

BEFORE THE
UNITED STATES
FEDERAL TRADE COMMISSION
WASHINGTON, D.C.

In Re:

United States Postal Service

Postal Accountability and Enhancement Act

Project No. P071200

72 FR 23280

May 1, 2007

SUBMISSION OF
FEDERAL EXPRESS CORPORATION

Communications with respect to this document should be sent to:

Nancy S. Sparks
FEDERAL EXPRESS CORPORATION
Managing Director, Regulatory Affairs
1101 Pennsylvania Avenue, N.W.
Suite 600
Washington, DC 20004
(202) 756-2461
nssparks@fedex.com

M. Rush O'Keefe, Jr.
FEDERAL EXPRESS CORPORATION
Senior Vice President and
General Counsel
Steven H. Taylor
Vice President, Regulatory
3620 Hacks Cross Road
Memphis, TN 38125

August 6, 2007

BEFORE THE
UNITED STATES
FEDERAL TRADE COMMISSION
WASHINGTON, D.C.

In Re:

United States Postal Service

Postal Accountability and Enhancement Act

Project No. P071200

72 FR 23280

May 1, 2007

SUBMISSION OF
FEDERAL EXPRESS CORPORATION

Federal Express Corporation (“FedEx”) appreciates the invitation of the Federal Trade Commission (the “Commission”) to provide information for the study examining how Federal and state laws apply differently to the United States Postal Service (“USPS”) and to private companies when providing similar products in competition with each other. 72 FR 23820 (May 1, 2007) (the “Notice”).

Differing legal treatment between private companies and USPS has been a long-standing point of concern for both USPS and its private competitors. Each side sees “advantages” that the other does not have. The recently enacted Postal Accountability and Enhancement Act of 2006¹ (“PAEA”) has dealt with some of these legal discrepancies, such as customs procedures and limitations on immunity from suit. Still, some differences remain on each side, and FedEx appreciates the opportunity to explain its views and in some cases to “put some numbers around” our concerns.

The PAEA

The PAEA has been a long time in coming, becoming the first major postal statute since 1970. The PAEA reflects modern realities for the delivery services community: while USPS continues to provide important public services, it is at the same time competing ever more directly with private delivery companies and other means of communications.

¹ Pub. L. 109-435, 120 Stat. 3198 (2006).

A major innovation of the new statute is to mandate different sets of rate-setting rules for market dominant and competitive services, putting the latter more on a level playing field with similar services offered by private companies. Fairness in the competitive marketplace, both to the consumers and to the participants, demands no less. A level playing field is in the best interests of the consumers – making choices transparent and cost-effective and creating genuine competition that will foster undistorted pricing and spur innovation. Still, it will be difficult, and in some cases impossible, to ensure completely and objectively free and fair competition by pulling apart the legal threads that have been woven over many years in response to manifold demands placed on USPS as a provider of public services. We acknowledge that difficulty as one starting point.

Another starting point must be recognition that a number of the concerns of private companies have already been addressed legislatively. For example, for many years, the private express companies complained about unequal treatment of postal and private company shipments by customs and other border-control officials. The PAEA mandates that for competitive products, such inequality must end. “Similar shipments” handled by USPS and private companies must be treated “in the same manner.”² While achieving this mandate in full may take some time, it is now an ongoing requirement for Customs and Border Protection and its sister border agencies. Rather than dwelling on past legal inequities, it is time now for USPS and private industry to work together to establish a non-discriminatory international legal framework, not only at the U.S. borders, but also at borders around the world. To this end, FedEx will be advocating changes in the Universal Postal Union (“UPU”) rules and foreign laws and regulations, as well as changes in U.S. policies, procedures and regulations.

Similarly, immunity from suit under a number of Federal statutes has also been removed or limited by the PAEA. Sections 409(d) and (e) of Title 39 now allows USPS to be sued under the Trademark Act,³ certain provisions of the Federal Trade Commission Act, and the antitrust laws.

Other differences have been addressed but not eliminated. Section 409(f) requires that USPS buildings be constructed or altered “to the maximum extent feasible as determined by the Postal Service” in compliance with nationally recognized model buildings codes, and only after “consideration” of zoning laws, land use or environmental laws of a State. While that moves the various building constraints further towards parity, the “wiggle room” of Section 409(f) – the feasibility of compliance with these standards is left to the sole discretion of USPS – is still formidable, and probably unquantifiable.

Given that backdrop, FedEx would now like to respond to specific questions of the Notice.⁴ We begin with Question 10 – the “separate company” concept – because we

² 39 U.S.C. §4079(c)(1) *et seq.*

³ Prior case law, such as Federal Express Corporation v. United States Postal Service, 151 F 3d 536 (6th Cir. 1998), relating to certain federal statutes has now been codified.

⁴ The full text of the questions from the Notice is set forth in these footnotes, in italics. We have combined Questions 4 and 5 and have not addressed Questions 7, 8 and 11.

believe that as a policy matter, a proper resolution of this issue could address most of the remaining issues, at least from the point of view of many competitors.

Question 10: Separate private entity.⁵

In 1970, when Congress last overhauled the postal statutes, the “new” USPS was transformed into an independent federal agency and instructed to be more “business-like.” As one report on the distinctions between USPS and its private competitors points out, “using the term ‘business-like’ rather than ‘business’ in describing the new Postal Service is an important distinction made in the [legislative history].”⁶

One approach to achieving a “level playing field” would be to require USPS to place competitive services in a separate corporate subsidiary. The new company would not necessarily have to establish an entirely separate network. It could instead take advantage of the economies of scale and scope of USPS’s market dominant network by purchasing services from USPS.⁷ The difference from today would be other competitors would have the same access to the market dominant network, with all users contracting on an arms’ length basis for all users.

