



On Thursday, Sept. 17, the U.S. Postal Service requested that American Oversight pull down the records the agency had previously produced to us under the Freedom of Information Act, claiming they had been improperly released.

We have agreed to remove the records for 24 hours as we wait for USPS to specify which pages it believes should continue to be withheld, and have temporarily replaced them with excerpts of documents that relate to topics that have already been publicly reported by the *Washington Post*.

Those excerpts, as well as the Postal Service's Sept. 17 letter requesting that the records be removed, are below. More details can be found at:

<https://www.americanoversight.org/new-post-office-records>



September 17, 2020

American Oversight
Daniel McGrath
1030 15th Street NW
Suite B255
Washington, DC 20005)
(via email: daniel.mcgrath@americanoversight.org)

Re: FOIA Case No. 2020-FPRO-001103

Dear Mr. McGrath:

Multiple pages of documents were mistakenly released to American Oversight in response to FOIA request number 2020-FPRO-001103. These documents were intended to be withheld in full pursuant to one or more FOIA exemptions. Please immediately take these documents down from American Oversight's website. We appreciate your cooperation.

Sincerely,

A handwritten signature in black ink that reads "Natalie A. Bonanno".

Natalie A. Bonanno
Associate General Counsel

Mendonca, Pat - Washington, DC

From: Brennan, Megan J - Washington, DC <(b)(6)>
Sent: Monday, May 4, 2020 6:07 PM
To: Louis DeJoy
Subject: RE: Requested Discussions

Good evening Louis,
It was a pleasure speaking with you. Congratulations again.

(b)(5)

(b)(5)

(b)(5) (b)(5)

Take care.

Megan

From: Louis DeJoy [mailto:(b)(6)]
Sent: Monday, May 4, 2020 4:59 PM
To: Brennan, Megan J - Washington, DC <(b)(6)>
Subject: [EXTERNAL] Requested Discussions

CAUTION: This email originated from outside USPS. STOP and CONSIDER before responding, clicking on links, or opening attachments.

General Brennan-

Thank you for your time and willingness to work with me. (b)(5)

1. (b)(5)
2. (b)(5)
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9. (b)(5)

10. (b)(5) [REDACTED]

11. (b)(5) [REDACTED]

12. (b)(5) [REDACTED]

I can be flexible so we can schedule around your availability. Probably looking for (b)(5) .

Let me know your thoughts.

Thanks,

Louis

Mendonca, Pat - Washington, DC

From: Brennan, Megan J - Washington, DC <(b)(6)>
Sent: Tuesday, April 14, 2020 3:43 PM
To: Corbett, Joseph - Washington, DC; Marshall, Thomas J - Washington, DC
Cc: Berthold, Mark S - Washington, DC; Schafer, Elizabeth M - Washington, DC
Subject: RE: [EXTERNAL] Re: Treasury Call

Joe,

(b)(5)

Thank you.

Megan

From: Corbett, Joseph - Washington, DC
Sent: Saturday, April 11, 2020 8:54 PM
To: Brennan, Megan J - Washington, DC <(b)(6)>; Marshall, Thomas J - Washington, DC
<(b)(6)>
Cc: Berthold, Mark S - Washington, DC <(b)(6)>; Schafer, Elizabeth M - Washington, DC
<(b)(6)>
Subject: RE: [EXTERNAL] Re: Treasury Call

Have been talking with (b)(5), (b)(3), (b)(5) I'll follow up on Monday.

From: Brennan, Megan J - Washington, DC
Sent: Friday, April 10, 2020 3:13 PM
To: Corbett, Joseph - Washington, DC <(b)(6)>; Marshall, Thomas J - Washington, DC <(b)(6)>
Subject: Fwd: [EXTERNAL] Re: Treasury Call

Thoughts?

Thanks,

Megan

Begin forwarded message:

From: David Williams <(b)(6)>
Date: April 10, 2020 at 3:12:24 PM EDT
To: "Brennan, Megan J - Washington, DC" <(b)(6)>
Subject: [EXTERNAL] Re: Treasury Call
Good Afternoon Megan
I know that you are furiously busy and it's hard to focus on the normal business opportunities

(b)(5)

Dave Williams

Sent from my iPhone

On Apr 10, 2020, at 2:28 PM, Brennan, Megan J - Washington, DC

[REDACTED] (b)(6) >> wrote:

Good afternoon Governors,

As information, Joe and Tom and several members of their teams had a call with Treasury yesterday afternoon

[REDACTED] (b)(5)

[REDACTED] (b)(5)

We will be prepared to discuss the situation further and to make our recommendations [REDACTED] (b)(5)

Thank you.

Megan

Mendonca, Pat - Washington, DC

From: Brennan, Megan J - Washington, DC <(b)(6)>
Sent: Monday, April 13, 2020 10:51 AM
To: Elston, Michael J - Washington, DC
Cc: Marshall, Thomas J - Washington, DC
Subject: Re: [EXTERNAL]

I don't think that is a (b)(5)

Thanks,

Megan

> On Apr 13, 2020, at 10:49 AM, Elston, Michael J - Washington, DC <(b)(6)> wrote:

>

>

>

> -----Original Message-----

> From: M. -Mike- Duncan Robert <(b)(6)>

> Sent: Monday, April 13, 2020 10:49 AM

> To: Elston, Michael J - Washington, DC <(b)(6)>

> Subject: [EXTERNAL]

>

>

> (b)(5)

> Conversation

>

> Donald J. Trump

> @realDonaldTrump

> I am right about Amazon costing the United States Post Office massive amounts of money for being their Delivery Boy. Amazon should pay these costs (plus) and not have them borne by the American Taxpayer. Many billions of dollars. P.O. leaders don't have a clue (or do they?)!

>

> Sent from my iPhone

(b)(5)

Mendonca, Pat - Washington, DC

From: Brennan, Megan J - Washington, DC <(b)(6)>
Sent: Friday, April 10, 2020 2:29 PM
To: Robert "Mike" Duncan; John M. Barger; Ron Bloom; Roman Martinez IV; David C. Williams
Cc: Marshall, Thomas J - Washington, DC; Corbett, Joseph - Washington, DC; Stroman, Ronald A - Washington, DC; Elston, Michael J - Washington, DC
Subject: Treasury Call

Good afternoon Governors,

As information, Joe and Tom and several members of their teams

(b)(5)

(b)(5)

We will be prepared to discuss the situation further (b)(5)

Thank you.

Megan

Mendonca, Pat - Washington, DC

From: Brennan, Megan J - Washington, DC (b)(6)
Sent: Tuesday, April 7, 2020 6:43 PM
To: Corbett, Joseph - Washington, DC; Grossmann, Luke T - Washington, DC
Subject: FW: President's press conference

Thank you.

Megan

-----Original Message-----

From: Stroman, Ronald A - Washington, DC
Sent: Tuesday, April 7, 2020 6:41 PM
To: Marshall, Thomas J - Washington, DC <(b)(6)>; Brennan, Megan J - Washington, DC
(b)(6)
Subject: RE: President's press conference

(b)(5)

(b)(5)

He also said, (b)(5)

-----Original Message-----

From: Marshall, Thomas J - Washington, DC
Sent: Tuesday, April 7, 2020 6:35 PM
To: Brennan, Megan J - Washington, DC <(b)(6)>; Stroman, Ronald A - Washington, DC
(b)(6)
Subject: RE: President's press conference

From what I am hearing, (b)(5) said the reason we are losing money is that we refuse to raise prices on the last mile, despite the fact that he has been telling us to do so for two years. (b)(5)

Thomas J. Marshall
General Counsel and Executive Vice President United States Postal Service

-----Original Message-----

From: Marshall, Thomas J - Washington, DC
Sent: Tuesday, April 7, 2020 6:27 PM
To: Walker, Janice D - Washington, DC (b)(6)
Cc: Brennan, Megan J - Washington, DC (b)(6); Stroman, Ronald A - Washington, DC
Subject: FW: President's press conference

Janice, can you get the President's quote for us?

Thomas J. Marshall
General Counsel and Executive Vice President United States Postal Service

-----Original Message-----

From: Grant, Helen R - St Louis, MO

Sent: Tuesday, April 7, 2020 6:26 PM

To: Marshall, Thomas J - Washington, DC [REDACTED] (b)(6) [REDACTED]

Subject: President's press conference

(b)(5)



Sent from my iPhone

Mendonca, Pat - Washington, DC

From: Brennan, Megan J - Washington, DC (b)(6)
Sent: Saturday, April 4, 2020 1:29 PM
To: Marshall, Thomas J - Washington, DC
Subject: Re: Mnuchin Phone Call

Well done Tom. (b)(5)

Thank you.

Megan

On Apr 4, 2020, at 12:57 PM, Marshall, Thomas J - Washington, DC (b)(6) > wrote:

Just as an fyi, we are providing some talking points for the Governors (b)(5)

From: Marshall, Thomas J - Washington, DC
Sent: Saturday, April 4, 2020 11:35 AM
To: Weidner, Keith E - Washington, DC <(b)(6)>
Subject: RE: Mnuchin Phone Call

Keith, my suggestions are on the attached. Are you also working with (b)(5)

From: Weidner, Keith E - Washington, DC
Sent: Friday, April 3, 2020 4:22 PM
To: Marshall, Thomas J - Washington, DC <(b)(6)>
Subject: RE: Mnuchin Phone Call

Tom, a revised version is attached.

Keith

From: Marshall, Thomas J - Washington, DC
Sent: Thursday, April 2, 2020 9:19 PM
To: Weidner, Keith E - Washington, DC <(b)(6)>
Subject: RE: Mnuchin Phone Call

(b)(5)

(b)(5)

(b)(5)

[REDACTED]

Thomas J. Marshall
General Counsel and Executive Vice President United States Postal Service

From: Weidner, Keith E - Washington, DC
Sent: Thursday, April 2, 2020 5:16 PM
To: Marshall, Thomas J - Washington, DC <[REDACTED] (b)(6) [REDACTED]>
Subject: RE: Mnuchin Phone Call

[REDACTED] (b)(5) [REDACTED]

Keith

From: Marshall, Thomas J - Washington, DC
Sent: Thursday, April 2, 2020 2:21 PM
To: Weidner, Keith E - Washington, DC <[REDACTED] (b)(6) [REDACTED]>
Subject: RE: Mnuchin Phone Call

Keith, I thank our [REDACTED] (b)(5) [REDACTED] (b)(5) [REDACTED]

Thomas J. Marshall
General Counsel and Executive Vice President United States Postal Service

From: Elston, Michael J - Washington, DC
Sent: Thursday, April 2, 2020 12:41 PM
To: Marshall, Thomas J - Washington, DC <[REDACTED] (b)(6) [REDACTED]>
Cc: Weidner, Keith E - Washington, DC <[REDACTED]>
Subject: RE: Mnuchin Phone Call

Thank you! [REDACTED] (b)(5) [REDACTED]

Keith, Jennifer's [REDACTED] (b)(6) [REDACTED]

From: Marshall, Thomas J - Washington, DC
Sent: Thursday, April 2, 2020 12:38 PM
To: Elston, Michael J - Washington, DC <[REDACTED] (b)(6) [REDACTED]>
Cc: Weidner, Keith E - Washington, DC <[REDACTED]>
Subject: RE: Mnuchin Phone Call

Mike, I [REDACTED] (b)(5) [REDACTED] (b)(5) [REDACTED]
Thanks.

Thomas J. Marshall
General Counsel and Executive Vice President United States Postal Service

From: Elston, Michael J - Washington, DC

Sent: Thursday, April 2, 2020 10:02 AM

To: Marshall, Thomas J - Washington, DC (b)(6)

Subject: Mnuchin Phone Call

Tom,

As I mentioned last night,

(b)(5)

(b)(5)

Let me know what you think.

Thanks,
Mike

Michael J. Elston
Secretary of the Board of Governors
United States Postal Service

(b)(6)

(b)(6)

Mendonca, Pat - Washington, DC

From: Brennan, Megan J - Washington, DC <(b)(6)>
Sent: Friday, April 3, 2020 12:37 PM
To: Latham, Sandra R - Washington, DC
Subject: Fwd: [EXTERNAL] Essential mail

Thanks,

Megan

Begin forwarded message:

From: (b)(6) <(b)(6)>
Date: April 3, 2020 at 10:50:00 AM EDT
To: "Brennan, Megan J - Washington, DC" <(b)(6)>
Subject: [EXTERNAL] Essential mail

My husband is a mail carrier. He is now delivering in a very infected area of (b)(6) PA. They currently are now dealing with major increase of Amazon packages due to the infected worked at that HUGE facility!

He and all the workers there know what ESSENTIAL means and All are doing there jobs. What I want to know is.... WHY IN GOD'S NAME ARE THEY DELIVERING UNESSENTIAL MAIL to EVERY HOUSE in a HIGHLY INFECTED AREA!!!! Do you want them to get the coronavirus!! This I ask NATIONALLY!!! Why. MUCH of the mail I'm RECEIVING right now. Is UNESSENTIAL!!!!

Again. Why!!!!???? So it can be thrown in the garbage. Do you see what is wrong with this picture. Or is it only the customers, employees and family members that see this problem.

Megan. You as post master seem to be the ONLY ONE who can do something about this situation... so DO SOMETHING, before the virus does it for you!

(b)(6)

Sent from Yahoo Mail for iPhone<<https://overview.mail.yahoo.com/?src=iOS>>

Mendonca, Pat - Washington, DC

From: Brennan, Megan J - Washington, DC (b)(6)
Sent: Thursday, April 2, 2020 12:34 PM
To: Cronkhite, Isaac S - Washington, DC; Williams Jr, David E (COO) - Washington, DC; Seaver, Kristin A - Washington, DC; Walker, Janice D - Washington, DC
Subject: RE: [EXTERNAL] Time to ask for White House meeting

Janice,

Please read – let's get our message on that thread.

Thank you.

Megan

From: Cronkhite, Isaac S - Washington, DC
Sent: Thursday, April 2, 2020 11:45 AM
To: Brennan, Megan J - Washington, DC <(b)(6)>; Williams Jr, David E (COO) - Washington, DC <(b)(6)>; Seaver, Kristin A - Washington, DC <(b)(6)>
Subject: RE: [EXTERNAL] Time to ask for White House meeting

The full tweet...

A big thanks to all the workers of ups, usps, Amazon, etc. who are still going to work every day risking their health to make sure people get their packages in this time of dire need #ThanksForDelivering

The #ThanksForDelivering hashtag has a ton of great tweets from people and organizations thanking delivery people. UPS has a big presence on that thread...

From: Brennan, Megan J - Washington, DC
Sent: Thursday, April 2, 2020 11:36 AM
To: Williams Jr, David E (COO) - Washington, DC <(b)(6)>; Seaver, Kristin A - Washington, DC <(b)(6)>; Cronkhite, Isaac S - Washington, DC <(b)(6)>
Subject: Fwd: [EXTERNAL] Time to ask for White House meeting

Thank you.

Megan

Begin forwarded message:

From: "M. -Mike- Duncan Robert" <(b)(6)>
Date: April 2, 2020 at 9:27:36 AM EDT
To: "Brennan, Megan J - Washington, DC" <(b)(6)>
Subject: [EXTERNAL] Time to ask for White House meeting
@realDonaldTrump: RT @nickmalinowskii: A big thanks to all the workers of ups, usps, Amazon, etc. who are still going to work every day risking their health...

Sent from my iPhone

Mendonca, Pat - Washington, DC

From: Brennan, Megan J - Washington, DC <(b)(6)>
Sent: Tuesday, March 31, 2020 6:26 PM
To: Latham, Sandra R - Washington, DC
Subject: Fwd: [EXTERNAL] The Virus

Thanks,

Megan

Begin forwarded message:

From: (b)(6) <(b)(6)>
Date: March 31, 2020 at 6:16:29 PM EDT
To: "Brennan, Megan J - Washington, DC" <(b)(6)>
Subject: [EXTERNAL] The Virus

The new White House press conference now estimates between 100,000 -200,000 dead from the virus. How many are going to be postal workers?

How many postal workers will die because we are delivering useless circulars or Amazon packages that aren't essential?

I delivered a dog hair dryer today...how is that essential?

We know what happened in Santa Fe, we know what is happening in Greenwich Village...we know about the Bronx carrier who died. We ALL know.

And while you and countless other "executives" get to sit at home out of harms way we get to be face to face with people who will eventually infect us. And for what?

Either stop the delivery of 3rd class mail, reduce window hours or even close a certain number of days or more postal workers will get sick and die.

We are scared, and we are all prepared, multiple postal workers throughout the country are ready to call in sick or just quit. I would rather lose my job and benefits then lose my life for you or any of the useless upper management.

I didnt sign up for this to work in a pandemic.

Grow a spine and become a leader.

Mendonca, Pat - Washington, DC

From: Brennan, Megan J - Washington, DC (b)(6)
Sent: Wednesday, March 25, 2020 9:09 PM
To: Seaver, Kristin A - Washington, DC
Subject: Fwd: [EXTERNAL] COVID-19 out of control

Thanks,

Megan

Begin forwarded message:

From: Jonathan Smith <(b)(6)>
Date: March 25, 2020 at 8:21:03 PM EDT
To: [REDACTED]
Cc: Mark Dimondstein (b)(6) >, Vance Zimmerman
>, tiffany foster
>, Diane Erlanger
>, Edward Dalton
>, Joseph Martir
>, Kevin Walsh
Subject: [EXTERNAL] COVID-19 out of control

My name is (b)(6) and I am the proud President of the (b)(6) Postal Union APWU. I am sending you what I like to call a love letter on behalf of my membership and quite frankly all postal workers throughout this country.

I asked that you temporarily close all postal facilities because the spread of the COVID-19 virus is getting worse every day and I am simply out of words of comfort and support for my members that are in the eye of this storm.

This temporary closer will allow the postal Service to get the necessary safety supplies and equipment to give the postal workers and the postal service a better chance of survival and victory.

I'm on the frontline and have been given the displeasure of COVID-19's impact not only on the postal service but on America itself. Postal worker don't mind fighting but please give us a chance to win. Which we presently don't have ,as I will now explain, why!

I literally was on the phone today with many of my members screaming at me to do something I don't want to die. How do you respond to a statement like that? The more they hear about their co-workers contracting the virus the more scared they become. This is not just co-worker relationship. Many of your employees are like family and they are watching their family get sick right in front of their eyes. Not just from the Virus but from stress and anxiety and the constant pressure from their management team to work fast instead of safe especially at a time like this.

Miss Brennan the Postal Workers want to hear it come directly from your mouth that there is nothing to fear. In the NY District we currently have 12 confirmed positive cases of the Coronavirus with many more presumed positive diagnosis.

This situation is about to blow up especially in NY City. The White House expert doctors has suggested that everyone in NY City or that has been to NY City needs to self-quarantine themselves for 14 days. You think the Postal workers don't hear this news.

You cannot expect the unions to convince the employees that if they come to work they have nothing to worry about, they can see what's going on all around them with the streets of NY practically empty. I cannot and will not lie to my membership.

Management refuses to use common sense and chooses to not respond to many of the unions concerns about the hazardous conditions they are asking these employees to endure. Management is trying to act like everything is normal. I believe that if management would drop the phony façade and genuinely admit this is a bad situation and things aren't ok the employees would be more willing to pull together. Management has created an atmosphere that it's us against them. Would you want to work for someone that you don't believe has your back?

If you gave the bargaining unit employees all the safety supplies and equipment they should have readily at their disposal, they would still be working in a very hazardous work environment but when you don't supply these basic needs now you're asking them to commit suicide.

The union says the station does not have hand sanitizer and managements reply is then go use soap. There are no gloves. mask or wipes. Managements reply is there on back order or no one can get supplies right now. Unacceptable and instantly kills the bargaining unit employees moral.

When you refuse to temporarily stop all contractor work in the facilities. Management is asking the employees to endure the dust and the dirt as well as their fear of COVID-19. This causes the employee to sneeze and cough releasing the dangerous droplets from your mouth and nose into the work environment. Common sense!

You might say, then the employees should wear mask but last week your management team and postal nurse was telling them they didn't need mask unless they are sick. What is the truth and where is your compassion.

When you refuse to enforce the no more than 10 people congregating in any one place as recommended by the CDC, yet there are 40 people allowed in the lobby of the Post Office giving the employees no chance to practice social distancing. This is not a message that the Post office cares about its employees or that the post office is really following the CDC recommendation. The CDC has become an excuse not to use common sense.

Not staggering the employees BT forces all of the workforce to be at the time clock at the same time social distancing right out the window, CDC regulations right out the window because it's not covenant. Something this simple to make the Postal workforce feel you care.

When you sign a MOU for dependent care but intimidate anyone who chooses to use it, by requiring them to submit their child's birth certificate as proof or a note from the school. Really, the employees are going to get a note from a school that is closed? Why isn't the employees word good enough you want them to take managements word about the security of their work environment, safety and health.

Postmaster Brennan this situation is out of control, I'm asking you to be proactive and not reactive. Here are some very simple ideas since I'm sure you won't do the most practical thing and temporarily close the post office, even if it was only for three or four days it would show the employees you care.

1. Employees can work on odd and even days this way you can reduce the workforce on any given day allowing the operation to function while allowing social distancing production will be slower but it will be safer.

1. Put out and MOU that no employees should be force to work without gloves, mask hand sanitizer,wipes this will put the responsibility where it belongs on the management team.

Article 14 of the CBA says it is the responsibility of management to provide safe work conditions in all present and future installations. Is it too much to ask you to honor this oath?

1. Make social distancing mandatory and not optional.

1. Solicit volunteers to help with the cleaning temporarily on overtime after maxing out all of the custodians overtime.

I have a lot more ideas and would hope you would want to consider them. This email provides my contact information.

Thanking you in advance for you consideration.

(b)(6)

(b)(6)

A Man is what he does, not what he says

Mendonca, Pat - Washington, DC

From: Brennan, Megan J - Washington, DC <(b)(6)>
Sent: Tuesday, March 17, 2020 11:38 AM
To: Cronkhite, Isaac S - Washington, DC; Tulino, Douglas A - Washington, DC
Subject: Fwd: [EXTERNAL] Corona virus

Thanks,

Megan

Begin forwarded message:

From: (b)(6) >>
Date: March 16, 2020 at 9:36:12 PM EDT
To: (b)(6) ilto: (b)(6)
Subject: [EXTERNAL] Corona virus

How long will you continue to put postal employees at risk?

CDC recommends no gatherings of 50 or more people. Our office has 90 employees in close proximity every single morning. Not all of these employees practice safe hygiene. As this PANDEMIC spreads more of the employees you are responsible for are put at greater risk with each passing day.

The time to act is now. Do the right thing, we are real people with real children and families who care for us.

Please close us down (b)(6)

(b)(6)

Mendonca, Pat - Washington, DC

From: Brennan, Megan J - Washington, DC <(b)(6)>
Sent: Friday, March 13, 2020 3:00 PM
To: Elston, Michael J - Washington, DC
Subject: Fwd: Notes on the 03/13/2020, 11:00, call with the Director for Election Security Policy, National Security Council

Thank you.

Megan

Begin forwarded message:

From: "Mendonca, Pat - Washington, DC" <(b)(6)>
Date: March 13, 2020 at 12:39:15 PM EDT
To: "Brennan, Megan J - Washington, DC" <(b)(6)>
Cc: "Stroman, Ronald A - Washington, DC" <(b)(6)>, "Williams Jr, David E (COO) - Washington, DC" <(b)(6)>, "Marshall, Thomas J - Washington, DC" <(b)(6)>, "Calamoneri, Kevin A - Washington, DC" <(b)(6)>
Subject: Notes on the 03/13/2020, 11:00, call with the Director for Election Security Policy, National Security Council

Following are my notes from the call (what did I miss?)

Subject: Notes on the 03/13/2020, 11:00, call with the Director for Election Security Policy, National Security Council

(b)(5)

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-----Original Message-----

From: Mendonca, Pat - Washington, DC

Sent: Friday, March 13, 2020 11:47 AM

To: 'Gajewski, Kimberly N. EOP/NSC' (b)(6); Stroman, Ronald A - Washington, DC
(b)(6); Williams Jr, David E (COO) - Washington, DC (b)(6); Marshall,
Thomas J - Washington, DC (b)(6) v>; Calamoneri, Kevin A - Washington, DC

Cc: Cavanaugh, Brian J. EOP/NSC (b)(6); Marshall, Thomas J - Washington, DC

Subject: RE: USPS COVID planning

Kim:

The following is the contact information for the USPS attendees (b)(6)

- Ron Stroman, Deputy Postmaster General, (b)(6)

- Dave Williams, Chief Operating Officer, (b)(6)

- Kevin Calamoneri, Deputy General Counsel, (b)(6)

- Also I copied our General Counsel on this email who was not able to attend.

Please let us know if you have any follow-up questions.

Thank you very much.

Patrick Mendonca
Senior Director

(b)(6)

From: Gajewski, Kimberly N. EOP/NSC [mailto:(b)(6)]
Sent: Thursday, March 12, 2020 6:19 PM

To: Mendonca, Pat - Washington, DC [REDACTED]
Cc: Cavanaugh, Brian J. EOP/NSC [REDACTED] (b)(6) [REDACTED]; Jonas, Seth H. EOP/NSC [REDACTED]
[REDACTED] Morse, Katherine M. EOP/NSC [REDACTED]; O'Beirne, Fiona G. EOP/NSC [REDACTED] (b)(6) [REDACTED]
Subject: [EXTERNAL] USPS COVID planning

Good evening Pat,

[REDACTED]
(b)(5)
[REDACTED]
[REDACTED]

Respectfully,
Kim

Kimberly Gajewski
Director for Election Security Policy
National Security Council
[REDACTED] (b)(6) [REDACTED]

From: [Marshall, Thomas J - Washington, DC](#)
To: [Passantino, Stefan \(59582\)](#)
Cc: [\(b\)\(6\)](#); [Rick Hohlt](#); [Brennan, Megan J - Washington, DC](#); [Elston, Michael J - Washington, DC](#); [Weidner, Keith E - Washington, DC](#)
Subject: FW: [EXTERNAL] 2020 General Election: List of when absentee ballots can first be mailed out for the General Election
Date: Sunday, May 10, 2020 8:05:51 PM
Attachments: [2020 05-08 vote-by-mail letter - Legal Strategy draft CLEAN.DOCX](#)

ATTORNEY-CLIENT COMMUNICATION
PRIVILEGED AND CONFIDENTIAL

(b)(5)

-Tom

From: Marshall, Thomas J - Washington, DC
Sent: Sunday, May 10, 2020 5:35 PM
To: (b)(6); 'Rick Hohlt' (b)(6)
Cc: Brennan, Megan J - Washington, DC (b)(6), (b)(3), 410c2; Elston, Michael J - Washington, DC (b)(6), (b)(3), 410c2; Weidner, Keith E - Washington, DC (b)(6), (b)(3), 410c2
Subject: RE: [EXTERNAL] 2020 General Election: List of when absentee ballots can first be mailed out for the General Election

ATTORNEY-CLIENT COMMUNICATION
PRIVILEGED AND CONFIDENTIAL

(b)(5)

-Tom

From: Rick Hohlt (b)(6)
Sent: Friday, May 8, 2020 3:29 PM
To: Marshall, Thomas J - Washington, DC (b)(6), (b)(3), 410c2
Cc: (b)(6); Brennan, Megan J - Washington, DC (b)(6), (b)(3), 410c2 (b)(6) >
Subject: [EXTERNAL] 2020 General Election: List of when absentee ballots can first be mailed out for the General

Election

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(b)(5)

[REDACTED]

[REDACTED]

[REDACTED]

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(b)(5)

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From: [Marshall, Thomas J - Washington, DC](#)
To: [Weidner, Keith E - Washington, DC](#)
Subject: FW: [EXTERNAL] 2020 General Election: List of when absentee ballots can first be mailed out for the General Election
Date: Friday, May 8, 2020 5:01:14 PM
Attachments: [1. 2020 General Election-Earliest Date Absentee Ballots can be mailed ou....docx](#)
[2. 2020 General Election- Alphabetical by State-list of when absentee ba....docx](#)

(b)

Thomas J. Marshall
General Counsel and Executive Vice President
United States Postal Service

From: Rick Hohlt (b) (6)]
Sent: Friday, May 8, 2020 3:29 PM
To: Marshall, Thomas J - Washington, DC (b)(6), (b)(3), 410(c)(2)
Cc: (b) (6) ; Brennan, Megan J - Washington, DC (b)(6), (b)(3), 410(c)(2) ; (b) (6)
Subject: [EXTERNAL] 2020 General Election: List of when absentee ballots can first be mailed out for the General Election

CAUTION: This email originated from outside USPS. STOP and CONSIDER before responding, clicking on links, or opening attachments.

