Comments of the United States Postal Service to the Federal Trade Commission Concerning USPS Study, Project No. P071200

August 6, 2007

Introduction

The Federal Trade Commission [FTC] has requested information and comment in the above matter in compliance with section 703 of the Postal Service Accountability and Enhancement Act, Public Law No. 109-435, enacted December 20, 2006. In response to the FTC's request, the United States Postal Service [Postal Service] submits the following information and comment.

Before turning to the specific questions listed in that notice, we begin with some background information and general comments.

The Postal Service is an organization established by federal statute in exercise of the Congressional power under Article I, section 8, clause 7 of the U.S. Constitution to "establish Post Offices and post Roads." The Postal Service is under the direction of a Board of Governors consisting of nine Governors appointed by the President of the United States with the advice and consent of the Senate, together with a Postmaster General chosen by those nine and a Deputy Postmaster General selected by the Governors and the Postmaster General.[1] Even as the Postal Service performs a public function under federal statute and direction, the Nation has long recognized that, in many respects, the task of selling postal services for a fee inherently entails many of the essentials of a business.[2]

The current internal structure and governance of the Postal Service come from reforms enacted by the Postal Reorganization Act in 1970, responsive in large measure to the embrace by Presidents Lyndon Johnson and Richard Nixon of recommendations developed by the 1968 President's Commission on Postal Organization [Kappel Commission], that the postal system should be run more like a business.[3] The December 2006 postal legislation was an updated attempt to wrestle with issues inherent in a federal function combining a government mission, structure, and leadership with elements of a business, again after input from a Presidential commission.[4]

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[1] 39 U.S.C. § 202.
[2] See, e.g. David E. Lilienthal & Robert H. Marquis, "The Conduct of Business Enterprises by the Federal Government," 54 Harv. L. Rev. 545, 546 (1941).
[3] Towards Postal Excellence, The Report of the President's Commission on Postal Organization (June 1968).
[4] Embracing the Future, Making the Tough Choices to Preserve Universal Service, Report of the President's Commission on the United States Postal Service (July 31, 2003), <http://www.treas.gov/offices/domestic-finance/usps/pdf/freport.pdf>.

As they stand today, the laws and traditions of this country foster both an active, competitive private sector and a full-service postal system operated by the Government from before the writing of the Constitution. The Postal Service today remains the second largest employer in the United States, with an operating budget exceeding $73 billion, delivering 703 million pieces of mail on a typical day, every one of them valued enough by someone to pay the applicable postage.[5]

The 2006 postal law establishes a regulatory distinction between competitive products and market-dominant products. In FY 2006 the competitive products category of domestic postal services – principally bulk parcels, Express Mail, and Priority Mail – comprised 9% of the Postal Service's total revenue, while the competitive products category of international services – bulk international mail – comprised 0.3% of the Postal Service's total revenue. The Postal Service's share of the overall market for the competitive product group is well behind some of the competition. A Colography Group analysis indicates that for calendar year 2006 the Postal Service's market share for domestic competitive products, as measured by revenue, was 11% percent.

Over the course of some eight years of legislative deliberations culminating in the 2006 amendments, a focus of concern and debate for the interested parties, including the Postal Service, was the extent to which the Postal Service's statutory framework helps or hinders its participation in competitive markets; whether particular advantages or disadvantages are fair and appropriate public policy; and how any differences should be addressed. As discussed further in response to Question 3 below, the enacted amendments included numerous adjustments to the framework for the Postal Service's participation in competitive markets. Section 703 of the law also sought further analysis and recommendations from the FTC.

Many of the issues Congress has asked the FTC to address were debated during the legislative deliberations preceding last December's enactment of the new postal legislation. As discussed in more detail below, Congress addressed many level playing field issues in the new law.

We welcome the FTC's fresh eyes on this important set of issues and look forward to your recommendations. We urge the FTC to assess not only any advantages the Postal Service may have over private sector competitors, but also restrictions placed on the Postal Service that limit its ability to compete on an equal footing with the private sector. A balanced assessment of legal requirements applicable to the Postal Service and those governing private businesses will best serve the nation.

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[5] U.S. Postal Service, "Postal Facts," <http://www.usps.com/communications/newsroom/postalfacts.htm>.

We will be pleased to provide additional information that you believe would be useful to clarify or expand upon any portion of our response.

FTC Questions

1. [a] With respect to competitive products, please identify specific federal laws, state laws, and local laws, regulations, ordinances, etc. (collectively, ``legal requirements'') with which private competitors must comply, but with which the USPS is not required to comply.

Nearly all state laws applicable to the conduct of private enterprises are inapplicable – from the business corporation laws defining the lawful purposes and fiduciary responsibilities of state-chartered corporations to the everyday rules of business activity in hiring, firing, paying, and managing staff to dealing with customers, suppliers, and finances.

We asked outside counsel with experience advising both the Postal Service and private firms to provide an overview of state, local, and federal requirements and have attached that analysis hereto. This paper provides an illustrative list of laws applicable to private companies with an indication of which of them also apply to the Postal Service.

1. [b] Please identify the specific source of the USPS exemption from each such legal requirement.

With respect to exemption from federal laws applicable to private firms, the source of any exemption for the Postal Service is the terms of those particular laws themselves, taken together with the postal laws codified in title 39 or other portions of the United States Code. For example, the Postal Service is not covered by the Securities and Exchange Act under the terms of that Act, but has certain related responsibilities specified in title 39.[6]

With respect to exemption from state and local laws applicable to private firms, in each case the exemption for the Postal Service does not trace from particular statutory language, but from the U.S. Constitution as interpreted by the federal courts.

By statute the Postal Service is classified as "an independent establishment of the Government of the United States,"[7] put in place by Congress to "be operated as a basic and fundamental service provided to the people by the Government of the United States, authorized by the Constitution, created by Act of Congress, and supported by the people."[8] In this capacity, under the Constitution, the Postal Service shares in the sovereign immunity of the Federal Government from state and local regulation, except in areas where Congress has waived such

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[6] 39 U.S.C. § 3654.
[7] 39 U.S.C. § 201.
[8] 39 U.S.C. § 101(a).

immunity.[9] The principal waiver is that, like many federal corporations, but unlike most agencies, the Postal Service is generally subject to suit, although jurisdiction lies in Federal District court, not state courts.[10] No special postal waiver is provided for state legislation or administrative regulation, although the Postal Service is covered under federal environmental statutes broadly waiving federal immunity from state requirements.

According to the U.S. Supreme Court:[11]

> If Congress and the Postal Service are to operate as efficiently as possible a system for the delivery of mail which serves a Nation extending from the Atlantic Ocean to the Pacific Ocean, from the Canadian boundary on the north to the Mexican boundary on the south, it must obviously adopt regulations of general character having uniform applicability throughout the more than three million square miles which the United States embraces. In so doing, the Postal Service's authority to impose regulations cannot be made to depend on all of the variations of climate, population, density, and other factors that may vary significantly within a distance of less than 100 miles.

The public expects accountability at the federal level, whether particular services are denominated for regulatory purposes as “market dominant” or “competitive.”

1. (c) Please provide estimates of both actual expenses, and administrative costs associated with compliance, that such legal requirements impose on private competitors.

We do not attempt to provide estimates on the assumption that companies having experience in meeting such requirements are in a better position to provide information to the Commission on the costs of compliance.

2. [a] Please discuss any benefits the USPS derives, in providing competitive services, from its legal monopolies over letter delivery and mailboxes.

Letter monopoly. The postal monopoly covers services for First-Class and Standard Mail letters, which are classified as market-dominant products. To the extent that the monopoly helps in preserving those services, all products offered within an integrated, full-service postal system – including competitive products – benefit from shared economies of scope.

In 1968 the Kappel Commission, relying on the cost and market studies it sponsored, recommended the retention of a postal monopoly to support universal service requirements, to protect economies of scope against the effects of

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[9] See Dolan v. United States Postal Service, 546 U.S. 481, 483 (2006).
[10] Franchise Tax Board of Calif. v. United States Postal Service, 467 U.S. 512 (1984); 39 U.S.C. §§ 401(1), 409(a).
[11] United States Postal Service v. Council of Greenburgh Civic Ass’ns, 453 U.S. 114, 133 (1981).

"cream-skimming."[12] The 2003 President's Commission recommended changes to narrow the monopoly's coverage and transfer regulatory responsibility to the Postal Regulatory Commission [PRC], which were largely enacted. While finding "strong evidence" that the monopoly's practical impact is diminishing with the maturation of electronic substitutes, the 2003 Commission concluded that "a postal monopoly will likely be necessary for many years" to safeguard universal service over a period of transition.[13]

Mailbox monopoly. The "mailbox monopoly," as a shorthand term, is different in character from the legal postal monopoly with respect to letter mail. Private firms would have a legal right to organize with their customers their own networks of delivery receptacles, standing alongside postal boxes as newspaper boxes did for many years. Private boxes would not have protection under a specific federal criminal statute that reserves the network of postal collection and delivery boxes for mail,[14] but the corporate integrity of the familiar collection boxes of private delivery firms presumably has some protection under state law as would similar delivery boxes. Somewhat in parallel, theft of mail (letters, parcels, or other) is a matter of federal criminal intervention[15] while theft of matter carried by private firms is governed by state rather than federal law.