The new USPS company – in this document it will be called CompCo (competitive products company) – would be established under normal corporate law. CompCo would not be a government entity and would have none of the “advantages” or “burdens” of USPS proper. The logic underlying the formation of CompCo is not wholly original, of course.⁸ In the early stages of the legislative process that ultimately produced the PAEA, Congress considered a provision would have allowed USPS to establish a private law corporation for non-postal and other competitive products. Despite FedEx’s support, this idea was not included in the final bill, apparently due in part to a lack of interest from USPS. Yet, even after deletion of this provision from the postal reform bill, informed industry observers have continued to urge variations of the concept.⁹

⁵ Question 10 provides in full: “10. Please discuss the costs, benefits, and feasibility associated with requiring the USPS to establish a separate private entity to provide competitive products. What, if any, scope economies between its market-dominant products and its competitive products would be lost under this scenario? Please cite any relevant examples involving foreign countries in which a state-owned postal service established a separate private entity to provide competitive products.”

⁶ “United States Postal Service: Business Government Status,” Law Department, USPS, January 1995 (hereinafter “USPS 1995”), at 2.

⁷ We will refer loosely to the remaining market dominant activities of USPS as “USPS” unless we specifically note that we are referring collectively USPS and its subsidiary, CompCo.

⁸ See, e.g., Haldi, John and William J. Olson, “Enhancing Competition by Unbundling the Post Administration,” in Progress Toward Liberalization of the Postal and Delivery Sector, edited by Michael Crew and Paul R. Kleindorfer, Springer Science + Business media: 2006, and works cited therein (hereinafter, “Haldi and Olson 2006”).

⁹ For example, Haldi and Olson argue that, “No approach to unbundling will eliminate or reduce the scope of the natural monopoly over delivery. Given that fact, the most straightforward way to reduce the resources operating under the protective umbrella of monopoly is to distinguish between activities that can lay claim to natural monopoly (delivery) and all others that are contestable. *Transfer of all contestable activities into an independent for-profit private entity* would increase substantially the resources subject to the discipline, risks and rewards of competitive markets, and

As stated above, CompCo could use its own assets (purchased with its own revenues) or contract with USPS, as it determined best for its business. For example, in some areas CompCo might wish to operate dedicated delivery trucks for the Parcel Post and Priority Mail businesses. Under such circumstances, CompCo's delivery trucks would be treated legally in the same way as FedEx's – *i.e.*, subject to personal property taxes, vehicle registration fees, and traffic and parking fines. If CompCo did not want to assume the cost of operating its own delivery fleet, it could contract with USPS to use its network and pay the relevant costs. This option would allow CompCo to continue to benefit from advantages that USPS may enjoy by virtue of differences in legal treatment, as well as economies of scale and reduced costs. By the same token, CompCo would be able to circumvent situations in which legal differences result in disadvantages for USPS. In short, CompCo and its private competitors would have the same possibilities and flexibilities, while still retaining access (for a fee) to the network of USPS.

After creation of CompCo, the network serving the remaining market dominant activities of USPS would be open to all competitors without exclusive arrangements for sale or delivery of any products. For example, if only CompCo products could be purchased at a USPS post office, all the old “advantages” – zoning, property taxes, etc. – would inure only to the benefit of CompCo. However, if a consumer could walk into a USPS facility and select from a choice of competing competitive products – and the producers of those products paid fair and equal commissions to USPS for their sale – then a level playing field could be maintained. If a competitor chose not to make its products available through the local post office outlet, that absence would be the choice of the competitor, not that of a legally advantaged monopolist, as it is today.

The management of CompCo would enjoy the same freedoms and face the same restrictions as other companies in the marketplace. CompCo could contract with USPS to have its products sold over-the-counter in post offices. It could use the USPS network downstream – for a charge. It could deliver items to post office boxes (“PO boxes”) and curbside mailboxes so long as USPS provided other private delivery companies similar opportunities. So, for example, one could imagine a PO box holding a FedEx Priority Overnight Letter and a CompCo Priority Flat Rate Box, side by side with First Class letters (a product of USPS), provided that both the FedEx and CompCo shipments met the technical requirements of USPS for size, addressing, sortation, etc., and both companies paid USPS an appropriate fee to compensate it for the costs of maintaining the PO box system.

Establishing CompCo as a means of achieving legal parity is conceptually similar to the European Commission's resolution in 2001 of a competition law complaint against Deutsche Post A.G. (“DPAG”) regarding use of monopoly revenues to subsidize its parcel post business. After investigation, the European Commission concluded that:

the entity's need to survive would instill cost-minimizing and profit-maximizing incentives into a large segment of the existing postal network.” Haldi and Olson 2006, at 175.

“[O]nly complete transparency of the financial relations between the reserved area on the one hand, and the parcel services which are open to competition on the other, can guarantee that individual competitive parcel services cover the additional costs of producing that service. Only if the DPAG activities which are open to competition are provided separate from those covered by the reserved area, is there a guarantee that competitors are not eliminated by offers which are not based on efficiency or superior performance, but solely on the basis of a price below the additional costs of providing the competitive service.

As a result, DPAG undertook:

“...to transfer all its commercial parcel activities, including the delivery of catalogues, to a legally separate company, Newco, by 31 December 2001. The hive-off would include all B-to-B and B-to-C services provided outside the post-office counter system, on the basis of individual contracts at special prices. Once the structural separation becomes effective, DPAG itself will no longer offer any commercial parcel services.¹⁰

It should be noted, however, that there are few direct foreign precedents for a CompCo-type approach because other industrialized countries have moved substantially beyond the need for such a legal device. In the European Union, as of mid-2006, 18 of the 25 public post offices had been corporatized, collectively accounting for approximately 71 percent of the letter post volume in the EU. Of these, eight European postal operators were also partially privatized, accounting of about one-third of the EU letter post. In addition, several EU countries have repealed or plan to repeal the postal monopoly so that it presently appears that by the first of 2008, about 60 percent of the EU letter post (by volume of mail) will be effectively liberalized. In the EU generally, it appears that there is already substantial, although not complete, equality of legal treatment for competitive services offered by public postal operators and private companies.¹¹

Indeed, the U.S. itself is already part of the way along the path of institutionally separate competitive and market dominant services. Competitors have products that use the USPS system for the “last mile” or even the “last few miles.” For example, FedEx Ground offers a product called “FedEx Smart Post” which uses the USPS service to deliver packages which FedEx Ground collects from customers. What we are proposing here is not just that competitors have access to the system, but that all competitive products –

¹⁰ Commission Decision of 20 March 2001, Case COMP/35.141 -- Deutsche Post AG, O.J. L 125, 5 May 2001, at.127. Similarly, in 1991, several European post offices and Canada Post formed a joint venture with a TNT, a private carrier, to provide international express services – a competitive service, just like under the PAEA. The European Commission approved this agreement only after insisting that it include provisions explicitly denying the joint venture any legal privileges enjoyed by the post offices. These included VAT exemptions, customs privileges, exemption from legal liability and special provision for air or road operations such as night flights. Commission Decision of 2 Dec. 1991, Case No IV/M.102 - TNT / Canada Post, etc., O.J. C 322 , 13 Dec. 1991.

