unused rate adjustment authority.

* * * * *

(e) The notice of rate adjustment shall identify for each affected class how much existing unused rate adjustment authority is used in the planned rates calculated as required by § 3010.28. All

calculations are to be shown, including citations to the original sources.

* * * * *

■ 12. In § 3010.20, revise paragraphs (b) and (d) and add paragraph (e) to read as follows:

**§ 3010.20 Calculation of maximum rate adjustment.**

* * * * *

(b) Type 1–A and Type 1–B rate adjustments are subject to an inflation-based annual limitation computed using CPI–U values as detailed in §§ 3010.21(a) and 3010.22(a).

* * * * *

(d) In any 12-month period the maximum rate adjustment applicable to a class is:

(1) For a Type1–A notice of rate adjustment, the annual limitation for the class; and

(2) For a Type 1–B notice of rate adjustment, the annual limitation for the class plus the unused rate adjustment authority for the class that the Postal Service elects to use, subject to the limitation under § 3010.29.

(e) There is no limitation on the amount of a rate decrease contained in a notice of Type 1–C rate adjustment.

■ 13. In § 3010.21, revise the section heading and paragraph (b) to read as follows:

**§ 3010.21 Calculation of annual limitation when Type 1–A or Type 1–B notices of rate adjustment are 12 or more months apart.**

* * * * *

(b) If a notice of a Type 1–A or Type 1–B rate adjustment is filed 12 or more months after the most recent Type 1–A or Type 1–B notice of rate adjustment, then the calculation of an annual limitation for the class (referred to as the *full year limitation*) involves three steps. First, a simple average CPI–U index is calculated by summing the most recently available 12 monthly CPI–U values from the date the Postal Service files its notice of rate adjustment and dividing the sum by 12 (Recent Average). Then, a second simple average CPI–U index is similarly calculated by summing the 12 monthly CPI–U values immediately preceding the Recent Average and dividing the sum by 12 (Base Average). Finally, the full year limitation is calculated by dividing the Recent Average by the Base Average and subtracting 1 from the quotient. The result is expressed as a percentage, rounded to three decimal places.

* * * * *

■ 14. In § 3010.22, revise the section heading and paragraphs (a) and (b) to read as follows:

**§ 3010.22 Calculation of annual limitation when Type 1–A or Type 1–B notices of rate adjustment are less than 12 months apart.**

(a) The monthly CPI–U values needed for the calculation of the partial year limitation under this section shall be obtained from the Bureau of Labor Statistics (BLS) Consumer Price Index—All Urban Consumers, U.S. All Items, Not Seasonally Adjusted, Base Period 1982 − 84 = 100. The current Series ID for the index is ''CUUR0000SA0.''

(b) If a notice of a Type 1–A or Type 1–B rate adjustment is filed less than 12 months after the most recent Type 1–A or Type 1–B notice of rate adjustment, then the annual limitation for the class (referred to as the *partial year limitation*) will recognize the rate increases that have occurred during the preceding 12 months. When the effects of those increases are removed, the remaining partial year limitation is the applicable restriction on rate increases.

* * * * *

■ 15. Revise § 3010.23 to read as follows:

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

(a) *Definitions.* In this section:

(1) *Current rate*—(i) *In general.* Except as provided in paragraphs (a)(1)(ii) and (iii) of this section, the term *current rate* means the rate in effect when the Postal Service files the notice of rate adjustment.

(ii) *Seasonal and temporary rates.* When used with respect to a seasonal or temporary rate, as described in paragraph (a)(2) of this section, the term *current rate* means the most recent rate in effect for the rate cell, regardless of whether the seasonal or temporary rate is available at the time the Postal Service files the notice of rate adjustment.

(iii) *Exception.* When used with respect to a rate cell that corresponds to a rate incentive that was previously excluded from the calculation of the percentage change in rates under paragraph (e)(1) of this section, the term *current rate* means the full undiscounted rate in effect for the rate cell at the time of the filing of the notice of rate adjustment, not the discounted rate in effect for the rate cell at such time. For example, if a rate incentive provides a 5-cent discount on a 25-cent rate and the Postal Service previously elected to exclude the rate incentive from the calculation of the percentage change in rates, the Postal Service may choose to begin including the discounted rate in its calculation of the percentage change in rates. If the Postal Service makes that choice, the current rate for the discounted rate cell will be 25 cents (the full undiscounted rate).