In practice, concerns about a "mailbox monopoly" advantage seem to boil down to arguments from the Postal Service's incumbency as a universal presence, with the historical assistance of the postal letter monopoly and with federal trappings. Since the size of most standard boxes is insufficient for the delivery of all but the smallest parcels and flats, the issue has been of primary concern in respect to market-dominant products. Much of the focus in past debates about mailbox access has been on periodicals and advertising flyers not classified in the competitive category under present law.[16] Furthermore, the residential mailbox is a two-way communication device for the Postal Service and its customers, used for the entry and return as well as delivery of mail, and in some areas for ordering postage stamps. Shared use would reduce efficiency and apparently could be very unpopular with the public.[17] As a practical matter, if the mail system in this country had evolved along the competitive lines of the parcel industry, with several alternative carriers, it is not clear that the major participants would have

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[12] Towards Postal Excellence, p. 129.
[13] Embracing the Future, p. 21.
[14] 18 U.S.C. § 1725.
[15] 18 U.S.C. § 1708-1709.
[16] See United States Postal Service v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114 (1981); Rockville Reminder v. United States Postal Service, 480 F.2d 4 (2nd Cir. 1973).
[17] United States General Accounting Office, "U.S. Postal Service: Information About Restrictions on Mailbox Access," GAO/GGD-97-85 (May 1997), pp. 15-19. <http://www.gao.gov/archive/1997/gg97085.pdf>. GAO's market research showed that an overwhelming majority opposed general access, but a smaller majority would support extending access only if it could be limited to just a few very familiar parcel carriers, which would be problematic for legal reasons.

shared delivery receptacles any more than they share collection receptacles now.

2. [b] Specifically, discuss any economies of scope (i.e., cost advantages or other efficiencies that arise due to the provision of multiple products) that exist between the supply of market-dominant products and the supply of competitive products.

All postal services benefit alike from the fact that the Postal Service provides a full-service postal system with universal coverage. The postal structure functions as an integrated system financed by customers of all services. To a considerable extent, whether a particular service is a monopoly market-dominant product (advertisements; bills and statements), a non-monopoly market-dominant product (periodicals; books), or a competitive service (bulk parcels; expedited flat-shaped documents), it will be processed and delivered by some of the same employees in the same facilities and transported in the same vehicles, bearing postage purchased through the same channels.

The networks of between 300 and 400 major facilities, 37,000 retail offices, and 250,000 carrier routes that have been developed to link together all communities nationwide involve substantial components of common or institutional costs. Economies of scale and scope are evident and significant in processing, transportation, delivery, and retail functions.[18]

- **Mail Processing**. Significant portions of major mail processing centers and operations at those facilities sort and dispatch both market-dominant and competitive mail. Even where individual operations are employed for the main purpose of processing competitive products, significant amounts of market-dominant products are processed as well. In addition, where separate operations are performed for competitive products, the equipment (for parcel sorting or flat sorting) is used at other times of the day for sorting market-dominant mail. Competitive product volumes alone would not support the same degree of investment in equipment for sorting.
- **Transportation**. The transportation network is designed to transport both market-dominant and competitive products for the current configuration of major facilities and post offices. For contracted air transportation, the Postal Service transports both market-dominant and competitive products under a contract with Federal Express.[19] In FY 2006 the FedEx agreement accounted for about 65 percent of air transportation expense.

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[18] Economics of scale and scope in the postal sector have received increasing technical examination in recent years. See Cathy M. Rogerson & William M. Takis, "Economies of Scale and Scope and Competition in Postal Service," in M.A. Crew & P.R. Kleindorfer (eds.), Regulation and the Nature of Postal and Delivery Services (1993), p. 109 et seq.; Michael D. Bradley, Jeff Colvin, & Mary K. Perkins, "Measuring Scale and Scope Economies with a Structural Model of Postal Delivery," in Crew & Kleindorfer, Liberalization of the Postal and Delivery Sector (2006), p. 103 et seq.

[19] The FedEx agreement involves two different networks, Dayturn and Nighturn. Dayturn operates during the day, transporting mostly Priority Mail and First-Class Mail. Nighturn operates at night, transporting mostly Domestic Express Mail and International Express Mail.

The remaining portion of contracted air transportation costs were incurred under contracts with commercial airlines and United Parcel Service, both of which predominantly transport First-Class Mail market-dominant products. Contracted surface transportation handles both market-dominant and competitive products on the same vehicles. In the case of air and much of surface transportation, competitive products account for a large share of mail transported. As a result transporting market-dominant and competitive products separately could entail significant network changes and likely higher costs for both product groups.

- **Delivery**. The competitive volume amounts to an estimated 15 pieces per delivery route per day, out of a total of about 2215 pieces per delivery route per day. The practice of delivering competitive products separately on routes other than regular carrier routes is largely confined to areas where foot routes predominate, mainly large cities. On regular routes, large parcels and Express Mail are to some extent ''delivered' independently. This often requires a different park point, carrying a competitive piece from the vehicle to the door, or attempting customer contact. In these cases the two product groups share travel time to and from the route and network driving time between sections of delivery stops, use of the same scanning equipment and vehicles, and many fixed network activities, as well as facility costs. Providing system-wide separate delivery of these competitive products would therefore be more costly. Priority Mail flats and small parcels, on the other hand, are delivered on regular city routes with market-dominant products. In that case, separate delivery would be even more costly.
- **Retail**. Window operations are designed to accommodate both competitive and market-dominant products and the special services that support them. The reach and accessibility of these services depend on the availability of a national network. When a package or item cannot be delivered because of size, signature requirements, or other factors, convenience to the customer depends on access to the nearest retail outlet.

2. [c] In what ways, if any, do private suppliers of competitive products interconnect with the USPS system?

Private sector providers of competitive products (including private sector package service providers) and the Postal Service interconnect with each other extensively in both directions as supplier and user of services.

Beginning in 1976 with the PRC's assistance, the Postal Service has offered a series of workshare rate discounts encouraging private sector firms to perform mail preparation and transportation which would otherwise be required of the Postal Service. This program has removed from the Postal Service over $18 billion (FY 2005) in mail processing, transportation, and preparation work that would otherwise have been performed internally. Private sector firms performing these activities include mail service providers that prepare mail on behalf of others as well as end-users of mail such as banks and utilities that prepare mail on their own behalf or drop ship their mailings to enter them into the mailstream near point of delivery.

About $600 million in workshare discounts are directly associated with products now to be classified in the competitive category. The customers who take advantage of this program include parcel carriers (UPS, FedEx, DHL), which are among the Postal Service's largest users of its Parcel Select service to deliver packages to their customers. The Postal Service provides these products to private sector package service providers on the same terms and conditions as they are provided to any other customer.

The workshare program bears much of the responsibility, along with growth in mail volume, for keeping postage rates on a pace with inflation over the first three decades after the Postal Service was created. The program also has gradually accomplished a major form of liberalization of the overall postal industry in the United States that has yet to achieve similar penetration in even otherwise more commercialized structures in other developed countries.[20]

In addition to providing last-mile service through the workshare program, the Postal Service's universal service network provides a channel through which private sector providers of package services can deliver parcels in remote and rural areas.

Through contractual agreement, the Postal Service has enabled FedEx to install customer drop boxes at several thousand post offices.

The Postal Service is also a large customer of FedEx and UPS through its contracts for air transportation. The air transportation contracts with these firms, accounting for about $1.8 billion of the Postal Service's nearly $2.8 billion in air transportation expense in FY 2006, benefit both the Postal Service and these two carriers.

In addition to air contracts with direct competitors, the Postal Service has agreements with other kinds of firms that provide services within a broadly-defined postal and shipping sector. These include contracts for packaging materials sold in post offices.

Finally, the Postal Service serves as a standard setter for firms in certain markets that uniquely serve the postal sector in interfaces with the mail system. These include standards for postage meters and PC postage applications. Such standards are a vital part of the revenue assurance efforts needed for efficient postage payment mechanisms protecting the financial interests of the postal system.

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[20] Mary S. Elcano, R. Andrew German, & John T. Pickett, "Hiding in Plain Sight: The Quiet Liberalization of the United States Postal Service," in Crew & Kleindorfer, Current Directions in Postal Reform (2000), p. 337 et seq.

2. [d] Do any federal or state laws prevent greater interconnection with the USPS system?

Private firms are accustomed to doing business with other firms with processes they understand and recognize. As a Government entity the Postal Service is somewhat inhibited in connecting with private companies for mutual advantage because of its fundamentally different statutory and regulatory makeup. In our experience, many aspects of how the Postal Service is required to do business can cause it to be perceived as a less than ideal business partner. The relatively recent, groundbreaking arrangements with FedEx and UPS show that these kinds of hurdles are not necessarily preclusive.

2. [e] If so, please cite these laws and explain the ways in which they prevent greater interconnection.

Special requirements created to serve public purposes, including notice and transparency processes, contracting requirements, and regulatory and oversight reviews discussed further in response to the first part of Question 4, add cost and tend to make some potential partners wary. For example, in the course of the Postal Service's explorations of Negotiated Service Agreements (NSAs) with customers, some potential NSA partners have reported that, because of their perception that certain proprietary information which they would prefer to keep confidential may have to be disclosed in order to obtain the necessary regulatory approval, they have concluded that the likely costs of the NSA process would exceed the likely benefits. While in our experience as noted above, the inhibitors seem broader than a list of particular statutory provisions, the Service Contract Act,[21] and the Davis-Bacon Act,[22] provide two significant examples of "prevailing wage" limitations applicable to the Postal Service and not applicable to the private sector that reduce opportunities for contracting out in particular circumstances. The Postal Service has thousands of service and construction contracts that must comply with these provisions. The Miller Act,[23] relating to construction supplier bonds, the Javits-Wagner-O'Day Act,[24] establishing preferential suppliers for certain goods and services, and a number of mandatory veterans' protection and equal-opportunity clauses,[25] all add administrative or other cost in the purchasing function.