¹¹ See generally, WIK, Main Developments in the Postal Sector (2004-2006) (May 2006), available at http://ec.europa.eu/internal_market/post/doc/studies/2006-wik-final_en.pdf. This study was prepared for the European Commission.

including what are now USPS competitive products – be charged on an arms’ length basis for the same access, rather than the preferential system for USPS competitive products that exist now.

In our view, the foregoing discussion is sufficient to suggest that allowing, or requiring, USPS to establish a separate corporate subsidiary to provide competitive products merits serious consideration as a means of achieving equal legal treatment for competitive products. At the same time, we appreciate that this is no more than a skeletal concept so far. Obviously, new legislation would be required. The rights of current USPS employees would have to be considered and appropriately protected. Certainly, the effects on the long term commercial viability of USPS and universal postal service must be evaluated. Nonetheless, given the broad range of thorny issues raised by the Commission’s other questions, we suggest you give serious thought to the advantages of a separate, corporate subsidiary for USPS’s competitive products.

Question 1: Legal requirements with which private competitors have to comply.¹²

USPS provides an amalgam of commercial services and governmental functions. Although USPS is exempt from certain laws and regulations (and uniquely subject to others – see question 3), the rationale relating such exemptions to public purposes is often obscure. In some cases, USPS’s legal exemptions appear to be traditional in nature, created out of whole cloth by administrative or judicial decision, rather than grounded in statute. As noted above, some statutory exemptions were explicitly removed by the PAEA. In addition, courts are gradually limiting their interpretation of other legal exemptions as USPS practices have become more and more “business-like.”

The value of a legal exemption may be measured most directly by the actual experience of those who are not exempt.¹³ FedEx incurs significant costs to comply with the following regulatory regimes which do not apply to USPS.

State and local assessments. The Supremacy Clause of the Constitution prohibits the imposition of income, real and personal *ad valorem* and other local taxes on USPS income and assets. Not so for its competitors. As a service business with operations in

¹² Question 1 provides in full: “1. 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. Please identify the specific source of the USPS exemption from each such legal requirement. Please provide estimates of both actual expenses, and administrative costs associated with compliance, that such legal requirements impose on private competitors.”

¹³ This method cannot be applied in all cases. Consider, for example, aviation security regulations under which USPS is specifically exempted from the regulations governing freight forwarders by definition. 49 C.F.R. § _____. It is our understanding that USPS has been required to prepare and follow an aviation security plan unique to it – only, like most security plans, it is secret, so we are unable to describe the differences between the burdens of USPS and those of other freight forwarders. We do know that Congress has made contributions to help pay for increased security costs after 9/11, contributions not made to the private freight forwarders. While Congress has given U.S. airlines money to help pay for security related costs – some \$9.4 billion – that also inures to the benefit of USPS, the largest contractor for air cargo space in the U.S.

every state, we pay a large variety of state and local taxes. These include real property taxes, sales and use taxes, personal property taxes and income and franchise taxes. We have provided estimations of the amounts that we pay in state and local taxes and some other charges in a separate, confidential filing. In addition, we must pay to maintain staff in reaction to the preparation and filing of all tax reports, and to analyze our tax liability under present and future statutes and regulations.

This does not extend to specific service fees, such as sewage and water fees, which are measured by use. Both USPS and private competitors pay such usage fees, but USPS claims exemption from assessments for infrastructure and improvements.¹⁴

In addition to personal property taxes, FedEx must also pay charges for titling and registering motor vehicles and any governmental charges relating to the operation of those motor vehicles (including the infamous parking tickets). In some jurisdictions, USPS has consented to pay parking fines but that is only because USPS has consented, not because the locality has mandated it. We have supplied some information on this in our confidential filing.

All this is to say that FedEx pays for the privilege to operate in a community and to offer its services to the residents: we contribute to the tax bases of the states and localities in which we operate. We believe that for its competitive products, USPS should do likewise. Once USPS departs from the “public good” of offering market-dominant products, it seems most appropriate that it also make such a contribution to the various governmental entities that support (through infrastructure and services) those products which are similar to those offered by their competitors.

Tort claims. Another continuing difference is legal liability. While some of these questions as to federal laws were resolved by the PAEA, others remain, both as to federal and state liability. USPS is covered by the Federal Torts Claim Act (FTCA),¹⁵ creating some level of liability for certain torts.¹⁶ However, it also has special treatment (beyond that of other federal agencies) that bars liability for others. One of the most important in this industry is for damages resulting from the transmission or delivery of mail, from which USPS is protected.¹⁷ FedEx and other companies limit (but do not bar) their

¹⁴ USPS 1995 at 37.

¹⁵ 28 USC §2679, 39 USC §409(e).

¹⁶ Of course, the FTCA establishes different ground rules for permissible tort claims against all parts of the federal government (not just USPS) as compared to private citizens. While the liability level is supposed to be the same as a private person under similar circumstances, 28 USC §2674, this is in fact limited by protections from some of the “hot buttons” about which many companies complain in today’s civil litigation systems. When suing USPS under the FTCA there is no right to a jury trial, no punitive damages and limitation on attorneys’ fees. 28 USC §§2402, 2674 and 2678. It is probably impossible to quantify the amount the USPS does not pay because of these general FTCA protections.