(2) *Rate cell.* The term *rate cell* means each and every separate rate identified in any applicable notice of rate adjustment for rates of general applicability. A seasonal or temporary rate shall be identified and treated as a rate cell separate and distinct from the corresponding non-seasonal or permanent rate.

(3) *Rate incentive* means a discount that is not a workshare discount and that is designed to increase or retain volume, improve the value of mail for mailers, or improve the operations of the Postal Service.

(b) *Calculation*—(1) *Type 1–A and Type 1–B rate adjustments.* For a Type 1–A or Type 1–B rate adjustment, for each class of mail and product within the class, the percentage change in rates is calculated in three steps. First, the volume of each rate cell in the class is multiplied by the planned rate for the respective cell and the resulting products are summed. Then, the same set of rate cell volumes are multiplied by the corresponding current rate for each cell and the resulting products are summed. Finally, the percentage change in rates is calculated by dividing the results of the first step by the results of the second step and subtracting 1 from the quotient. The result is expressed as a percentage.

(2) *Type 1–C rate adjustments.* For a Type 1–C rate adjustment, for each class of mail and product within the class, the percentage change in rates is calculated by amending the workpapers attached to the Commission's order relating to the most recent Type 1–A or Type 1–B notice of rate adjustment to replace the planned rates under the most recent Type 1–A or Type 1–B notice of rate adjustment with the corresponding planned rates applicable to the class from the Type 1–C notice of rate adjustment.

(c) *Formula.* The formula for calculating the percentage change in rates for a class described in paragraph (b) of this section is as follows:

Percentage change in rates =

$$\left(\frac{\sum_{i=1}^{N}(R_{i,n})(V_i)}{\sum_{i=1}^{N}(R_{i,c})(V_i)}\right) - 1$$

Where,

N = number of rate cells in the class

i = denotes a rate cell (i = 1, 2, . . . , N)

Ri,n = planned rate of rate cell i

Ri,c = current rate of rate cell i (for a Type 1–A or Type 1–B rate adjustment) or rate from most recent Type 1–A rate

adjustment for rate cell i (for a Type 1–C rate adjustment)
Vi = volume of rate cell i

(d) *Volumes*—(1) *Obtaining Volumes from billing determinants.* The volumes for each rate cell shall be obtained from the most recent available 12 months of Postal Service billing determinants.

(2) *Permissible adjustments.* The Postal Service shall make reasonable adjustments to the billing determinants to account for the effects of classification changes such as the introduction, deletion, or redefinition of rate cells. The Postal Service shall identify and explain all adjustments. All information and calculations relied upon to develop the adjustments shall be provided together with an explanation of why the adjustments are appropriate.

(3) *Basis for adjustments.* Whenever possible, adjustments shall be based on known mail characteristics or historical volume data, as opposed to forecasts of mailer behavior.

(4) *Adjustment for deletion of rate cell when alternate rate cell is not available.* For an adjustment accounting for the effects of the deletion of a rate cell when an alternate rate cell is not available, the Postal Service should adjust the billing determinants associated with the rate cell to zero. If the Postal Service does not adjust the billing determinants for the rate cell to zero, the Postal Service shall include a rationale for its treatment of the rate cell with the information required under paragraph (d)(2) of this section.

(e) *Treatment of rate incentives.* (1) Rate incentives may be excluded from a percentage change in rates calculation. If the Postal Service elects to exclude a rate incentive from a percentage change in rates calculation, the rate incentive shall be treated in the same manner as a rate under a negotiated service agreement (as described in § 3010.24).

(2) A rate incentive may be included in a percentage change in rates calculation if it meets the following criteria:

(i) The rate incentive is in the form of a discount or can be easily translated into a discount;

(ii) Sufficient billing determinants are available for the rate incentive to be included in the percentage change in rate calculation for the class, which may be adjusted based on known mail characteristics or historical volume data (as opposed to forecasts of mailer behavior); and

(iii) The rate incentive is a rate of general applicability.

■ 16. Revise § 3010.24 to read as follows:

**§ 3010.24 Treatment of volume associated with negotiated service agreements and rate incentives that are not rates of general applicability.**

(a) Mail volumes sent at rates under a negotiated service agreement or a rate incentive that is not a rate of general applicability are to be included in the calculation of percentage change in rates under § 3010.23 as though they paid the appropriate rates of general applicability. Where it is impractical to identify the rates of general applicability (*e.g.,* because unique rate categories are created for a mailer), the volumes associated with the mail sent under the terms of the negotiated service agreement or the rate incentive that is not a rate of general applicability shall be excluded from the calculation of percentage change in rates.