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From: [Marshall, Thomas J - Washington, DC](#)
To: [Weidner, Keith E - Washington, DC](#); [Brownlie, Caroline R - Washington, DC](#); [Belt, David C - Washington, DC](#)
Subject: FW: [EXTERNAL] : STATE ABSENTEE VOTING info since our call
Date: Monday, May 4, 2020 7:33:47 PM

Keith, (b)(5)

Thomas J. Marshall
General Counsel and Executive Vice President
United States Postal Service

From: Rick Hohlt (b)(6)
Sent: Monday, May 4, 2020 1:33 PM
To: Marshall, Thomas J - Washington, DC (b)(6), (b)(3), 410(c)(2) ; Brennan, Megan J - Washington, DC
(b)(6), (b)(3), 410(c)(2)
Cc: (b)(6)
Subject: [EXTERNAL] : STATE ABSENTEE VOTING info since our call

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From: [Marshall, Thomas J - Washington, DC](#)
To: [Weidner, Keith E - Washington, DC](#); [Brownlie, Caroline R - Washington, DC](#); [Belt, David C - Washington, DC](#)
Subject: FW: [EXTERNAL] : STATE ABSENTEE VOTING info since our call
Date: Monday, May 4, 2020 7:33:50 PM

Keith, (b)(5)

Thomas J. Marshall
General Counsel and Executive Vice President
United States Postal Service

From: Rick Hohlt [(b)(6)]
Sent: Monday, May 4, 2020 1:33 PM
To: Marshall, Thomas J - Washington, DC (b)(6), (b)(3), 410(c)(2); Brennan, Megan J - Washington, DC (b)(6), (b)(3), 410(c)(2)
Cc: (b)(6)
Subject: [EXTERNAL] : STATE ABSENTEE VOTING info since our call

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From: [Marshall, Thomas J - Washington, DC](#)
To: [Weidner, Keith E - Washington, DC](#)
Subject: FW: [EXTERNAL] FW: On vote-by-mail michele obama involved in mail voting
Date: Monday, May 11, 2020 12:03:41 PM

(

Thomas J. Marshall
General Counsel and Executive Vice President
United States Postal Service

From: Rick Hohlt (b)(6)
Sent: Monday, May 11, 2020 11:23 AM
To: Brennan, Megan J - Washington, DC (b)(6), (b)(3), 410c2; Marshall, Thomas J - Washington, DC (b)(6), (b)(3), 410c2
Cc: 'Passantino, Stefan (59582)' (b)(6)
Subject: [EXTERNAL] FW: On vote-by-mail michele obama involved in mail voting

CAUTION: This email originated from outside USPS. STOP and CONSIDER before responding, clicking on links, or opening attachments.


Non-responsive record



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From: [Marshall, Thomas J - Washington, DC](#)
To: [Weidner, Keith E - Washington, DC](#)
Subject: FW: [EXTERNAL] JUNE Primary Elections 2020: Closest Absentee Ballot Request Date to Primary Election 2020
Date: Thursday, May 7, 2020 3:54:16 PM
Attachments: [1. JUNE Primary Elections 2020- Presidential and Congressional.docx](#)

(b)(5)

Thomas J. Marshall
General Counsel and Executive Vice President
United States Postal Service

From: Rick Hohlt [(b)(6)]
Sent: Thursday, May 7, 2020 11:31 AM
To: Marshall, Thomas J - Washington, DC (b)(6), (b)(3), 410(c)(2)
Cc: Brennan, Megan J - Washington, DC (b)(6), (b)(3), 410(c) gov>; (b)(6)
Subject: [EXTERNAL] JUNE Primary Elections 2020: Closest Absentee Ballot Request Date to Primary Election 2020

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From: [Marshall, Thomas J - Washington, DC](#)
To: [Weidner, Keith E - Washington, DC](#)
Subject: FW: [EXTERNAL] Re: USPS/Michael Best
Date: Friday, March 27, 2020 9:18:21 AM

(b)

Thomas J. Marshall
General Counsel and Executive Vice President
United States Postal Service

-----Original Message-----

From: John Barger (b)(6)]
Sent: Thursday, March 26, 2020 8:54 PM
To: Marshall, Thomas J - Washington, DC (b)(6), (b)(3), 410(c)(2)
Cc: (b)(6)
Subject: [EXTERNAL] Re: USPS/Michael Best

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Thanks,

John M. Barger

Please excuse typos, courtesy of iPhone keyboard, oversized thumbs, aggressive Apple algorithms

> On Mar 26, 2020, at 5:35 PM, Marshall, Thomas J - Washington, DC (b)(6), (b)(3), 410(c)(2) > wrote:

>

> Governor Barger,

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>

> -Tom

>

> Thomas J. Marshall

> General Counsel and Executive Vice President United States Postal
> Service

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>

> <USPS DPA Memorandum (final) -- 27794003 v1.docx>

From: [Marshall, Thomas J - Washington, DC](#)
To: [Weidner, Keith E - Washington, DC](#)
Subject: FW: [EXTERNAL] TOM MY EARLIER ELAIL WAS WRONG
Date: Monday, May 11, 2020 9:58:57 AM

(b)

Thomas J. Marshall
General Counsel and Executive Vice President
United States Postal Service

From: Rick Hohlt (b)(6)
Sent: Monday, May 11, 2020 8:40 AM
To: Marshall, Thomas J - Washington, DC (b)(6), (b)(3), 410c2 ; Brennan, Megan J - Washington, DC
(b)(6), (b)(3), 410c2
Cc: (b)(6)
Subject: [EXTERNAL] TOM MY EARLIER ELAIL WAS WRONG

CAUTION: This email originated from outside USPS. STOP and CONSIDER before responding, clicking on links, or opening attachments.

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From: [Marshall, Thomas J - Washington, DC](#)
To: [Weidner, Keith E - Washington, DC](#)
Subject: FW: call this afternoon
Date: Friday, April 10, 2020 2:15:40 PM
Attachments: [image001.png](#)

Fyi. Let's chat before the 3 pm.

Thomas J. Marshall
General Counsel and Executive Vice President
United States Postal Service


From: Passantino, Stefan (59582) (b)(6)
Sent: Friday, April 10, 2020 1:56 PM
To: Marshall, Thomas J - Washington, DC <(b)(6), (b)(3), 410(c)(2)>
Subject: [EXTERNAL] RE: call this afternoon

(b)(5)

A large rectangular area of the document is redacted with a solid light blue color, obscuring several lines of text.

Stefan Passantino
Partner
Practice Group Chair, Government Relations, Political Law & Public Policy
T 202.747.9582 | michaelbest.com <<http://www.michaelbest.com>>

Duplicate

A very large rectangular area of the document is redacted with a solid light blue color, covering the majority of the lower half of the page.

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From: [Marshall, Thomas J - Washington, DC](#)
To: [M. -Mike- Duncan Robert](#)
Subject: RE: [EXTERNAL] Re: USPS/Michael Best
Date: Friday, March 27, 2020 6:22:08 PM

Thanks Governor Duncan, and I did eventually get your voice mail. I was on the 10th floor most of the day, and there are certain areas in this building where cell calls are often delayed. You do, however, have the correct number.

Let me know if you would prefer a call back. Otherwise, I will talk with you on Monday, barring any emergencies.

-Tom

Thomas J. Marshall
General Counsel and Executive Vice President
United States Postal Service

-----Original Message-----

From: M. -Mike- Duncan Robert [<mailto:mike@rmduncan.com>]
Sent: Friday, March 27, 2020 6:09 PM
To: Marshall, Thomas J - Washington, DC <thomas.j.marshall@usps.gov>
Subject: Re: [EXTERNAL] Re: USPS/Michael Best

Tom, it's not necessary but check you cell voice mail to see if I got the correct number!

Sent from my iPhone

> On Mar 27, 2020, at 5:29 PM, Marshall, Thomas J - Washington, DC <thomas.j.marshall@usps.gov> wrote:
>
> Sorry Mr. Chairman, I did not get a message that you called. Do you need me to call you back this evening? I have spoken to Governor Barger, and will be setting up a conference call with the outside firm on Monday, to include Governor Barger and you at his request.
>
> -Tom
>
> Thomas J. Marshall
> General Counsel and Executive Vice President United States Postal
> Service
>
>
> -----Original Message-----
> From: Barger/NorthernCrossPartners
> [<mailto:jbarger@northerncrosspartners.com>]
> Sent: Friday, March 27, 2020 4:42 PM
> To: Marshall, Thomas J - Washington, DC <thomas.j.marshall@usps.gov>
> Cc: mike@rmduncan.com
> Subject: Re: [EXTERNAL] Re: USPS/Michael Best
>
> Great Tom,
>
> We know you are running hard.
> Lets do circle up when you have a moment.
> You can start with the Chairman; he will loop me in as required.

>
> Take care,
>
>
>
>> On Mar 27, 2020, at 1:23 PM, Marshall, Thomas J - Washington, DC <thomas.j.marshall@usps.gov> wrote:
>>
>> Governor Barger, I have been on the run all day, and will call you back as soon as I get a moment to come up for air.
>>
>> However, after our call yesterday, one additional item that occurred to me was whether we have any argument under the Defense Production Act that the Administrations can provide the Postal Service with personal protection equipment like protective gloves, hand sanitizer, disinfectant wipes, and the like, since we are performing an essential public service as part of the nation's critical infrastructure and this material is necessary to enable our folks to do their jobs safely? As you know some of these items, particularly hand sanitizer, are in short supply.
>>
>> In any event, we are asking Michael Best to research the issue, and to provide us with their advice and guidance on how we might get this matter in front of the Administration. Given the connections of the Governors, I would also appreciate your thoughts on whether you could facilitate that conversation, once we know the answer if whether this is feasible under the Defense Production Act.
>>
>> -Tom
>>
>> Thomas J. Marshall
>> General Counsel and Executive Vice President United States Postal
>> Service
>>
>>
>> -----Original Message-----
>> From: John Barger [<mailto:jbarger@northerncrosspartners.com>]
>> Sent: Thursday, March 26, 2020 8:54 PM
>> To: Marshall, Thomas J - Washington, DC <thomas.j.marshall@usps.gov>
>> Cc: mike@rmduncan.com
>> Subject: [EXTERNAL] Re: USPS/Michael Best
>>
>> Thank you Tom.
>>
>> Nothing new here as you know. We're already doing all that.
>>
>> Per our discussion this afternoon, are there other emergency measures POTUS has invoked besides the DPA and which could be used as a basis for regulatory relief?
>>
>> As discussed, beyond funding issues the USPS board of Governors is curious about possible changes to the regulatory framework that can be accomplished by Executive order.
>>
>> Have the lawyers looked at that?
>>
>> Thanks,
>>
>> John M. Barger
>>
>>
>>
>> Please excuse typos, courtesy of iPhone keyboard, oversized thumbs,
>> aggressive Apple algorithms
>>
>>>> On Mar 26, 2020, at 5:35 PM, Marshall, Thomas J - Washington, DC <thomas.j.marshall@usps.gov> wrote:

>>>
>>> Governor Barger,
>>>
>>> Further to our conversation this evening, I am forwarding the preliminary research my received today from Michael Best. To cut the chase, I have set forth their initial recommendations below:
>>>
>>> The USPS should:
>>>
>>> (1) engage Congress to assure passage of the CARES Act by the House without alteration to the section authorizing \$10 Billion in direct loans;
>>>
>>> (2) immediately upon passage of the CARES Act, work with the Treasury Department to secure favorable terms for funds made available; and
>>>
>>> (3) continue to engage with Congress to secure additional authority for loans or loan guarantees in excess of the \$10 Billion appropriated in the CARES Act if the current national emergency continues.
>>>
>>>
>>> We will circle back to the firm to expand the scope of their research to add the items we discussed. In the interim, let me know if you have any questions or concerns, and I will talk to you soon.
>>>
>>> -Tom
>>>
>>> Thomas J. Marshall
>>> General Counsel and Executive Vice President United States Postal
>>> Service
>>>
>>>
>>> <USPS DPA Memorandum (final) -- 27794003 v1.docx>
>>
>

From: [Marshall, Thomas J - Washington, DC](#)
To: [Weidner, Keith E - Washington, DC](#)
Subject: Re: [EXTERNAL] Re: USPS/Michael Best
Date: Friday, March 27, 2020 7:26:43 PM

Can you get the times he can do on Monday and Tuesday?

Sent from my iPhone

On Mar 27, 2020, at 7:13 PM, Weidner, Keith E - Washington, DC <Keith.E.Weidner@usps.gov> wrote:

Tom,

MB is asking to do the call in the afternoon due to a conflict.

Sent from my iPhone

Begin forwarded message:

From: "Passantino, Stefan (59582)" <spassantino@michaelbest.com>
Date: March 27, 2020 at 6:34:54 PM EDT
To: "Weidner, Keith E - Washington, DC" <Keith.E.Weidner@usps.gov>
Cc: "Olson, Joseph L (13465)" <JLOLSON@michaelbest.com>
Subject: [EXTERNAL] Re: USPS/Michael Best

Absolutely. Is there any chance you have availability in the afternoon? I am in a telephonic board meeting in the morning.

On Mar 27, 2020, at 5:45 PM, Weidner, Keith E - Washington, DC <Keith.E.Weidner@usps.gov> wrote:

Thanks very much, Stefan. I had a conversation with Tom Marshall and wanted to follow-up on a few things.

First, I wanted to see if you (and whoever else from your firm you think should join) are available for a conference call on Monday morning with a few of our Governors, plus Tom and I, to discuss what you have done so far and next steps. Preferably 11:00, but if that doesn't work please let me know what your availability is.

Second, and in terms of next steps, there are a few additional matters that we would like you to consider that I wanted to put on your radar screen.

--A big pain point for our organization is securing sufficient personal protective supplies for our employees like hand sanitizer, gloves, disinfectant wipes, etc. We would like your guidance on whether there are any legal tools we could use to seek to secure such supplies, considering we are designated as critical infrastructure. If so, we would also like your guidance on the specific steps we should take with the Administration to leverage those tools. It appears from your DPA analysis that Title III might be relevant here; if not, perhaps another statute or Executive Branch tool might be.

--We would also like you to consider whether the Postal Service could be given additional pricing and product flexibility through some sort of executive action. As you may know, the Postal Service is limited in the types of products and services we can provide pursuant to statute and regulation, and is also subject to regulation by the Postal Regulatory Commission concerning our prices and products (see generally chapter 36 of title 39, US Code, and 39 CFR Chapter III). Our Board has been considering whether to pursue certain reforms to this statutory and regulatory construct as part of the legislative process (see attached document), but also wants you to research whether these or similar reforms could be pursued through non-legislative means. Regarding this issue, it might make sense to have a further call early next week so that I can walk you through the issues.

Thanks,

Keith

Keith Weidner
Deputy General Counsel, Headquarters
475 L'Enfant Plaza S.W.
Room 6002
Washington, D.C. 20260
202-268-6252 (w)
202-577-9413 (c)

From: Passantino, Stefan (59582) [<mailto:spassantino@michaelbest.com>]
Sent: Friday, March 27, 2020 4:18 PM
To: Weidner, Keith E - Washington, DC <Keith.E.Weidner@usps.gov>
Cc: Olson, Joseph L (13465) <JLOLSON@michaelbest.com>; Boerke, Nicholas J (12767) <njboerke@michaelbest.com>; Priebus, Reince (53838) <rp@michaelbest.com>; Groth, Nathan D (59584) <ndgroth@michaelbest.com>
Subject: [EXTERNAL] RE: USPS/Michael Best

Keith, it was good speaking with you just now and I am glad to hear that our initial work product appeared to be what you were looking for as a first cut. As we discussed, this weekend we are pulling together comprehensive CARES Act analysis as pertains to USPS (both the specific provisions related to USPS and the other general credit facilities available under CARES). We will also be providing you with our analysis of other Executive Branch tools (Executive Orders, regulatory guidance, etc) which, candidly, do not appear as impactful as the CARES Act. In the interim, here is the more generalized CARES Act analysis I described which will form the foundation of our specific analysis tailored to the USPS:

LENDING COVID-19 OPPORTUNITIES

BUSINESS LENDING SUPPORTED BY FEDERAL RESERVE BANK

The Federal Reserve Bank (FRB) has announced a "Main Street Business Lending Program" is intended to provide relief to what the FRB cites as small to midsize businesses.

While Congress's focus has been on small businesses and consumers, FRB's actions are focused on businesses that are basically healthy but in danger at these times because of the freeze-up in financial markets. Some have been insulated from the outbreak's effect to this point, but rely on debt as part of their normal operations. Others have lost business because of the virus but could survive if they could borrow to cover their expenses.

Several of the FRB's actions are derived from actions taken 2008-2009 financial crisis. But some are new, like the FRB is considering lending money directly to large corporations, something it has never done before. The FRB has framed the program as "bridge financing" to help otherwise healthy companies keep their doors open and their workers employed during a period of disruption.

The three new programs that FRB announced on March 23, 2020 are:

1. Main Street Business Lending Program: This program is intended to support lending to eligible small and midsize businesses. Such a program is likely to depend on additional money from the Treasury Department. The FRB hasn't yet provided program details.
2. Term Asset-Backed Securities Loan Facility, or TALF: This facility will mirror one the FRB used in 2008 to support consumer and business credit markets. The FRB has stated that it will use this facility to lend money to investors to buy securities backed by credit card loans and other consumer debt.
3. Support Financing for Corporate Debt Obligations: The FRB announced a new facility to address the lack of new financing in the roughly \$6 trillion market for highly rated corporate debt by offering bridge loans for up to four years, which includes limits on the payment of dividends and stock buybacks for firms that defer interest payments on their loans. A facility aimed at unblocking the market for existing corporate debt, allowing the FRB to purchase

bonds already issued by highly rated companies and eligible exchange-traded funds, which have around \$147 billion in investment-grade corporate debt

SMALL BUSINESS LENDING

SBA Economic Injury Disaster Loan Program (PRESIDENT EXECUTIVE ORDER)

President Trump announced the administration's action to provide relief to small businesses impacted by the coronavirus (COVID-19) through the Economic Injury Disaster Loan Program <<https://www.sba.gov/disaster-assistance/coronavirus-covid-19>>.

The SBA's Economic Injury Disaster Loan program provides small businesses with targeted, low-interest working capital loans of up to \$2 million that can provide economic support to small businesses to help overcome the temporary loss of revenue they are experiencing. These loans may be used to pay fixed debts, payroll, accounts payable and other bills that cannot be paid because of the disaster's impact. The interest rate is 3.75% for small businesses. The interest rate for non-profits is 2.75%. SBA offers loans with long-term repayments in order to keep payments affordable, up to a maximum of 30 years. Terms are determined on a case-by-case basis, based upon each borrower's ability to repay.

For any SBA EIDL loans made in response to COVID-19 before December 31, 2020, the SBA shall waive any personal guarantee on advances and loans below \$200,000, the requirement that an applicant needs to have been in business for the 1-year period before the disaster, and the credit elsewhere requirement. During the covered period, SBA can approve and offer EIDL loans based solely on an applicant's credit score, or use an alternative appropriate alternative method for determining applicant's ability to repay.

The SBA is working with all states and territories to offer these loans. These loans are made available upon a formal request received from a state's or territory's Governor. Once a declaration is made for designated areas within a state, small businesses can apply for the disaster relief loan. The information on the application process for the Economic Injury Disaster Loan assistance will be made available to all affected communities as well as updated on SBA's website <<https://disasterloan.sba.gov/ela>>. Here <<https://disasterloan.sba.gov/ela/Declarations/Index>> are the states and territories that have Presidential and SBA declared disasters.

SBA spokesperson Carol Chastang has stated that SBA generally approves a state's request no longer than 48 hours and SBA may take two to three weeks to make a decision once a loan application is submitted by a business. If the loan is approved, disbursement of funds can be made within five days of receiving the loan closing documents.

Visit SBA's webpage <<https://disasterloan.sba.gov/ela/>> to learn about eligible disaster areas, to apply online, and to check your application status. Business owners can call the disaster customer service center at 800-659-2955, or email disastercustomerservice@sba.gov <<mailto:disastercustomerservice@sba.gov>>. The deaf and hearing impaired may call 800-877-8339.

SBA Paycheck Protection Loans (PPL) (CARES ACT)

The Paycheck Protection Loan (PPL) is a new loan product within the SBA's 7a Loan Program authorized for \$349 billion. Both existing SBA lenders and new lenders brought into the program with the assistance of the Department of Treasury will be able to offer these loans to eligible small businesses.

The Paycheck Protection Program is 100 percent guaranteed by the SBA with an interest rate of 4%. The maximum loan amount is \$10 million or 2.5 times the average monthly payroll based on the prior year's payroll.

The loan covers payroll costs included costs related to the continuation of group health care benefits during periods of paid sick, medical, or family leave, and insurance premiums; employee salaries, commissions, or similar compensations; payments of interest on any mortgage obligation (not to include prepayment of or payment of principal on a mortgage obligation); rent (including rent under a lease agreement); utilities; and interest on any other debt obligations that were incurred before February 15, 2020. Eligible borrowers must make a good faith certification that the loan is necessary due to the uncertainty of current economic conditions caused by COVID-19; they will use the funds to retain workers and maintain payroll, lease, and utility payments; and are not receiving duplicative funds for the same uses from another SBA program.

For eligibility purposes, requires lenders to, instead of determining repayment ability, which is not possible during this crisis, to determine whether a business was operational on February 15, 2020, and had employees for whom it paid salaries and payroll taxes, or a paid independent contractor.

Small businesses and certain nonprofits, including 501(c)(3) organizations and 501(c)(19) veteran organizations, and tribal business concerns, with less than 500 employees as well as those that meet the current SBA size standards for the loan are eligible for the loan. Additionally, sole proprietors, independent contractors, federal small business contractors and self-employed individuals will also be eligible. Moreover, small businesses in the hospitality and food industry with more than one location could be eligible at the store and location level if the store employs less than 500 workers; meaning each store location could be eligible, if a franchisor appears in the SBA's National Franchise Director, assistance will extend down to the franchisee at the store or location level.

To increase speed and turnaround time within this new loan product, more than 800 existing SBA-certified lenders, including banks, credit unions, and other financial institutions, have been delegated authority and SBA would be required to streamline the process to bring additional lenders into the program. Delegated authority allows the lenders to process, close, and service a loan without SBA review. This authority will also extend to lenders who join the program and make these loans.

All borrower and lender fees for the Paycheck Protection Loans are waived. The Credit Elsewhere Test, collateral requirements, and all requirements for personal guarantees under the Paycheck Protection Loans are waived. The loans have automatic deferrals of principal, interest, and fee for six months. Any portion of a loan that is not used for forgiveness purposes will have a maturity of not more than 10 years, and the guarantee for that portion of the loan will remain intact.

Small businesses can obtain both a new Paycheck Protection Loan and an SBA Economic Injury Disaster Loan (EIDL) so long as they cover different items. Flexibility is granted through no repayment penalties on either the Paycheck Protection Loan or the EIDLs and a refinancing option has been included.

1. PPL Loan Forgiveness

As part of the PPL program, a loan forgiveness tool has been developed that allows businesses that maintain payroll continuity from February 15, 2020 through June 30, 2020 as defined by headcount, to request forgiveness on a Paycheck Protection Loan used on payroll costs, mortgage interest, rent, and utility pay over an 8 week period. The amount forgiven will be reduced proportionally by any reduction in employees retained compared to the prior year and reduced by the reduction in pay of any employee beyond 25% of their prior year compensation. The loan forgiveness program provides flexibility for businesses that re-hire workers that were previously laid off. To receive loan forgiveness, a business will have to work with a lender to justify their payroll was maintained through documentation. Lenders will be held harmless on decisions of eligibility and SBA will purchase the loan after the lender grants approval.

SBA Express Loan Program

The maximum loan for a SBA Express loan was increased from \$350,000 to \$1 million through December 31, 2020, after which point the Express loan will have a maximum of \$350,000. It also allows Veteran's fee waivers for the 7(a) Express loan program to be permanently waived.

Emergency Economic Injury Disaster Grant Program (EIDL) (CARES ACT)

An Emergency Grant is established to allow an eligible entity who has applied for an EIDL loan due to COVID-19 to request an advance on that loan, of not more than \$10,000, which the SBA must distribute within 3 days.

Applicants are not required to repay advance payments, even if subsequently denied for an EIDL loan.

In advance of disbursing the advance payment, the SBA must verify that the entity is an eligible applicant for an EIDL loan. This approval shall take the form of a certification under penalty of perjury by the applicant that they are eligible.

The advance payment may be used for providing paid sick leave to employees, maintaining payroll, meeting increased costs to obtain materials, making rent or mortgage payments, and repaying obligations that cannot be met due to revenue losses.

An advance payment must be considered when determining loan forgiveness, if the applicant transfers into a loan made under SBA's Paycheck Protection Program.

SBA's authority to carry out Emergency EIDL Grants expires on December 30, 2020.

Additional SBA guidance, resources, and information for small businesses impacted by COVID-19 can be found here<<https://www.sba.gov/page/coronavirus-covid-19-small-business-guidance-loan-resources>>.

Existing 7(a), 504 or Microloan Product

SBA is required to pay the principal, interest, and any associated fees that are owed on the covered loans, which includes an existing 7(a) (including Community Advantage), 504 or microloan products, for a six month period starting on the next payment due. Loans that are already on deferment will receive six months of payment by the SBA beginning with the first payment after the deferral period. Loans made up until six months after enactment will also receive a full 6 months of loan payments by the SBA.

SBA must make payments no later than 30 days after the date on which the first payment is due.

SBA is required to still make payments even if the loan was sold on the secondary market.

SBA is to encourage lenders to provide deferments and allows lenders, up until one year after enactment, to extend the maturity of SBA loans in deferment beyond existing statutory limits.

LENDING FOR ALL BUSINESS INCLUDING STATE AND LOCAL GOVERNMENTS (CARES)
Economic Stabilization and Assistance to Severely Distressed Sectors of the United States Economy" (ESF)
Provides for a \$500 billion authorization for the Treasury Department to make loans, guarantees and "other investments" to support certain eligible businesses, as well as state and local governments.

1. Direct Lending, including:
 - a. \$25 billion for passenger air carriers, eligible businesses that are certified under part 145 of title 15, Code of Federal Regulations, and approved to perform inspection, repair, replace, or overhaul services, and ticket agents;
 - b. \$4 billion for cargo air carriers; and
 - c. \$17 billion for businesses important to maintaining national security (likely for Boeing).
- (2) \$454 billion, as well as any amounts available but not used for direct lending, for loans, loan guarantees, and investments in support of the Federal Reserve's lending facilities to eligible businesses, states, and municipalities. Federal Reserve 13(3) lending is a critical tool that can be used in times of crisis to help mitigate extraordinary pressure in financial markets that would otherwise have severe adverse consequences for households, businesses, and the U.S. economy.