¹⁷ In 28 USC §2680(b), “[a]ny claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter” is barred. This is indeed a fundamental exception for the business of USPS, as many courts have noted. *See, e.g.,* the decision in Dolan v. USPS, 377 F. 3d 285 (3d Cir. 2006), where that court stated that while the exception does not protect USPS from slip-and-fall suits relating to packages left on doorsteps, it does give USPS a valuable shield. “Illustrative instances of the exception’s operation, then, would be personal or financial harms arising from nondelivery

liability by contract, and internationally under the Warsaw Convention. Nonetheless, these are the most common claims that a transportation company faces: that a shipment was delayed, misdelivered or destroyed. The fact that USPS remains immune from these claims relating to its competitive offerings is a significant difference between private and public competitors.

Question 2: Benefits from the letter monopoly and the mail box rule.¹⁸

The letter monopoly is an outdated device that purports to finance the public obligations of the USPS. In 2004, FedEx Chairman Frederick W. Smith told Congress, “The postal monopoly law lingers like an ancient curse on middle earth.” The Congressional purpose underlying the postal monopoly law, if there ever was an explicit purpose, is now difficult to discern.¹⁹ Its effect has been to limit innovation, and to “enervate and demoralize”²⁰ postal employees, and create an atmosphere of unrealistic confidence as to USPS’ financial future.

A second statutory monopoly is created by the statutory ban – via a criminal statute, no less – on placing items in the customer’s “mail box.”

A third, less well-known monopoly exists on access to PO boxes. This is created by USPS’s refusal to accept documents transmitted by private carrier and delivered to a post office for placement in a PO box located at that post office. The effect is to create a separate, government-only system that is in common use by many consumers (for example, to send their payments to their creditors, if they have not already switched to electronic payments.)

Collectively, these three limitations have severely restricted the growth of innovative document delivery services in the United States. Express services might not exist today but for the fact that outcry over USPS efforts to use the monopoly to suppress such services resulted in the “urgent letter” exemption now contained in 39 C.F.R. §320. Yet

or late delivery of sensitive materials or information (e.g., medicines or a mortgage foreclosure notice) or from negligent handling of a mailed parcel (e.g., shattering of shipped china). Such harms, after all, are the sort primarily identified with the Postal Service’s function of transporting mail throughout the United States.”

¹⁸ Question 2 provides in full “2. Please discuss any benefits the USPS derives, in providing competitive services, from its legal monopolies over letter delivery and mailboxes. 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. In what ways, if any, do private suppliers of competitive products interconnect with the USPS system? Do any federal or state laws prevent greater interconnection with the USPS system? If so, please cite these laws and explain the ways in which they prevent greater interconnection.”

¹⁹ See James I. Campbell Jr., “An Introduction to the History of the Postal Monopoly Law,” a paper presented at Cato Institute, Private Postal Service in the 21st Century, Washington, D.C., December 1994, and available at http://www.jcampbell.com/articles/CP_US_history.pdf.

²⁰ Statement of Frederick W. Smith, Hearings before the Committee on Governmental Affairs, U.S. Senate, March 9 and 11, 2004 (hereinafter, “Smith 2004”).

²¹ Smith 2004.

this exemption has kept prices artificially high (over the so-called “two-times” rule), and it was not until passage of the PAEA that the monopoly was curtailed to apply more distinctly to standard correspondence, the most basic USPS service.²²

Postal monopoly. A lot has been written about the USPS letter monopoly. It requires more study and probably much more analysis than the Commission can devote in this context, given the other questions it has posed as to legal advantages. FedEx has its own views, which were expressly publicly on many occasions during the debates leading up to the PAEA. In 2004, FedEx chairman Frederick W. Smith testified before Congress on this issue:

“The persistence of the postal monopoly is due mostly to an illusion that it is necessary to sustain universal service. It is often said the postal monopoly allows the Postal Service to raise extra money on cheap urban deliveries and subsidize the high costs of mail delivery in rural areas. In fact, economic studies show that the cost of rural postal service is not much greater than the cost of urban postal service. There is no reason to suppose that the Postal Service would abandon rural areas or raise prices sharply without a postal monopoly.

“Then, too, it has been argued that the monopoly protects the Postal Service by allowing it to get every last piece of mail and thus spread the fixed costs of its network over the maximum amount of mail. This logic would support extension of the Postal Service’s monopoly into any business activity in which incremental costs are less than total costs. For example, granting the Postal Service a monopoly over air freight services could, by this reasoning, reduce the price of a first class stamp by several cents. What’s wrong with this logic? What is wrong is that a monopoly not only generates economies of scale, it also breeds inflated costs, inefficiency, and lack of innovation. No one in his right mind would suggest that the United States would have better or cheaper or more universal express service today if the Postal Service had succeeded in extending its monopoly to include express services in the 1970s. As studies by economists at the Postal Rate Commission demonstrate, inefficiencies due to the postal monopoly exceed economies of scale by several billions of dollars. While reasonable persons can dispute the exact figures, no one can deny that a postal monopoly implies huge costs as well as benefits.

“The truth is that we have universal postal service in the United States in spite of the postal monopoly not because of it...

²² The PAEA will limit the monopoly to letters weighing less than 12 ½ ounces or for which a private carrier charges more than six times the basic first class rate. 39 USC §601(b). There is no longer a requirement for “urgency,” an earlier subjective test which chilled potential competitors (and resulted in all FedEx Letter and Pak envelopes saying “Extremely Urgent” somewhere on the packaging).