3. Please identify any additional legal requirements that confer benefits upon the USPS that are not available to its private competitors.

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[21] 41 U.S.C., chapt. 6; 39 U.S.C. § 410(b)(5)(B).
[22] 40 U.S.C. §§ 3141-3147; 39 U.S.C. § 410(b)(4)(A).
[23] 40 U.S.C. §§ 3131, 3133; 39 U.S.C. § 410(b)(4)(A).
[24] 41 U.S.C. §§ 46-48c.
[25] Vietnam Era Veterans Readjustment Assistance Act of 1972, 38 U.S.C. § 4212; Executive Order 11701, January 23, 1973; Veterans Employment Opportunities Act of 1999; 41 C.F.R. § 60–250.

While we do not have additional such requirements to list beyond those already referenced, we think that a balanced analysis will be informed by recognizing that the laws have very recently changed in relevant respects. The range of requirements that might have previously been considered to favor the Postal Service in competition with the private sector has already been narrowed significantly by the Postal Accountability and Enhancement Act. That Act enacted numerous adjustments to legal requirements in an attempt to address previously expressed concerns in regard to competitive activity by the Postal Service. These include the following:

- **Pricing**. Products are newly defined as either competitive or market-dominant. For competitive products the Postal Service must publish advance public notice of price changes and the record supporting them. Regulation of pricing for competitive products will include a dual approach to protect the public interest. First, prices must cover attributable costs to avoid any cross-subsidy from the market-dominant category. We understand the law to require application of an economically sound incremental cost analysis to exclude the presence of cross-subsidy. Secondly, the law empowers the regulator to establish rules requiring competitive products as a group to cover an appropriate share of the Postal Service's institutional costs. Every five years the PRC must examine developments in the marketplace to see if changes are required to serve the interest of competition.[26] These protections give the regulator ample authority to safeguard the public interest in the pricing rules for competitive products.
- **Accounting**. Costs and revenues for competitive products must be accounted for in a separate fund to be established in the U.S. Treasury, called the Competitive Products Fund.[27]
- **Assumed federal income tax**. The Competitive Products Fund must pay annually the equivalent of federal income tax on its operations into the separate Postal Service Fund.[28] This payment will help to defray the cost of universal service requirements.
- **Antitrust and fair competition laws**. The statute removes immunity from federal antitrust and fair competition laws, including section 5 of the FTC Act, for conduct with respect to non-monopoly products, except that criminal penalties and damages awards do not apply.[29]
- **Regulations affecting competition**. The PRC is authorized to resolve complaints that Postal Service regulations give it an unfair competitive advantage, or misuse private intellectual property or proprietary information in anticompetitive ways.[30]

[26] 39 U.S.C. § 3631(a), 3633(a).
[27] 39 U.S.C. § 2011.
[28] 39 U.S.C. § 3634.
[29] 39 U.S.C. § 409d; see under prior law, United States Postal Service v. Flamingo Industries, 540 U.S. 736 (2004).
[30] 39 U.S.C. § 404a.

- **Letter monopoly**. The scope of the letter monopoly has been narrowed to exclude any piece weighing at least 12-1/2 ounces or charged by the private carrier at least six times the Postal Service's one-ounce First-Class letter rate. The law also shifts authority for implementing regulations to the PRC.[31]
- **International services**. Classification, pricing, and complaints regarding international services, both market-dominant and competitive, become subject to the PRC's regulatory authority in the same way as domestic services.[32]
- **Customs requirements**. Customs requirements must be applied in the same manner to both shipments of competitive products by the Postal Service and similar shipments by private companies.[33]
- **Borrowing**. Postal Service authority to pledge assets to support a public issue of bonds (should Treasury not exercise its priority right to purchase them) is confined to assets of the Competitive Products Fund for borrowing to support competitive products. The Postal Service's $2 billion "put" requiring Treasury to lend it money in an emergency is made inapplicable to borrowing for the Competitive Products Fund.[34]
- **New business and services**. The Postal Service is newly limited to postal services defined in terms of hard-copy mail and incidental services. New or unregulated services may not be offered outside that boundary. In approving new products, the PRC explicitly must consider the availability of private providers and the effect on small business.[35]

4. [a] With respect to competitive products, please identify specific legal requirements with which the USPS must comply, but with which private competitors are not required to comply, or any other legal constraints on the USPS' operations that affect its costs. Please provide estimates of both actual expenses, and administrative costs associated with compliance, that such legal requirements and constraints impose on the USPS.

The legal requirements are discussed below. We have provided available cost information on the more significant requirements.

U.S. Constitution

The differences in rules begin in the U.S. Constitution. As noted in response to question 1, the Constitution authorizes Congress to establish a postal system and provides for the supremacy of federal law on the subject. At the same time, the Constitution reserves to private citizens crucial First Amendment, Fourth Amendment, and Fifth Amendment rights that every private corporation treasures and no federal entity has or should have.

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[31] 39 U.S.C. § 601.
[32] 39 U.S.C. §§ 3621, 3631.
[33] 39 U.S.C. § 407(e).
[34] 39 U.S.C. § 2005(b)(2), 2006(b).
[35] 39 U.S.C. §§ 404(e), 3642(b)(3); cf. 39 U.S.C. § 404(a)(6) (2000), repealed by Pub. L. No. 109-435, § 102(a)(1).

Employment and Labor Laws

The Postal Service is a heavily labor-intensive operation within a U.S. economy driven by technological advance. Its mission requires it to be the one service delivering personally to virtually every address in America six days a week. In FY 2006 compensation and benefits expense accounted for $56.5 billion or 78.6 percent of total expense.[36] As described under Question 3, the world's most extensive program of workshare-pricing has succeeded in dramatically curtailing growth in mail processing costs and some transportation costs, but has also narrowed the opportunity for future cost reductions in those functions. In FY 2006 the city and rural delivery functions, which are less amenable to worksharing strategies, accounted for 44.9 percent of all workhours.

Between 1970 and 2000, mail volume expanded from 84.9 billion to 207.9 billion pieces. Since then, as electronic alternatives have matured, total volume did not reach the 2000 level again until 2005, and in 2006 stood at 213.1 billion pieces. Since 2000 the trend in the mail mix has been unfavorable as well. First-Class Mail, including bills and statements which contribute substantially more per piece than Standard Mail, accounted for 59.1 percent of total mail volume and 57.8 percent of total domestic and international postage revenue in 1970; 49.8 percent of volume and 57.0 percent of revenue in 2000; and 45.8 percent of volume and 53.6 percent of revenue in 2006.[37]

Operating within a challenged environment for the foreseeable future, as a matter of mathematics the Postal Service is disproportionately sensitive to differences in treatment under applicable employment and labor laws.

In general private sector companies operate under the respective state employment laws and the National Labor Relations Act [NLRA] (or the Railway Labor Act). The Postal Service is covered by the NLRA, with an exception, and under specific federal legislation which we summarize below.

- **Wages and working conditions, bargaining-unit employees**. While the NLRA generally applies to the Postal Service, several key features do not apply. Union shops are prohibited and employees do not have the right to strike. Where collective bargaining negotiations are unsuccessful, interest arbitration must be used to create a new labor contract.[38] These substitutions reflect the Postal Service's universal service function and its

[36] U.S. Postal Service Annual Report, 2006, pp. 27, 60 <http://www.usps.com/financials/_pdf/anrpt2006_final.pdf>. Volume and revenue numbers are also found in this and preceding years' reports.

[37] While the 2000 and 2006 figures appear in the U.S. Postal Service Annual Reports, for comparability purposes given intervening definitional adjustments the numbers presented for 1970 are taken from the Postal Service's more detailed 1970 Revenue, Pieces and Weights Report.

[38] 39 U.S.C. §§ 410(b)(1), 1207, 1209; 5 U.S.C § 7311.

position in the national communications infrastructure. The 2003 President's Commission highlighted expert testimony that the Postal Service faces a substantial wage premium in most localities.[39] The Commission recommended changes in labor and employment provisions,[40] most of which attracted no significant support during subsequent legislative deliberations.