For the entire authorization, the Treasury Secretary would have authority to determine terms and conditions for the program, including the rates—which will be based on the risk and current average yield of Treasuries of comparable maturity.

Terms and Conditions Associated with the Loans:

For the three sector-specific categories, the Treasury Secretary may make loans to businesses that can demonstrate: (1) they are an eligible business to which credit is not reasonably available at the time of the transaction; (2) the intended obligation is prudently incurred; and (3) the loan or guarantee is sufficiently secured or made at a rate that reflects the risk and, to the extent practicable, is not less than an interest rate based on market conditions for comparable obligations prior to the outbreak of COVID-19.

Additional terms require an applicant from these three sectors to: (1) show, to the extent practicable, the duration of the loan or guarantee will not exceed 5 years; (2) forego buying back stock or paying dividends for common stock (except if contractually obligated to do so) for 12 months after the obligation is no longer outstanding; (3) maintain employment levels as of March 24, 2020, to the extent practicable, until September 30, 2020, - and not "in any case" reduce those employment levels by more than 10 percent; (4) certify that the business is "created or organized in the United States or under the laws of the United States and has significant operations in and a majority of its employees based in the United States; and (5) demonstrate that it incurred losses such "that the continued operations of the business are jeopardized."

Many, but not all, of these restrictions also apply to the broader loan category for other eligible businesses or state and local governments. Most important, for example, businesses receiving money from this pool are subject to the same restrictions on stock repurchase and dividend issuance, although the Secretary retains the authority to waive dividend restriction if it is in the interest of the U.S. government to do. (However, the Secretary must be prepared to potentially defend that decision before Congress.) The restriction that recipients be U.S. businesses applies to this pool as well, but the loan duration, employment level, and loss restrictions do not.

Allows the U.S. government to share in the gains made pursuant to such loans applies to the three-sector specific industries - but not for the broader general business loan pool. Additionally, the Treasury Department must liquidate its interest in any authorized loan programs in this title as soon as soon as reasonably practical—while maximizing the U.S. government's interest.

Employee/Officer Compensation Provisions limit officers or employees who earned in excess of \$3 million in total compensation in calendar year 2019 from earning, in 2020, total compensation more than the sum of \$3 million plus 50 percent of the amount over \$3 million of the total compensation they received in 2019.

1. Assistance for Mid-Sized Businesses

Within the general business loan program, the final bill emphasizes that the Secretary should "endeavor to" make loans and investments available—to the extent practicable—to midsize businesses (including nonprofit organizations) with between 500 and 10,000 employees at a rate not higher than two percent annualized, and with no principal or interest payable for the first six months of the life of the loan. Entities wishing to take advantage of this program must make a good-faith certification that: (1) economic uncertainty requires those terms; (2) funds received will be used to retain 90 percent of the workforce at full compensation and benefit levels through Sept. 30, 2020; and (3) they intend to restore not less than 90 percent of their workforce level prior to Feb. 1, 2020 while restoring all compensation and benefit levels to workers no later than 4 months after their termination date.

These entities must also certify that they will not "outsource or offshore jobs for the term of the loan or two years after completing repayment of the loan"; will not abrogate collective bargaining rights during this time; and will remain neutral in a union organizing effort for the term of the loan.

C. **Municipal Prioritization:** The final bill requires the Secretary to attempt to provide liquidity to "the financial system that supports lending to States and municipalities."

D. **New Administrative Issues of Notes:** On the administrative side, the final bill authorizes the Treasury Department to designate financial institutions—including but not limited to depositories, brokers, dealers, and other institutions—as financial agents of the U.S for the purpose of performing the Secretary's duties under this title. Additionally, the Secretary must prescribe regulations or guidance as appropriate to carry out the purpose of the title within 10 days following enactment.

E.

New Inspector General: Section 4018 establishes, within the Treasury Department, the Office of the Special Inspector General for Pandemic Recovery who will oversee implementation of the ESF. The President will be responsible for nominating this individual "as soon as practicable after any loan, loan guarantee, or other investment is made" under the program. The Special IG will be subject to the removal provisions in Section 3(b) of Inspector General Act.

The Special IG will have authority to conduct, supervise, and coordinate audits and investigations of "the making, purchase, management, and sale of loans, loan guarantees, and other investments made by the Secretary," in addition to the Secretary's management of the program. In doing so, the Special IG will have the authorities provided in section 6 of the Inspector General Act of 1978 and will be considered exempt from termination by the Attorney General. The bill authorizes \$25 million to fund the Special IG's activities.

Finally, the bill creates a Congressional Oversight Commission to oversee the execution of the ESF program by the Secretary and the Board of Governors of the Federal Reserve System. The Commission must submit regular reports to Congress and review the implementation of the program. Reports must begin no later than 30 days following the first exercise of the Secretary's authority under the ESF program. Membership in the Commission will consist of one member appointed by each of the Speaker of the House, the House Minority Leader, the Senate Majority Leader, and the Senate Minority Leader. The fifth member, Commission's Chair, will be jointly appointed by the Speaker and the Senate Majority Leader.

Bankruptcy

The Small Business Reorganization Act is amended to increase the eligibility threshold to file under subchapter V of chapter 11 of the U.S. Bankruptcy Code to businesses with less than \$7,500,000 of debt. The increase sunsets after one year and the eligibility threshold returns to \$2,725,625.

Additionally, the definition of income in the Bankruptcy Code for chapters 7 and 13 is amended to exclude coronavirus-related payments from the federal government from being treated as "income" for purposes of filing bankruptcy. This provision sunsets after one year.

The calculation of disposable income for purposes of confirming a chapter 13 plan shall not include coronavirus-related payments. This provision sunsets after one year.

Individuals and families currently in chapter 13 can seek payment plan modifications if they are experiencing a material financial hardship due to the coronavirus pandemic, including extending their payments for up to seven years after their initial plan payment was due. This provision sunsets after one year.

OTHER LENDING PROGRAMS (CARES)

USDA LENDING

RURAL BUSINESS COOPERATIVE SERVICE – \$20.5 million

The bill provides the necessary subsidy to make \$1 billion in lending authority available for the Business and Industry loan guarantee program, which provides much-needed financing to business owners that might not be able to qualify for a loan on their own.

COMMODITY CREDIT CORPORATION (CCC)

The CCC is the funding mechanism for agricultural programs such as Price Loss Coverage and Dairy Margin

Coverage. The CCC bolsters commodity and income support programs, natural resources conservation programs, disaster assistance programs and most recently the Market Facilitation Program. The bill includes language that replenishes the CCC borrowing authority by \$14 billion. The \$14-billion replenishment is for fiscal year 2020, so that's in addition to the second and third tranche of MFP payments, as well as farm bill payments made last fall. This replenishment will allow USDA to develop new support programs to assist agricultural producers and potentially help agribusinesses such as ethanol plants

U.S. DEPARTMENT OF AGRICULTURE (USDA)/OFFICE OF THE SECRETARY – \$9.5 billion

The bill provides \$9.5 billion in emergency COVID-19 response funding to provide financial support for agricultural producers impacted by COVID-19, including producers of specialty crops, producers that supply local food systems, and livestock producers.

Stefan Passantino

Partner

Practice Group Chair, Government Relations, Political Law & Public Policy

E spassantino@michaelbest.com <<mailto:spassantino@michaelbest.com>>

T 202.747.9582 | M 202.400.1530 | F 202.347.1819

<image001.png>

A LexMundi Member

Michael Best & Friedrich LLP

my bio <<http://www.michaelbest.com/People/Stefan-Passantino>> | our firm <<http://www.michaelbest.com>> |
vCard <<http://www.michaelbest.com/People/Stefan-Passantino.vcf>>

Click here to visit our COVID-19 Resource Center with the latest updates on business & legal implications related to the coronavirus. <<https://t.xink.io/Tracking/Index/f-IBAHUXAQcw2VQA0>>

-----Original Message-----

From: Passantino, Stefan (59582)

Sent: Thursday, March 26, 2020 5:08 PM

To: 'Weidner, Keith E - Washington, DC' <Keith.E.Weidner@usps.gov> <<mailto:Keith.E.Weidner@usps.gov>>>

Cc: Olson, Joseph L (13465) <JLOLSON@michaelbest.com> <<mailto:JLOLSON@michaelbest.com>>>; Boerke, Nicholas J (12767) <njboerke@michaelbest.com> <<mailto:njboerke@michaelbest.com>>>; Priebus, Reince (53838)

<rp@michaelbest.com> <<mailto:rp@michaelbest.com>>>; Groth, Nathan D (59584)

<ndgroth@michaelbest.com> <<mailto:ndgroth@michaelbest.com>>>

Subject: RE: USPS/Michael Best

Keith, attached per your request is a first pass at the high-level analysis of the Defense Production Act of 1950.

Note also in this memorandum the discussion regarding the fact that the USPS is addressed in Title VI Section 6001 of the new CARES Act (attached) regarding borrowing and prioritization of USPS delivery of medical products.

There is some discussion ongoing but clearly the evolution of this legislation is also something we are watching very closely and will continue to advise on.

Stefan Passantino

Partner

-----Original Message-----

From: Weidner, Keith E - Washington, DC <Keith.E.Weidner@usps.gov<<mailto:Keith.E.Weidner@usps.gov>>>

Sent: Thursday, March 26, 2020 2:04 PM

To: Passantino, Stefan (59582) <spassantino@michaelbest.com<<mailto:spassantino@michaelbest.com>>>

Subject: RE: USPS/Michael Best

Hello Stefan,

I am circling back to get an ETA on when we might get some preliminary talking points regarding the Defense Production Act.

Thanks,

Keith

Keith Weidner

Deputy General Counsel, Headquarters

475 L'Enfant Plaza S.W.

Room 6002

Washington, D.C. 20260

202-268-6252 (w)

202-577-9413 (c)

-----Original Message-----

From: Passantino, Stefan (59582) [<mailto:spassantino@michaelbest.com>]

Sent: Tuesday, March 24, 2020 7:59 PM

To: Weidner, Keith E - Washington, DC <Keith.E.Weidner@usps.gov<<mailto:Keith.E.Weidner@usps.gov>>>

Cc: Olson, Joseph L (13465) <JLOLSON@michaelbest.com<<mailto:JLOLSON@michaelbest.com>>>; Boerke, Nicholas J (12767) <njboerke@michaelbest.com<<mailto:njboerke@michaelbest.com>>>; Groth, Nathan D (59584) <ndgroth@michaelbest.com<<mailto:ndgroth@michaelbest.com>>>

Subject: [EXTERNAL] Re: USPS/Michael Best

If it's ok with you. Let's try for 9:30 am ET tomorrow. We can use my call-in:

Dial in (United States): 1-888-378-0222 Conference Room Number: 877-542-288

On Mar 24, 2020, at 5:42 PM, Weidner, Keith E - Washington, DC <Keith.E.Weidner@usps.gov<<mailto:Keith.E.Weidner@usps.gov>>> wrote:

Stefan, I am available between 9:30 and 11 and 12:30-2, and then anytime after 3. However, if you need another time let me know and I can move certain of my other meetings around.

Keith

Keith Weidner

Deputy General Counsel, Headquarters

475 L'Enfant Plaza S.W.

Room 6002

Washington, D.C. 20260

202-268-6252 (w)

202-577-9413 (c)

From: Passantino, Stefan (59582) [<mailto:spassantino@michaelbest.com>]

Sent: Tuesday, March 24, 2020 5:13 PM

To: Weidner, Keith E - Washington, DC <Keith.E.Weidner@usps.gov<<mailto:Keith.E.Weidner@usps.gov>>>;
Lewis, Michael A - Washington, DC <Michael.A.Lewis@usps.gov<<mailto:Michael.A.Lewis@usps.gov>>>
Cc: Kallat, Prashanth - Washington, DC <Prashanth.Kallat@usps.gov<<mailto:Prashanth.Kallat@usps.gov>>>
Subject: [EXTERNAL] RE: USPS/Michael Best

Thank you. As a first step I would like to set up a call with a few senior members of our team. Do you have availability tomorrow morning or early afternoon?

Stefan Passantino

Partner

Practice Group Chair, Government Relations, Political Law & Public Policy T 202.747.9582 | michaelbest.com
<<http://www.michaelbest.com>>

<image001.png>

Michael Best & Friedrich LLP

Click here to visit our COVID-19 Resource Center with the latest updates on business & legal implications related to the coronavirus. <<https://t.xink.io/Tracking/Index/f-IBAHkXAQCw2VQA0>>

From: Weidner, Keith E - Washington, DC <Keith.E.Weidner@usps.gov<<mailto:Keith.E.Weidner@usps.gov>>>>

Sent: Tuesday, March 24, 2020 4:55 PM

To: Lewis, Michael A - Washington, DC <Michael.A.Lewis@usps.gov<<mailto:Michael.A.Lewis@usps.gov>>>>;
Passantino, Stefan (59582) <spassantino@michaelbest.com<<mailto:spassantino@michaelbest.com>>>>

Cc: Kallat, Prashanth - Washington, DC <Prashanth.Kallat@usps.gov<<mailto:Prashanth.Kallat@usps.gov>>>>

Subject: RE: USPS/Michael Best

Thanks, Mike.

Stefan, please reach out to me with any questions concerning the legal research we would like your firm to perform. As I am sure has already been discussed, we would like you to examine whether there are any statutes or executive materials that would provide the Postal Service with the ability either to seek financial assistance due to the COVID-19 pandemic, and/or to assist in the response to the pandemic. One statute in particular we would like a better understanding of is the Defense Production Act.

My contact information is below.

Thanks,

Keith

Keith Weidner

Deputy General Counsel, Headquarters

475 L'Enfant Plaza S.W.

Room 6002

Washington, D.C. 20260

202-268-6252 (w)

202-577-9413 (c)

From: Lewis, Michael A - Washington, DC

Sent: Tuesday, March 24, 2020 4:41 PM

To: Passantino, Stefan (59582) <spassantino@michaelbest.com<mailto:spassantino@michaelbest.com>>>

Cc: Weidner, Keith E - Washington, DC <Keith.E.Weidner@usps.gov<mailto:Keith.E.Weidner@usps.gov>>>; Kallat, Prashanth - Washington, DC <Prashanth.Kallat@usps.gov<mailto:Prashanth.Kallat@usps.gov>>>

Subject: USPS/Michael Best

Stefan:

Pursuant to the message below, the contracting officer has authorized your firm to begin work immediately. Contract documents will be finalized tomorrow.

As discussed earlier, Keith Weidner, our Deputy General Counsel, will serve as Contracting Officer's Representative and will be the firm's primary POC on matters relating to work. I've copied him on this message.

Mike

Michael A. Lewis

Chief Counsel, Procurement & Intellectual Property USPS Law Department Procurement & Property Law

475 L'Enfant Plaza, SW, Room 6319

Washington, DC 20260-1101

Desk Phone: 202-268-7063

Mobile Phone: 202-713-6280

E-mail: michael.a.lewis@usps.gov<<mailto:michael.a.lewis@usps.gov>>>

From: Kallat, Prashanth - Washington, DC

Sent: Tuesday, March 24, 2020 4:10 PM

To: Lewis, Michael A - Washington, DC <Michael.A.Lewis@usps.gov<<mailto:Michael.A.Lewis@usps.gov>>>

Subject: RE: For Review

Mike,

I approve Michael Best to begin work today. The contract will be finalized by COB tomorrow.

Thanks.

[Prashanth Kallat](#)

[Contracting Officer](#)

[Manager, Professional & Technical Services The United States Postal Service](#)

[202-268-6538](#)

[Email Disclaimer](#)

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[<2020-03 product-pricing proposals V4 \(002\)-dcb.docx>](#)

From: [Marshall, Thomas J - Washington, DC](#)
To: [John Barger](#)
Cc: [M. -Mike- Duncan Robert](#); [Weidner, Keith E - Washington, DC](#); [Pangilinan, Regina K - Washington, DC](#)
Subject: RE: [EXTERNAL] Re: USPS/Michael Best
Date: Saturday, March 28, 2020 12:10:53 PM

(b)(5)

From: John Barger [(b)(6)]
Sent: Saturday, March 28, 2020 11:30 AM
To: Marshall, Thomas J - Washington, DC (b)(6), (b)(3), 410(c)(2)
Cc: M. -Mike- Duncan Robert (b)(6); Weidner, Keith E - Washington, DC
(b)(6), (b)(3), 410(c)(2) Pangilinan, Regina K - Washington, DC (b)(6), (b)(3), 410(c)(2)
Subject: Re: [EXTERNAL] Re: USPS/Michael Best

John M. Barger
Managing Director
www.northerncrosspartners.com<<http://www.northerncrosspartners.com>>

Please excuse typos, courtesy of iPhone keyboard, oversized thumbs, aggressive Apple algorithms

On Mar 28, 2020, at 7:48 AM, Marshall, Thomas J - Washington, DC
(b)(6), (b)(3), 410(c)(2) wrote:

(b)(5)
(b)(5)

From: John Barger (b)(6)]
Sent: Saturday, March 28, 2020 9:52 AM
To: M. -Mike- Duncan Robert (b)(6)
Cc: Marshall, Thomas J - Washington, DC (b)(6), (b)(3), 410(c)(2) >
Subject: Re: [EXTERNAL] Re: USPS/Michael Best

(b)(5)

Thank you.

John M. Barger
Managing Director
www.northerncrosspartners.com<<http://www.northerncrosspartners.com>>

Please excuse typos, courtesy of iPhone keyboard, oversized thumbs, aggressive Apple algorithms

On Mar 28, 2020, at 6:44 AM, M. -Mike- Duncan Robert <(b)(6)> >>

wrote:
John,

(b)(5)

Mike
Sent from my iPhone

On Mar 27, 2020, at 10:25 PM, John Barger

(b)(6) > wrote:
Mike

(b)(5)

Thanks.
John M. Barger
Managing Director
www.northerncrosspartners.com<<http://www.northerncrosspartners.com>>

Please excuse typos, courtesy of iPhone keyboard, oversized thumbs, aggressive Apple algorithms

Begin forwarded message:

From: "Marshall, Thomas J - Washington, DC"

(b)(6), (b)(3), 410(c)(2)

Date: March 27, 2020 at 7:19:39 PM PDT

To: Barger/NorthernCrossPartners

<(b)(6)>

Cc: "(b)(6)"

(b)(6) >

Subject: RE: [EXTERNAL] Re: USPS/Michael Best
Governors, (b)(5)

Best regards,

-Tom

-----Original Message-----

From: Barger/NorthernCrossPartners (b)(6)

Sent: Friday, March 27, 2020 4:42 PM

To: Marshall, Thomas J - Washington, DC (b)(6), (b)(3), 410(c)(2)

Cc: (b)(6)

Subject: Re: [EXTERNAL] Re: USPS/Michael Best

(b) Tom,

(b)(5)

Take care,

On Mar 27, 2020, at 1:23 PM, Marshall, Thomas J - Washington, DC
(b)(6), (b)(3), 410(c)(2) wrote:

Governor Barger, (b)(5)

(b)(5)

(b)(5)

-Tom

Thomas J. Marshall
General Counsel and Executive Vice President United States Postal
Service

-----Original Message-----

From: John Barger [(b)(6)]

Sent: Thursday, March 26, 2020 8:54 PM

To: Marshall, Thomas J - Washington, DC (b)(6), (b)(3), 410(c)(2) >

Cc: (b)(6)

Subject: [EXTERNAL] Re: USPS/Michael Best

(b)(5)

(b)(5)

(b)(5)

(b)(5)

(b)(5)

Thanks,

John M. Barger

Please excuse typos, courtesy of iPhone keyboard, oversized thumbs,
aggressive Apple algorithms

On Mar 26, 2020, at 5:35 PM, Marshall, Thomas J - Washington, DC
(b)(6), (b)(3), 410(c)(2) wrote:

Governor Barger,

(b)(5)

-Tom

Thomas J. Marshall
General Counsel and Executive Vice President United States Postal
Service

<USPS DPA Memorandum (final) -- 27794003 v1.docx>

From: [Marshall, Thomas J - Washington, DC](#)
To: [Passantino, Stefan \(59582\)](#)
Cc: [Weidner, Keith E - Washington, DC](#); [Olson, Joseph L \(13465\)](#); [Boerke, Nicholas J \(12767\)](#)
Subject: Re: [EXTERNAL] RE: USPS--Attorney/Client, Deliberative and Predecisional Materials
Date: Friday, April 3, 2020 5:42:28 PM

Can you tell me whether you got the message?

Sent from my iPhone

On Apr 3, 2020, at 5:40 PM, Marshall, Thomas J - Washington, DC (b)(6) wrote:

Stefan, can you call in to the teleconference?

Sent from my iPhone

On Apr 3, 2020, at 3:19 PM, Passantino, Stefan (59582) (b)(6) > wrote:

Attached please find the final memorandum. We will be available at our convenience this afternoon to discuss.

Stefan Passantino

Partner

Practice Group Chair, Government Relations, Political Law & Public Policy

T 202.747.9582 | michaelbest.com <<http://www.michaelbest.com>>

<image001.png>

Michael Best & Friedrich LLP

Click to visit our COVID-19 Resource Center<<https://t.xink.io/Tracking/Index/f-IBAHkXAQCw2VQA0>> & CARES Act Relief Resource Center<<https://t.xink.io/Tracking/Index/IgACAHkXAQCw2VQA0>> with the latest updates on business & legal implications related to the coronavirus.

From: Weidner, Keith E - Washington, DC (b)(6) >
Sent: Friday, April 03, 2020 2:32 PM
To: Passantino, Stefan (59582) (b)(6) >>
Cc: Olson, Joseph L (13465) (b)(6)
Subject: RE: USPS--Attorney/Client, Deliberative and Predecisional Materials

Stefan/Joe,

(b)(5)

Thanks,
Keith

Keith Weidner
Deputy General Counsel, Headquarters
475 L'Enfant Plaza S.W.
Room 6002
Washington, D.C. 20260
202-268-6252 (w)

(b)(6) (c)

From: Passantino, Stefan (59582) (b)(6)
Sent: Friday, April 3, 2020 11:19 AM
To: Marshall, Thomas J - Washington, DC (b)(6) >;
Weidner, Keith E - Washington, DC <(b)(6)>
Cc: Olson, Joseph L (13465) (b)(6) >
Subject: [EXTERNAL] RE: USPS--Attorney/Client, Deliberative and Predecisional Materials

Tom, Keith, (b)(5)

Stefan Passantino
Partner
Practice Group Chair, Government Relations, Political Law & Public Policy
T 202.747.9582 | michaelbest.com <<http://www.michaelbest.com>>

<image001.png>

Michael Best & Friedrich LLP

Click to visit our COVID-19 Resource Center<<https://t.xink.io/Tracking/Index/f-IBAHkXAQCw2VOA0>> &
CARES Act Relief Resource Center<<https://t.xink.io/Tracking/Index/IgACAHkXAQCw2VOA0>> with the latest
updates on business & legal implications related to the coronavirus.

From: Marshall, Thomas J - Washington, DC (b)(6) >
Sent: Thursday, April 02, 2020 9:21 PM
To: Passantino, Stefan (59582) (b)(6) >; Weidner,
Keith E - Washington, DC (b)(6)
Cc: Olson, Joseph L (13465) (b)(6) >
Subject: RE: USPS--Attorney/Client, Deliberative and Predecisional Materials

Stefan, (b)(5)

Thanks, (b)(5)

-Tom

Thomas J. Marshall
General Counsel and Executive Vice President
United States Postal Service

From: Passantino, Stefan (59582) (b)(6)
Sent: Thursday, April 2, 2020 2:59 PM
To: Marshall, Thomas J - Washington, DC (b)(6) >;
Weidner, Keith E - Washington, DC <(b)(6)>
Cc: Olson, Joseph L (13465) <(b)(6)>
Subject: [EXTERNAL] USPS--Attorney/Client, Deliberative and Predecisional Materials

Tom, Keith, (b)(5)

Stefan Passantino
Partner
Practice Group Chair, Government Relations, Political Law & Public Policy
E spassantino@michaelbest.com<<mailto:spassantino@michaelbest.com>>
T 202.747.9582 | M 2(b)(6) | F 202.347.1819

<image001.png>

A LexMundi Member

Michael Best & Friedrich LLP

my bio <<http://www.michaelbest.com/People/Stefan-Passantino>> | our firm <<http://www.michaelbest.com>> |
vCard <<http://www.michaelbest.com/People/Stefan-Passantino.vcf>>

Click to visit our COVID-19 Resource Center<<https://t.xink.io/Tracking/Index/f-IBAHUXAQCw2VOA0>> &
CARES Act Relief Resource Center<<https://t.xink.io/Tracking/Index/IgACAHUXAQCw2VOA0>> with the latest
updates on business & legal implications related to the coronavirus.

From: Passantino, Stefan (59582)
Sent: Wednesday, April 01, 2020 4:04 PM
To: Marshall, Thomas J - Washington, DC (b)(6) ;
Weidner, Keith E - Washington, DC (b)(6) >
Cc: Olson, Joseph L (13465) (b)(6) >
Subject: RE: USPS--Background

(b)(5)

Stefan Passantino
Partner
Practice Group Chair, Government Relations, Political Law & Public Policy
T 202.747.9582 | michaelbest.com <<http://www.michaelbest.com>>

<image001.png>

Michael Best & Friedrich LLP

Click to visit our COVID-19 Resource Center<<https://t.xink.io/Tracking/Index/f-IBAHkXAQCw2VOA0>> &
CARES Act Relief Resource Center<<https://t.xink.io/Tracking/Index/IgACAHkXAQCw2VOA0>> with the latest
updates on business & legal implications related to the coronavirus.

From: Passantino, Stefan (59582) (b)(6)
Sent: Monday, March 30, 2020 7:44 PM
To: Marshall, Thomas J - Washington, DC (b)(6)
Subject: Re: USPS--Background

Thank you. I (b)(5)

On Mar 30, 2020, at 7:42 PM, Marshall, Thomas J - Washington, DC
(b)(6) > wrote:

Sorry, (b)(5)

(b)(5)

-Tom

Thomas J. Marshall
General Counsel and Executive Vice President
United States Postal Service

From: Passantino, Stefan (59582) (b)(6)
Sent: Monday, March 30, 2020 5:07 PM
To: Marshall, Thomas J - Washington, DC (b)(6)
Subject: [EXTERNAL] RE: USPS--Background

(b)(5)

Stefan Passantino
Partner
Practice Group Chair, Government Relations, Political Law & Public Policy
E spassantino@michaelbest.com <<mailto:spassantino@michaelbest.com>>
T 202.747.9582 | M (b)(6) | F 202.347.1819

<image001.png>

A LexMundi Member

Michael Best & Friedrich LLP

my bio <<http://www.michaelbest.com/People/Stefan-Passantino>> | our firm <<http://www.michaelbest.com>> |
vCard <<http://www.michaelbest.com/People/Stefan-Passantino.vcf>>

Click to visit our COVID-19 Resource Center<<https://t.xink.io/Tracking/Index/f-IBAHUXAQCw2VOA0>> &
CARES Act Relief Resource Center<<https://t.xink.io/Tracking/Index/IgACAHUXAQCw2VOA0>> with the latest
updates on business & legal implications related to the coronavirus.