“I urge Congress to treat the postal monopoly in the future as a technical rather than a political issue. The basic principle should be that the postal monopoly should be no more extensive than necessary to finance universal service. This is an economic question amenable to proceedings before the Postal Rate Commission. When the Commission concludes that the monopoly can be pruned slightly without affecting universal service, it should be authorized to do so. More fundamentally, we need to face the ultimate fact that the postal monopoly is rendering the Postal Service unfit to compete and prosper in the delivery services sector of the future. While the ceiling on the postal monopoly proposed in S. 1285 is similar to that adopted in the European Union in 1997, the EU has already moved on to adopt tighter restrictions. Meanwhile, several individual countries in and out of the EU have abolished the postal monopoly altogether. In all cases, reduction or repeal of the postal monopoly has meant not the end of universal postal service but the improvement of universal postal service. Nor has any incumbent national post office suffered the loss of significant share so far. Like these other nations, we need to gather all of the facts necessary to plan an appropriate phase out of the postal monopoly. This would be the single most important step that could be taken towards structural transformation and modernization of the Postal Service. The transition period must be long enough to give the Postal Service time to prepare for increased competition, but short enough so that it cannot afford to put off the start of those preparations...”²³

Mr. Smith ended his testimony on this topic by noting that the European Union was examining ending the monopoly in that region by 2008. While the date may change (European authorities are presently debating this issue), the theme in Europe remains the same: the postal monopoly is not good for post offices that seek to be efficient nor for all those desirous of a competitive marketplace in delivery services, whether they be postal operator or private company.

The legal effect of the PAEA on the postal monopoly is so far largely unrecognized, but may be profound. What is commonly perceived as “the postal monopoly law” is in fact a set of regulations adopted by USPS in 1974 with scant (to say the least) statutory authority. The legal lynchpin of these regulations was the USPS claim of authority to “suspend” the postal monopoly under former 39 USC. §601(b), a claim flatly contrary to the statutory history of this provision. The PAEA repealed former §601(b) and USPS’s authority to adopt regulations implementing the postal monopoly. At the same time, the PAEA grandfathered those postal monopoly regulations purporting to suspend the postal monopoly and authorized the Postal Regulatory Commission (“PRC”) to adopt such regulations as may be required to implement the revised law. Since the PRC is no longer required to give deference to USPS regulations based on a repealed statutory provision, it appears that the PRC will be required to go back to the underlying postal monopoly statutes, statutes which date from 1872 and whose current meaning is far from clear.

²³ Smith 2004 at NEED CITE.

Mailbox monopoly. The monopoly on access to homeowners' mailboxes rule was enacted in 1934 and is a criminal statute punishable by fine but not imprisonment.²⁴ It is further broadened by USPS' own regulations.²⁵ No other country has such a monopoly. There is no economic evidence that a mailbox access restriction is necessary to maintain universal postal service. However, USPS has argued that the mailbox restriction is important for the police functions assigned to the postal inspectors and to reduce mail theft. In 1996 and 1997, the General Accounting Office (GAO) did two studies of the mailbox rule,²⁶ and came to the conclusion that while the rule did not necessarily help the goal of universal service, some Americans supported the rule for reasons of convenience or security. A clear majority (58 percent) of the GAO survey group, however, favored allowing "express companies like Federal Express or UPS" to leave packages in their mailboxes.

Maintaining appropriate control over the mailbox system is achievable without resort to a complete monopoly (and especially without resort to a criminalized restriction, which surely is overkill).²⁷ In his dissent in the Supreme Court case majority finding the mailbox rule constitutional (on First Amendment grounds), Justice John Paul Stevens laid out a practical solution:²⁸

If a private party - by using volunteer workers or by operating more efficiently - can deliver written communications for less than the cost of postage, the public interest would be well served by transferring that portion of the mail delivery business out of the public domain. I see no reason to prohibit competition simply to prevent any reduction in the size of a subsidized monopoly. In my opinion, that purpose cannot justify any restriction on the interests in free communication that are protected by the First Amendment...

Mailboxes cluttered with large quantities of written matter would impede the efficient performance of the mail carrier's duties. Sorting through papers for mail to be picked up or having no space in which to leave mail that should be delivered

²⁴ 18 U.S.C. §1725.

²⁵ See, e.g., USPS, Domestic Mail Manual 508, Sections 2.0 and 3.0.

²⁶ U.S. General Accounting Office, "U.S. Postal Service: Information about Restrictions on Mailbox Access," May 1997, GAO/GGD-97-85 and "Postal Service Reform: Issues Relevant to Changing Restrictions on Private Letter Delivery" (GAO/GGD-96-129A/B, Sept, 1996).

²⁷ Some countries have an informal system where a sticker ("Stop pub") on a home mailbox requests that unaddressed advertising not be deposited in the box. See, e.g., "France Cracks Down on Junk Mail," Expatica magazine, at http://www.expatica.com/actual/article.asp?channel_id=3&story_id=8599. But this is a far cry from the U.S. system, which criminalizes the use of the homeowners' mailbox -- which each home is required by law to maintain -- by anyone other than the USPS. As an aside, a French association representing those who deliver such "junk mail" has complained about the stickers, saying that the stickers would harm their livelihood. The stickers in France are being promoted by the Environmental Ministry.

²⁸ U.S. Postal Service v. Greenburgh Civic Assns., 453 U.S. 114 (1981), at 153-154.

can unquestionably consume valuable time. Without the statute that has been in place for decades, what may now appear to be merely a minor or occasional problem might grow like the proverbial beanstalk. Rather than take that risk, Congress has decided that the wiser course is a total prohibition that will protect the free flow of mail.

But as Justice Marshall has noted, the problem is susceptible of a much less drastic solution. . . . There are probably many overstuffed mailboxes now - and if this statute were repealed there would be many more - but the record indicates that the relatively empty boxes far outnumber the crowded ones. If the statute allowed the homeowner to decide whether or not to receive unstamped communications - and to have his option plainly indicated on the exterior of the mailbox - a simple requirement that overstuffed boxes be replaced with larger ones should provide the answer to most of the Government's concern."

Despite this simple suggestion by a noted Justice, and despite the same suggestions being echoed by competitors over the years, the law and supporting regulations remain in effect.

The economic importance of the mailbox access rule has escalated since it was originally adopted. In the mid-1960s, the Post Office announced it would henceforth deliver only to curbside boxes in new residential areas, citing studies showing that curbside delivery was half as expensive as delivery to the door. Today, about 87 percent of households use curbside mailboxes, cluster boxes, apartment boxes, and similar USPS-only receptacles. We have not, as a company, studied the economic impact of this rule and so cannot provide the Commission cost-based guidance on it. However, it is instructive to note that FedEx does impose a residential charge, of which some portion reflects the inconvenience of going all the way to a home doorstep.