- **Wages and working conditions, supervisors and managers**. Organizations representing postal supervisors, postmasters, and other managers have formal statutory rights to participate directly through consultation in the planning and development of pay policies and schedules, fringe benefit programs not fixed by law, and other programs relating to supervisors and managers.[41] Private sector managers and supervisors do not have comparable statutory rights. No satisfactory way to quantify the effect of this disparity is apparent.
- **Benefit programs**. Bargaining and consultation include benefits with the exceptions of major statutory benefit programs described further below. Collective bargaining is colored by a statutory grandfather clause stating that the program for fringe benefits may not be less favorable to employees than the package in effect at the creation of the Postal Service on July 1, 1971.[42] The import of this provision has not been definitively adjudicated, and no dollar value can easily be attached to it. No private firm operates under such a statute and many private firms have significantly curtailed employee benefits in recent years. The 2003 President's Commission observed that the combination of an apparent wage premium and generous Government benefits package when compared to the private sector gives postal employees "the best of both worlds."[43]
- **Retirement Plans**. For most employees hired after December 31, 1983, the Postal Service is subject to the Federal Employees Retirement System to the same extent as the FTC.[44] The program joins elements of a defined benefit plan administered by the Office of Personnel Management [OPM] with combined employer and employee contributions to an investment account in the Thrift Savings Plan managed by the Federal Retirement Thrift Investment Board. The normal cost for the defined benefits portion

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[39] The report cited an estimate of 21.2 percent.
[40] Embracing the Future, pp. 118-123; Michael L. Wachter, Testimony Before President's Commission on the United States Postal Service, April 29, 2003, p. 4 <http://www.treas.gov/offices/domestic-finance/usps/meetings/4-29-03/wachter.pdf>.
[41] 39 U.S.C. § 1004(b)-(h).
[42] 39 U.S.C. § 1005(f).
[43] Embracing the Future, pp. 109, 121, 122-123.
[44] 39 U.S.C. § 1005(d). Lesser numbers of employees first hired after December 31, 1983, are subject to CSRS-Offset rather than FERS. See 5 U.S.C. § 8402(c)(1); 5 C.F.R. § 842.105. Also, employees who leave federal service and are rehired into Postal Service positions are subject to CSRS, FERS, or CSRS-Offset depending upon their circumstances. 5 U.S.C. § 8402(b)(2); 5 C.F.R. § 842.104(c)-(e). Further, certain employees previously included under CSRS had the option to switch to FERS.

of this plan is currently 11.2 percent of basic pay, resulting in a FY 2006 expense of $2.652 billion for an average expense of $2.65 per FERS work hour. The 2006 cost of the defined contribution portion of this plan is $0.960 billion or $0.96 per FERS workhour, for a combined cost of the FERS retirement plan of $3.61 per hour. Private employers, who are generally covered by the Employee Retirement Income Security Act of 1974 (ERISA), have broad discretion over retirement plans offered to their employees, subject to any collective bargaining obligations. The U.S. Department of Labor's Website reports that for the quarter ending December 2006 the average cost of retirement benefits for workers in private industry was $1.21 per work hour, and in the category for production, transportation, and material moving occupations, $0.97 per work hour.[45]

- **CSRS**. The Postal Service is also covered by the Civil Service Retirement System for most employees hired before 1984. The Postal Service was formerly required to make certain unfunded liability payments not required of other agencies. Following an assessment requested by the Government Accountability Office, OPM concluded in 2003 that higher-than assumed earnings on the Postal Service's contributions had put it on pace to overpay its pension liability.[46] Under amendments enacted in April 2003 that were further adjusted in the December 2006 legislation, OPM has determined that the Postal Service has already more than fully funded its entire liability for this program (exclusive of continued employee contributions at the established rate). Further, Postal Service presented to OPM an analysis by an actuarial firm showing that OPM's division of cost responsibility for pre-1971 retirees between the Government and the Postal Service overcharges the Postal Service by another $85 billion as estimated under principles applied to successor organizations after reorganizations in the private sector. In reaffirming its decision OPM was not required to demonstrate that the firm's analysis was incorrect under private sector experience, and the Postal Service was not entitled to have the matter litigated before a neutral judge. No private corporation could be singled out by law to be charged $85 billion without a neutral decision backed up by full due process.
- **Health Benefits for Annuitants**. The Federal Employee Health Benefits [FEHB] program provides the right for postal employees to elect to continue FEHB coverage into retirement under either the FERS or CSRS pension programs. Prior to the amendments enacted in December 2006, the Postal Service accounted for annuitant health benefits under Generally Accepted Accounting Principles [GAAP] using multi-employer plan

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[45] U.S. Dep't of Labor, Employer Costs for Employee Compensation Historical Listing (Quarterly), 2004-2006 (March 29, 2007), pp. 3, 8 <http://www.bls.gov/ncs/ect/sp/ececqrtn.pdf>. Total retirement expense for FERS, for CSRS, and for the CSRS supplemental liability expense, was $5.163 billion in FY 2006 resulting in an average retirement expense of $3.54 per work hour.

[46] U.S. General Accounting Office, "Review of the Office of Personnel Management's Analysis of the United States Postal Service's Funding of Civil Service Retirement Costs, GAO-03-448R (January 31, 2003) <http://www.gao.gov/new.items/d03448r.pdf>.

accounting rules, recognizing expense as payments to OPM came due. Under the new law, although governed by the same accounting rules, the Postal Service must pay a schedule of annual deposits into a new OPM-managed Postal Service Retiree Health Benefit Fund through September 30, 2016. At that point the amount in the Fund will first become available to be applied to payment of the Postal Service's portion of health benefit premiums for annuitants. OPM will then calculate and the Postal Service will pay an annual amortization as needed to cover any unfunded balance by 2056.[47] No statute specifically requires private employers to pre-fund annuitant health benefits from company-sponsored plans. While GAAP requires private employers to accrue for their future health premium obligation, and SEC regulations require disclosure of funded and unfunded liabilities, the employer is not required to relinquish control of the funding to a governmental body before payment is required.[48] Further, private employers who have collectively bargained to provide retiree health benefits may abrogate the obligation through collective bargaining, including through the implementation of a last, best and final offer even if the union does not agree. This procedure does not apply to the Postal Service. The amounts that the Postal Service is required to pay to the new fund are large, increasing from $5.4 billion to $5.8 billion per year through 2016.

- **Medicare Part D**. Medicare-eligible retirees from the Postal Service and other entities in the public and private sectors can participate in the Medicare Part D program of drug prescription benefits. Since prescription drug benefits under retiree health benefit programs pay benefits before Medicare, their availability restrains Medicare costs. Congress enacted certain incentive payments to encourage retiree health benefit plans to include and preserve drug prescription benefits.[49] As a participant in the FEHB program that includes such drug benefits, we requested OPM to obtain the statutory incentive for at least the Postal Service's portion of FEHB in order to offset part of the Postal Service's premium liability. This request was denied on the ground that the Government does not subsidize itself to provide an incentive for health benefits coverage already in place. Private health plans already providing such coverage are eligible to receive such incentives to the benefit of the employers and employees who pay for them. The Government's decision prevents the Postal Service from receiving a remission of $250 million per year in health benefit expense to which it would be legally entitled if it were a private employer.[50]

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[47] 5 U.S.C. § 8909(a).

[48] The Pension Benefit Guarantee Corporation does not guarantee health benefits and therefore does not require that corporations deposit funds to cover future health benefit costs.

[49] Medicare Prescription Drug Improvement and Modernization Act of 2003, Pub. L. No. 108-173, § 1860-22(a),117 Stat. 2066, 2125 (42 U.S.C. § 1395w-132).

[50] An independent actuary estimated that the decision prevented a reduction of $6 billion in the Postal Service's long-term liability.

- **Executive pay**. The December 2006 amendments empower the Board of Governors of the Postal Service to pay annual performance bonuses, in combination with salary, together not exceeding the salary set for the Vice President of the United States, except for up to 12 critical positions for which the total paid compensation may not exceed 120 percent of the Vice President's salary.[51] Although these amendments give the Board some flexibility in paying compensation to attract and retain key executives, they fall well short of the flexibility available under laws applicable to private corporations of comparable size.
- **TCOLA**. The Postal Service is subject, without regard to collective bargaining, to statutory civil service requirements for certain cost-of-living adjustments for employees stationed outside the 48 contiguous states. Private employers do not have such responsibilities imposed by law. The cost of this benefit in FY 2006 was $71.7 million.[52]
- **Workers Compensation**. The Postal Service is covered by the Federal Employees Compensation Act [FECA] in the same manner as other federal agencies, with one exception enacted in the December 2006 amendments. For postal employees, a three-day waiting period before compensation eligibility attaches, during which an employee may use available leave, has been restored up front before the employee becomes eligible for 45-day continuation of pay, similar to a previous rule before liberalizing amendments were enacted in 1974.[53] Private employers are covered under state workers compensation laws. Such laws typically provide benefits at a rate of 2/3 of pay rather than 75 percent as applicable to employees with dependents under FECA, and do not include FECA's 100 percent continuation of pay for the first 45 compensable days. Moreover, unlike private firms but like other agencies, the Postal Service is precluded by law from settling workers' compensation claims. State laws provide for lump sum final payments to claimants who reach maximum recovery and are unable to return to work instead of continued compensation payments for life as under FECA. State laws do not require the employer to return a claimant to work in a limited-duty position when the claimant is medically unable to perform regular duties. We do not have data showing the cost of these differences.
- **Veterans' Preference**. The Postal Service is covered by federal veterans' preference in hiring and retention. Preference-eligible applicants may appeal non-selection to the Merit Systems Protection Board [MSPB] and preference-eligible employees may appeal adverse actions to the MSPB as if they were employees in the competitive service of the federal civil service.[54] Private employers do not have similar veterans' preference

[51] 39 U.S.C. § 3686.
[52] 39 U.S.C. § 1005(b); 5 U.S.C. § 5941. Eligible employees receive a specified percentage adjustment, ranging from 10.5% to 25% depending on locality, applied to base salary for up to 40 hours of work per week.
[53] 5 U.S.C. § 8117; 39 U.S.C. § 1005(c).
[54] 39 U.S.C. § 1005(a)(2).

legislation or administrative appeals tied to veteran status. The requirements drive complex and costly testing, screening, and appeals systems for discipline and for organizational reassignments. Differential rights for preference eligible veterans versus other employees make business decisions on staffing or local changes in assignments for employees more complex, time-consuming, and costly. Precise comparative numbers are not available.