<image002.gif>

From: Barger/NorthernCrossPartners

(b)(6)

Sent: Monday, March 30, 2020 3:51 PM

To: Marshall, Thomas J - Washington, DC (b)(6)

Rick Hohlt (b)(6)

>; M. -Mike- Duncan Robert

(b)(6)

Keith.E.Weidner@usps.gov(b)(6)

>; Passantino, Stefan (59582)

<spassantino@michaelbest.com(b)(6)

>; Olson, Joseph L (13465)

<JLOLSON@michaelbest.com(b)(6)

Subject: USPS--Background

(b)

(5)

(b)(5)

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<USPS Memorandum RE COVID-19 Pandemic (04.03.20).pdf>

Keith

From: Nemetz, Miriam R. (b)(6)
Sent: Thursday, April 2, 2020 2:37 PM
To: Weidner, Keith E - Washington, DC (b)(6) (b)(3) 410(c)(2)
Subject: [EXTERNAL] RE: Borrowing materials

Hi Keith.

I (b)(5)

Thanks.

Miriam

Miriam R. Nemetz
Mayer Brown LLP
1999 K Street, NW
Washington, D.C. 20006
202-263-3253 (phone)
202-263-5253 (fax)

(b)(6)

From: Weidner, Keith E - Washington, DC (b)(6) (b)(3) 410(c)(2)
Sent: Wednesday, April 01, 2020 4:49 PM
To: Nemetz, Miriam R. (b)(6)
Subject: RE: Borrowing materials

EXTERNAL SENDER

Thanks, Miriam.

(b)(5)

Thanks,
Keith

Keith Weidner
Deputy General Counsel, Headquarters
475 L'Enfant Plaza S.W.
Room 6002
Washington, D.C. 20260
202-268-6252 (w)

(b)(6)

From: Nemetz, Miriam R. (b)(6)
Sent: Wednesday, April 1, 2020 4:26 PM
To: Weidner, Keith E - Washington, DC (b)(6) (b)(3) 410(c)(2)
Subject: [EXTERNAL] RE: Borrowing materials

Hi again.

(b)(5)

Best,
Miriam

Miriam R. Nemetz
Mayer Brown LLP
1999 K Street, NW
Washington, D.C. 20006
202-263-3253 (phone)
202-263-5253 (fax)

(b)(6)

From: Nemetz, Miriam R.
Sent: Wednesday, April 01, 2020 4:22 PM
To: Weidner, Keith E - Washington, DC (b)(6) (b)(3) 410(c)(2)
Subject: RE: Borrowing materials

Hi Keith.

We have cleared conflicts. With respect to the estimate, I was waiting to see whether Charles would have additional thoughts after reviewing the material, but I am not sure that he will be able to get back to me today. However, I have reviewed the USPS memo

(b)(5)

Miriam

Miriam R. Nemetz
Mayer Brown LLP
1999 K Street, NW
Washington, D.C. 20006
202-263-3253 (phone)
202-263-5253 (fax)

(b)(6) (b)(3) 410(c)(2)

From: Weidner, Keith E - Washington, DC (b)(6) (b)(3) 410(c)(2)
Sent: Wednesday, April 01, 2020 2:03 PM
To: Nemetz, Miriam R. (b)(6)
Subject: RE: Borrowing materials

EXTERNAL SENDER

(b)(5)

Thanks,
Keith

From: Nemetz, Miriam R. (b)(6)
Sent: Tuesday, March 31, 2020 11:47 AM
To: Weidner, Keith E - Washington, DC (b)(6) (b)(3) 410(c)(2)
Subject: [EXTERNAL] RE: Borrowing materials

Thanks.

From: Weidner, Keith E - Washington, DC (b)(6) (b)(3) 410(c)(2)
Sent: Tuesday, March 31, 2020 11:45 AM
To: Nemetz, Miriam R. (b)(6)
Subject: RE: Borrowing materials

EXTERNAL SENDER

(b)(5)

Keith

From: Nemetz, Miriam R. (b)(6)
Sent: Tuesday, March 31, 2020 11:24 AM
To: Weidner, Keith E - Washington, DC (b)(6) (b)(3) 410(c)(2)
Subject: [EXTERNAL] RE: Borrowing materials

(b)(5)

From: Weidner, Keith E - Washington, DC (b)(6) (b)(3) 410(c)(2)
Sent: Tuesday, March 31, 2020 11:11 AM
To: Nemetz, Miriam R. (b)(6)
Subject: RE: Borrowing materials

EXTERNAL SENDER

Thanks, Miriam.

(b)(5)

Keith

From: Nemetz, Miriam R. (b)(6)
Sent: Tuesday, March 31, 2020 10:58 AM
To: Weidner, Keith E - Washington, DC (b)(6) (b)(3) 410(c)(2)
Subject: [EXTERNAL] RE: Borrowing materials

Hi Keith

(b)(5)

Thanks.

Miriam

Miriam R. Nemetz
Mayer Brown LLP
1999 K Street, NW
Washington, D.C. 20006
202-263-3253 (phone)
202-263-5253 (fax)

(b)(6) (b)(3) 410(c)(2)

From: Weidner, Keith E - Washington, DC (b)(6) (b)(3) 410(c)(2)
Sent: Monday, March 30, 2020 12:32 PM
To: Nemetz, Miriam R. (b)(6)
Subject: Borrowing materials

EXTERNAL SENDER

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ATTORNEY-CLIENT PRIVILEGED

Miriam,

(b)(5)

Thanks,
Keith

Keith Weidner
Deputy General Counsel, Headquarters
475 L'Enfant Plaza S.W.
Room 6002
Washington, D.C. 20260
202-268-6252 (w)

(b)(6)

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From: [Marshall, Thomas J - Washington, DC](#)
To: [Weidner, Keith E - Washington, DC](#)
Subject: RE: Borrowing materials
Date: Thursday, April 23, 2020 3:30:58 PM

(b)(5)

Thomas J. Marshall
General Counsel and Executive Vice President
United States Postal Service

From: Marshall, Thomas J - Washington, DC
Sent: Thursday, April 23, 2020 3:21 PM
To: Weidner, Keith E - Washington, DC
Subject: RE: Borrowing materials

(b)(5)

Thomas J. Marshall
General Counsel and Executive Vice President
United States Postal Service

From: Marshall, Thomas J - Washington, DC
Sent: Thursday, April 23, 2020 3:16 PM
To: Weidner, Keith E - Washington, DC
Subject: RE: Borrowing materials

(b)(5)

Thomas J. Marshall
General Counsel and Executive Vice President
United States Postal Service

From: Weidner, Keith E - Washington, DC
Sent: Thursday, April 23, 2020 3:15 PM
To: Marshall, Thomas J - Washington, DC
Subject: RE: Borrowing materials

(b)(5)

Keith

From: Marshall, Thomas J - Washington, DC
Sent: Thursday, April 23, 2020 3:06 PM
To: Weidner, Keith E - Washington, DC
Subject: RE: Borrowing materials

Keith (b)(5)

Thanks.

Thomas J. Marshall
General Counsel and Executive Vice President
United States Postal Service

From: Weidner, Keith E - Washington, DC
Sent: Tuesday, April 21, 2020 10:32 AM
To: Marshall, Thomas J - Washington, DC
Subject: FW: Borrowing materials

Tom,

(b)(5)

Keith

From: Rothfeld, Charles A. (b)(6)
Sent: Monday, April 13, 2020 8:31 PM
To: Weidner, Keith E - Washington, DC
Cc: Nemetz, Miriam R. (b)(6)
Subject: [EXTERNAL] Re: Borrowing materials

CAUTION: This email originated from outside USPS. STOP and CONSIDER before responding, clicking on links, or opening attachments.
Keith -

(b)(5)

Many thanks.

Charles

From: Weidner, Keith E - Washington, DC (b)(6) (b)(3) 410(c)(2)
Sent: Friday, April 10, 2020 4:33 PM
To: Rothfeld, Charles A. (b)(6) >; Nemetz, Miriam R. (b)(6)
Subject: RE: Borrowing materials

EXTERNAL SENDER

Charles,

(b)(5)

Keith

From: Rothfeld, Charles A. (b)(6)
Sent: Friday, April 10, 2020 4:05 PM
To: Nemetz, Miriam R. (b)(6)
Cc: Weidner, Keith E - Washington, DC (b)(6) (b)(3) 410(c)(2)
Subject: [EXTERNAL] Re: Borrowing materials

(b)(5)

Sent from my iPhone

On Apr 10, 2020, at 4:06 PM, Nemetz, Miriam R. (b)(6) >> wrote:

(b)(5)

From: Rothfeld, Charles A. (b)(6)
Sent: Friday, April 10, 2020 4:05 PM
To: Nemetz, Miriam R. (b)(6)
Cc: Weidner, Keith E - Washington, DC (b)(6) (b)(3) 410(c)(2) >
Subject: Re: Borrowing materials

(b)(5)

Sent from my iPhone

On Apr 10, 2020, at 1:58 PM, Nemetz, Miriam R. (b)(6) > wrote:

(b)(5)

Sent from my iPhone

On Apr 10, 2020, at 1:56 PM, Weidner, Keith E - Washington, DC (b)(6) (b)(3) 410(c)(2) >> wrote:

EXTERNAL SENDER

(b)(5)

Thanks,
Keith

From: Weidner, Keith E - Washington, DC
Sent: Friday, April 10, 2020 1:47 PM
To: 'Rothfeld, Charles A.' (b)(6)
Subject: RE: Borrowing materials

Nemetz, Miriam R. (b)(6)

(b)(5)

Keith

From: Rothfeld, Charles A. (b)(6)
Sent: Friday, April 10, 2020 1:42 PM
To: Nemetz, Miriam R. (b)(6)
Cc: Weidner, Keith E - Washington, DC <(b)(6) (b)(3) 410(c)(2)>
Subject: [EXTERNAL] Re: Borrowing materials

Also works for me.
Sent from my iPhone

On Apr 10, 2020, at 12:26 PM, Nemetz, Miriam R. (b)(6) wrote:
4 pm is fine with me.

Sent from my iPhone

On Apr 10, 2020, at 12:11 PM, Weidner, Keith E - Washington, DC (b)(6) (b)(3) 410(c)(2) wrote:

EXTERNAL SENDER

Are you both available at 4:00 today?

Keith

From: Rothfeld, Charles A. (b)(6)
Sent: Thursday, April 9, 2020 3:53 PM
To: Weidner, Keith E - Washington, DC (b)(6) (b)(3) 410(c)(2) Nemetz, Miriam R. (b)(6)
Subject: [EXTERNAL] RE: Borrowing materials

Okay, thanks -- we're flexible on timing for a call.

Charles

From: Weidner, Keith E - Washington, DC (b)(6) (b)(3) 410(c)(2)
Sent: Thursday, April 9, 2020 2:53 PM
To: (b)(6) Nemetz, Miriam R. (b)(6)
Subject: RE: Borrowing materials

EXTERNAL SENDER

Thanks very much, Charles. (b)(5)

Keith

Keith Weidner
Deputy General Counsel, Headquarters
475 L'Enfant Plaza S.W.
Room 6002
Washington, D.C. 20260
202-268-6252 (w)

(b)(6)

From: Rothfeld, Charles A. (b)(6)
Sent: Thursday, April 9, 2020 12:11 PM
To: Nemetz, Miriam R. (b)(6) Weidner, Keith E - Washington, DC (b)(6) (b)(3) 410(c)(2)
Subject: [EXTERNAL] RE: Borrowing materials

Keith --

(b)(5)

Many thanks.

Charles

From: Nemetz, Miriam R. (b)(6)
Sent: Wednesday, April 8, 2020 2:53 PM
To: Weidner, Keith E - Washington, DC <(b)(6) (b)(3) 410(c)(2)>
Cc: Rothfeld, Charles A. <(b)(6)>
Subject: RE: Borrowing materials

Thanks Keith. (b)(5) s. A call later tomorrow or Friday would be fine. Does that work?

Miriam

From: Weidner, Keith E - Washington, DC <(b)(6) (b)(3) 410(c)(2)>
Sent: Wednesday, April 08, 2020 1:42 PM
To: Nemetz, Miriam R. <(b)(6)>
Subject: RE: Borrowing materials

EXTERNAL SENDER

Thanks, Miriam (b)(5)

(b)

Keith

From: Nemetz, Miriam R. (b)(6)
Sent: Wednesday, April 8, 2020 12:57 PM
To: Weidner, Keith E - Washington, DC (b)(6) (b)(3) 410(c)(2)
Subject: [EXTERNAL] RE: Borrowing materials

Hi Keith.

(b)(5) Would you like to set a time for a call? We can do it at the end of the day today, but Charles said that early tomorrow might be better if that is acceptable.

Best,

Miriam

Miriam R. Nemetz
Mayer Brown LLP
1999 K Street, NW
Washington, D.C. 20006
202-263-3253 (phone)
202-263-5253 (fax)

(b)(6)

From: Weidner, Keith E - Washington, DC <Keith.E.Weidner@usps.gov><mailto:Keith.E.Weidner@usps.gov>>
Sent: Thursday, April 02, 2020 4:07 PM
To: Nemetz, Miriam R. <MNemetz@mayerbrown.com><mailto:MNemetz@mayerbrown.com>>
Subject: RE: Borrowing materials

****EXTERNAL SENDER****

Hi Miriam,

That is acceptable.

Thanks,
Keith

From: Nemetz, Miriam R. [<mailto:MNemetz@mayerbrown.com>]
Sent: Thursday, April 2, 2020 2:37 PM
To: Weidner, Keith E - Washington, DC <Keith.E.Weidner@usps.gov><mailto:Keith.E.Weidner@usps.gov>>
Subject: [EXTERNAL] RE: Borrowing materials

Hi Keith.

I have one more administrative item. Ken and I have specific USPS rates already but Charles Rothfeld does not. We are proposing that his time be billed at \$895 per hour. His law school graduation year is 1980 and his standard rate is \$1,090. Please let me know whether that is acceptable

Thanks.

Miriam

Miriam R. Nemetz
Mayer Brown LLP
1999 K Street, NW
Washington, D.C. 20006
202-263-3253 (phone)
202-263-5253 (fax)
mnemetz@mayerbrown.com<<mailto:mnemetz@mayerbrown.com>>

From: Weidner, Keith E - Washington, DC <Keith.E.Weidner@usps.gov><mailto:Keith.E.Weidner@usps.gov>>
Sent: Wednesday, April 01, 2020 4:49 PM
To: Nemetz, Miriam R. <MNemetz@mayerbrown.com><mailto:MNemetz@mayerbrown.com>>
Subject: RE: Borrowing materials

****EXTERNAL SENDER****

Thanks, Miriam.

My view is to move forward with Phase I now. I have a purchase order in the pipeline that accommodates the estimate for that portion of the project. We'll get that over to you, though in the meantime the CO has authorized you to begin work.

Regarding Phase II, I would like to hold off on a full memo at this point until we get closer to the end of Phase I. Given that this is a fluid situation I want to make sure the work product we are having you do continues to align with what we need, and at this point I can't say with absolute certainty that we will need a full-blown memo when the time comes.

Let me know if that works on your end.

Thanks,
Keith

Keith Weidner
Deputy General Counsel, Headquarters
475 L'Enfant Plaza S.W.
Room 6002
Washington, D.C. 20260
202-268-6252 (w)
202-577-9413 (c)

From: Nemetz, Miriam R. [<mailto:MNemetz@mayerbrown.com>]
Sent: Wednesday, April 1, 2020 4:26 PM
To: Weidner, Keith E - Washington, DC <Keith.E.Weidner@usps.gov><mailto:Keith.E.Weidner@usps.gov>>
Subject: [EXTERNAL] RE: Borrowing materials

Hi again.

Charles just got back to me, and agrees that the estimate below is reasonable.

Best,
Miriam

Miriam R. Nemetz
Mayer Brown LLP
1999 K Street, NW
Washington, D.C. 20006
202-263-3253 (phone)
202-263-5253 (fax)
mnemetz@mayerbrown.com<<mailto:mnemetz@mayerbrown.com>>

From: Nemetz, Miriam R.
Sent: Wednesday, April 01, 2020 4:22 PM
To: Weidner, Keith E - Washington, DC <Keith.E.Weidner@usps.gov><mailto:Keith.E.Weidner@usps.gov>>
Subject: RE: Borrowing materials

Hi Keith.

We have cleared conflicts. With respect to the estimate, I was waiting to see whether Charles would have additional thoughts after reviewing the material, but I am not sure that he will be able to get back to me today. However, I have reviewed the USPS memo and think a reasonable estimate is \$15,000- \$20,000 for Phase I (analysis and summary of conclusions) and an additional \$20,000 to \$25,000 for phase 2 (complete memo). Does that seem reasonable to you? We will try to be efficient.

I don't know whether the purchase orders are specific to a project, but I thought I would mention (in case any usable funds remain) that we recently completed a project for Ray Donahue.

Miriam

Miriam R. Nemetz
Mayer Brown LLP
1999 K Street, NW
Washington, D.C. 20006
202-263-3253 (phone)
202-263-5253 (fax)
mnemetz@mayerbrown.com<<mailto:mnemetz@mayerbrown.com>>

From: Weidner, Keith E - Washington, DC <Keith.E.Weidner@usps.gov><mailto:Keith.E.Weidner@usps.gov>>
Sent: Wednesday, April 01, 2020 2:03 PM
To: Nemetz, Miriam R. <MNemetz@mayerbrown.com><mailto:MNemetz@mayerbrown.com>>
Subject: RE: Borrowing materials

****EXTERNAL SENDER****

Hi Miriam, do you have an ETA on when you expect to complete the conflicts check and give me an estimate? Just trying to get my ducks in a row from an administrative perspective.

Thanks,
Keith

From: Nemetz, Miriam R. [<mailto:MNemetz@mayerbrown.com>]

Sent: Tuesday, March 31, 2020 11:47 AM
To: Weidner, Keith E - Washington, DC <Keith.E.Weidner@usps.gov><<mailto:Keith.E.Weidner@usps.gov>>>
Subject: [EXTERNAL] RE: Borrowing materials

Thanks.

From: Weidner, Keith E - Washington, DC <Keith.E.Weidner@usps.gov><<mailto:Keith.E.Weidner@usps.gov>>>
Sent: Tuesday, March 31, 2020 11:45 AM
To: Nemetz, Miriam R. <MNemetz@mayerbrown.com><<mailto:MNemetz@mayerbrown.com>>>
Subject: RE: Borrowing materials

EXTERNAL SENDER

Preferably by Wednesday of next week.

If you find that you need more time it would be good to at least get oral feedback about what your conclusions are by then.

This is my best guess at this time and could change based on developments with the Board.

Keith

From: Nemetz, Miriam R. [<mailto:MNemetz@mayerbrown.com>]
Sent: Tuesday, March 31, 2020 11:24 AM
To: Weidner, Keith E - Washington, DC <Keith.E.Weidner@usps.gov><<mailto:Keith.E.Weidner@usps.gov>>>
Subject: [EXTERNAL] RE: Borrowing materials

Yes, it does. When do you need to receive the first, shorter document?

From: Weidner, Keith E - Washington, DC <Keith.E.Weidner@usps.gov><<mailto:Keith.E.Weidner@usps.gov>>>
Sent: Tuesday, March 31, 2020 11:11 AM
To: Nemetz, Miriam R. <MNemetz@mayerbrown.com><<mailto:MNemetz@mayerbrown.com>>>
Subject: RE: Borrowing materials

EXTERNAL SENDER

Thanks, Miriam.

Please do provide separate estimates for an initial analysis/oral feedback and then a full-blown memo. For the initial stage I am wondering if it makes most sense to both have a discussion and also get a short document that summarizes your views on the issues. We could have that in hand for internal discussions with our Board regarding strategy moving forward, while you work on a more complete memo. Let me know if that makes sense to you.

This will be a fluid situation so at this point we don't need an estimate for any Congressional work. Ultimately I think what is most likely is that we will want to leverage a memo in any dealings we have with public officials on this matter, but I am not sure what approach we will be taking at this time.

Keith

From: Nemetz, Miriam R. [<mailto:MNemetz@mayerbrown.com>]
Sent: Tuesday, March 31, 2020 10:58 AM
To: Weidner, Keith E - Washington, DC <Keith.E.Weidner@usps.gov><<mailto:Keith.E.Weidner@usps.gov>>>
Subject: [EXTERNAL] RE: Borrowing materials

Hi Keith. Thanks for sending these materials and for thinking of us for this assignment. I have initiated a rush conflict check. (There should be no conflict but we still have to do it, obviously.)

I have lined up Charles Rothfeld to work on this because he has relevant knowledge and experience (and is one of the smartest lawyers I know). I am linking to his bio here. <https://www.mayerbrown.com/en/people/r/rothfeld-charles-a?tab=overview><<https://nam01.safelinks.protection.outlook.com/?url=https%3A%2F%2Fwww.mayerbrown.com%2Fen%2Fpeople%2F%2Frothfeld-charles-a%3Ftab%3Doverview&data=01%7C01%7CCRoThfeld%40mayerbrown.com%7C88ac8794c2d1438d615a08d7dd8e6498%7C09131022b7854e6d8d42916975e51262%7C0&sdata=cgRDa2YK5fS0x3jbnHQWHLNKKFxxqBVjAog%2FMpagt1%3D&reserved=0>>>
Ken Geller, who has previously advised the Postal Service on governance issues, will also be involved a high level. Charles is not listed on the rate matrix that we provided to the Postal Service and I am working on getting a rate for him that we can propose to you.

You mentioned that you would like an oral report from us early next week. When next week do you need it?

For the estimate, should we assume that we will first give an oral report and then prepare a memo? Should we provide separate estimates for the initial analysis/oral feedback and for a possible memo? I believe you also mentioned the possibility that you would need advice or assistance dealing with Congress. Is that something that should factor into the estimate?

Thanks.

Miriam

Miriam R. Nemetz
Mayer Brown LLP
1999 K Street, NW
Washington, D.C. 20006
202-263-3253 (phone)
202-263-5253 (fax)
mnemetz@mayerbrown.com<<mailto:mnemetz@mayerbrown.com>>

From: Weidner, Keith E - Washington, DC <Keith.E.Weidner@usps.gov><<mailto:Keith.E.Weidner@usps.gov>>>
Sent: Monday, March 30, 2020 12:32 PM
To: Nemetz, Miriam R. <MNemetz@mayerbrown.com><<mailto:MNemetz@mayerbrown.com>>>
Subject: Borrowing materials

EXTERNAL SENDER

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ATTORNEY-CLIENT PRIVILEGED

Miriam,

Attached are the materials relating to the Treasury borrowing issue we discussed. They are as follows:

5/10/19 USPS letter to Treasury (general letter on legal underpinnings of our borrowing relationship with Treasury, to try to head off the term sheet)
5/15/19 Treasury letter to USPS (response to 5/10 letter)
5/22/19 USPS internal memo to Governors (analysis for Governors as to why term sheet was illegal)
5/31/19 USPS letter to Treasury (arguing to Treasury why the term sheet was illegal, using the analysis in the 5/22 memo)
6/28/19 Treasury letter to USPS (arguing why the term sheet was legal)
8/9/19 USPS letter to Treasury (our response to Treasury)

Also attached is the term sheet that Treasury was insisting on.

Please let me know if you have any questions.

Thanks,
Keith

Keith Weidner
Deputy General Counsel, Headquarters
475 L'Enfant Plaza S.W.
Room 6002
Washington, D.C. 20260
202-268-6252 (w)
202-577-9413 (c)

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From: [Marshall, Thomas J - Washington, DC](#)
To: [Brennan, Megan J - Washington, DC](#)
Subject: RE: Mnuchin Phone Call
Date: Saturday, April 4, 2020 4:11:34 PM

(b)(5)

From: Brennan, Megan J - Washington, DC
Sent: Saturday, April 4, 2020 1:29 PM
To: Marshall, Thomas J - Washington, DC (b)(3), 410(c)(2), (b)(6)
Subject: Re: Mnuchin Phone Call

(b)(5)

Thank you.

Megan

On Apr 4, 2020, at 12:57 PM, Marshall, Thomas J - Washington, DC
<(b)(3), 410(c)(2), (b)(6)> wrote:

Just as an fyi, (b)(5)

From: Marshall, Thomas J - Washington, DC
Sent: Saturday, April 4, 2020 11:35 AM
To: Weidner, Keith E - Washington, DC (b)(3), 410(c)(2), (b)(6)
Subject: RE: Mnuchin Phone Call

Keith, (b)(5)

From: Weidner, Keith E - Washington, DC
Sent: Friday, April 3, 2020 4:22 PM
To: Marshall, Thomas J - Washington, DC (b)(3), 410(c)(2), (b)(6) >
Subject: RE: Mnuchin Phone Call

Tom, (b)(5)

Keith

From: Marshall, Thomas J - Washington, DC
Sent: Thursday, April 2, 2020 9:19 PM
To: Weidner, Keith E - Washington, DC (b)(3), 410(c)(2), (b)(6) >
Subject: RE: Mnuchin Phone Call

(b)(5)

(b)(5)

Thomas J. Marshall
General Counsel and Executive Vice President
United States Postal Service

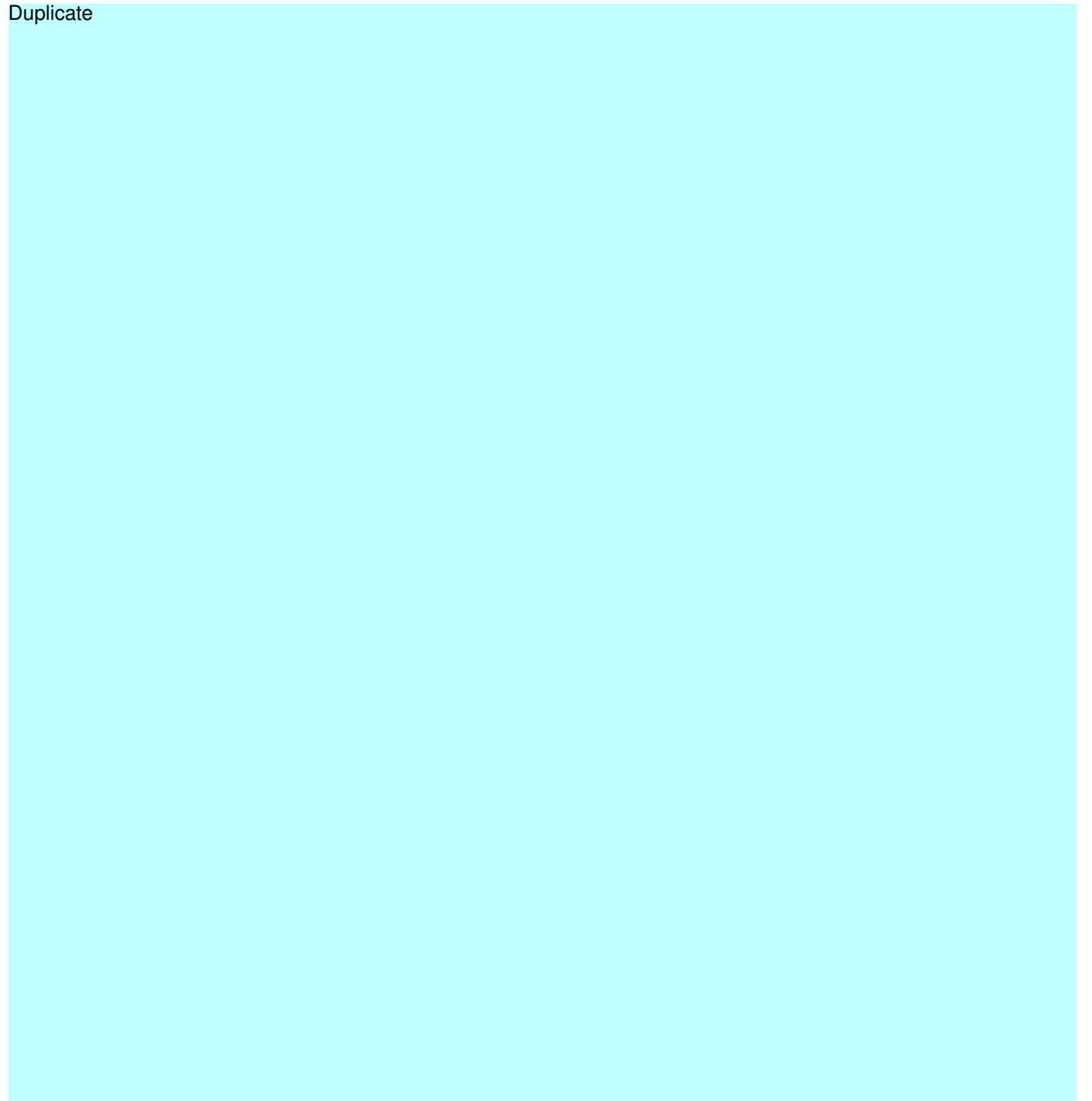
From: Weidner, Keith E - Washington, DC
Sent: Thursday, April 2, 2020 5:16 PM
To: Marshall, Thomas J - Washington, DC (b)(6), (b)(3), 410(c)(2) >
Subject: RE: Mnuchin Phone Call

Tom, (b)(5)

Keith

Duplicate

Duplicate



From: [Marshall, Thomas J - Washington, DC](#)
To: [Elston, Michael J - Washington, DC](#); [Weidner, Keith E - Washington, DC](#)
Cc: [Selde, Jennifer L - Washington, DC](#)
Subject: RE: Mnuchin Phone Call
Date: Saturday, April 4, 2020 8:19:35 PM

Sounds good. Talk to you tomorrow.