The nation's system of mailboxes was built and paid for by householders. The mailbox network provides a uniquely simple and inexpensive means for delivering letters and small parcels to America. There is no moral or economic reason why access to this network of mailboxes should be reserved for the exclusive use of the USPS.

Post office box monopoly. The third monopoly is on delivery to PO boxes. USPS operates a system of PO boxes, to which businesses and individuals can have mail delivered. These are for the exclusive use of USPS. A letter which originates with a competitor company – for example, a FedEx Envelope item – cannot be delivered to a post office box. We cannot even hand over an item for final delivery by USPS that is addressed to a PO box. If the PO box is the only address a sender has, he has no choice but to use USPS, held captive to the service merely by the address.

This is not the situation in many other countries. In fact, in some countries, residential delivery is non-existent, with house addresses largely unknown. FedEx delivers to PO

boxes in many foreign countries – just not in the U.S.²⁹ Given proper compensation to USPS for maintaining the PO box system and handling the final delivery, competitors should be able to collect and transport items addressed to U.S. PO boxes, with USPS handling the “last mile” – which in many cases might be the “last 50 feet.” Again, this is an issue that would gain much more transparency with the implementation of the CompCo concept we outlined at the beginning of this submission.

Question 3: Other benefits.³⁰

Operational Federal government funding. In 2004, James I. Campbell, Jr. prepared a wide-ranging summary of many of the legal benefits available to USPS relative to private competitors, which should be useful to the Commission in its examination on many of the points raised in the notice.³¹ Regarding Federal assistance, he wrote:

“The Postal Service also receives operational funds denoted as ‘revenue forgone’ payments. In principle, this payment is set equal to ‘the difference between the revenues the Postal Service would have received . . . and the estimated revenues to be received’ for the carriage of mail for which Congress has mandated special rates of postage. Since 1993, Congress has sharply limited eligibility for preferential postage rates, and revenue forgone payments have been on the order of \$60 to \$100 million per year.

“[Another] type of operational subsidy comes in the form of specific ad hoc grants by Congress. For example, Congress appropriated a total of \$ 1.0 billion to cover ‘accumulated operating indebtedness’ in the years 1976 and 1977. In 2002, Congress gave the Postal Service \$ 0.5 billion to help pay for increased security costs after terrorist activities in 2001.”

These types of operational contributions might be appropriate for services reserved by law for the USPS, but by limiting the eligibility for such subsidies items carried by USPS, they contribute to further distortion of the market for potentially competitive products, such as mass mailings by charitable institutions.

Services of Federal agencies. Campbell also pointed out that USPS gets direct and indirect support from other Federal agencies:

“[The Federal] Government also pays for certain expenses that a normal company would incur on its own account. The Department of Justice provides legal

²⁹ FedEx delivers to PO box addresses in Puerto Rico and 137 foreign countries. We cannot accept shipments addressed in the U.S. to PO, APO or FPO addresses.

³⁰ Question 3 provides in full: “3. Please identify any additional legal requirements that confer benefits upon the USPS that are not available to its private competitors.”

³¹ James I. Campbell Jr., “Beyond the Monopoly: Other Legal Restraints on Entry into U.S. Postal Markets,” a paper presented at a seminar held by the Wissenschaftliches Institute für Kommunikationsdienste, “Contestability and Barriers to Entry in Postal Markets,” 7th Königswinter Seminar, 17-19 November 2002 and available at http://jcampbell.com/articles/CP_US_policy.pdf (hereinafter “Campbell 2004”), at 57-58 (footnotes omitted).

representation for the Postal Service. The Department of State pays for U.S. membership in the Universal Postal Union, an intergovernmental body devoted primarily to promoting the international business of the Postal Service. The Department of the Treasury trains police officers for the Postal Service. The Postal Rate Commission, the General Accounting Office, and other government analysts provide independent analyses and studies similar to those that a management consultant would perform for a private company.”³²

This cooperation is embedded in the postal statutes, which provide specifically for cooperation with government agencies, on special terms:

“Executive agencies ... are authorized to furnish property, both real and personal, and personal and nonpersonal services to the Postal Service, and the Postal Service is authorized to furnish property and services to them. The furnishing of property and services under this section shall be under such terms and conditions, including reimbursability, as the Postal Service and the head of the agency concerned shall deem appropriate.”³³

The PAEA, however, did limit the representation by the Department of Justice when suits under the antitrust laws, the Trademark Act and other actions which might create a conflict of interest.³⁴

In addition to explicit services, Campbell pointed out the comity accorded USPS among Federal agencies, something which cannot be quantified but which gives it a powerful advantage in certain contexts:

“[T]he Postal Service's role as governmental agency yields the unique privilege of dealing with other governmental agencies as a colleague rather than as a petitioner. The Postal Service is privy to inter-agency policy deliberations inaccessible to a private company. The Postal Service can call upon other federal agencies for assistance. A government investigation of practices in the postal services market will typically be sent to the Postal Service in draft form for comment, a ‘courtesy’ less likely to be accorded private parities.”³⁵

International mail system. Another group of benefits uniquely reserved for USPS are those that flow from Universal Postal Convention (“UPC”) and other acts of the UPU, such as special customs treatment for postal shipments. Although the PAEA overrides the UPC (an executive agreement) and mandates equal customs treatment for similar

³² Campbell 2004 at 58 (footnotes omitted). A small expense borne by private competitors not borne by USPS is that private participants are charged for participating in the UPU Consultative Committee – USPS costs for participating in the UPU are paid out of the U.S. Treasury.

³³ 39 USC §411.

³⁴ 39 USC §409(g).

³⁵ Campbell 2004 at 67.

competitive products from U.S. authorities,³⁶ USPS will continue to benefit from differentiated customs treatment for its products entering or leaving other countries, continuing the unlevel playing field on this issue abroad.

Going beyond the customs issue, the more fundamental bias in the UPU system is that it is based on a premise that postal services are supplied by governmental monopolies. While this premise was valid until the last decade or two of the twentieth century, today governmental postal administrations are giving way to commercialized public (and in some cases privatized) postal operators in country after country. Despite the rise of multiple operators internationally, the UPU continues to be a closed system benefiting only one operator per country – in this case, USPS.