- **EEO appeals**. Like the FTC, the Postal Service is subject to the more burdensome federal-sector EEO appeals process. Unlike the private-sector EEO appeals process, federal-sector requirements include official paid time for appellants and their representatives at every stage of the process with few limitations, plus the cost of investigating every cognizable EEO claim without the kind of summary judgment process that characterizes the private sector EEO process.[55]
- **Inspection Service**. Similar to the way in which the private sector maintains a security force to address the safety and security of its products, the Inspection Service provides for the safety and security of the mail. However, by law, the Inspection Service is also assigned to address matters that go beyond the safety and security of the mail. These often include pursuing child pornography, much of which has now moved to the Internet, securities fraud investigations, and identity theft.[56]

Financial, Investment, and Borrowing Restrictions

For convenience and to avoid repetition we have consolidated the discussion of these matters under Question 8, which focuses specifically on one aspect of borrowing, although much of the material included there would be responsive to this question.

Unfunded Service and Pricing Mandates

Like the laws applicable to private business, those that regulate the Postal Service are intended to promote efficiency.[57] In the Postal Service's case, however, this is one important value among many values and concerns that its management is required to balance, as public officials providing a Government service under law.

While title 39 of the United States Code does not explicitly employ the term "universal service obligation," it includes many requirements intended to promote universal coverage and affordability. One of the uncodified study requirements included in the Postal Accountability and Enhancement Act, however, directs the Postal Regulatory Commission to report and make recommendations to the

[55] 42 U.S.C. § 2000e-16; 29 C.F.R. Part 1614.
[56] 39 U.S.C. § 401(a)(6); 18 U.S.C. § 3061.
[57] See 39 U.S.C. § 101(a), 3rd sentence; 403(a), (b), 404(b), 407(a)(1), 1001(e)(4), 2010, 3622(b)(1).

President and Congress on universal postal service and on the postal monopoly.[58] We will not try to anticipate that report here with a catalog of the statutory service and rate restrictions that have been established for social policy reasons. However, it may be useful to provide a few examples as illustrations of the range of these restrictions and requirements.

- **Six-day and rural delivery**. Annual appropriation riders re-enacted each year beginning in 1984 provide that "6-day mail delivery and rural delivery of mail shall continue at not less that the 1983 level."[59]
- **Post offices**. Small post offices may not be "closed solely for operating at a deficit," and a post office closing is subject to procedures for advance notice and public comment, written decision, and appeal to the PRC.[60]
- **Zoning limitations**. Rates for Media Mail (formerly called book-rate mail) and Library Mail cannot vary with distance.[61] This restriction causes customer behaviors that place upward pressure on costs for these services and prevent recognition of the different value and demand for longer-distance package delivery.
- **Periodicals**. Statutory provisions requiring consideration of "educational, scientific, cultural, and informational value" produce lower cost coverages for Periodicals mail. In the most recent rate case, the PRC's rates included a cost coverage of 100.2 percent for Periodicals, while the coverage for Standard Mail Regular, the most comparable category including catalogs, was 170.8 percent. An increase in cost coverage for Periodicals to 120 percent would increase revenue by $500 million annually. Although never covered by the postal monopoly, Periodicals remain in the market-dominant category for regulatory purposes.[62]
- **Charitable and other nonprofit mailings**. Statutes prescribe specific advantageous rate differentials for nonprofit, library, in-county periodicals, and other favored mailings as compared to similar commercial mail. For example, rates for Nonprofit Standard Mail must be set so that the estimated average revenue per piece is 60 percent of the same figure for the regular-rate subclass. These rate preferences reduce Postal Service revenue by about $1.1 billion per year.[63] Congress formerly paid the postage differential or "revenue forgone" for statutory reduced-rate mail, but currently does so only for free mail for the blind and for overseas voting, and to amortize past shortfalls in authorized reimbursements during the appropriation years 1993-1998 at the rate of $29 million annually through 2035.[64]

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[58] Postal Accountability and Enhancement Act, § 702.
[59] Transportation, Treasury, Housing and Urban Development, the Judiciary, the District of Columbia, and Independent Agencies Appropriations Act, 2006, Pub. L. No. 109-115, 119 Stat. 2396, 2490.
[60] 39 U.S.C. § 404(d).
[61] 39 U.S.C. § 3683.
[62] 39 U.S.C. §§ 3621(a); 3622(c)(11); 3685.
[63] 39 U.S.C. § 3626(a)(6).
[64] 39 U.S.C. § 2401(e).

- **Alaska bypass mail transportation**. The most detailed portion of the Postal Service's operating statute may be the extensive provisions regulating air transportation of mail destined for bush points in Alaska.[65] In FY 2006 the Postal Service paid $118.6 million for this transportation against $21.1 million in revenue, for a net deficiency of $97.5 million.
- **International mail transportation**. Rates for international mail transportation for the Postal Service are regulated by the Department of Transportation.[66] Corresponding prices paid by private shippers are set by the market. In FY 2006 the Postal Service paid an estimated $65-$98 million more for this transportation than market rates would have charged.

Some of these provisions limit the discretion of the Postal Service in managing its operations and networks, which affects all products including competitive products. Rate restraints limiting the revenue contribution of particular products place a heavier load on the rest of the system in supporting networks common to all. Such public policy constraints are not applied to competitors under federal or state law. Authority for a compensatory general public service appropriation in the amount of $460 million per year nominally remains in the law but none has been requested in the President's budget since first excluded in FY 1983 for budgetary restraint reasons.[67] Meanwhile, the network reach requirement adds almost two million more delivery points every year to keep up with the growth of the country,[68] whether mail volume grows or not.

Market Restrictions

Private companies are chartered under state laws that typically empower them to engage in any lawful business.[69] In recent years, as domestic parcel and express markets have matured, the leading parcel and express companies have found their most dynamic growth opportunities in overseas markets and in fields outside their core operations. Without these opportunities, the major companies would be noticeably smaller and less profitable than they are today. The genuinely commercialized postal operations in the world are readily distinguished by their merger and acquisition activities with private parcel, express, logistics, and financial companies, domestic and foreign.

As a federal entity the Postal Service is limited to the scope and authority prescribed by Congress. By law its business is to receive and deliver throughout the United States "written and printed matter, parcels, and like materials and provide … services incidental thereto."[70] It also is authorized to serve the United States in exchanging mail with other countries but does not have a mission to

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[65] 39 U.S.C. § 5402.
[66] 49 U.S.C. § 41907.
[67] 39 U.S.C. § 2401(b).
[68] U.S. Postal Service Annual Report, 2006, p. 36.
[69] See the attached summary prepared for the Postal Service by outside counsel familiar with advising private corporate clients.
[70] 39 U.S.C. § 403(a).

establish postal systems to serve growing economies overseas except in their communication and commerce with the United States. In the Postal Accountability and Enhancement Act, Congress specifically constrained the scope of the Postal Service's provision of competitive products by defining postal services in terms of hard-copy mail and by prohibiting any new nonpostal services.[71]

Transparency and Oversight Mechanisms

For public accountability the Postal Service is subject to disclosure and control requirements that differ from or supplement legal requirements applicable to private companies for the protection of shareholders and capital markets.

- **Disclosure**. The Postal Service is covered by the Privacy Act, the Government in the Sunshine Act, the Freedom of Information Act (FOIA), the Standards of Conduct for Employees of the Executive Branch, criminal laws regulating the conduct of federal employees, and PRC disclosure requirements and subpoenas. The FOIA requirement is subject to a postal-only "good business practice" exception for information of a commercial nature.[72] In regulatory matters the PRC has authority to adjudicate what commercial information will be disclosed by the Postal Service, applying a test that balances "the nature and extent of the likely commercial injury to the Postal Service against the public interest in maintaining the financial transparency of a government establishment competing in commercial markets."[73] Although competitors have the legal right to participate in PRC proceedings, the PRC has no authority to require similar disclosures from them as its new subpoena authority runs only against the Postal Service.
- **Reports**. Numerous periodic reports are required, including an Annual Report with audited financial statements, an annual Comprehensive Statement to Congress with oversight testimony, an annual cost and revenue report to the PRC, financial reporting in the President's Budget, a Strategic Plan and Performance Plan and Report under the Government Performance and Review Act, and, under last December's legislation, annual and quarterly reports to the PRC on formats prescribed by the Securities and Exchange Commission for disclosure by corporations under the Sarbanes-Oxley Act.[74]
- **Auditing**. The Postal Service is subject to audit by the Government Accountability Office and its own Inspector General and is required to

[71] 39 U.S.C. § 102(5), 404(e).
[72] 39 U.S.C. § 410(b)(1), (2), (c); 3016.
[73] 39 U.S.C. § 504(g).
[74] 39 U.S.C. §§ 2008-2009, 2401(e), 2402, 2801-2805, 3652, 3654.

have its financial statements audited by an independent external auditing firm.[75]

4. [b] Can any of these requirements or constraints be addressed apart from changes that would apply to the entire USPS? If so, please identify any requirements or constraints that might be removed only to the extent that they apply to competitive products.

As a matter of Constitutional law, Congress has the authority to remove or change any of the provisions discussed under the first part of this question except the Constitution.[76] Employment and labor laws or market restrictions could operate differently for competitive products and market-dominant products, and the cost of unfunded service and pricing mandates could be borne only by market-dominant products. As an administrative matter, implementing such provisions would also have some cost and could reduce economies of scope.