(b) The Postal Service shall identify and explain all assumptions it makes with respect to the treatment of negotiated service agreements and rate incentives that are not rates of general applicability in the calculation of the percentage change in rates and provide the rationale for its assumptions.

■ 17. In § 3010.26, revise the section heading and paragraphs (b) and (e) to read as follows:

**§ 3010.26 Calculation of unused rate adjustment authority for Type 1–A and Type 1–B rate adjustments.**

* * * * *

(b) When notices of Type 1–A or Type 1–B rate adjustments are filed 12 months apart or less, annual unused rate adjustment authority will be calculated. Annual unused rate adjustment authority for a class is equal to the difference between the annual limitation calculated pursuant to § 3010.21 or § 3010.22 and the percentage change in rates for the class calculated pursuant to § 3010.23(b)(1).

* * * * *

(e) Unused rate adjustment authority generated under this section lapses 5 years after the date of filing of the notice of rate adjustment leading to its calculation.

* * * * *

**§§ 3010.27 and 3010.28 [Redesignated as §§ 3010.28 and 3010.29]**

■ 18. Redesignate §§ 3010.27 and 3010.28 as §§ 3010.28 and 3010.29.

■ 19. Add new § 3010.27 to read as follows:

**§ 3010.27 Calculation of unused rate adjustment authority for Type 1–C rate adjustments.**

(a) For a notice of Type 1–C rate adjustment, unused rate adjustment authority for a class is calculated in two steps. First, the difference between the annual limitation calculated pursuant to § 3010.21 or § 3010.22 for the most recent notice of Type 1–A or Type 1–B rate adjustment and the percentage change in rates for the class calculated pursuant to § 3010.23(b)(2) is calculated. Second, the unused rate adjustment authority generated in the most recent Type 1–A or Type 1–B rate adjustment is subtracted from that result.

(b) Unused rate adjustment authority generated under paragraph (a) of this section lapses 5 years after the date of filing of the most recent notice of Type 1–A or Type 1–B rate adjustment.

(c) Unused rate adjustment authority generated under paragraph (a) of this section for a class shall be added to the unused rate adjustment authority generated in the most recent notice of Type 1–A rate adjustment on the schedule maintained under § 3010.26(f). For purposes of § 3010.28, the unused rate adjustment authority generated under paragraph (a) of this section for a class shall be deemed to have been added to the schedule maintained under § 3010.26(f) on the same date as the most recent notice of Type 1–A or Type 1–B rate adjustment.

(d) Unused rate adjustment authority generated under paragraph (a) of this section shall be subject to the limitation under § 3010.29, regardless of whether it is used alone or in combination with other existing unused rate adjustment authority.

■ 20. Add § 3010.30 to read as follows:

**§ 3010.30 De minimis rate increases.**

(a) The Postal Service may elect to file a Type 1–A notice of rate adjustment as a *de minimis* rate increase if:

(1) For each affected class, the rate increases contained within the notice of a Type 1–A rate adjustment do not result in the percentage change in rates for the class equaling or exceeding 0.001 percent; and

(2) For each affected class, the sum of all rate increases included in *de minimis* rate increases since the most recent Type 1–A, Type 1–B, or Type 3 rate adjustment that was not a *de minimis* rate increase does not result in the percentage change in rates for the class equaling or exceeding 0.001 percent.

(b) No unused rate adjustment authority will be added to the schedule of unused rate adjustment authority maintained under § 3010.26(f) as a result of a *de minimis* rate increase.

(c) No rate decreases may be taken into account when determining whether rate increases comply with paragraphs (a)(1) and (2) of this section.

(d) In the next notice of a Type 1–A or Type 1–B rate adjustment for a class that is not a *de minimis* rate increase:

(1) The annual limitation shall be calculated as if the de minimis rate increase had not been filed; and

(2) For purposes of calculating the percentage change in rates, the current rate shall be the current rate from the *de minimis* rate increase.

(e) The Postal Service shall file supporting workpapers with each notice of *de minimis* rate increase that demonstrate that the sum of all rate increases included in *de minimis* rate increases since the most recent Type 1–A, Type 1–B, or Type 3 notice of rate adjustment that was not *de minimis* does not result in a *percentage* change in rates for the class equaling or exceeding 0.001 percent.

By the Commission.

**Shoshana M. Grove,**

*Secretary.*

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