From: Elston, Michael J - Washington, DC
Sent: Saturday, April 4, 2020 7:18 PM
To: Marshall, Thomas J - Washington, DC (b)(6), (b)(3), 410(c)(2); Weidner, Keith E - Washington, DC (b)(6), (b)(3), 410(c)(2)
Cc: Selde, Jennifer L - Washington, DC (b)(6), (b)(3), 410(c)(2)
Subject: RE: Mnuchin Phone Call

Thank you both very much. (b)(5)

Mike

From: Marshall, Thomas J - Washington, DC
Sent: Saturday, April 4, 2020 2:27 PM
To: Weidner, Keith E - Washington, DC (b)(6), (b)(3), 410(c)(2) >
Cc: Selde, Jennifer L - Washington, DC (b)(6), (b)(3), 410(c)(2) Elston,
Michael J - Washington, DC (b)(6), (b)(3), 410(c)(2)
Subject: Re: Mnuchin Phone Call

(b)(5)

Let us know if you have any question or concerns about these items.

-Tom.

Sent from my iPhone

On Apr 4, 2020, at 1:53 PM, Weidner, Keith E - Washington, DC
(b)(6), (b)(3), 410(c)(2) <[gov](#)>> wrote:

Jennifer,

Per Mike's request we have developed draft talking points for the BOG Office's consideration, regarding the third (b)(5)

I am also happy to discuss at any time. I am available by email or by calling my cell at (b)(6)

Thanks,
Keith

From: Marshall, Thomas J - Washington, DC
Sent: Thursday, April 2, 2020 2:21 PM
To: Weidner, Keith E - Washington, DC (b)(6), (b)(3), 410(c)(2) >
Subject: RE: Mnuchin Phone Call

Keith, (b)(5)

Thomas J. Marshall
General Counsel and Executive Vice President
United States Postal Service

From: Elston, Michael J - Washington, DC
Sent: Thursday, April 2, 2020 12:41 PM
To: Marshall, Thomas J - Washington, DC (b)(6), (b)(3), 410(c)(2) >>
Cc: Weidner, Keith E - Washington, DC (b)(6), (b)(3), 410(c)(2) >
Subject: RE: Mnuchin Phone Call

Thank you! Letter attached.

Keith, Jennifer's phone number is (b)(6), (b)(3),

From: Marshall, Thomas J - Washington, DC
Sent: Thursday, April 2, 2020 12:38 PM
To: Elston, Michael J - Washington, DC <(b)(6), (b)(3), 410(c)(2)>
Cc: Weidner, Keith E - Washington, DC (b)(6), (b)(3), 410(c)(2)
Subject: RE: Mnuchin Phone Call

Mike, (b)(5)

Thanks.

Thomas J. Marshall
General Counsel and Executive Vice President
United States Postal Service

From: Elston, Michael J - Washington, DC
Sent: Thursday, April 2, 2020 10:02 AM
To: Marshall, Thomas J - Washington, DC (b)(6), (b)(3), 410(c)(2) >
Subject: Mnuchin Phone Call

Tom,

(b)(5)

(b)(5)

Thanks,
Mike

Michael J. Elston
Secretary of the Board of Governors
United States Postal Service
(202) 268-4800

<2020-03-31 Chairman Duncan to Sec. Mnuchin.pdf>
<BOG TPs Treasury_draft 4.4.2019.docx>

From: [Marshall, Thomas J - Washington, DC](#)
To: [Passantino, Stefan \(59582\)](#)
Cc: [Weidner, Keith E - Washington, DC](#)
Subject: RE: USPS IP Issue
Date: Monday, April 13, 2020 4:57:23 PM

Thanks Stefan, (b)(5)

-Tom

Thomas J. Marshall
General Counsel and Executive Vice President
United States Postal Service

Duplicate

From: [Marshall, Thomas J - Washington, DC](#)
To: [Brennan, Megan J - Washington, DC](#)
Subject: RE: Washington Post article on stimulus money and USPS
Date: Sunday, April 12, 2020 4:47:00 PM

We should probably talk before the discussion you reference below. I am thinking it might make sense for me to talk separately to Governor Barger to dill him in on some of our concerns privately, and to get his thoughts about what he is comfortable with us sharing with the consultants. I think we need to fill them in a bit more about what happened with the NPA, and the recent inquiries we have received from Joe Davidson and others, since to me the consultants are operating from a view of the universe that is not tethered to what we know to be the reality.

From: Marshall, Thomas J - Washington, DC
Sent: Sunday, April 12, 2020 12:38 PM
To: Brennan, Megan J - Washington, DC <megan.j.brennan@usps.gov>
Subject: RE: Washington Post article on stimulus money and USPS

Happy to join.

From: Brennan, Megan J - Washington, DC
Sent: Sunday, April 12, 2020 12:38 PM
To: Marshall, Thomas J - Washington, DC <thomas.j.marshall@usps.gov><<mailto:thomas.j.marshall@usps.gov>>>
Subject: Re: Washington Post article on stimulus money and USPS

Absolutely. It is on my list. Let's take it directly to the source rather than entertaining a radio tour or pitching to cable news outlets. Window dressing.

I'd like you to join my discussion with Janice, Fred, Jim Morrell & Elston tomorrow - to be scheduled.
Thanks,

Megan

On Apr 12, 2020, at 12:34 PM, Marshall, Thomas J - Washington, DC
<thomas.j.marshall@usps.gov><<mailto:thomas.j.marshall@usps.gov>>> wrote:
Reinforces (yet again) the need for the Governors to have a candid conversation with the Secretary. We should bring this up at the 5:15 tomorrow.

From: Brennan, Megan J - Washington, DC
Sent: Sunday, April 12, 2020 12:26 PM
To: Walker, Janice D - Washington, DC <Janice.D.Walker2@usps.gov><<mailto:Janice.D.Walker2@usps.gov>>>
Cc: Marshall, Thomas J - Washington, DC <thomas.j.marshall@usps.gov><<mailto:thomas.j.marshall@usps.gov>>>
Subject: Re: Washington Post article on stimulus money and USPS

"Multiple congressional sources" not an Administration official?
Thanks,

Megan

On Apr 12, 2020, at 11:23 AM, Walker, Janice D - Washington, DC
<Janice.D.Walker2@usps.gov><<mailto:Janice.D.Walker2@usps.gov>>> wrote:
FYI below. Thanks.

From: Stroman, Ronald A - Washington, DC
Sent: Sunday, April 12, 2020 10:44 AM
To: Walker, Janice D - Washington, DC <Janice.D.Walker2@usps.gov><<mailto:Janice.D.Walker2@usps.gov>>>
Subject: Re: Washington Post article on stimulus money and USPS

Thanks Janice
Sent from my iPhone

On Apr 12, 2020, at 10:35 AM, Walker, Janice D - Washington, DC
<Janice.D.Walker2@usps.gov<<mailto:Janice.D.Walker2@usps.gov>>> wrote:
Ron,
His reply was "I would say, multiple congressional sources told me this was the case. Sorry I can't be more helpful."

From: Stroman, Ronald A - Washington, DC
Sent: Sunday, April 12, 2020 8:12 AM
To: Walker, Janice D - Washington, DC <Janice.D.Walker2@usps.gov<<mailto:Janice.D.Walker2@usps.gov>>>
Subject: Re: Washington Post article on stimulus money and USPS

It could also be the senior Administration official referred to in the article.

Thanks for checking.

Happy Easter!
Ron
Sent from my iPhone

On Apr 12, 2020, at 8:03 AM, Walker, Janice D - Washington, DC
<Janice.D.Walker2@usps.gov<<mailto:Janice.D.Walker2@usps.gov>>> wrote:
Hi Ron,

We can check. I am wondering if it's the same committee aid.

Happy Easter!

Janice

From: Stroman, Ronald A - Washington, DC
Sent: Sunday, April 12, 2020 7:09 AM
To: Walker, Janice D - Washington, DC <Janice.D.Walker2@usps.gov<<mailto:Janice.D.Walker2@usps.gov>>>
Subject: Re: Washington Post article on stimulus money and USPS

Janice,
Will the reporter tell you the basis of his statement that "Mnuchin has signaled any postal relief in a Phase IV stimulus package under negotiation would amount to a poison pill."?

Thanks
Sent from my iPhone

On Apr 11, 2020, at 3:06 PM, Walker, Janice D - Washington, DC
<Janice.D.Walker2@usps.gov<<mailto:Janice.D.Walker2@usps.gov>>> wrote:
<https://www.washingtonpost.com/business/2020/04/11/post-office-bailout-trump/>

White House rejects bailout for U.S. Postal Service battered by coronavirus
The pandemic has pushed USPS to the brink, but Trump and Mnuchin shot down emergency aid
By Jacob Bogage<<https://www.washingtonpost.com/people/jacob-bogage/>>
April 11, 2020 at 11:41 a.m. EDT

Through rain, sleet, hail, and even a pandemic, mail carriers serve every address in the United States, but the coronavirus<https://www.washingtonpost.com/health/2020/02/28/what-you-need-know-about-coronavirus/?tid=lk_inline_manual_2&itid=lk_inline_manual_2> crisis is shaking the foundation of the U.S. Postal Service in

new and dire ways.

The Postal Service's decades-long financial troubles have worsened dramatically as the volume of the kind of mail that pays the agency's bills — first-class and marketing mail — withers during the pandemic. The USPS needs an infusion of money, and President Trump has blocked potential emergency funding for the agency that employs around 600,000 workers, repeating instead the false claim that higher rates for Internet shipping companies Amazon, FedEx and UPS would right the service's budget.

Trump threatened to veto the \$2.2 trillion Coronavirus Aid, Relief, and Economic Security, or Cares, Act if the legislation contained any money directed to bail out the postal agency, according to a senior Trump Administration official and congressional official.

"We told them very clearly that the president was not going to sign the bill if [money for the Postal Service] was in it," the Trump Administration official said. "I don't know if we used the v-bomb, but the president was not going to sign it, and we told them that."

Instead, Sens. Gary Peters (D-Mich.) and Ron Johnson (R-Wis.) added a last minute \$10 billion Treasury Department loan to the Cares Act to keep the agency on firmer ground through the spring of 2020, according to a Democratic committee aide.

Lawmakers originally agreed to a \$13 billion direct grant the Postal Service would not have to repay. That effort was blocked by Treasury Secretary Steven Mnuchin who warned such a move could blow up the relief bill. A committee aide said Mnuchin told lawmakers during negotiations: "You can have a loan or you can have nothing at all."

Only the \$10 billion loan to the Postal Service made it into law, over Mnuchin's objections.

Without the loan, which awaits approval by the Treasury Department, USPS would be "financially illiquid" by Sept. 30, according to estimates provided to lawmakers. Advocates for the Postal Service worry the agency is in a vulnerable position. As its main funding source dwindles, the Postal Service could be seen as ripe for a makeover; conservatives have long talked about privatizing the mail delivery in the United States.

The Postal Service projects it will lose \$2 billion each month through the coronavirus recession while postal workers maintain the nationwide service of delivering essential mail and parcels, such as prescriptions, food and household necessities.

That work often comes at great personal risk. Nearly 500 postal workers have tested positive for the coronavirus and 462 others are presumptive positives, USPS leaders told lawmakers. Nineteen have died; more than 6,000 are in self-quarantine because of exposure.

While the Trump Administration and Mnuchin pushed through private-sector bailouts in the Cares Act — \$350 billion to the Small Business Administration loan program, \$29 billion to passenger airlines and air cargo carriers, and economic incentives for the construction, energy and life sciences industries, among others — Mnuchin has signaled any postal relief funds in a "Phase IV" stimulus package under negotiation would amount to a poison pill.

Postmaster General Megan Brennan asked lawmakers Thursday for another \$50 billion — \$25 billion to offset lost revenue from declining mail volume due to the coronavirus and \$25 billion for "modernization" — plus another \$25 billion Treasury loan and a mechanism to pay down \$14 billion in existing public debt.

House Democrats, led by Virginia Rep. Gerald E. Connolly, cautioned that without the funding, the Postal Service may not make it past September without missing payrolls or service interruptions. Senate Republicans insist the \$10 billion loan from the Cares Act provided sufficient short-term liquidity, the staffer said, and the Senate would not vote to extend more money to an agency unlikely to make good on its borrowing.

"I'm so frustrated at how difficult it has been for a long time to galvanize attention and action around an essential service," Connolly said in a phone interview. "And maybe the pandemic forces us all to refocus on this service and how essential it is and how we need to fix it while we can before it gets into critical condition."

Trump has long been antagonistic of the post office, calling it once in a tweet Amazon's "delivery boy" <<https://twitter.com/realdonaldtrump/status/981168344924536832?lang=en>>." The Postal Service often serves as a vendor for Amazon, UPS, FedEx and other shipping companies, delivering the "last mile" service to often rural and remote areas. It is a crucial service for the Postal Service, for which package delivery is a growing part of its business.

Much of Trump's invective on the Postal Service is aimed at Amazon's founder and chief executive Jeff Bezos, who owns The Washington Post. Trump has advocated for increasing the prices on Amazon deliveries, against the recommendation of shipping experts and the agency's own Board of Governors, a majority of whom Trump appointed.

"They should raise, they have to raise the prices to these companies that walk in and drop thousands of packages on the floor of the post office and say, 'Deliver it,'" Trump said at a news conference Wednesday. "And they make money, but the post office gets killed. Okay? So they ought to do that, and we are looking into it, and we've been pushing them now for over a year."

Raising rates too much would lead private-sector competitors to develop their own cheaper methods to deliver packages, said Lori Rectanus, director of physical infrastructure at the Government Accountability Office. Even if a rate increase generates revenue, that money would be marginal to the total U.S. Postal Service debt, almost all of which comes from a congressional requirement to prepay pension and retiree health care costs for all employees, even those who haven't yet retired.

Under normal market conditions, the Postal Service nearly breaks even, save for the pension account debt, despite cratering volume on deliveries in recent years. In 2010, USPS delivered 77.6 billion items of first-class mail. In 2019, it delivered only 54.9 billion first-class items. The service handled 3.1 billion packages in 2010 and 6.2 billion in 2019, although processing packages doesn't earn the agency as much revenue as first-class mail delivery.

The coronavirus has completely upended consumer behavior and the quantity of items in the mail. Volume in the first week of March declined 30 percent, postal agency officials told lawmakers. At the end of June, the agency projects volume to be down 50 percent, and it could lose \$23 billion over the next 18 months.

"We are at a critical juncture in the life of the Postal Service," Brennan, the postmaster general, said in a statement. "At a time when America needs the Postal Service more than ever, the reason we are so needed is having a devastating effect on our business."

The Postal Service has faced financial troubles for more than a decade, as digital communication morphed and took off, giving lawmakers many opportunities to debate its future. The Postal Service is so foundational to the country it's enumerated in the Constitution.

The agency's troubles have renewed conservative conversations about structural changes that would force the Postal Service to act more like a corporation, with steps such as eliminating the prepaid pension requirement and easing its universal service obligation to deliver to every address in the United States, including ones so remote.

"If we're concerned about the Postal Service and its workers," said Romina Boccia, an economist at the right-leaning Heritage Foundation, "the best thing we can do is to free up the Postal Service to operate like a business so they can try to get back into the black."



February 15, 2019

Steven D. Laughton
Assistant General Counsel (Banking & Finance)
U.S. Department of the Treasury
1500 Pennsylvania Avenue, N.W.
Washington, DC 20220

SUBJECT: Legal Analysis of White House Task Force Report

Dear Steve:

It was great to speak with you this afternoon. As I mentioned to you today, and to other members of your team yesterday, please accept this letter as our effort to provide you with additional information and to express our views concerning certain legal and practical issues implicated by the December 4 report of the Task Force on the United States Postal System (Task Force), and to request the opportunity to discuss these issues with you further. As we discussed, we are very interested in having a broader legal discussion concerning the Task Force recommendations, and in particular regarding your understanding of the available legal paths to implement them in the event that our Governors direct us to do so.

In that regard, the Task Force report makes a number of recommendations that it designates as "Administrative" or "Legislative," with "Administrative" recommendations directed to the Postal Service or the Postal Regulatory Commission (Commission). In our view, many of those designations are accurate. However, we believe that some of the designations warrant further review or clarification and discussion, as next steps regarding the Task Force report are considered. In particular, certain items designated as "Administrative" seem to us to lie entirely or substantially outside of the control of the Postal Service or the Commission. In addition, it would be useful for us to better understand the perspective of the Task Force with regard to certain of the recommendations as we prepare to advise our clients concerning the "going-forward" strategy of the Postal Service, particularly given the legal issues which we articulate below.

Each recommendation is introduced below as it is framed and designated in Appendix A of the Task Force report. In cases where the text of the report clarifies or expands upon the recommendation as presented in Appendix A, that is noted in the discussion that follows each header.

Recommendation 1

Universal Service Obligation (USO)

Definition. Clearly define the USO. Provide a targeted definition of minimum, essential postal services, that due to specific social and economic needs have a basis for government protection. (Administrative)

The Task Force's proposal to reclassify postal services as "essential" and "commercial" underlies a number of its recommendations, and it is the focus of Recommendation 1.

This recommendation would redefine the scope of the universal service obligation (USO) and would impact product regulation. Because we believe that altering the scope of the USO in the fundamental way proposed by the Task Force is a public-policy decision reserved to the Congress, we believe it requires legislative change.

The Postal Accountability and Enhancement Act of 2006 (PAEA), Pub. L. No. 109-435, 120 Stat. 3198 (2006), made no changes to the statutory provisions governing the USO (except for requiring the Postal Service to establish, in its regulations, specific service standards for market-dominant products). In fact, as discussed in more detail below, Congress deliberately opted not to allow the Commission to change the USO's scope. The PAEA's main regulatory innovations were to prescribe different modes of postal regulation based on whether or not the Postal Service exercises market power (as defined by the statute) over a particular product. Congress did not clarify how this division based on market power affected the USO, but after enactment of the PAEA, the Commission issued a report interpreting the USO as applying to both market-dominant and competitive products.

By contrast, the Task Force proposes a new structure to define the scope of the USO, as well as for product-regulation purposes. Instead of the current division based on market power (market-dominant or competitive), the Task Force would distinguish between products and services deemed "essential" to public policy and those that are "non-essential" and "commercial." Whatever regulatory framework might protect consumers of "essential" services, the Postal Service would be largely free to choose the appropriate price and terms of service for "commercial" services, so long as prices are "market-based" and aimed at raising revenue to support the USO covering "essential" services. In addition to Recommendation 1, this concept animates Recommendations 7, 8, 9, 10, and 11 and plays a role in Recommendations 2 and 4.

The Task Force designates this recommendation as "Administrative," although it also recognizes that the Postal Service may have to seek legislation in order to define the USO around the Task Force's "essential"- "commercial" distinction. The Task Force is correct in this latter regard because, as explained below, Congress has reserved to itself the public policy decisions concerning the definition of the USO. In the product-regulation context, attempting to make these changes without statutory reform would raise a number of complications.¹ Most significantly, because the current market-dominant and competitive groupings are not a proxy for the Task Force's "essential" and "commercial" categories, it does not appear that the Task Force's objectives for that distinction can be achieved in a comprehensive and coherent fashion without legislative reform.²

A. Scope of the USO

With respect to the USO, there does not appear to be a basis for an "essential"- "commercial" distinction in current law. The USO applies broadly to "written and printed matter, parcels, and like materials," including "business correspondence" as well as other forms of correspondence. 39 U.S.C. §§ 101(a), 403(a). The only statutory reference to "essential postal services" is in the broad context of access to postal services in general; there is no indication that the use of the

¹ Moreover, attempting to do so without a corresponding statutory change to the USO's scope would appear to be inconsistent with the Task Force's intent: at page 32, the Task Force cautions that "[u]pdating some components [of the recommendations] but not others, or updating different components in isolation of others, will not result in a coherent, sustainable strategy."

² The need for legislative reform to comprehensively implement the Task Force's recommendations regarding the "essential"- "commercial" distinction for purposes of product regulation is explained in more detail below. Most fundamentally, because certain mail products that the Task Force would designate as "commercial" must remain on the market-dominant product list under current law, and certain package products that the Task Force would designate as "essential" are properly defined as competitive under the present statute, the current market-dominant and competitive groupings are not a proxy for the Task Force's "essential" and "commercial" categories. The Task Force itself recognizes that this approach is a departure from the current structure. For example, when discussing the Postal Service's mission and business model at pages 32-33, the Task Force opines that the Postal Service must adopt a new, more targeted business model, moving from the current "statutory monopoly" to a model based on the provision of "essential services."

qualifier “essential” in that context was intended as a basis for distinguishing among postal services. *Id.* § (b) (3).³ Therefore, to the extent that certain segments of postal services would be considered “essential” (and hence subject to the USO), and others “commercial” (and hence not subject to the USO), this would have to be predicated on new public-policy considerations, not on the current terms of the statute. In developing the PAEA, however, Congress emphatically reserved to itself the power to change the USO as a matter of public policy, rather than delegating that power to the Commission or the Postal Service:

With steadily declining volumes of First Class mail, it is clear that the nation’s correspondence needs are changing. The President’s Commission [established by President George W. Bush] recommended, therefore, that an independent entity – the Regulatory Commission – be charged with, “refining key aspects of universal service as circumstances require/permit.” . . . From the perspective of the [Senate] Committee, both the postal monopoly and universal service are issues of broad public policy – not regulatory issues. For that reason, the Committee decided that the power to refine either the monopoly or the universal service obligation should remain in the hands of Congress. However, the Committee thought it would be helpful to hear from the Regulatory Commission what potential changes to either the monopoly or the universal service obligation they believed made sense. Congress would then have the option to enact any of the Regulatory Commission’s recommendations with which they agreed.

S. REP. NO. 108-318, at 38-39 (2004) (citation omitted); *see also* H.R. REP. NO. 109-66, pt. 1, at 62-63 (2005). The final version of the PAEA adopted the approach in the committee reports and relegated the Commission’s role to studying the USO and offering recommendations to Congress. Pub. L. No. 109-435, § 702, 120 Stat. 3198, 3243 (2006).

While, as noted above, Congress in the PAEA retained the statutory language setting forth the USO in broad terms, there was a question as to how the new regulatory distinction between market-dominant and competitive products affected the implementation of the USO, in terms of its application to specific products. In its resulting 2008 report, the Commission concluded that, under current statutes, the USO applies to all products.⁴ Postal Regulatory Comm’n, Report on Universal Postal Service and the Postal Monopoly 4, 23-25 (2008) [hereinafter “USO Report”]. While the Commission could theoretically reconsider its conclusion that the USO applies to all products, it might find it difficult to articulate a rational basis for doing so, given that the relevant statutes have not changed since the 2008 report. In any event, reconsideration of the 2008 report, which was advisory in nature, would have no legal effect without Congressional action, and could not effectuate the “essential”-“commercial” distinction for purposes of the USO, given the language of the current statute.

In its role as operator of the postal network, the Postal Service has some authority to interpret and apply the current USO provisions regarding matters such as service standards, access, and mode of delivery (subject to Commission oversight). The relevant statutes usually set forth qualitative

³ We are unaware of any legislative history limiting the scope of the phrase “essential postal services” in 39 U.S.C. § 403(b)(3). To the contrary, in the one instance where we are aware that the Commission has discussed the phrase in the context of this provision, the Commission interpreted the phrase broadly as “rang[ing] from postal products, to mail acceptance points (such as collection boxes), to access to letter carriers who accept mail for posting, to easily accessible information.” Postal Regulatory Comm’n, Report on Universal Postal Service and the Postal Monopoly 19 (2008).

⁴ In its own submission to the Commission, the Postal Service took the position that the USO should not apply to competitive products, owing, in part, to the PAEA’s grant of significant flexibility with respect to those products’ pricing and service. U.S. Postal Serv., Report on Universal Postal Service and the Postal Monopoly 3, 11-13, 18, 86 (2008). As explained in the next section, however, the PAEA’s distinction between market-dominant and competitive products is not a proxy for the Task Force’s new, social-policy-based “essential” and “commercial” categories. In any event, the Commission rejected the Postal Service’s proposed limitation of the USO’s scope: a fact that underscores the Postal Service’s inability to redefine the USO on its own.

standards about the service that the Postal Service must provide, rather than quantitative requirements, and so the Postal Service generally has discretion in balancing customer needs with financial considerations in deciding how to provide service to the American public. See 39 U.S.C. §§ 403(a)-(b), 3691(b)-(c). Certain Task Force recommendations (such as those focused on delivery mode and service standards) reinforce the current discretion of the Postal Service in these respects and implicate the Postal Service's administrative authority to make such decisions. Again, however, Congress reserved to itself the power to redefine the USO's scope. Doing so therefore is beyond the Postal Service's authority to interpret the current USO terms. As such, only Congress can give effect to the Task Force's recommendation that the USO's scope be redefined according to whether postal services are "essential" or "commercial."

B. Scope of Product Regulation

With respect to price regulation, the current statute differentiates between market-dominant and competitive products. The current dividing lines are based on three criteria:

- 1) If a product is subject to the Private Express Statutes, 18 U.S.C. §§ 1693-1699; 39 U.S.C. § 601, then it must be classified as market-dominant. 39 U.S.C. § 3642(b) (2). The Private Express Statutes set forth the parameters of the so-called "letter monopoly"; subject to various exceptions, they generally prohibit the private carriage of written materials weighing less than 12.5 ounces or costing less than six times the rate of a one-ounce single-piece First-Class Mail letter (i.e., the price of a regular postage stamp). Because most First-Class Mail and Marketing Mail volume is subject to the Private Express Statutes, this volume cannot be reclassified as competitive.⁵
- 2) If a product is subject to statutory "preferred-rate" mandates, then it must be regulated as market-dominant. 39 U.S.C. §§ 3626(a)(1) & (g)(4)(B). The preferred-rate statute covers nonprofit Marketing Mail, Library Mail, and various types of Periodicals.
- 3) Finally, a product must be classified as market-dominant if the Postal Service exercises market power in the relevant product market, as defined by the Commission using antitrust standards. 39 U.S.C. § 3641(b)(1).

If any of those three criteria applies to the product, it must be classified as market-dominant under current law; if none apply, it is eligible to be classified as competitive. None of the current classification criteria directly correspond to considerations of whether or not a given service is "essential" as a matter of social policy.