More fundamentally, however, the recent experience of over a decade of legislative deliberations leading to the December 2006 postal law has not shown that the public policy climate in this country will support movement in such a direction. The legal measures outlined in the response to the first part of Question 4 reflect judgments of fundamental legislative policy about how the federal government chooses to conduct postal operations in a democratic system as an employer and in service of the public interest. In this context matters such as health care, pensions, wages, facility closings, service to Alaska, new business entry, or public accountability are not necessarily seen differently for competitive as distinguished from market-dominant products.

The 2003 President's Commission report and the legislative hearings process have highlighted the risk that the Postal Service would run if its costs outstrip inflation, as technological substitutes for mail become more attractive and achieve further penetration. Congress adopted a new regulatory regime featuring a rule that market-dominant price increases for the future, by class, may not exceed changes in the Consumer Price Index.[77] It provided for reporting of financial activity and more flexible pricing for competitive products, while adding a number of additional accountability provisions (see response to Question 3). It declined to provide substantial flexibility or relief in labor matters as the President's Commission had proposed; it increased employee benefit expenses; and it added to social requirements and restrictions rather than reducing them.[78]

The amendments required that competitive products contribute an appropriate share toward the institutional costs of an integrated postal system and, in

[75] 39 U.S.C. §§ 410(b)(10), 2008; Inspector General Act of 1978, 5 U.S.C. app. § 8G. Under the new law, expenses of the Postal Service Inspector General ($158 million for FY 2006) and the PRC ($9 million for FY 2006) will be appropriated by Congress, but these will still be paid from the Postal Service Fund. 39 U.S.C. §§ 2003(e), 2009.

[76] Lebron v. National R.R. Passenger Corp., 513 U.S. 374 (1995).

[77] 39 U.S.C. § 3622(d).

[78] 39 U.S.C. §§ 409(f), 3622(e), 3691; Pub. L. No. 109-435, §§ 302(e), 705-708, 711, 1003-1005, 1009.

addition, pay the equivalent of federal income tax to the Postal Service Fund to help defray the cost of universal service requirements. The amendments provided some flexibility in pricing for competitive products but they did not change the nature of what remains a governmental operation.

4. [c] What laws would need to be changed to remove these requirements or constraints?

The statutes cited in the material under the first part of this question are the relevant provisions that would have to be amended.

5. Please provide an estimate of how the requirements identified in responses to Question 4 affect the costs that the USPS incurs to provide competitive products, and the prices that the USPS charges for competitive products.

The requirements and constraints described in response to Question 4 affect the costs and prices of all products, including competitive products. Competitive products are sold, processed, and delivered using much the same personnel, equipment, systems, and networks as those used for market-dominant products.

The most significant constraints affecting postal costs and prices, in dollar terms, are those related to employee pay and benefits, as indicated by the size of the figures cited in the response to Question 3. Requirements concerning universal coverage and social policies and limitations on discretion to reduce or realign processing and delivery operations also come at a cost. These constraints affect both the unit cost and quantity of resources expended.

For pricing purposes Postal Service costs are categorized in two types: (1) attributable costs, which are those costs having a direct causal relationship with the specific product, for the most part those which vary with volume; and (2) institutional costs, consisting of all other costs.[79] In FY 2006 institutional costs comprised $31.0 billion or 41 percent of total cost. Under the law the prices of competitive products are required to cover their attributable costs. Revenue from competitive products also contributes to fund institutional costs. The regulations that will govern how competitive products must be priced are currently under development in a rulemaking proceeding conducted by the Postal Regulatory Commission.[80]

The requirement for universal coverage and constraints on the discretion of the Postal Service to size and align its processing and delivery operations affect the

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[79] The PRC and the Postal Service together are generally recognized as having the best systems and understanding of cost of any postal system in the world, and for continually improving them. See A.T. Kearney, Inc., Data Quality Study (Alexandria, Va.; Apr. 16, 1999).
[80] Postal Regulatory Commission, Second Advance Notice of Proposed Rulemaking on Regulations Establishing a System of Ratemaking, RM 2007-1 (May 17, 2007), 72 F.R. 29284 (May 25, 2007) <http://a257.g.akamaitech.net/7/257/2422/01jan20071800/edocket.access.gpo.gov/2007/E7-10095.htm>.

quantity of necessary resources, including labor, materials, and capital, not just for market-dominant services but also for competitive services, which share the networks and their cost. Such restrictions prevent the Postal Service from maximizing productivity and reducing the quantity of resources needed to meet service standards.

The costs attributable to competitive products are significantly higher than they would otherwise be, due to each of the requirements listed in the employment and labor laws section of the answer to Question 3. The sum of the parts, considered separately in isolation, would not necessarily yield the consolidated cost of all such requirements. To determine how much higher the cost of a particular restriction is, one would have to know what the particular expense would be under a more flexible set of legal requirements. If the Postal Service were in a private sector legal environment under state rather than federal regulation, decisions that shape the nature of the services performed and markets served, capitalization levels, sales, network reach, and wage and benefit policy all would be likely to change. It is clear, however, due to the scale of the Postal Service and the predominance of labor and benefit expense within its financial statements, that even proportionally small differences in principal cost drivers translate to large numbers at the bottom line.

6. [a] Please comment on the costs, benefits, and feasibility of requiring the USPS to account for the cost of complying with the legal requirements identified in responses to Question 1 in the cost of competitive products and in setting prices for competitive products.

The Postal Service does not believe that requiring the operations of the Competitive Products Fund to account for costs avoided by exemption from state and local law can be justified as a slate-balancing policy, at the same time that federal laws also: tightly bind the operations of that Fund within its historical market; require it for social policy reasons to follow high-cost, model employer policies not applicable to the competition; constrain its management of the size and location of its networks; impose multiple layers of transparency and oversight controls on top of those applicable to corporate disclosure; and generally require it to behave like the federal institution it is. The question does not ask whether private competitors should be required to account for costs avoided by their exemptions from the federal laws listed in answer to Question 2. But the contrast from flipping the question to the other side can be illuminating in evaluating how balanced the slate is.

6. [b] How should these costs be calculated and allocated between competitive and market-dominant products?

The question seems to ask: while the Postal Service incurs no cost under laws from which it is exempt, if a policy decision were made to charge it a proxy for such costs, thus adding a new element to its existing costs, how much should that new element be and what share should apply to competitive services? Our view, as indicated under the first part of the question, is that no such charge can be justified.

6. [c] Should the USPS be required actually to pay these costs or merely account for them when setting prices?

Neither, in our view, for the reasons stated above.

6. [d] If the USPS actually pays the costs associated with legal requirements, should it be required actually to comply with these legal requirements with respect to competitive products (e.g., pay local property taxes on buildings and vehicles to local governments)?

Requiring the Postal Service to comply with state and federal legislation would alter the subject from a cost-parity issue to a state-federal relations issue as discussed in response to the second part of Question 1 and further developed in response to the tax issue in Question 8 below.

6. [e] Alternatively, should the USPS be required to pay the costs associated with these legal requirements to the U.S. Treasury or the U.S. Postal Fund?

No, not in our opinion, when private companies are not required to pay the costs associated with legal requirements applicable specially to the Postal Service and not to them.

7. [a] Please describe how the USPS not being required to pay a return on the capital that the federal government contributed toward its competitive operations affects the USPS' costs and prices of competitive products.

To “pay a return” here apparently refers to a return in the sense that private companies pay from an equity investor’s standpoint. The Postal Service does not have this kind of access to equity from private investors. The Government’s capital contribution to the Postal Service is carried at $3.034 billion. The former General Accounting Office valued the original contribution at $1.724 billion in FY 1972. Since then the Postal Service received two infusions of $500 million each exclusively available for retirement of Treasury obligations in 1976-1977; and annual appropriation installments through FY 1984 toward the inherited liability for annual leave entitlements previously earned by employees of the former Post Office Department as of July 1, 1971, totaling $363 million.[81] These infusions of capital more than 20 years ago benefited and in some sense continue to benefit the Postal Service. But in practice, the Postal Service’s capital needs are largely funded from operations.

The short answer to the return question is that not requiring the Postal Service to pay some sort of proxy for a private-sector-style return avoids forcing the Postal Service to pay twice for the same investment, in two different ways, both of which

[81] 39 U.S.C. § 2002; Pub. L. No. 94-421, §2, 90 Stat. 1303 (1976); former 39 U.S.C. § 2004, repealed, Pub. L. No. 105-33, Title VII, § 7003(a)(1) (1997). The total of $3.034 billion also reflects certain other small adjustments during the early period.

add cost. As explained below, the Postal Service already returns, at considerable expense, the kind of value that the government was looking for in investing in the Postal Service.