“...[T]he Universal Postal Convention establishes a legal framework that favours post offices over private delivery services and, in each national territory, favours the local post office over foreign post offices. Under the Convention, post offices agree on a fixed price for the delivery of international mail. This scheme allows the Postal Service to purchase delivery of documents and parcels from post offices in industrialized countries at lower rates than available to a private delivery service. It is as though the United States agreed to an international aviation agreement [that] provided lower landing fees for one U.S. airline to the detriment of all others. Special delivery rates for national postal monopolists are reinforced by another section of the Convention that authorizes post offices to intercept international mail that is posted in the ‘wrong’ country; i.e., mail that is transmitted by private means from one country to another and tendered to a foreign post office that offers better service or lower rates.”³⁷

The PAEA, however, mandates a fundamental reorientation of international postal regulation, at least insofar as the U.S. is concerned. Revised Section 407 directs the Department of State to “promote and encourage unrestricted and undistorted competition in the provision of international postal services and other international delivery services” and prohibits the U.S from joining a new international agreement that the agreement “would, with respect to any competitive product, grant an undue or unreasonable preference to the Postal Service, a private provider of international postal or delivery services, or any other person.”³⁸ It thus appears that, at the next UPU Congress (to be held in Nairobi in 2008), the Department of State is obliged to advocate suitable reforms to eliminate these institutional biases. To the extent, the United States is unable to persuade other members of the UPU to accept the policies of the PAEA, the U.S. will be required to adopt appropriate reservations to the final convention.

³⁶ 39 U.S.C. §407(e)(2).

³⁷ Campbell 2004, at 61-62.

³⁸ 39 USC §§407(a)(2), (b)(1).

Privacy guarantees and postal police. USPS has the full power of U.S. law behind it, both in providing its users with guaranteed privacy and protecting its network, employees and assets from harm. Even USPS acknowledges this as a competitive advantage:

“Thanks to the Fourth Amendment’s assurance of privacy, protected by the Inspection Service, mail restrictions are restricted to limited instances under warrant. Thus, correspondence carried by the Postal Service enjoys unparalleled privacy. No private business can guarantee the privacy of its cargo, backed by the Fourth Amendment.”³⁹

Additionally, Title 39 and Title 18 continue to provide extraordinary protections for the assets and products of USPS. Mail fraud,⁴⁰ theft of the mail⁴¹ – it is even a federal crime to damage a USPS mailbox.⁴² The Inspection Service provides enforcement for these laws, backed by the quasi-judicial and prosecutorial powers enjoyed by this government agency.⁴³

“The Inspection Service provides the Postal Service with important business advantages for competing in the communications marketplace,” the USPS law department has correctly asserted. “The Inspection Service’s audit and fraud functions protect postal revenue and protect against fraud, waste and abuse by means unavailable in the private sector because they are backed by the powers of Inspector General subpoenas, search and seizure warrants and grand jury subpoenas.”⁴⁴

USO and the “power of the brand.” While post offices around the world argue that the universal service obligation (“USO”) is a burden, and some are demanding that their competitors finance this burden through special fees, FedEx would contend that it is also a benefit. Today, FedEx (and its competitor United Parcel Service) serve every address in the U.S. This meets or exceeds the geographic coverage of USPS – but we do not go to each address every day. Such consistency in coverage makes the customer reliant on USPS, as a constant presence. Furthermore, the power of the USO carries over to the mandatory use of mail for many everyday transactions, where deposit of an item in the mail creates a presumption (such as posting of a tax return⁴⁵).

³⁹ USPS 1995, at 41.

⁴⁰ 18 USC §§1341 and 1342.

⁴¹ 18 USC §1708.

⁴² 18 USC §1705, punishable by fine or imprisonment up to three years.

⁴³ A useful list of laws enforced by the Inspection Service can be seen at its web site: <http://www.usps.com/postalinspectors/jurislaw.htm>

⁴⁴ USPS 1995, at 41-42 (emphasis added).

⁴⁵ Taxpayers may use FedEx services to meet the “timely filed” requirement of the Internal Revenue Services, but only certain FedEx products are permitted. Not all private companies are allowed to be used – in 2006, it was limited to FedEx, UPS and DHL and only USPS can offer the “timely filed when mailed” presumption for the price of a first class stamp.

Questions 4 and 5: Legal requirements imposed on USPS – identify and quantify.⁴⁶

USPS can explain better than FedEx the burdens that it faces as a public operator competing with private carriers. Although the PAEA did, in fact, address some of these legal inequities, many remain. It would be grossly unfair to overlook the significant level of added costs that are imposed on USPS, including on its competitive products, by laws that do not apply to private companies. Leading examples include the following:

Price constraints. Even though the PAEA established a different, more flexible rate system for competitive services than for market dominant products, USPS remains a regulated entity which must subject its rates and costs to public scrutiny. This process not only costs USPS a significant amount of money (in staff time, accounting overhead, etc.) but also still provides limits on competitive responses. Whether a CompCo would be subject to those constraints would be a hotly debated aspect, but the separate nature of the company should sharply limit the risk of cross-subsidization and hence the need for regulatory scrutiny.

Labor provisions. While the intent of the 1970 statute was to create “a labor framework modeled after the private sector,”⁴⁷ most observers do not see the result in that way. USPS is subject to the jurisdiction of the National Labor Relation board (like many of its competitors), but the final decision on a contract is subject to binding arbitration. The result, according to many reports, are labor costs that far exceed those of private competitors. “Nearly 80 percent of USPS spending goes toward labor, compared to about 50 percent at private delivery companies. The average postal worker earns over 25 percent more than his private-sector factory-worker counterparts.”⁴⁸

In addition to the basic collective bargaining format, USPS is subject to a number of special statutory provisions on hiring, such as veterans’ preferences. It is important to note that some of the rules imposed on USPS through affirmative action and other provisions are also imposed on competitors such as FedEx through statutes relating to government contracting.