Within this framework, the Postal Service and the Commission could move only incrementally in the direction of effectuating the "essential"- "commercial" distinction. In particular, to the extent that certain "commercial" market-dominant services could be transferred to the non-price-capped competitive-product category, opportunities for such transfers are few. Only a small portion of market-dominant volume clearly falls outside of the first (letter-monopoly) and second (preferred-rate) criteria outlined above: single-piece First-Class Mail flats in the 12- to 13-ounce range, the Keys and Identification Devices price category of First-Class Mail,⁶ Marketing Mail delivered on a

⁵ Under current law, the scope of the letter monopoly cannot be administratively narrowed to facilitate a greater range of reclassifications. Congress declined to delegate to the Commission the power to redefine the letter monopoly as well as the USO. See S. REP. NO. 108-318 at 39, 54 (characterizing 39 U.S.C. § 601(c) as delegating to the Commission only the power to administer the monopoly's exceptions, and explaining Congress's intent as reserving to itself the power to redefine the monopoly's scope).

⁶ In 2016, the Commission rejected, without prejudice, a proposed transfer of Keys and Identification Devices to the competitive product list, based on a lack of evidence in that proceeding as to the existence of competing providers. Order No. 2686, Order Denying Transfer of First-Class Mail Parcels to the Competitive Product Category, PRC Docket No. MC2015-7 (Aug. 26, 2015), at 23-24. (The Postal Service successfully sought judicial review of that Commission decision with respect to

saturation basis with simplified addressing, Alaska Bypass Service, and certain Bound Printed Matter Flats and Parcels. To re-categorize any of those items that might be deemed “commercial, the Postal Service would have to convince the Commission that the Postal Service lacks market power, on the basis of a fact-intensive inquiry that would depend heavily on how the Commission defines the relevant market.⁷ While the Postal Service may be in a position to make such a showing for at least some of these types of mail, the point remains that such reclassifications would, at best, affect a relatively small portion of mail volume and fall far short of the coherent and comprehensive restructuring that the Task Force envisions.

Even without transferring market-dominant products to the competitive-product category, the Commission could theoretically establish a two-tier regulatory system within the market-dominant category through the Ten-Year Review.⁸ The Commission would first have to decide that it has the power to change the legacy mail classes, to which at least the initial market-dominant rate-regulation system must apply. 39 U.S.C. § 3622(d)(2)(A). The Postal Service believes that the Commission has the power to do so and raised this question in the Ten-Year Review, but the Commission has not yet resolved it. Then, and more fundamentally, the Commission would have to establish a non-arbitrary basis for an “essential”-“commercial” distinction and for the regulatory treatment of each category, all of which would have to be consistent with the existing statutory objectives and factors governing rate regulation. However, none of those statutory objectives and factors set forth or clearly support an “essential”-“commercial” distinction for purposes of market-dominant product regulation. *Id.* § 3622(b)-(c).⁹ Because of the delay, uncertainty, and likelihood of legal challenge involved if the Commission took this approach, it would be more effective for Congress to specify the terms of any new division of the product-regulation system consistent with any decisions it makes regarding changes to the USO.

With respect to products currently classified as competitive, the Commission has consistently and appropriately recognized that the market for the Postal Service’s parcel products is competitive for purposes of 39 U.S.C. § 3642(b)(1). As such, these products are removed from the regulatory framework for market-dominant products, including the current price cap. *Cf. id.* § 3622(d). For that reason, the existing statutory parameters for competitive products do not allow the Commission to impose a price cap, or to distinguish its mode of regulation in any other way, based on a judgment of whether a service is “essential.” See 39 U.S.C. § 3633. And, as explained earlier in this section, the statutory standards for moving a competitive product under the market-dominant price cap depend on an analysis of market power, not on social policy.

For all of these reasons, the current legal powers of the Postal Service and the Commission are too limited to allow for comprehensive, effective implementation of Recommendation 1.

First-Class Mail Parcels, but not with respect to Keys and Identification Devices. See *U.S. Postal Serv. v. Postal Regulatory Comm’n*, 842 F.3d 1271, 1272 (D.C. Cir. 2016) (per curiam.)

⁷ For example, amid intense controversy, the Commission declined to consider electronic substitutes as part of market-power analyses. Order No. 2306, Order Denying Request, PRC Docket Nos. MC2013-57 & CP2013-75 (Dec. 23, 2014), *aff’d*, *U.S. Postal Serv. v. Postal Regulatory Comm’n*, 816 F.3d 883, 886 (D.C. Cir. 2016). This calls into question the ability to re-categorize any product outside of the parcel- and express-delivery markets traditionally viewed as competitive.

⁸ The Ten-Year Review refers to the Commission’s ongoing proceeding to review and modify or replace the initial system for regulating market-dominant rates and classes, in accordance with 39 U.S.C. § 3622(d)(3) (Docket No. RM2017-3).

⁹ The Postal Service has proposed a substantially streamlined regulatory model for all market-dominant products generally, which would be consistent with the current objectives and factors. See *generally* Comments of the United States Postal Service, PRC Docket No. RM2017-3 (Mar. 20, 2017). But those arguments concern statutory provisions and circumstances pertinent to all market-dominant products; they do not bear on the creation of a new regulatory distinction between “essential” and “commercial” services. It is open to question whether the distinction proposed by the Task Force can be reconciled with the existing statutory criteria.

Recommendation 2

Geographic Scope. Keep current practice, which designates that the USO includes all addresses in the country covering “the United States, its territories and possessions,” irrespective of population density. (Administrative)

With Recommendation 2, the Task Force proposes to maintain the USO’s current geographic scope – all addresses, regardless of population density – for “essential” services. Presumably, the Postal Service would attain new flexibility as to the provision of “commercial” services in different areas.

Although the Task Force designates this recommendation as “Administrative,” only Congress can change the scope of the USO, as described in connection with Recommendation 1 above.

In addition, at page 42, the Task Force report argues that the prices for “essential” services “should be standard, regardless from where the products are sent or delivered – similar to the current flat postage rate for First-Class Mail.” Such a requirement would be more restrictive, on balance, than under current law. At present, uniform-rate requirements apply only to First-Class Mail, Media Mail, and Library Mail, not to all market-dominant services, and certainly not to all services that the Task Force appears to consider “essential.” 39 U.S.C. §§ 404(c), 3683(a). Moreover, the uniform-rate requirement means different things for different products. Media Mail and Library Mail rates are expressly prohibited from varying with distance, while First-Class Mail is not necessarily subject to a similar prohibition on distance-variable pricing. This contrast in statutory text has historically been interpreted to mean that First-Class Mail prices could theoretically vary with distance (e.g., pricing “local” and “non-local” mail differently), so long as the same price schedule is available in every location. See, e.g., 116 CONG. REC. 27,606 (1970) (remarks of Rep. Udall); Tentative Decision Concerning Proposals for Local and Nationwide Subclasses within First-Class Mail, PRC Docket No. MC76-1, at 3-9 (July 15, 1977); USO Report at 30 n.10, 77-78, 117-18. While a “flat postage rate for First-Class Mail” may be a longstanding public expectation for which there are also significant operational and business justifications, it has arguably not been codified into a statutory requirement. To the extent that, under the Task Force’s recommendation, Congress would affirmatively prohibit distance-variable pricing for First-Class Mail and, more critically, extend that prohibition to “essential services” beyond First-Class Mail, that restriction would sweep more broadly than current requirements.

Recommendation 3

Number and Density of Post Offices and Collection Boxes. Establish a rule that specifies that access to the postal system must only be sufficient to implement defined USO standards for delivery. (Administrative)

The Task Force identifies certain qualitative statutory parameters as responsible for the current breadth of the delivery and collection network. It recommends the enactment of a rule to specify quantitative standards for network access, and it designates such action as “Administrative.”

As noted in connection with Recommendation 1 above, Congress expressly reserved to itself, not the Commission or the Postal Service, the power to redefine the USO. To be sure, the Postal Service has discretion under statutory USO parameters to determine the appropriate retail and collection network, and over the past decade has pursued a number of initiatives to right-size its network. But a redefinition of the parameters themselves would require Congressional action. Congress also might need to amend other governing statutory standards, such as to allow Post Offices to be closed for operating at a deficit. See 39 U.S.C. § 101(b).

It should be noted that the Task Force does not discuss the “essential”-“commercial” distinction in connection with this USO recommendation; it is thus unclear whether and how such a distinction, if

enacted, might translate into different degrees of latitude with respect to access to various postal services.

Recommendation 4

Delivery Frequency. Provide greater flexibility to determine mail and package delivery frequency. (Legislative)

The Task Force recommends, as a “Legislative” action, that Congress stop including a rider in appropriations bills that mandates a certain level of six-day delivery. We agree that Congress would need to take that step in order for this recommendation to be implemented. To the extent that the Task Force’s vision of how the Postal Service would exercise its resulting flexibility turns on a distinction between “essential” and “commercial” services, see Recommendation 1 above.

Recommendation 5

Mode of Delivery. Maintain current discretion to determine mode of delivery consistent with a financially sustainable business model. (Administrative)

The Task Force recommends, as an “Administrative” action, the maintenance of the Postal Service’s current discretion to determine the mode of delivery (that is, to a mailbox at a recipient’s door, a curbside mailbox, or a centralized cluster box). The recommendation is generally correct, in that this discretion currently rests with the Postal Service. As a further “Administrative” action, the Commission would need to avoid creating political roadblocks in any advisory opinion, which the Postal Service is required to seek under current law for sufficiently large-scale, programmatic changes in service. See 39 U.S.C. § 3661(b)-(c).

In addition, legislative action would likely be advisable to enable the Postal Service to effectively implement any large-scale change in mode of delivery. For one thing, it would be useful for Congress to endorse the use of Postal Service discretion in this regard to avoid any explicit or implicit Congressional interference with Postal Service efforts. For another, a number of considerations have given the Postal Service pause in converting existing addresses to centralized delivery, such as the likelihood of customer and political backlash;¹⁰ the uncertain effect on the perceived value of mail and, correspondingly, on mail volume (and hence revenue); and the fact that, over the past several years, Congress has considered several bills on centralized delivery without settling on a consistent message. See Reply Comments of the United States Postal Service, PRC Docket No. R2013-11 (Dec. 6, 2013), at 103-105. And, as noted in a recent submission to the Government Accountability Office,¹¹ there are a number of significant legal issues that would arise from any widespread move toward centralized delivery, independent of whether the USO standards permit it. Thus, even though this recommendation is technically within the Postal Service’s existing legal authority from the standpoint of the USO, it would be very challenging to implement, as a practical matter, absent legislation expressly endorsing a shift toward more efficient modes like centralized delivery, even if such legislation might add some procedural constraints.

Like Recommendation 3, this recommendation is not framed in terms of the Task Force’s “essential”-“commercial” service distinction, so it is unclear whether this recommendation applies to all products and services or only a subset of them.

¹⁰ In 2015, public opposition, combined with a change in government leadership, led Canada Post Corporation to halt an initiative to convert all delivery points to cluster boxes. See Tania Kohut, *A Timeline of Canada Post’s Contentious Community Mailboxes*, GLOBAL NEWS, Oct. 26, 2015, <https://globalnews.ca/news/2300376/a-timeline-of-canada-posts-contentious-community-mailboxes>.

¹¹ The Postal Service provided this submission to the Task Force on May 22, 2018.

Recommendation 6

Processing Standards. Keep current practices, which allow the USPS to manage processing standards. (Administrative)

Like Recommendation 2, this essentially recommends maintenance of the status quo in terms of the Postal Service's authority to set service standards and manage its processing network.¹² The Postal Service has broad discretion in this area, subject to certain requirements. See 39 U.S.C. §§ 101(d) & (g), 403(b)(1) & (3), 3652, 3653(b)(2), 3691; Pub. L. No. 109-435, § 302(c)(3)(D) & (c)(5), 120 Stat. 3198, 3220-3221 (2006). This recommendation is "Administrative" or "Legislative" to the extent that it calls upon the Commission or Congress, respectively, to avoid interfering with Postal Service decisions. To the extent that the recommendation envisions an expansion of that discretion, legislative change would be necessary.

We note that Recommendation 22 appears to suggest giving the Commission new power to overrule the Postal Service's establishment of service standards. It is not clear how this is intended to interact with Recommendation 6.

Recommendation 7

USO Funding. Review and determine if income generated by activities defined to be outside of the USO could be optimized to cover the costs of funding the USO. (Administrative)

The Task Force recommends the maximization of revenue from activities defined to be outside of the USO, in order to support activities within the USO, and designates this recommendation as "Administrative."

The Task Force's recommendation appears to be tied not to the existing legal framework, however, but to the Task Force's vision of a redefined USO that applies only to "essential" services. The predicate step of restructuring the USO and the product-regulation system would require Congressional action, as discussed in connection with Recommendation 1 above. So, too, would any expansion of the Postal Service's revenue-generating activities, as discussed in connection with Recommendation 19 below. Therefore, this action should be designated as "Legislative" in the first instance.

If Congress allowed for such restructuring per Recommendation 1, only then would implementation of Recommendation 7 hinge on "Administrative" action. At that point, the Commission could structure the regulatory system for "commercial" services to maximize the Postal Service's ability to generate revenue, and the Postal Service would be responsible for making full use of that authority (and for controlling "commercial" services' costs to improve contribution).

Recommendation 8

Mail and Package Markets

Business Model. Develop a new model that can be used to both set rates and control costs to achieve sustainability. (Administrative)

The discussion in this portion of the Task Force report (pp. 50-51) is unclear, but the Task Force appears to recommend that, until a reclassification along "essential"- "commercial" lines can be

¹² We understand "processing standards" to refer to the service standards that determine many aspects of the mail processing network.

conducted (see Recommendation 1), the Commission should do what it can through the Ten-Year Review to allow net-income maximization for “commercial” market-dominant services.

The Postal Service agrees that this can be achieved with “Administrative” action, insofar as the Commission should use its regulatory powers to facilitate revenue maximization from market-dominant products, consistent with objectives of the statute. In the Ten-Year Review, the Postal Service has argued that the Commission can and should, within its existing authority, abolish the price cap in favor of after-the-fact regulatory monitoring. See *generally* Comments of the United States Postal Service, PRC Docket No. RM2017-3 (Mar. 20, 2017). As noted in footnote 7 above, however, the rationale for doing so applies across all market-dominant products, not just “commercial” ones.

To the extent that this recommendation urges the Commission to create an “essential”-“commercial” distinction through the Ten-Year Review, it would be more effective to do so through legislative action, as discussed in connection with Recommendation 1 above.

The Task Force does not explain the “control costs” language in the recommendation. To the extent that this can be interpreted as urging the Postal Service and/or Commission to do more to control costs, see Recommendations 21 and 22 below.

Recommendation 9

***Business Model.* Require price increases, reduce service costs, or exit the business for any mail products that are not deemed an essential service and do not cover their direct costs. (Administrative)**

The Task Force recommends, as an “Administrative” action, price increases, cost reductions, or termination for “non-essential” (i.e., “commercial”) services that do not cover their “direct” costs. To the extent that this would be effectuated by redefining the USO, see Recommendation 1, or by abolishing the price cap on “non-essential” services, see Recommendations 1 and 8. As the Postal Service has argued in the Ten-Year Review and elsewhere, a price-cap system provides little incentive to devote limited pricing authority to “underwater” products with rapidly declining volume, as the resulting price increases will not yield as much overall net income as would increases to other, more stable products. Without a price cap, there may be ways to address the situation that do not sacrifice overall remuneration.

The Task Force also recommends that the Postal Service be required to price “non-essential services” at a “market rate” (p. 51). It is not clear what this means, but the Postal Service already sets prices, to the extent possible under current statutory criteria, according to our evaluation of what the market will bear. Where those statutory criteria, such as the current price cap or the statutory objectives and factors, impede the Postal Service’s ability to price market-dominant products to the market, reform of these criteria would require Congressional action. To the extent that this aspect of the recommendation seeks prices that are artificially pegged to competitors’ prices, rather than reflecting the cost and demand factors for the postal products, see Recommendation 14 below.

Recommendation 10

***Product Classes.* Redefine mail classes by creating products defined by the type of sender and the declared purpose of the mail item. (Administrative)**

This recommendation appears to seek the same result as Recommendation 1. As discussed above, a broad redefinition of mail classifications along “essential” and “commercial” lines would most effectively be accomplished by Congress, rather than by any “Administrative” entity. Within the context of existing mail-classification categories, however, it should again be noted that the Postal

Service has asked the Commission, as part of the 10-Year Review, to confirm that the current statute allows for a redefinition of market-dominant product classes.

Recommendation 11

Product Classes. Change USPS systems in order to track the purposes and uses of mail, to allow for better cost allocation, targeted pricing, and more business intelligence. (Administrative)

This recommendation is properly designated as “Administrative” and directed to the Postal Service. That said, we would welcome a chance to discuss the intent behind this recommendation, and your ideas concerning how we might better leverage our Household Diary Surveys.

Recommendation 12

Strategic Options. Evaluate areas of USPS operations where the USPS could expand third party relationships in order to provide services in a more cost efficient manner (e.g., mid-stream logistics and processing). (Administrative)

The Postal Service has the authority to evaluate opportunities to partner with third-party vendors or to offer new work-sharing incentives. Any new or modified workshare discounts would require Commission approval, and so this recommendation is properly designated as “Administrative” in that regard.

Similarly, the Postal Service has the authority to pursue outsourcing opportunities under certain circumstances, but outsourcing is a mandatory subject of bargaining under the National Labor Relations Act (NLRA), to which the Postal Service is subject. 39 U.S.C. § 1209; see *U.S. Postal Serv. v. Am. Postal Workers Union, AFL-CIO*, NLRB No. 5-CA-140963, at 19-23, 2016 WL 6610695 (Nov. 8, 2016) (admin. law judge decision) (shifting of work from bargaining unit to workers outside of the bargaining unit is a mandatory subject of bargaining), *adopted by Board*, 2017 WL 1279607 (Jan. 4, 2017). Under a longstanding provision of its collective bargaining agreements, the Postal Service is required to “give due consideration to public interest, cost, efficiency, availability of equipment, and qualification of employees when evaluating the need to subcontract.” *E.g.*, 2015-2018 Agreement between the United States Postal Service and the American Postal Workers Union, AFL-CIO, art. 32(1)(A) (2016). The Postal Service must also provide affected labor unions with advance notification of, and an opportunity to comment on and discuss, any planned outsourcing that will have “a significant impact on bargaining unit work.” *Id.* art. 32(1)(B). A labor organization may challenge the Postal Service’s decision to subcontract through binding arbitration if it believes that the appropriate Article 32 procedures were not followed. 39 U.S.C. § 1207. The Postal Service’s ability to reduce labor costs through outsourcing may also be impacted by clauses in its collective bargaining agreements that protect particular categories of employees from layoffs. *E.g.*, *id.* art. 6.

While the Postal Service could attempt to negotiate different subcontracting provisions, the practical ability to achieve such changes is limited by the statutory backdrop of binding interest arbitration. As discussed further in connection with Recommendation 17 below, the interest arbitration process is structured to favor the status quo. To the extent that the current collective-bargaining and interest arbitration requirements impede the achievement of this recommendation, legislative change would be necessary to alter those requirements.

Recommendation 13

***Strategic Options.* As a means of generating more income, the mailbox monopoly could be monetized. (Administrative)**

The mailbox monopoly statute, 18 U.S.C. § 1725, requires payment of postage on all mailable items placed in mailboxes. In theory, the Postal Service could establish special “postage” classifications and rates for items delivered by qualifying third-party delivery providers into mailboxes. The Commission would have to approve these classifications and rates. Therefore, the Task Force correctly recognized that, as a general matter, this recommendation could be implemented by “Administrative” action.

Such a move would bring other legal and policy complications, however. To begin with, it would affect other public benefits that the mailbox monopoly provides, particularly the secure, efficient provision of universal service. The mailbox monopoly does not merely protect revenue to support the Postal Service’s ability to effectively achieve its USO. By channeling mailbox deliveries to a single universal service provider, it promotes efficient mail delivery: there is room in mailboxes for letter carriers to deliver, and carriers do not need to spend time at each mailbox distinguishing collection mailpieces from alternative-delivery mailpieces. The mailbox monopoly also protects mail security, by giving recipients a stable expectation as to who can legitimately access a mailbox and who might warrant suspicion. That assurance of security, in turn, provides value to the “brand” of the mail. Opening mailbox access, even via franchising, should involve consideration of the impact on these current public benefits, as well as delivery costs and revenue.

Recommendation 14

***Strategic Options.* Price competitive products in a manner that maximizes revenues and generates income that can be used to fund capital expenditures and long-term liabilities. (Administrative)**

As an initial note, Recommendations 14, 15, and 16 focus on competitive products, as currently defined, without reference to “essential” or “commercial” services. It is not clear how these recommendations interact with the Task Force’s vision of an “essential”-“commercial” distinction (e.g., in Recommendation 1) or with its reliance on that proposed distinction in other recommendations.

Recommendation 14 urges competitive products to be priced to maximize revenue with which to support the USO. To the extent that this recommendation generally urges revenue maximization as the goal of pricing, the Postal Service agrees that this is appropriately designated as “Administrative,” subject to existing legal and regulatory constraints. Indeed, maximizing revenue and contribution to institutional costs is consistent with the Postal Service’s existing approach to competitive-product pricing. As the Commission recently noted, the Postal Service has strong incentives to maximize contribution from competitive products given the decline in market-dominant volume, and the evidence (in the form of the price increases imposed by the Postal Service since the PAEA and the large increase in competitive product contribution) demonstrates that the Postal Service has been doing so. Order No. 4963, Order Adopting Final Rules Relating to the Institutional Cost Contribution Requirement for Competitive Products, PRC Docket No. RM2017-1 (Jan. 3, 2019), at 60-62. The Task Force also acknowledges elsewhere that the Postal Service has aggressively grown competitive-product revenue and contribution since the PAEA. The Postal Service has done so consistent with the PAEA’s aim, discussed further below, of allowing the Postal Service to compete more effectively in the competitive marketplace and to seek retained earnings.

To the extent that the Task Force suggests that competitive products can and should be priced substantially higher to generate more revenue, this does not appear to account for the fact that, by statutory definition, the Postal Service cannot raise competitive product prices substantially above

costs, or raise them significantly at all, without risking the loss of significant business. 39 U.S.C. § 3642(b)(1). Indeed, the Task Force recognizes that “there are limits to how much consumers are willing to pay for delivery” and that “e-commerce consumers remain highly sensitive to delivery costs” (p. 50)), which suggests that these products are competitive and that, accordingly, the Postal Service cannot price them substantially higher without harming its ability to compete effectively in the marketplace. Because of the inconsistencies in the Task Force recommendation in this regard, the Postal Service would welcome the opportunity to discuss it further.

Alternatively, the Task Force recommends that the Postal Service consider, in its pricing decisions, “the potential market distortions that could drive industry participants out of the market” (p. 54). As a factual matter, it should be noted that, of the three major package and express delivery providers, the Postal Service holds the smallest share of the overall market when measured by revenue. The Postal Service’s two major competitors are in robust financial health and have made no indication of a fear of being driven from the package-delivery market. As such, it is unclear how the Postal Service’s current pricing practices represent any serious threat to these competitors.

As a legal matter, this consideration is not properly aimed at the Postal Service, whose pricing decisions are designed to maximize revenue to support the USO and its other statutory obligations, rather than to preserve its competitors’ market position. Guarding against predatory pricing is an object of regulation by the Commission, the Federal Trade Commission, and the Department of Justice’s Antitrust Division, not of any individual market participant. Yet even those agencies’ role is to protect “competition, not competitors.” *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962); see *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993) (“The purpose of the [Sherman] Act is not to protect businesses from the working of the market; it is to protect the public from the failure of the market.”); *Direct Marketing Ass’n v. U.S. Postal Serv.*, 778 F.2d 96, 105-106 (2d Cir. 1985) (approving the application of antitrust principles and the *Brown Shoe dictum* in the context of postal regulation); see also *Newspaper Ass’n of Am. v. Postal Regulatory Comm’n*, 734 F.3d 1208, 1214-15 (D.C. Cir. 2013) (same).

Moreover, a difference in price levels between competitors is not the legal or economic test for an unfair market distortion. It is well-established that, so long as a competitive product covers its marginal and incremental costs, it is not unfairly distortionary, regardless of how it compares with competitors’ prices.

[I]n the context of pricing practices, only predatory pricing has the requisite anticompetitive effect. See [Phillip] Areeda & [Donald F.] Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697, 697-99 (1975); [John S.] McGee, *Predatory Pricing Revisited*, 23 J. LAW & ECON. 289, 292-94 (1980). Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition. . . . In *Cargill, Inc. v. Monfort of Colorado, Inc.*, . . . [w]e observed that nonpredatory price competition for increased market share, as reflected by prices that are below “market price” or even below the costs of a firm’s rivals, “is not activity forbidden by the antitrust laws.” 479 U.S. [104,] 116 [(1986)].

Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 339-40 (1990) (footnote omitted). Barring predatory below-cost pricing behavior, “[i]t is in the interest of competition to permit dominant firms” – let alone a non-dominant firm, such as the Postal Service in the package-delivery market – “to engage in vigorous competition, including price competition.” *Id.* (quoting *Cargill*, 479 U.S. at 116). The same principle of relying on cost coverage, rather than price comparison, applies to testing competitive product pricing for unfairness under the PAEA. 39 U.S.C. § 3633; Dep’t of the Treasury, Accounting Principles and Practices for Operation of the United States Postal Service’s Competitive Products Fund 4-5, 7 (2007) [hereinafter “Treasury Report”].

Even if a simple price comparison were relevant, any analysis would need to consider whether nominal disparities in price might reflect differences in demand. For instance, customers' willingness to pay may vary across different package-delivery providers' offerings, based on actual or perceived differences in those products' features and quality.

To the extent that this recommendation implies that the Postal Service should attempt to match competitors' prices, not for reasons of rational business self-interest or legal compliance, but to protect competitors of the Postal Service, that sort of artificial price increase would itself distort the market and harm the interests of consumers. As noted above, it is these interests, not those of competitors that are the focus of competition regulation. As such, pricing artificially to protect postal competitors could itself draw antitrust scrutiny.

It is unclear how the Postal Service could practically resolve the internal tension between protecting competitors and maximizing revenue to fund the USO, if artificially raising prices has the effect of driving away volume and reducing cash flow and overall revenue and contribution. It would also force all customers in the market to pay more, both through higher Postal Service prices and through competitors' abandonment of the pricing restraint that comes from having to compete on price with the Postal Service. Such a strategy would mark a departure from the PAEA's aims of open, fair competition and of treating the Postal Service as a self-interested business actor on par with its private-sector peers. In the end, it would only serve to benefit certain Postal Service competitors, at the expense not only of the Postal Service, but also of consumers and the market as a whole.

Recommendation 15

Costing Options. Develop a new cost allocation model to establish full price transparency and fully distribute costs. (Administrative)

Recommendation 15 seeks the adoption of (a) "full price transparency" and (b) fully-distributed costing. Both prongs of this recommendation are inconsistent with the current statutory framework, and for that reason to adopt these changes as a matter of law would require legislative change. During our meeting yesterday your team suggested that, at least with regard to the costing recommendation, your concerns were focused on our internal cost accounting as a tool to better inform our pricing decisions. To the extent the costing recommendation is limited to the administrative practices of the Postal Service, we would agree that it is within our control, though there would still be a tension between such a practice and Congressional intent.