- **Public Policy Purposes and Social Return**. Unlike private shareholders, the Government has not put its money into the Postal Service explicitly looking to maximize its financial investment. Instead the Government has operated the Postal Service in order to distribute social and economic benefits to the Nation at large, by linking it together, by assuring harder-to-serve areas are included, by promoting certain valued forms of communication, by serving as a model employer, and in other ways. This analysis is applicable to the provision of competitive products as well as market-dominant products. A comparison of the crisis state of affairs described in the Kappel Commission's 1968 report with that found in the report of the 2003 President's Commission suggests that the 1971 and 1976-1977 Government investments in the Postal Service have been returned many times over in the currency that the Government was looking for. The 2003 Commission's consumer survey found that 73 percent of the public either thought the Postal Service works extremely well the way things were going or that it needed only minor change.[82]

- **Implicit Financial Returns**. As last December's legislation demonstrates, the Government does extract financial returns from the Postal Service, at considerable cost to users of competitive products, even if not explicitly denominated as a return on invested capital. The schedule of annual payments into the new Postal Retirees Health Benefits Fund, ranging from $5.4 to $5.8 billion per year through FY 2016, does not derive from actuarial estimates of health benefits premium liabilities. This schedule, which reflects a transfer from one federal fund to another, is simply the transfer necessary to allow the Postal Service to stop overpaying its CSRS retirement liability, while keeping the net effect on the Federal Budget neutral. That is, the Postal Service and its customers continue to pay essentially what they were paying before; the money will be invested through FY 2016 in Treasury notes (reducing the Government's need to borrow from the public) and not otherwise used until that time; and only beginning in FY 2017 does the law allow the balance to become available for retiree health benefit purposes. In effect, the Government, as parent of the Postal Service, is extracting mandatory annual loans of over $5 billion (at below-market interest compared to the private sector), which the law states will not be paid back directly but instead will be applied starting in FY 2017 to pay Postal Service obligations. Multi-billion dollar, often retrospective adjustments to the Postal Service's benefit liabilities in aid of federal budgetary goals have had an extensive history since the mid-1980s.[83] While an explicit return on the Government's investment could theoretically be devised, this would simply add a

[82] Embracing the Future, p. 19.
[83] See Table 3.2, Selected Costs Transferred from U.S. Government to U.S. Postal Service, in U.S. Postal Service, Comprehensive Statement on Postal Operations (1997), p. 72 (reflecting a total transfer of $62 billion through FY 1997).

cost surcharge, as there is no practical way for one Congress to prohibit others in the future from making further implicit extractions. Furthermore, the $5.4-$5.8 billion stream of payments is now entrenched in the law and budgetary realities preclude reopening the matter.

- **Postage Reflects Capital Consumption**. Capital actually consumed by the provision of postal services, including buildings, vehicles, and equipment, is included in the rate base and built into pricing floors, and will remain so under the new legislation. This is because depreciation is a GAAP expense included in cost pools attributed to services on a cost-causal basis.

- **Conserved Capital Reflects Geographical Reach**. The major non-depreciable capital asset of the Postal Service is land. Postal Service land use is overwhelmingly a function of geography and ubiquity. Its nationwide scope responds to the range of duties, expectations, and service obligations imposed by the Government. When the Postal Service must acquire new land, the cash to pay for it comes from both competitive and market-dominant products, whether immediately or through amortized borrowing expense.

- **Private Sector**. As a prudential matter private companies must be seriously concerned with their investors' financial return on investment. Nevertheless, this is not a matter of statutory requirements applicable to them from which the Postal Service is exempt. It is a practical consequence of their statutory opportunity to solicit equity investment, an opportunity not made available to the Postal Service. Dividend decisions do not trace to statutory requirements.

7. [b] Should the USPS be required actually to pay a return on the capital that the federal government contributed toward its competitive operations or merely account for such a cost when setting prices for competitive products?

The opportunity to pay dividends, in amounts subject to the company's discretion, is a legal prerogative that private companies employ as part of their management of share price and the attraction of equity capital into their firms. The Postal Service does not have the legal option to issue shares or pay dividends to attract equity capital. Requiring the Postal Service to pay the equivalent of a dividend to the Government or to surcharge its prices as a proxy for dividends would impose more cost without providing any of the discretion or the benefit that private firms enjoy from their equity management.

7. [c] How should this return be calculated?

Of companies in the Standard & Poors' S&P 500 stock index that do pay a dividend, we understand that the current dividend yield averages less than 2 percent.

7. [d] How would this cost be allocated between competitive and market-dominant products?

We do not believe that such a cost should be allocated to either, for the reasons discussed above.

7. [e] Should the USPS be required to pay this return to the U.S. Treasury or to pay this return to the Postal Service Fund?

As indicated in response to the earlier part of Question 7, and for reasons explained further in response to Question 8, we believe that the Government and the Treasury are already well compensated for the investment in the Postal Service.

8. [a] Please describe how the USPS' ability to borrow from the U.S. Treasury at preferential rates as compared with private sector companies affects the USPS' costs and prices of competitive products.

The answer depends on how narrowly the focus is confined to one piece of a complex Treasury-Postal Service relationship. If the only cognizable point of comparison is the difference in interest rates between what the Postal Service pays and what private borrowers pay in the private market, then the Postal Service has an advantage. In FY 2006 the Postal Service reported interest expense of $2 million. In recent practice the Postal Service has been paying 12.5 basis points over Treasury's cost of borrowing. This tells a small fraction of the story.

Following is a more complete description of the legal situation involving Postal Service borrowing and investment, which applies equally to competitive and market-dominant products:[84]

- **Equity market access for capital needs**. The Postal Service has no access. Private companies have full access.
- **Bond markets access for capital needs**. The Postal Service may borrow up to a total cap of $15 billion, and within that limit may increase amounts outstanding in any year by not more than $3 billion per year. Within these limits the Postal Service has nominal legal access to the private markets unless Treasury preempts; in practice and by consistent Treasury policy imposed since 1974, Treasury always precludes Postal Service borrowing outside of the Federal Financing Bank. Private companies have access to private bond markets and Treasury cannot intervene. They do not face statutory amount limitations.
- **Borrowing from Treasury**. If Treasury elects to purchase the Postal Service's notes, then the Postal Service may borrow from Treasury, up to its statutory ceilings, through the Federal Financing Bank at a negotiated rate. Private companies have no access to borrow from Treasury, and Treasury may not require them to do so.

[84] 39 U.S.C. §§ 2005-2006, 2011. Under Question 3 we discussed the limited, $2 billion emergency "put" to Treasury, which is not available to support competitive products.

- **Equity market access for investment and operating needs**. The Postal Service has no authority to invest its own funds directly. The Postal Service may request Treasury's investment on its behalf in any securities deemed appropriate. In practice, by policy, Treasury will not invest in equities. Private companies have full investment options without control by Treasury.
- **Bond market access for investment needs**. The Postal Service has no authority to invest its own funds directly. The Postal Service may request Treasury's investment on its behalf in any securities deemed appropriate. In practice, by policy, Treasury will not invest for the Postal Service in bond markets, Government or private. Private companies have full investment options without control by Treasury.
- **Investment with Treasury**. Treasury will invest for the Postal Service exclusively in special-issue, non-marketable Treasury notes. Private companies may purchase Treasury securities but they control their own investments rather than placing them through Treasury and under its control.

To summarize, private companies can determine optimal capital structure, considering a balance of equity and debt. The Postal Service finances primarily through operations, with its borrowing constrained by statutory limits and Treasury control and administration. In the past the Postal Service was expected to break even over time and has not accumulated significant amounts of retained earnings to offset its need for capital despite its long history in operation. Although the new law authorizes the Postal Service to try to build retained earnings going forward, the private sector has a huge head start and has a source of capital through private investors that the Postal Service lacks.

The Postal Service, unlike the private sector, does not control the investment of its pension funds, the newly created Postal Service Retiree Health Benefit Fund [PSRHBF], or its cash from operations. The balance for Postal Service pensions as of the end of FY 2006 was $234 billion. The new PSRHBF will have a balance of $25.5 billion at the end of FY 2007 and will grow at least $5.4 billion each year through 2016. By statute these balances are invested only through OPM, which has all of its investments in non-marketable special-issue U.S. Treasury securities. The private sector is not restricted to investing only in U.S. Treasury securities but instead can invest in a broadly diversified portfolio of assets. FedEx reported in a recent 10K filing a historical return on pension plan assets, net of investment manager fees, of 10% for the 15-year period ending February 28, 2006. Over the same time period, yields on U.S. Treasury securities with the longest maturities averaged 6.2%.

As the question indicates, when Treasury exercises its preemptive right to purchase the Postal Service's notes, the Postal Service then pays an interest rate lower than the rate at which private companies are able to borrow. The policy basis for Treasury's decision is not to subsidize the Postal Service, but to consolidate all of the Government's borrowing and avoid intramural competition in the financing markets to protect the overall public interest. Earlier in the course of the legislative process that eventually produced last December's enactment, proposals would have both required the Competitive Products Fund to borrow in the market or at market rates and authorized it to invest in the market.[85] These provisions were removed at the Administration's request to protect Treasury's control.

In any year that the Postal Service's income on invested funds exceeds interest expense on borrowed funds, the net interest-rate effect, even ignoring the huge pension and health funds, is still a net disadvantage for the Postal Service compared to participants in the private markets. Investment amounts from operations net during the year exceeded borrowing amounts in FY 2005 and FY 2006. Accordingly, considering the net combined effect of the Postal Service's borrowing rate and its investment yield through Treasury, prices for all products, competitive and market-dominant, were higher during this period due to the net disadvantage compared to private company opportunities.

8. [b] How should these borrowing costs be calculated and allocated between competitive and market-dominant products?

The law establishes a procedure for the PRC to adopt regulations, after receiving recommendations from Treasury, concerning the identification of borrowing and other costs incurred by the Postal Service with either the Postal Service Fund or the Competitive Products Fund.[86] To the extent that the question intends to refer to a differential in borrowing cost between what the Postal Service incurs and what private companies incur, the Postal Service does not believe that differential should be made an element of Postal Service borrowing cost for the reasons stated.