⁴⁶ Questions 4 and 5 provide in full: “4. 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. 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. What laws would need to be changed to remove these requirements or constraints?”
“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”.

⁴⁷ USPS 1995, at 14.

⁴⁸ Sam Ryan, “Return to Sender: Postal Reform Has Miles to Go Yet,” National Review, June 28, 2005. See also 2006 Annual Report of USPS (labor costs represented 78.8% of costs in FY 2006).

Contracting and facilities. U.S. laws that relate to special contracting provisions – such as the Prompt Payment Act,⁴⁹ the Miller Act performance bond provisions,⁵⁰ Davis-Bacon construction labor rules⁵¹ – shape the manner in which USPS contracts. The statutes that apply to USPS are laid out specifically in the postal statutes.⁵² While some of these are unique to the federal government, such as Davis-Bacon, others are closer to the practices that many large corporations now follow, such as increasing minority business contracting.

We would end this section by pointing to a recent Inspector General’s report, the White Paper on Cost Burdens.⁵³ This paper identified five areas of unfunded mandates, not borne by any other business and considered by the USPS management to be outside the previous statutory provisions. While two of these – relating to the Civil Service Rate System – were addressed in the PAEA, three remain: rebates under Medicare Part D, air bypass services in Alaska and contracting for international mail transportation.⁵⁴ Together, these were judged by the OIG as costing USPS almost \$340 million annually.

Question 6: Requiring USPS to account for benefits.⁵⁵

If USPS actually had to pay for competitive benefits implied by various regulatory schemes, the problem of apportioning the value of legal treatment between market dominant and competitive products would be formidable. What portion of a vehicle license fee or parking ticket should be paid? The most feasible way to resolve such issues is, we believe, the separate company concept set forth at the beginning of this submission.

However, if that approach were not followed and USPS competitive and market dominant products remained mixed within a single legal, governmental entity, we believe

⁴⁹ 31 USC §§3902-3906.

⁵⁰ 40 USC §§270a-270c.

⁵¹ 40 USC §276a *et seq.*

⁵² 39 USC §410(b).

⁵³ Office of Inspector General, USPS, MS-WP-06-001, June 22, 2006

⁵⁴ Not only do the government-established international mail transportation rates increase costs for USPS, in so doing it increases the power of foreign posts in the U.S. to compete for mail volumes, according to USPS, See 2006 Annual Report of USPS, at 26.

⁵⁵ Question 6 provides in full: “6. 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. How should these costs be calculated and allocated between competitive and market-dominant products? Should the USPS be required actually to pay these costs or merely account for them when setting prices? 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)? 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?”

that apportionment would not be an insurmountable barrier. Under the guidance of the PRC, these charges could be apportioned just as other institutional costs are today among the various products. (See our answer to Question 9, below, for more on apportionment.)

At least with regard to taxes and other amounts otherwise payable to State and local governments, we believe that those amounts should be paid into the relevant state and local tax funds rather than putting them into the Postal Service Fund. The subsidies affect the treasuries of, state and local governments due to reduced tax collections. As one commentator states:

“[T]he Postal Service uses its multiple tax exemptions to escape paying many of the taxes that private businesses carrying out the same operations would have to pay. The more the Postal Service expands, the greater the revenue loss to governments, and to maintain a given level of government spending, the more governments must borrow or collect through higher taxes on other taxpayers.”⁵⁶

Question 9: State and Local taxes.⁵⁷

The existing statutory provisions allow for some allocation of revenues and income among competitive and market dominant products even without moving to the CompCo model. The PAEA added a requirement to calculate an assumed federal income tax, which requires USPS to compute the amount of federal taxes that would be required to be paid on its competitive products income.⁵⁸ USPS is then to transfer that amount to the Postal Service Fund, where it should be allocated only to market-dominant products. Additionally, under the new provision regarding the assets related to competitive products,⁵⁹ assets related to competitive products will be evaluated according to rules adopted by the Postal Regulatory Commission in light of recommendations by Treasury. From these valuations, taxes such as property taxes, vehicles taxes and other state and local levies could be calculated. However, such allocations are not without controversy – see, for example, the litigation relating to the assets of Deutsche Post⁶⁰ and the services of La Poste⁶¹ in Europe – so that the cleanest and most transparent method would still be the CompCo model suggested in our answer to Question 10, above.

⁵⁶ Schuyler, Michael, Statement Submitted to the President’s Commission on the United States Postal Service, Institute for Research on the Economics of Taxation, February 12, 2003.

⁵⁷ Question 9 provides in full: “9. Please discuss the costs, benefits, and feasibility of requiring the USPS explicitly to pay state and local taxes on its competitive operations. How should these costs be calculated and allocated between competitive and market dominant products? 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. What laws if any would need to be changed to require the USPS to explicitly pay such taxes?”

⁵⁸ 39 USC §3634; see also 39 USC §2011(h)(1)(A)(ii).

⁵⁹ 39 USC §2001(h)(1)(A)(i)(I).

⁶⁰ See footnote 10 above.

⁶¹ This case, involving a suit brought by express companies in France against the national post offices and certain subsidiaries, is supposedly the longest running litigation in Europe today, and is a good example of how not to set up a

The allocation procedure established by this provision would substantially simplify the computation of state taxes as well, since the competitive product tax base (for income taxes) would already be established. However, FedEx would argue that at least for state and local taxes, those amounts should not be paid into the Postal Service Fund, but instead directly to the state and local tax authorities. As noted above, we pay for the services of the communities in which we operate – fire and rescue services, roads and traffic controls, schools for our employees, and all the other important state and local services on which we rely. Whether there is a CompCo or simply a financial breakout of the income from competitive products within the existing USPS structure as configured by the PAEA, we think that payment of those taxes (as opposed to transfer to the market dominant funds) should be required to achieve a more level playing field as well as to further enforce discipline as an independent market participant.

Respectfully submitted,

FEDERAL EXPRESS CORPORATION

August 6, 2007

CompCo type business. La Poste has appealed the most recent decision, in July 2006 and the appeal of the European Commission's decision regarding what is "state aid" has will celebrate its tenth anniversary on October 1 of this year.