A. "Full Price Transparency"

It is not entirely clear what is meant by "full price transparency," although the discussion at pages 54-55 suggests a belief that negotiated service agreement (NSA) pricing, which is not publicly disclosed, somehow distorts markets. To the extent that this lack of public disclosure of customers' negotiated pricing is the issue, it should be noted, as an initial matter, that no other delivery provider publicly discloses prices that it negotiates with customers. Thus, requiring the Postal Service but not its competitors to publish negotiated pricing would distort the market and deter customers from dealing with the Postal Service, despite the prospect of lower or more efficient pricing that would benefit the overall market. Yet Congress intended the Postal Service to compete on a level playing field, not that it compete with a handicap. See H.R. REP. NO. 109-66, pt. 1 at 44; S. REP. NO. 108-318 at 14.

The governing statute reflects Congressional intent with respect to this business reality. Although the Postal Service is generally subject to the Freedom of Information Act, see 39 U.S.C. § 410(b)(1), it is not required to disclose "information of a commercial nature, including trade secrets, whether or not obtained from a person outside the Postal Service, which under good business practice would not be publicly disclosed." 39 U.S.C. § 410(c)(2). Courts have recognized that negotiated price information warrants this protection, as it would not be disclosed as a matter of good business practice. See generally *Wickwire Gavin v. U.S. Postal Serv.*, 356 F.3d 588 (4th Cir. 2004).

With respect to the confidential treatment of NSAs filed at the Commission, the relevant statute requires the Commission's confidentiality rules to account for the interest in protecting commercial information that would be withheld in good business practice. 39 U.S.C. § 504(g); see also H.R. REP. NO. 109-66, pt. 1 at 61; S. REP. NO. 108-318, at 20, 47-48. The Commission's rules ensure that other interested parties can fully and fairly engage in regulatory proceedings, without unilaterally disadvantaging the Postal Service's commercial interests. See 39 C.F.R. pt. 3007, app. A (allowing access to non-public filings by any person, such as an attorney or consultant, except for a person involved in competitive decision-making for an entity that would gain competitive advantage from the materials). This confidentiality standard enables effective regulation while maintaining a level informational playing field. In that regard, full transparency would appear to work against the recommendation of the Task Force that the Postal Service maximize revenue through its competitive pricing strategy.

Mandatory disclosure of NSA pricing would be a significant departure from Congress's longstanding vision of the Postal Service operating as a business on a level playing field. The current statute places it beyond the discretion of any "Administrative" actor.

B. Fully-Distributed Costing

At pages 54-55, the Task Force report frames fully-distributed costing as a solution for competitors' complaints about supposed unfair cross-subsidization.

To the extent this recommendation is focused on the costing standards as set forth in postal law, this recommendation would concern how costs are to be measured for purposes of the cost-based price floors for competitive products. 39 U.S.C. § 3633(a)(1)-(3). One approach (economic costing) would attribute those costs that are demonstrably caused by a given product, and to allow the remaining costs to be recovered through demand-based pricing. The alternative approach (fully-distributed or fully-allocated costing) would attempt to attribute or assign all costs to products. Where costs are shared across multiple products and product-specific causation cannot be determined, fully-distributed costing would employ assumptions, proxies, and inferences to allocate those costs.

Economists, regulators, policymakers, and businesses have, for decades, rejected fully-distributed costing as inherently arbitrary and an invalid basis for pricing and regulatory decisions. *E.g.*, Order No. 4963 at 32 (noting that fully-distributed costing "has long been rejected by the Commission, economists, and the courts."); *United States v. AMR Corp.*, 335 F.3d 1109, 1117 (10th Cir. 2003) ("[B]ecause [certain proposed predatory-pricing tests] rely on 'arbitrary allocation of costs among different classes of service,' they 'cannot purport to identify those costs which are caused by a product or service, and this is fundamental to economic cost determination.'" (quoting *MCI Communs. Corp. v. AT&T*, 708 F.2d 1081, 1116 (7th Cir. 1982)); Salvatore Massa et al., *Pricing Network Elements Under the Telecommunications Act of 1996: Back to the Future*, 23 HASTINGS COMM. & ENT. L.J. 751, 769 & n.97 (2001) (recounting that "[m]any economists have criticized pricing schemes that simply allocate shared, joint and common costs as arbitrary and unlikely to lead to economically efficient prices," and providing numerous scholarly citations); WILLIAM J. BAUMOL & J. GREGORY SIDAK, *TOWARD COMPETITION IN LOCAL TELEPHONY* 56 (1994) (describing fully-allocated costing as a "traditional" but "admittedly arbitrary rule of thumb" that "is now generally discredited and is increasingly being abandoned in regulatory practice"); *Towards Postal Excellence: The Report of the President's Commission on Postal Organization* 31 (1968) ("Pricing practices of many corporations (including utilities) have moved away from reliance on such rigid accounting allocations and now take service and market considerations as well as cost into account."), available at <https://go.usa.gov/xQMhm> [hereinafter "Kappel Commission Report"].¹³

¹³ We would be pleased to provide further background about fully-distributed costing upon request.

In postal regulation, Congress explicitly chose to require the use of causation-based, economic costing over fully-distributed costing. When the modern Postal Service was founded in 1970, the blue-ribbon Kappel Commission and Congress welcomed the Postal Service's shift from fully-distributed costing to economic costing, and they rebuffed private delivery companies' calls to maintain fully-distributed costing as a tool to force Postal Service prices higher.

Express companies in the private sector of the economy have expressed their very keen desire to include language in the bill which would require the recovery of fully allocated costs for parcel post [the forerunner of today's competitive products]. The committee rejects the suggestion on the principle that no particular cost accounting system is recommended and no particular classification of mail is required to recover a designated portion of its cost beyond its incremental cost. That decision is for the Postal Rate Commission to determine, in accordance with the general criteria enacted by law. That [sic] criteria for ratemaking include seven specific requirements, among them, the effect of rate increases upon "enterprises in the private sector of the economy engaged in the delivery of mail other than letters." To go beyond that point would simply be to recommend provisions of law protecting a particular economic interest or limiting the availability of a Federal parcel delivery service.

S. REP. NO. 91-912, at 17 (1970); see also *Hearings on Postal Rates and Revenue and Cost Analysis Before the Subcomm. on Postal Rates of the House Comm. on Post Office and Civil Serv.*, 91st Cong. at 1 (1970) (remarks of Rep. Olsen) (praising the Post Office Department's decision to abandon fully-allocated costing in favor of "supply[ing] postal figures based on demonstrably related costs"); Kappel Commission Report at 30-31, 133-35.¹⁴

Under the PRA, then, "each class of mail or each type of mail service" was required to "bear the direct and indirect postal costs attributable to that class or type plus that portion of all other costs of the Postal Service reasonably assignable to such class or type." 39 U.S.C. § 3622(b)(3) (2005).

Despite Congress's rejection of fully-distributed costing, certain mailing-industry advocates continued to urge the Postal Rate Commission to adopt it. After multiple proceedings on the issue, the Postal Rate Commission stayed with the economic and legislative consensus. It required individual products to cover their economically-determined attributable costs; the assignment of other costs would have to be based on statutory policy criteria and business judgment, rather than allocated according to some arbitrary algorithm. *Nat'l Ass'n of Greeting Card Publishers v. U.S. Postal Serv.*, 462 U.S. 810, 814-16 (1983) (recounting the relevant regulatory history). In affirming the Postal Rate Commission's approach as consistent with the statute and legislative history (including the Kappel Commission Report), the Supreme Court specifically rejected arguments that fully-distributed costing was necessary or intended as a safeguard against cross-subsidization. *Id.* at 829 n.24.

In the PAEA, Congress codified the Postal Rate Commission's "reliable causation" standard that the Court had upheld. 39 U.S.C. §§ 3622(c)(2), 3631(b); see S. REP. NO. 108-318, at 10 (2004) ("The [NAGCP] Court rejected a contention that it was appropriate to make classes responsible for the recovery of costs for which an extended inference of causation was claimed. It emphasized the

¹⁴ It is notable that Congress and the Kappel Commission, in the run-up to the Postal Service's creation, expressly supported postal officials' move away from basing internal accounting and pricing decisions on fully-distributed costing. Thus, even if the statute's preclusion of fully-distributed costing were construed to apply only to regulatory matters, and not necessarily to the Postal Service's internal pricing decisions, a return to fully-distributed costing for internal decisions would also be inconsistent with the intent behind the current Congressional scheme. Moreover, because fully-distributed costing entails a choice among various distribution methods, any such choice by the Postal Service would almost certainly be subject to political (and perhaps legal) challenge as arbitrary by competitors and customers seeking a different result.

need for reliable indicators of causality without specifying any specific method for identifying causality. . . . The Committee finds no reason for changing this standard.”).¹⁵

Addressing the longtime argument over whether enough costs were being attributed, Congress declined to pass judgment and committed the question to the Commission’s technical expertise:

While considering this legislation the Committee heard testimony suggesting that currently accepted levels of cost attributions were both too low and too high, and that specific rules for cost attribution should be incorporated into law. The Committee has decided that the technical decision of what cost analysis methodologies are sufficiently reliable at any given time to form the basis for attribution should be left to the Postal Regulatory Commission, acting with benefit of counsel from all interested persons in open public proceedings.

S. REP. NO. 108-318, at 9; see also H.R. REP. NO. 109-66, pt. 1, at 49.

In a study of postal accounting practices commissioned under the PAEA, the Treasury Department likewise recommended the continuation of the Postal Rate Commission’s economic approach to cost attribution. Treasury Report at 3-8.

More recently, the Commission has rejected calls to resurrect fully-distributed costing as incompatible with statutory criteria and economic theory. One of these cases involved an attempt to attribute more costs to products using a game-theory exercise, rather than a demonstration of causation. Order No. 3506, Order Concerning United Parcel Service, Inc.’s Proposed Changes to Postal Service Costing Methodologies (UPS Proposals One, Two, and Three), PRC Docket No. RM2016-2 (updated Oct. 19, 2016), at 3, 35, 51-55, 60-62. As the Task Force acknowledges at page 55, the Commission’s application of the statutory cost-attribution standard in that case was upheld on appeal. *United Parcel Serv., Inc. v. Postal Regulatory Comm’n*, 890 F.3d 1053, 1066-69 (D.C. Cir. 2018), *reh’g denied*, No. 16-1354, 2018 U.S. App. LEXIS 20968 (D.C. Cir. July 27, 2018), *petition for cert. filed*, ___ U.S.L.W. ___ (U.S. Dec. 24, 2018) (No. 16-1354).

The second case involved proposals to use non-causal proxies – namely, competitive products’ share of total attributable costs, total revenue, or space on delivery vehicles – to set the “appropriate share” of institutional costs that competitive products must cover.¹⁶ The Commission rejected such proposals as, in effect, an attempt to fully distribute the Postal Service’s costs, which would violate the statute’s requirement of causation-based cost attribution. Order No. 4963 at 36-38, 113, 131-32, 146-47, 152; Order No. 4402, Notice of Proposed Rulemaking to Evaluate the Institutional Cost Contribution Requirement for Competitive Products, PRC Docket No. RM2017-1 (Feb. 8, 2018), at 81-82.¹⁷

In establishing the statutory standards for postal costing, Congress set the goal as “a technically correct result, placing accuracy above achieving a particular outcome of higher or lower attribution.” H.R. REP. NO. 109-66, pt. 1, at 49. The fact that a substantial portion of Postal Service costs may be institutional does not vitiate Congressional intent. *UPS*, 890 F.3d at 1063 (noting that Congress had

¹⁵ At one point, the PAEA’s framers in the House had considered an “equal cost coverage” rule that would have required an arbitrary allocation of institutional costs, H.R. 22, § 201(a) (1999) (proposed 39 U.S.C. § 3744), but they abandoned it in the next iteration.

¹⁶ “Institutional costs” refers to the residual category of costs that cannot be attributed to products. See *UPS*, 890 F.3d at 1061-63.

¹⁷ Congress made market conditions an explicit factor in the “appropriate share” level, but not in cost attribution, which underscores the point that cost attribution must be driven by methodological rigor rather than by policy judgments. *UPS*, 890 F.3d at 1067. While market conditions are one factor in the “appropriate share” analysis, see 39 U.S.C. § 3633(b), the Commission must analyze those conditions in light of other statutory criteria, the context of the statute as a whole (including the distinct standards governing cost attribution), and its general duties of reasoned decision-making.

codified the longstanding cost-attribution standard at a time when institutional costs “made up ‘40 percent of the Postal Service’s costs” (quoting S. REP. NO. 108-318 at 9)); *Newsweek, Inc. v. U.S. Postal Serv.*, 663 F.2d 1186, 1200 (2d Cir. 1981) (“There is nothing in the legislative history [of the PRA] to suggest that attribution of fifty percent of postal costs is inadequate.”), *aff’d sub nom.*, *NAGCP*, 462 U.S. 810. The Commission’s role “is to carry out the particulars of the scheme Congress created, not to engineer specific market outcomes.” *UPS*, 890 F.3d at 1067. As the statutory text, legislative history, and case-law demonstrate, fully-distributed costing would be contrary to that statutory scheme. Therefore, it is not within the discretion of the Postal Service or the Commission to implement this recommendation.

That is not to say that the current approach to costing does not allow for changes in the economic attribution of costs as circumstances and data evolve. The Postal Service regularly files proceedings with the Commission to refine its costing methodologies pursuant to the statutory requirement of “reliably identified causal relationships.” These proceedings result in differing and often greater levels of cost attribution, while resting on evidence instead of arbitrary assumptions or proxies. For example, in one recent case, the Postal Service proposed to update city carrier costs on the basis of routinely collected data, which showed an increase in packages’ share of total delivery time; this change had the effect of attributing \$198.5 million more costs to competitive products and \$179.5 million less to market-dominant products. See Order No. 4259, Order on Analytical Principles Used in Periodic Reporting (Proposal Four), PRC Docket No. RM2017-8 (Dec. 1, 2017), at 5, 22 (discussing cost impact and approving change). As it has done for decades, the Postal Service will continue to explore ways in which cost attribution can be improved, consistent with the economically sound statutory standard.

Recommendation 16

Costing Options. Establish a separate balance sheet for packages to help prevent cross-subsidization between the mail and package business units. (Administrative)

The Task Force recommends, as an “Administrative” action, the establishment of “a separate balance sheet for packages to help prevent cross-subsidization between the mail and package business units.” It is not clear what is intended by this. Rate regulation is not based on the assets and liabilities reflected on a balance sheet. Rather, it turns on costs and revenues. As discussed in connection with Recommendations 14 and 15 above, it is well established that measuring prices against costs is the test for cross-subsidization. It is not clear how balance-sheet separation would serve that goal.

That said, the value of Postal Service assets and liabilities are already reflected in product costs and revenues used for rate regulation. Cash and cash-equivalent assets derive largely from product revenues. The value of property assets translates into depreciation expense. And compensation and benefits liabilities have their own annual-expense counterparts. All of these expenses are attributed to market-dominant and competitive products in accordance with the “reliable causation” standard of 39 U.S.C. §§ 3622(c)(2) and 3631(b), as discussed in connection with Recommendation 15 above.

On a practical level, it is also unclear what this recommendation intends beyond the balance-sheet separation that is already required by the PAEA. The Competitive Products Fund is required to have its own balance sheet, based on the assets and liabilities identified as relevant to competitive products, and separate from the Postal Service Fund. Compare 39 U.S.C. § 2003 with *id.* § 2011. The Postal Service must transmit the Competitive Products Fund’s balance sheet, along with other financial reports, to the Treasury Department and the Commission each year. *Id.* § 2011(i)(1)-(2). The Postal Service’s most recent report was filed on December 28, 2018. See, e.g., Library Reference USPS-FY-39, FY 2018 Competitive Products Fund Reporting Materials, PRC Docket No. ACR2018. On the balance sheet, assets and liabilities are allocated to competitive products on the basis of various distribution keys, such as competitive products’ share of total revenue or of certain

attributable costs. *Id.*, Microsoft Excel file “FY18-CP04.xlsx.” This allocation is permissible for the balance sheet, because it is not used for price-setting or rate regulation and therefore not subject to the “reliable causation” standard discussed in connection with Recommendation 15 above.

Without further clarification of whether or to what extent this recommendation seeks a change in the current practice, we are unable to evaluate the accuracy of its designation as “Administrative.”

Recommendation 17

Operating Model

Operations. Align USPS employee rights with other federal employee rights by eliminating collective bargaining over compensation for USPS employees. (Legislative)

The Postal Service agrees with the designation of this recommendation as “Legislative.” Specifically, the Task Force recommends that postal employees be made subject to the General Schedule pay system for Federal employees and unable to bargain over compensation. As the Task Force recognizes, Congress would have to make the Postal Service subject to the Federal Service Labor-Management Relations Statute (FSLMRS), 5 U.S.C. §§ 7101-7135, rather than the National Labor Relations Act, 29 U.S.C. §§ 151-169. See 39 U.S.C. § 1209.

That step alone would not necessarily end bargaining over compensation, however. Congress would also have to make the General Schedule and related pay rules (or any successor statutes) specifically applicable to the Postal Service. Without that additional step to “specifically provide[] for [it] by Federal statute,” compensation would qualify, by default, as a “condition of employment” subject to mandatory bargaining. See 5 U.S.C. § 7103(a)(14); *Fort Stewart Sch. v. Fed. Labor Relations Auth.*, 495 U.S. 641 (1990).¹⁸

In the meantime, the Task Force recommends that the Postal Service do what it can within its existing authority to align employee compensation more closely with general Federal compensation rules. The Postal Service has managed to negotiate collective bargaining agreements in recent years that reduced average hourly compensation, in contrast to the inexorable growth in private-sector compensation since FY2011. The Postal Service intends to continue its aggressive pursuit of cost-reduction flexibilities through labor negotiations, arbitration, and non-bargaining-unit policy changes.

With respect to the bargaining-unit employees that make up the overwhelming majority of the postal workforce, however, the existing legal framework limits the Postal Service's opportunity to accomplish the recommended change. As this recommendation recognizes, compensation is a mandatory subject of collective bargaining under the NLRA. Any impasse in bargaining must be resolved through a statutorily prescribed dispute-resolution process that usually ends in binding arbitration. 39 U.S.C. § 1207. Interest arbitrators tend to be more conservative in their approach and rarely, if ever, award wholesale changes to the compensation structure of bargaining unit employees. To the extent that the current collective-bargaining and interest arbitration requirements impede the achievement of this recommendation, legislative change would be necessary to alter those requirements.

¹⁸ Despite the general rule that agencies subject to the FSLMRS do not bargain over compensation, at least eight Federal agencies' employees do reportedly bargain over compensation as a result of specific statutory language or a judicial or administrative decision. See Cong. Research Serv., No. 7-5700, *Collective Bargaining and the Federal Service Labor-Management Relations Statute: Selected Legal Issues 3* (2017), <https://fas.org/sgp/crs/misc/R44794.pdf> (identifying these agencies as the U.S. Office of Personnel Management, the Bonneville Power Administration, the Federal Aviation Administration, the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, the Office of the Comptroller of the Currency, the Securities and Exchange Commission, the National Credit Union Administration, and, at least with respect to certain employees, the Department of Defense).

Non-bargaining-unit employees of the Postal Service are subject to a pay system that is based on performance, not seniority, and that does not include step increases. In light of Recommendation 18 below, it is not clear whether the Task Force intends a change in that pay system. If so, then such a change is generally within the Postal Service's discretion. However, for the supervisors, managers, and postmasters that comprise a substantial portion of non-bargaining-unit employees, the Postal Service must by law involve the representative organizations for such employees in the planning and development of pay policies and schedules. 39 U.S.C. § 1004(b)-(h).

Recommendation 18

Operations. Pursue reforms to USPS employee wages consistent with those proposed for the broader federal workforce in the President's Management Agenda. (Legislative)

The Task Force frames this recommendation alternately in terms of "wages" and "compensation." With respect to wages, the President's Management Agenda (Agenda) proposes a slowing of tenure-based step increases and the replacement of across-the-board raises with performance-based pay incentives. Off. of Mgmt. & Budget, President's Management Agenda 18-19 (2018), <https://go.usa.gov/xEa9Z>. In terms of non-wage compensation, the Agenda refers to proposed pension reforms in the President's Budget; those reforms would reduce benefits expense and increase employees' share of the funding obligation. *Id.* at 19; Off. of Mgmt. & Budget, Budget of the U.S. Government, Fiscal Year 2019: Major Savings and Reforms 181, 183-84 (2018) [hereinafter "*FY2019 Major Savings & Reforms*"], <https://go.usa.gov/xPJPZ>. Assuming that these aspects of the Agenda are those to which the Task Force report refers, the Postal Service agrees that these reforms are "Legislative."

As noted in connection with Recommendation 17 above, while the Postal Service might theoretically have some ability to seek wage reforms (albeit not pension reforms) through collective bargaining, its practical ability to implement such reforms is constrained by the existing binding interest arbitration system. With respect to non-bargaining-unit employees, those employees are already subject to a performance-based pay system that does not include tenure-based step increases.

Recommendation 19

Operations. Explore and implement new business lines that generate revenue, and that present no balance sheet risk to the USPS. (Legislative)

The Task Force (at page 61) recommends that the Postal Service be allowed (a) to "explore supplying [certain] services for Federal, State, and local government entities," (b) to "convert[] post offices into contract post offices," (c) to "co-locat[e] with . . . complementary retail establishments," and (d) to "rent[] space to complementary retail establishments." The Task Force characterizes this recommendation as "Legislative." While the Postal Service already has some authority in these areas, it agrees with this designation to the extent that this recommendation calls for expansion of that authority.

With respect to item (a), current law already allows the Postal Service to enter agreements to provide services to other Federal agencies. 39 U.S.C. § 411. The Postal Service pursues such opportunities, and it will continue exploring them. No similar authority exists for partnering with State, local, and tribal governments, however, and so the statute would have to be amended to facilitate such partnerships.

With respect to item (b), the Postal Service is already authorized to dispose of real property (including Post Offices) and to enter into contracts (including for Contract Postal Units). *Id.* § 401(3)-(5). The Postal Service is also authorized to determine the need for Post Offices. *Id.* § 404(a)(3). That authority is subject to procedural and substantive limitations, however. The Postal Service cannot close any Post Office solely for operating at a loss, and, in its closing decisions, it may not

consider compliance with the Occupational Health and Safety Act of 1970. *Id.* §§ 101(d), 404(d)(2)(B). The Postal Service must also comply with public notice requirements, consider certain factors, and ensure that its decision is non-arbitrary and evidence-based. *Id.* § 404(d)(1)-(5). In addition, expansion of outsourcing could require collective bargaining, consultation, and/or binding arbitration with postal labor organizations, as discussed in connection with Recommendation 12 above. To the extent that this recommendation entails expanding the Postal Service's ability to close Post Offices and outsource bargaining-unit work beyond current legal bounds, such expansion would require legislative change.

Many of the same considerations apply to item (c). The same contracting authority noted above covers the Postal Service's ability to "co-locate" by leasing space in non-Postal-Service-owned property. 39 U.S.C. § 401(3)-(5). To the extent that the Task Force envisions shifting bargaining-unit work to the business partner's employees, the same labor considerations would come into play as noted above.

With respect to item (d), the Postal Service already has authority to lease its real property assets to private entities. *Id.*; Order No. 154, Review of Nonpostal Services under the Postal Accountability and Enhancement Act, PRC Docket No. MC2008-1 (Dec. 19, 2008), at 64-68. Indeed, the Postal Service aggressively seeks out-leasing opportunities, when feasible. It should be noted, however, that Postal Service real estate holdings must, in the first instance, be "necessary or convenient in the transaction of its business." 39 U.S.C. § 401(5). In other words, the Postal Service must generally aim to align space with the operational requirements of offering postal services, with revenue-generating out-leasing relegated to a secondary use of excess space (to the extent that market opportunities exist). See Order No. 154 at 64-68. If the Task Force envisions expanding the Postal Service's ability to hold real estate with the primary aim of generating revenue from out-leasing, that would likely require legislative change.

Recommendation 20

***Governance and Oversight.* Strengthen the governance and regulatory oversight of USPS. This could be achieved through reforming, but maintaining, the existing institutional structures or by changing the institutional structures, which would require legislation. (Legislative)**

This recommendation seeks, as a "Legislative" action, reform or change to "existing institutional structures" in order to "[s]trengthen the governance and oversight of" the Postal Service. It is not clear what is intended with this recommendation, as distinct from Recommendations 21 and 22; there is no discrete discussion of the recommendation in the body of the report. The Board of Governors and the Commission have some latitude, within the scope of their existing authority, to make strategic decisions that could be interpreted as strengthening governance and oversight. As the recommendation recognizes, however, any changes to existing institutional structures would require legislation.

To the extent that this recommendation corresponds to the report's discussion of the currently low complement of sitting Governors (pages 61-62), appointment of additional Governors would require action by both the President and the Senate. 39 U.S.C. § 202(a)(1).

Recommendation 21

***Governance and Oversight.* Institute a new policy mandate for management that sets organizational direction and financial targets, which align with a sustainable business model**

and establish an enforcement mechanism if the existing Board is unable to meet these targets. (Legislative)

This recommendation consists of two parts. First, at page 62, it seeks the Postal Service's adoption of "a new policy mandate that resets the USPS's organizational direction and develops financial targets that move the USPS toward the achievement of a sustainable business model. Governance should be strengthened with expanded Board controls and increased accountability." Such internal objective-setting is generally within the Postal Service's existing authority. As the Task Force recognizes elsewhere, however, legislative and regulatory action is needed to establish a sustainable business model and avoid a liquidity crisis (p. 4; see, e.g., Recommendations 8, 17, 18, 19, 23, 24, and 25). Given the statutory constraints on the Postal Service's ability to improve its financial health, it is unclear how reasonable or effective financial targets can be unless and until legislative and regulatory reforms give the Postal Service more control over costs and revenue.

The second part of this recommendation urges the Commission to "be given stronger regulatory authority to take necessary revenue and expense measures" if the Postal Service "is unable to achieve a sustainable business model and satisfy its financial commitments to other federal agencies." The Postal Service agrees with this recommendation's designation as requiring "Legislative" action.

Recommendation 22

***Governance and Oversight.* Strengthen the regulatory oversight role of the PRC, providing the PRC with expanded controls, imposing increased accountability on the USPS. (Legislative)**

The Postal Service agrees that reforming the Commission's powers is properly designated as "Legislative." To the extent that page 62 of the report suggests that the Commission should have more power to overturn and dictate the Postal Service's decisions on service standards, operations, and capital investments, this recommendation appears to be at some tension with Recommendations 3 through 6, which advocate for preserving or expanding the Postal Service's operational discretion.

Recommendation 23

***Benefits.* Pursue reforms proposed to the Federal Employees' Compensation Act that are included in the President's FY2019 Budget. (Legislative)**

The Postal Service agrees that reforming the Federal Employees' Compensation Act is properly designated as "Legislative."

Recommendation 24

***Benefits.* Pursue reform of the Federal Employees' Retirement System (FERS) that would increase employee contributions and move toward a defined contribution system. (Legislative)**

The Postal Service agrees that reforming FERS is properly designated as "Legislative."

Recommendation 25

Benefits. Maintain but restructure the retiree health benefits liability, including the \$43 billion in pre-funding payments that the USPS failed to pay into the Postal Service Retiree Health Benefits Fund (PSRHBF) and the unfunded actuarial liability, with the total liability re-amortized with a new actuarial calculation based on the population of employees at or near retirement age. (Legislative)

The Postal Service agrees that changing how the actuarial liability for the Postal Service's retiree health benefits is calculated would require legislative change. It should be noted that doing so, without more, would not change the actual benefits to which postal annuitants are entitled, the payment of which is ultimately the responsibility of the Postal Service. See 5 U.S.C. §§ 8906(g)(2)(A), 8909a(d)(3).