8. [c] Should the USPS be required to borrow at commercial rates or should there be another mechanism to equalize this cost differential?

The Postal Service should not be required to borrow at commercial rates except to the extent that it receives access to the commercial markets for both borrowing and investment, including benefit funds under private-sector legislative requirements.

8. [d] If so, how should it be calculated and should it be paid to the U.S. Treasury or the Postal Service Fund?

Access to the commercial markets would enable the market to determine the calculations, and no payment to Treasury or the Postal Service Fund would be needed. To require the Postal Service to pay Treasury an interest rate that the private bond markets would charge, while still entitling Treasury to control Postal

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[85] See, e.g., S. 1285, 108th Cong., 1st Sess. (2003), § 401.
[86] 39 U.S.C. § 2011(h).

Service borrowing and investment for the general Government's purposes, would not be a field-leveling action. It would compound existing imbalances.

9. [a] Please discuss the costs, benefits, and feasibility of requiring the USPS explicitly to pay state and local taxes on its competitive operations.

As to feasibility, as stated in response to the tax question posed under Question 6, subjecting a federal entity to state taxation and attendant regulation extends the issue beyond cost-parity into the separate realm of federal-state relations.

Federal exemption from state taxation is not principally a matter of money; it derives from important principles first recognized by Chief Justice John Marshall's decision exempting the Second Bank of the United States from state taxation and other regulation, as an exercise of sovereignty to accomplish a federally determined and regulated mission.[87] Furthermore, private competitors are not uniformly subjected to all forms of state taxation and have legal privileges and attendant mitigation opportunities that the Postal Service would not have.

- Taxing authority entails the power to audit, investigate, and regulate. Such powers at the state and local level can be administered in ways inconsistent with exercises of comparable federal oversight.
- Private corporations, specifically including major Postal Service competitors, have a history of negotiating tax reductions or incentives in exchange for locating their operations in particular jurisdictions that welcome the benefits of jobs or other economic byproducts. The Postal Service must serve all locations and as a federal entity is disqualified from lobbying or negotiating for special favors.[88]
- The Postal Service already funds the property taxes for leased property through the rental terms. Of the Postal Service's total interior square footage, nearly a third is leased.[89]
- Postage and delivery service transactions of private sector competitors are typically not covered by sales taxes. In most states and localities sales tax is applied to tangible personal property.
- If charged sales tax when buying postage, the public would have to accept paying different prices for postal services in different localities. Stamp and meter administration would be complicated since some uses of the same postage would be taxable and others not.
- The Postal Service does not measure product revenues and costs by state or locality. For regulatory purposes, its revenues and costs by product are national estimates based on national sampling systems. Significant changes in data collection systems and processes to produce statistically valid product revenues and costs by state or locality would be

[87] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).
[88] See 18 U.S.C. 1913.
[89] U.S. Postal Service Comprehensive Statement, 2006, p. 25, <http://www.usps.com/strategic planning/cs06/cs2006.pdf>.

expensive. In some states with less density of population and delivery points, costs could exceed revenues.

9. [b] How should these costs be calculated and allocated between competitive and market-dominant products?

We do not believe there is sufficient justification for singling out these particular differences among many for calculation and allocation as described.

9. [c] For private sector competitors, please describe and provide the costs associated with filing and paying state and local income, sales, and property taxes and the magnitude of these taxes.

We expect that private companies may be in the best position to offer relevant data on these points.

9. [d] What laws if any would need to be changed to require the USPS to explicitly pay such taxes?

As explained in answer to Question 1, the relevant law is the Constitution of the United States as interpreted by the courts. Under applicable decisions, Congress could waive the Postal Service's immunity from state taxation by so providing in a statutory enactment.

10. [a] Please discuss the costs, benefits, and feasibility associated with requiring the USPS to establish a separate private entity to provide competitive products.

It would not be a stable permanent solution for the Government of the United States to operate a private company to engage independently, at arms length to the rest of the Postal Service, in the competitive provision of services traditionally integrated into the Postal Service's full-service networks. The purpose of the Government's current participation in these services is to provide the Nation with the benefit of a full-service postal system offering services traditionally and effectively provided through the nationwide networks required for universal coverage. Every major postal administration in the world has traditionally included these services within its inventory and continues to do so. If the U.S. national view of this matter changed, so that consumers were no longer to be allowed to benefit from economies of scope and scale inherent in such a full-service postal system with universal coverage, then the reason for the Government's maintaining a role in such competitive services would be overtaken, in our view.

Early in the course of the legislative process that eventually produced last December's enactment, bills were introduced that would have authorized the Postal Service, at the discretion of the Board of Governors, to incorporate under state law a company in which it could invest to perform any of the Postal

Service's non-monopoly services and engage in joint ventures.[90] This may have been conceived as a transitional measure toward privatization of these services. As this proposal was considered, before its purpose and effect could be definitively explored, it was dropped due to strenuous opposition.

10. [b] What, if any, scope economies between its market-dominant products and its competitive products would be lost under this scenario?

The nature of economies of scope and scale in the Postal Service was discussed in answer to Question 2. A quantification of the economies of joint production would entail construction of a model of a thorough re-invention of the Postal Service's networks, including hundreds of facilities, thousands of offices, and 250,000 carrier routes, assuming the collection, sorting, transport, and delivery of two separate groups of products. Such a model is not available.

10. [c] Please cite any relevant examples involving foreign countries in which a state-owned postal service established a separate private entity to provide competitive products.

No foreign government has done this. State-owned posts provide both competitive and reserved or monopoly postal services through a single entity, or through divisions of a parent state-owned corporation. We do not know of any postal operator that has separated into divisions based on distinguishing competitive services from non-competitive services. The predominant direction in the more commercial posts involves reducing or eliminating monopolies so that all or most services are competitive, while also expanding economies of scale and scope by extending into related businesses. As discussed in response to Question 2, so far these posts have not exploited worksharing strategies to the degree adopted in the United States. Following is a brief summary of the relevant experience of major foreign posts.

- **Deutsche Post AG**. Deutsche Post is no longer state owned. It has acquired subsidiaries providing parcel, expedited, and logistics services. Deutsche Post operates both parcel and letter services within Germany and also owns DHL, which provides parcel, expedited, and logistics services worldwide, including in Germany.

- **TNT N.V.** (Netherlands). TNT NV is a privately owned holding company. Its Royal TNT Post subsidiary provides letter and parcel services within The Netherlands and also has a TNT subsidiary providing parcel, expedited, and logistics services worldwide, including domestically in The Netherlands. There appears to be no separation between the parcel and letter services provided by Royal TNT Post.

- **Canada Post Corporation**. Canada Post is a crown corporation owned by the Canadian Government. It provides letter and parcel services within

[90] See, e.g., H.R. 22, 106th Cong., 1st Sess. (1999), § 204.

Canada. It acquired Purolator Corporation of Canada, which provides parcel, expedited, and logistics services in Canada and other countries. Parcel and letter services provided by Canada Post are not separated, however.

- **La Poste** (France). La Poste is a public enterprise owned by the French Government, providing letter and parcel services within France. It also is the owner of Chronopost, which provides parcel, expedited, and logistics services in France and other countries. Parcel and letter services provided by La Poste are not separated.

- **Royal Mail Group Limited**. Royal Mail is a public limited company owned by the government of the United Kingdom [UK]. Royal Mail Group provides letter and parcel services in the UK. It also owns General Logistics Systems (GLS), a company that provides parcel and logistics services in Europe but not in the UK. Royal Mail Group is divided into three divisions: Royal Mail, which provides letter mail services in the UK; Parcel Force, which provides parcel and expedited services in the UK (including delivery in the UK of GLS parcels originating outside the UK); and Post Office Counters, which operates post offices that provide collection, delivery, and other supporting services to Royal Mail and Parcel Force. All provide competitive services.

Many of these posts have received broad discretion to organize themselves as they find most suitable and to participate fully as commercial competitors, in ways not available to the Postal Service under U.S. law:

- Many of them own banks.
- Most provide lobby services for non-traditional products.
- Many have the option to establish corporate subsidiaries as they find advantageous.
- Many have created extra territorial office of exchange subsidiaries to compete for business outside their national territory.[91]
- Japan Post has ownership in an airline and the largest savings bank in the world.
- Emirates Post is building an airline.
- China Post owns printing companies, an airline, and hotels, as well as a bank.
- Some of the posts own telephone companies.

11. Please discuss any other possible ways of ending the differences in legal requirements between the USPS and its private competitors with respect to the competitive category of mail, including the costs, benefits, and feasibility associated with these other possible approaches.

[91] See <http://www.upu.int/etoe/en/index.shtml>.

At a theoretical level, a range of strategies might be conceived. For example, the European Union has authorized member states to establish compensation funds for universal service provision. If created, such funds are to be structured to pool financial contributions from operators authorized to offer services outside the scope of any monopoly maintained by the member state, and used for the purpose of supporting the cost of universal service provision of postal items and postal packages.[92] That kind of approach has not gained any traction in the United States. Some countries have started to bring postal monopolies to an end and have either privatized postal providers or encouraged government-owned postal operators to engage fully in commercial competition with private firms. For the near term these strategies have not drawn much favor in this country.

[92] European Directive 97/67/EC, Article 9.4 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31997L0067:EN:HTML>.