Conclusion

Thank you once again for our telephone conversation today, and for the opportunity to meet with some of your team yesterday. While we agree with many of the "Administrative" and "Legislative" designations in the recommendations of the Task Force, for the reasons noted above we believe that some of the designations warrant additional review or clarification. We therefore request the opportunity to discuss these items with you further at your convenience. It would be very helpful for us to understand the perspective of the Task Force with regard to its recommendations and its views on implementation as we prepare to advise our clients going forward.

We look forward to discussing these items with you soon.



Thomas J. Marshall

cc: Brent McIntosh, General Counsel, U.S. Department of the Treasury
Governor Duncan
Governor Williams
Postmaster General Brennan
Deputy Postmaster General Stroman



May 31, 2019

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SUBJECT: Legal Concerns With Regard to the Proposed Term Sheet

Dear Steve:

Thank you for your letter dated May 15, 2019, regarding your office's views about the Department of the Treasury's (Treasury's) authority to purchase Postal Service debt obligations, and for our recent meeting concerning the new terms that the Federal Financing Bank (FFB) recently proposed in connection with the establishment of a new Note Purchase Agreement (NPA). I appreciate your continued willingness to engage in a dialogue with me concerning legal matters, both with respect to this issue as well as with respect to other matters that we have dealt with, so that we can both effectively advise our clients. In furtherance of that dialogue, I am sending this memorandum to address legal concerns that we have with the initial proposed terms and conditions that we recently received from the FFB regarding our NPA.

Specifically, on May 17, we received a proposal from the FFB to subject renewal of our NPA to a number of new conditions. Broadly speaking, the proposed conditions fall into three general categories. Conditions 1-3 are debt security terms that would require the Postal Service to establish an escrow account to cover 15 months of interest. Conditions 4-6 would require the Postal Service to obtain FFB consent in the establishment of postal policy and before engaging in various business activities, such as establishment of annual performance targets, and management of major negotiated service agreements. Condition 7 would require the Postal Service, under certain circumstances, to potentially cede to FFB the decision-making authority for matters concerning pricing, collective bargaining, major contracting, structural organization, and the composition of senior management. Finally, conditions 8-11 are transparency and reporting requirements that would require various reports and briefings to the FFB. (A twelfth condition is a remedy provision that provides that the breach of any other condition would entitle the FFB to refuse to purchase a Postal Service obligation issued under the NPA.)

Based on your May 15 letter, we understand Treasury's argument in support of these proposed conditions to rest on two basic points. First, whatever statutory restrictions might arguably apply to the Postal Service-Treasury borrowing relationship under the Postal Reorganization Act of 1970 (PRA), Congress's establishment of the FFB in 1973 created a separate borrowing option free of those restrictions. Second, the borrowing-authority statutes give the FFB and the Postal Service broad authority as to the terms and conditions of borrowing. Further, based on a May 17, 2019, phone conference with our Finance Department as well as our subsequent discussion held with Treasury on May 21, 2019 in which you and I participated, we further understand that the FFB sees these conditions as customary terms that could be imposed on a financially distressed company seeking to borrow money from the market. Finally, from those same discussions on May 21, we understand that you have proposed these terms based on private-sector principles, without consideration of the specific legal issues that are implicated by imposing such terms on the Postal Service, as an entity of the Executive Branch with a specific and unique statute and legal status.

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However, and for the reasons explained below, it is our conclusion that Treasury's view that these terms are appropriate in a commercial context does not adequately address the fundamental constitutional and statutory problems with conditions 4-7, as applied to the Postal Service. Our analysis leads us to conclude that these conditions in particular are legally problematic, and not within the power of the FFB to demand or within the power of the Postal Service to accept. Further, although this document focuses on these particular terms given what we perceive to be their legal infirmities, this should not be interpreted as a concession that the remaining terms, which represent a significant departure from our current agreement, are necessary or appropriate in the context of intergovernmental borrowing.

The remainder of this memorandum discusses why (1) the Postal Service does not believe that it can lawfully agree to essentially cede decision-making authority to the FFB (or, for that matter, to Treasury or private creditors), and (2) why the FFB's separate statutory authority does not change that conclusion. In this regard, although it may well be correct that a private creditor might customarily impose similar control-oriented conditions on a financially distressed private borrower in the course of a market transaction, such terms are not appropriate given the unique legal status of the Postal Service. The FFB is not a private creditor, and the Postal Service is not a private entity, but an independent establishment of the Executive Branch created and governed by statute. 39 U.S.C. § 201; see *U.S. Postal Serv. v. Flamingo Indus. (USA) Ltd.*, 540 U.S. 736, 740-41 (2004). Title 39 of the United States Code sets forth a carefully constructed governance structure for the Postal Service, in which postal powers are vested in the Board and in the Governors. By instead proposing to potentially vest ultimate control and authority over the Postal Service in the hands of the FFB (and hence Treasury), the FFB's proposed conditions 4-7 would, if enacted into the NPA, upend the statutory scheme and usurp Congress's authority over postal organization.

I. THE POSTAL SERVICE CANNOT UNDER CURRENT LAW AGREE TO POTENTIALLY CEDE DECISION-MAKING AUTHORITY TO TREASURY, THE FFB, OR ANY OTHER CREDITOR

Under the Constitution, Congress holds the power to establish the postal system and to make all necessary and proper laws related to that power. U.S. CONST. art. I, § 8, cl. 7, 18. It is also Congress's power to establish "offices" for carrying out the postal laws it enacts. *Id.* art. II, § 2, cl. 2. Only the President can appoint officers to those Congressionally-established offices: for so-called principal officers, this requires Senate confirmation, whereas Congress can alternatively provide for appointment of inferior officers by the President alone or by a designated principal officer. *Id.*

To apply these precepts to the situation at hand, Congress established the Postal Service to fulfill the various operational and business functions in Title 39, United States Code. Congress created particular offices in which it vested decision-making powers: specifically, Congress vested the exercise of most of the powers of the Postal Service in the Board, with certain significant powers reserved to the Governors alone. 39 U.S.C. § 202(a)(1), (c)-(e); see *id.* § 402. Those powers include pricing, product management, control of expenses, collective bargaining, structural organization, and performance planning: the very subjects of the FFB's proposed conditions 4-7. *Id.* §§ 205(a), 401, 404, 1206, 2803-2804, 3632. Powers assigned to the Board can be delegated to committees of the Board or to the Postmaster General and can be re-delegated within the Postal Service. *Id.* § 402. Powers assigned to the Governors cannot under current law be delegated. *Id.* Congress provided for the Governors, as principal officers, to be appointed by the President with Senate confirmation; inferior officers (including the Postmaster General and Deputy Postmaster General) to be appointed by the Governors; and employees of the Postal Service to be appointed by the inferior officers or other employees. See *id.* §§ 202, 402, 1001(a).

Congress gave the Governors "ultimate control and authority" over the Postal Service. *Silver v. U.S. Postal Serv.*, 951 F.2d 1033, 1038 (9th Cir. 1991). It might have been constitutionally valid for Congress to place postal decision-making under Treasury's control. But that is not what Congress and the President chose in the PRA. Indeed, the legislative history of the PRA attests to Congress's manifest intent that the Postal Service be removed from direct control by the President or officers

who serve at the pleasure of the President, such as the Treasury Secretary. See S. REP. NO. 91-912, at 4, 8 (1970); H.R. REP. NO. 91-1104, at 13 (1970); President's Message to Congress Transmitting Postal Reform, H.R. DOC. NO. 91-313, at 51-52 (1970); see also *Status of the United States Postal Service as an "Executive Agency" Under Executive Order No. 12,250*, 5 Op. Off. Legal Counsel 241 (1981) ("Moreover, both the Act and its history reveal that Congress intended to grant the Service at least some measure of insulation from control by the President and to place the Service in a separate category from the conventional executive departments." (citation omitted)).

Hence, the Governors are subject to Presidential removal only for cause, in the interest of vesting the Governors with the independent ability to determine postal policy, including in the establishment of postal prices and in the selection of senior management. 39 U.S.C. § 202(a); *Mail Order Ass'n of Am. v. U.S. Postal Serv.*, 986 F.2d 509, 519-520 (D.C. Cir. 1993) (noting that the governance structure of the Postal Service is designed to confer "independence from political pressures and independence to manage its operations in a professional, businesslike manner," with the Board exercising "policy control [over postal affairs] with functions similar to a board of directors") (citations omitted); see also *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 502 (2010); *Buckley v. Valeo*, 424 U.S. 1, 133 (1976) ("The Court in [*Humphrey's Executor*] carefully emphasized that . . . the members of such agencies were to be independent of the Executive in their day-to-day operations[.]"); *In re Aiken County*, 645 F.3d 428, 442 (D.C. Cir. 2011) (Kavanaugh, J., concurring) ("Because of *Humphrey's Executor*, the President cannot remove an independent agency's officers when the agency pursues policies or makes decisions the President disagrees with.").

Since it is Congress's prerogative to create Executive Branch entities, define their functions, and designate offices to execute those functions, the Executive Branch cannot transfer functions from one Executive Branch unit to another without Congressional authorization. *Centralizing Border Control Policy Under the Supervision of the Attorney General*, 26 Op. Off. Legal Counsel 22, 22-24 (2002) ("This Office has long held that transfers of statutory authority from one department to another 'may normally be accomplished only by legislation or by executive reorganization under the [since-lapsed] Reorganization Act.'" (citations omitted)). As was noted by the Office of Legal Counsel (OLC):

It has long been established that, if the laws . . . require a particular officer by name to perform a duty, not only is that officer bound to perform it, but no other officer can perform it without a violation of the law; and were the President to perform it, he would not only be not taking care that the laws were faithfully executed, but he would be violating them himself.

Id. (citing *The President and Accounting Officers*, 1 Op. Att'y Gen. 624, 625 (1823)).¹

As noted above, Congress designated the officers responsible for postal decision-making. Congress also gave those officers no authority to delegate their authority outside the Postal Service (if at all). The Executive Branch does not have the constitutional power to supersede Congress's choice to delegate the execution of the postal laws to the Postal Service, rather than to Treasury or the FFB.²

¹ Typically, the *President and Accounting Officers* opinion illustrates the point with a hypothetical about the President appointing a postmaster notwithstanding Congress's vesting of that power in the Postmaster General. Absent some other role in the structure that Congress established, the President's constitutional role is limited to removing and replacing an officer who is not faithfully executing the laws. *The President and Accounting Offices*, 1 Op. Att'y Gen. at 626.

² In addition to upending the structure that Congress enacted, there is yet another constitutional problem with Treasury/FFB supervision of the Postal Service. The Constitution gives the President alone the power to supervise principal officers like the Governors, as an incident of his removal power. That constitutional responsibility cannot be delegated to Treasury or FFB, *Centralizing Border Control Policy*, 26 Op. Off. Legal Counsel at 24-25, let alone assumed by Treasury/FFB amid Presidential silence.

As your May 15 letter points out, the statutory provisions on Postal Service borrowing allow the Postal Service to agree to conditions and covenants in any sale of its obligations. See 39 U.S.C. §§ 2005-2006. Section 2006, for instance, notes that the Postal Service obligations purchased by Treasury may be “under such terms . . . as [the Treasury Secretary] and the Postal Service may agree.” Your letter suggests that the plain language of these provisions is broad enough to authorize the FFB’s proposed conditions. While it is true that these provisions give the Postal Service discretion regarding the terms it may agree to, that discretion is not limitless. Those statutory provisions cannot be read in isolation; rather, they must be read in the context of the statute as a whole. *E.g.*, *Sturgeon v. Frost*, 136 S. Ct. 1061, 1070 (2016). As explained above, the same PRA that enacted Sections 2005 and 2006 created the Postal Service as an independent establishment, insulated it from direct political control, and designated the Governors and Board as the officers responsible for making postal policy and business decisions. We do not believe that a provision that simply authorizes the Postal Service to agree to conditions when exercising its borrowing authority can reasonably be construed to allow the Postal Service and another Executive Branch entity to agree to act inconsistently with the governance structure that Congress painstakingly established in the same Act. *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 468 (2001) (“Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions – it does not, one might say, hide elephants in mouseholes.” (citations omitted)).³

As we noted in a previous letter to you, the legislative history of the PRA supports this understanding of the Postal Service’s borrowing authority. Prior to enactment, Treasury’s Under Secretary for Monetary Affairs explained that, under the PRA provisions concerning borrowing, the Treasury Secretary should neither “assert substantive control over the Postal Service” nor “[]ever put himself in a position where he is preventing the postal authority from obtaining what financing [the Postal Service] think[s] is necessary.” *Postal Modernization: Hearings Before the Senate Comm. on Post Off. & Civil Serv.*, 91st Cong., at 311-12 (1969) (remarks of Under Secretary Paul A. Volcker); see also *id.* at 305-06 (“stress[ing]” that the Treasury Secretary’s purchase option would not “interfer[e] with the financing of essential Postal Service activities or arrogat[e] to the Secretary any control over the operations of the Postal Service”); *Post Office Reorganization, Part III: Hearings Before the House Comm. on Post Off. & Civil Serv.*, 91st Cong. 1165 (1969) (statement of Under Secretary

³ As noted earlier, Treasury asserts that private lenders would demand a similar cession of control. However, the Postal Service could not accede to such a demand from a private lender under Section 2005, any more than it can accede to transferring control of the Postal Service to another Executive Branch entity. In effect, this scenario would involve the Board and the Governors re-delegating their governmental decision-making authority to a private party. Such a cession would violate another principle of constitutional law. According to the so-called non-delegation doctrine, “Congress may employ private entities for ministerial or advisory roles, but it may not give these entities governmental power over others.” *Pittston Co. v. United States*, 368 F.3d 385, 395 (4th Cir. 2004) (agreeing with the Third Circuit’s summary of the doctrine in *United States v. Frame*, 885 F.2d 1119 (1989)) (emphasis omitted); see *Am. Ass’n of R.R. v. U.S. Dep’t of Transp.*, 721 F.3d 666, 670-72 (D.C. Cir. 2013), *vacated on other grounds*, 135 S. Ct. 1225 (2015); see also *Dep’t of Transp. v. Am. Ass’n of R.R.*, 135 S. Ct. at 1252-53 (Thomas, J., concurring). Where an agency delegates to private individuals its decisionmaking authority vested by statute, the harm to political accountability “is doubled in degree in the context of a transfer of authority from Congress to an agency and then from agency to private individuals. The vitality of challenges to the former type of transfer is suspect, but to the latter, unquestionable.” *Nat’l Ass’n of Regulatory Utility Comm’rs v. FCC*, 737 F.2d 1095, 1143 n.41 (D.C. Cir. 1984). This conclusion further demonstrates that, while commercial principles can play a role in the interpretation and application of 39 U.S.C. §§ 2005 and 2006, those principles must be applied within limits imposed by the Constitution and by statute. *Cf. Scope of Treasury Department Purchase Rights with Respect to Financing Initiatives of the U.S. Postal Service* [hereinafter “*Treasury Purchase Rights*”], 19 Op. Off. Legal Counsel 238, 245 (1995) (using commercial principles to interpret Section 2006(a) only “[i]n the absence of contrary language in the statute”).

Volcker) (Treasury's role should be understood as limited, lest "some outsider looking at the bill" might construe it as "giv[ing] the Secretary of the Treasury] certain powers over the Post Office Department that he shouldn't have"); see H.R. REP. NO. 91-1104, at 21 (1970).⁴ Therefore, the borrowing provisions were intended simply to ensure that Treasury could coordinate overall Government debt issuances (including those of the Postal Service), without in any way suggesting that they could be used to cede to Treasury substantive control of the Postal Service.

Case-law on the analogous relationship between the Postal Service and the Department of Justice (DOJ) further buttresses the analysis here. In at least two cases, DOJ has asserted a prerogative to control the Postal Service's litigating position, settlement of claims, and ability to represent itself. On both occasions, courts held that, notwithstanding statutory authority for DOJ involvement in Postal Service litigation, DOJ's assertions of control ran afoul of Congress's decision to confer independent decision-making authority on the Postal Service. *Mail Order Ass'n of Am.*, 986 F.2d at 522-23 ("Respect for the language of the [PRA] and its underlying purposes simply will not permit the conclusion that Congress intended simultaneously to give the Postal Service such broad and unfettered discretion and to condition its judicial review options on [DOJ]'s – or even the President's – approval."); *Leonard v. U.S. Postal Serv.*, 489 F.2d 814, 817-18 (1st Cir. 1974). To paraphrase the court in *Leonard*, "It was the intent of the Congress to create an independent Postal Service. It would be anomalous to hold that decisions normally committed wholly to the independent discretion of the Service are made subject to [Treasury or FFB] veto power when incident to [borrowing]." *Leonard*, 489 F.2d at 817-18.

Congress could vest ultimate decision-making powers concerning postal operations in officers outside the Postal Service, if it wished. Indeed, the Postal Service is already subject to final decision-making authority exercised by various other Executive Branch entities, such as the Federal Trade Commission, the Postal Regulatory Commission, and the Equal Employment Opportunity Commission. *E.g.*, 39 U.S.C. §§ 409(d)-(e), 3662(c)-(d); 42 U.S.C. § 2000e-16. In contrast to all of those explicit provisions, however, there is no statutory authority about which we are aware that would allow Treasury to supervise and potentially supersede decisions of the Governors and the Board.⁵

In summary, Congress did not delegate postal decision-making to Treasury, and we do not believe there is a reasonable basis to construe the borrowing provisions of the Postal Service's statute as a tacit grant of authority to the Postal Service and Treasury to agree to such a transfer of control. To do so would be contrary to the statutory structure that Congress carefully and deliberately created. Under the Constitution, such choices lie with Congress, not with the Executive Branch.

⁴ OLC expressly relied on this legislative history to interpret the meaning of 39 U.S.C. §§ 2005-2006. See *Treasury Purchase Rights*, 19 Op. Off. Legal Counsel at 245 n.5; *Authority of the Secretary of the Treasury Regarding Postal Service Bond Offering*, 17 Op. Off. Legal Counsel 6, 8-10 (1993) (quoting both the House and Senate Hearings in explaining that the statute itself may be ambiguous, but the "legislative purpose" behind the statute is clear).

⁵ The lack of any such obvious statutory authority is also distinguishable from statutes that have expressly permitted Treasury and other agencies to assume control of an institution. 12 U.S.C. § 1455(f) (providing Treasury with temporary authority to acquire equity in the Federal Home Loan Mortgage Association (Freddie Mac), and authorizing Treasury to consider "[r]estrictions on the use of Corporation resources, including limitations on the payment of dividends and executive compensation and any such other terms and conditions as appropriate for those purposes," among other things); see 12 U.S.C. § 4617 (authorizing the Federal Housing Finance Agency to place Freddie Mac and other housing-finance institutions into conservatorship). In contrast to these clear statutory authorities, the PRA is devoid of any similarly explicit provision allowing Treasury, through its purchase of obligations, to potentially assume control over Postal Service decisions. As noted above, the legislative history of the PRA indicates that quite the opposite is true.

II. WE CANNOT FIND ANYTHING IN THE FFB'S GOVERNING STATUTE THAT PROVIDES IT WITH AUTHORITY TO POTENTIALLY ASSUME CONTROL OVER THE POSTAL SERVICE

Your May 15 letter also suggests that, whatever limitations Congress imposed on the borrowing relationship between the Postal Service and Treasury, the FFB exists outside those limitations. To the extent that you suggest that Congress implicitly authorized the FFB to exercise substantive control over postal decision-making when it enacted the Federal Financing Bank Act of 1973 (FFBA), such an interpretation appears to run counter to the FFBA's text and legislative history.

As your letter notes, the FFBA was enacted a mere three years after the PRA and created the FFB as "a body corporate" and "an instrumentality of the United States Government" that is "subject to the general supervision and direction of the Secretary of the Treasury." 12 U.S.C. § 2283. The FFB is governed by a five-member Board of Directors with the Treasury Secretary serving as Chairman, and with the other four directors "appointed by the President from among the officers or employees of the Bank or of any Federal agency." *Id.* § 2284(a). Currently, the directors are all officials of the Treasury. FFB, 2018 Annual Report 6, <https://go.usa.gov/xmvzY>. By statute, the FFB is authorized to purchase obligations of any federal agency, and each federal agency that is authorized to sell obligations is authorized to sell such obligations to the FFB. *Id.* § 2285(a).

As explained in the preceding section, when Congress intends to vest one Executive Branch entity with the power to potentially assume substantive control over a separate entity, Congress says so explicitly. Congress did not do so in the FFBA. Rather, the FFB was created merely to "assure coordination of [Federal financing] programs with the overall economic and fiscal policies of the Government" and to reduce the cost and market disruption of federal borrowings. *Id.* § 2281. The FFB exercises powers otherwise vested in Treasury and is expressly "subject to the direction and supervision of the Secretary of the Treasury." 31 U.S.C. § 305. For example, the FFB can exercise the powers assigned to Treasury under 39 U.S.C. § 2006. Nothing in the FFBA's language suggests that the FFB's lending powers were designed to be broader than those afforded Treasury as a general matter. Accordingly, while the FFB has the authority to purchase Postal Service obligations "on terms and conditions determined by the [FFB]," 12 U.S.C. § 2285(a), the statute nowhere suggests that such terms and conditions can extend beyond the terms and conditions that the Secretary could otherwise establish. Indeed, the FFB's purpose of simply coordinating overall Federal financing programs aligns precisely with the role that Congress contemplated for Treasury under 39 U.S.C. § 2006(a), as discussed above.

The FFBA's legislative history confirms that Congress did not intend for the FFB to have any authority to exercise substantive control over the Postal Service's statutory duties or powers. To the contrary, the committee reports accompanying the FFBA explained that the FFB was not authorized to lend money to the Postal Service beyond the scope of Treasury's powers under 39 U.S.C. § 2006(a):

Your committee has reviewed the status of the authorities of the U.S. Postal Service to issue obligations as to whether this authority under the Postal Reorganization Act would be affected by any provision of this bill. Your committee intends that this bill will not impair or diminish the authority of the Postal Service to issue obligations under the financing provisions of the Postal Reorganization Act. Under the Postal Reorganization Act, the Secretary of the Treasury may purchase all Postal Service obligations if he does so within the time period prescribed in 39 U.S.C. 2006(a). The bill would have the effect of giving the Secretary the authority to exercise this right by requiring the Postal Service to sell its securities to the Federal Financing Bank. However, if the Bank or the Secretary did not act to take up a proposed Postal borrowing within the prescribed time limit, the Postal Service could, on its own initiative, borrow in the private market under its independent Postal Reorganization Act authority. Your Committee believes that no specific amendment is required to preserve the independent financing authority of the Postal Service.

H.R. REP. NO. 93-299, at 5 (1973); accord S. REP. NO. 93-166, at 3 (1973); H.R. REP. NO. 92-1478, at 6-7 (1972);⁶ see also *Treasury Purchase Rights*, 19 Op. Off. Legal Counsel at 243 (interpreting the 1973 House committee report as “intended to provide broad assurance that the FFBA would not unduly impair USPS’ existing financing authority under the PRA”). The FFB thus was conceived of as an agent for Treasury’s exercise of its purchase option under 39 U.S.C. § 2006(a), and not as an entity with an independent purchase option.

As with the PRA, Congress’s expression of the FFBA’s intent was largely based on the views of Treasury itself. *Federal Financing Bank Act: Hearings Before the House Comm. on Ways & Means*, 93d Cong. at 18 (1973) (remarks of Under Secretary Volcker) (“The principal effect of the Federal Financing Bank in this respect is that the Secretary of the Treasury could say to the postal service that he is going to take that issue [under 39 U.S.C. § 2006(a)] for the Federal Financing Bank rather than for the Treasury itself.”); *Federal Financing Bank Act: Hearings Before the House Comm. on Ways & Means*, 92d Cong. at 26 (1972) (remarks of Under Secretary Volcker) (characterizing “the only really essential” effect of the FFBA on Postal Service borrowing as “that the Secretary of the Treasury or the Board of Directors of the Federal Financing Bank would” exercise the right of first purchase).⁷

Moreover, the Administration that proposed the creation of the FFB assured the Postal Service and Congress that the FFBA would not give the FFB or Treasury the power to control Postal Service decision-making. Upon receiving a letter outlining the Postmaster General’s concerns about the proposed FFBA, the Office of Management and Budget (OMB) replied that the FFB’s role would be limited to coordinating Federal borrowing activities;

the proposed legislation does not require or intend that the Treasury Department have any role in or any veto power over the development or implementation of the programs of the various agencies. Thus, the proposed legislation contemplates no involvement of the Treasury or the Federal Financing Bank in formulating, reviewing, or otherwise affecting the structure or scope of agency programs.

Letter from Frank C. Carlucci, Executive Director, OMB, to Postmaster General E.T. Klassen, Apr. 8, 1972, reprinted in *Federal Financing Authority: Hearings Before the Senate Comm. on Banking, Housing & Urban Affairs*, 92d Cong. at 77 (1972).

In sum, the provision of the FFB’s statute allowing it to set terms and conditions for the purchase of Postal Service debt cannot reasonably be interpreted as giving FFB the authority to assert substantive control over the Postal Service. A contrary conclusion is not supported by the FFBA’s text and inconsistent with the expressed intent of the Congress and Administration that enacted the FFBA.

⁶ As noted in your letter, the 1972 House committee report, at slight variance from the later reports, cast the FFB as “another potential purchaser of postal obligations.” H.R. REP. NO. 92-1478 at 7. This stray characterization, however, does not support an inference that the FFB’s purchase option is independent from Treasury’s, for three reasons. First, the sentence is facially ambiguous: given Treasury’s oversight of the FFB, the FFB’s separate corporate identity does not necessarily imply separate substantive authority regarding Postal Service borrowing. Second, contrary to any such implication and consistent with the later committee report language excerpted above, the sentence that follows characterizes the FFB or Treasury exercising the purchase option under 39 U.S.C. § 2006(a). *Id.* Finally, the 1972 committee report was superseded by the 1973 committee reports in any event, and those later reports are unambiguous on this point.

⁷ The Postal Service expressed its satisfaction with these assurances that the FFBA would not impair its ability to borrow under the PRA. *Federal Financing Bank Act*, 92d Cong. at 40-41.

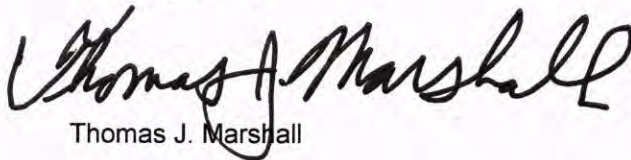
Finally, even if there were some indication of legislative intent to allow the FFB to assume decision-making powers as a condition of lending (which we cannot find), it would be unconstitutional for the FFB to exercise such powers. As noted in section I above, the Constitution's Appointments Clause requires each freestanding component of the Executive Branch to be headed by a "principal officer" appointed by the President and confirmed by the Senate. See *Free Enter. Fund*, 561 U.S. at 511. Because the Postal Service is such a freestanding component, and because the FFB Board of Directors consists predominantly of inferior officers or employees,⁸ the Appointments Clause bars the FFB from acting as an agency head and subordinating the Postal Service Governors, whom Title 39 designates as principal officers. See *Silver*, 951 F.2d at 1038-39.⁹ Even if the FFB were headed by a principal officer, however, it would violate the Constitution's separation of powers at any rate for the FFB to assume control of the Postal Service without express Congressional authorization.

III. CONCLUSION

In sum, while proposed conditions 4-7 might be customary terms in commercial transactions between private parties, they pose significant constitutional and statutory problems in the context of a transaction between the Postal Service and Treasury (whether acting through FFB or in its own name). For that reason, we do not believe they can lawfully be a part of any Note Purchase Agreement between the Postal Service and FFB.

Please do not hesitate to give me a call if you have any questions or concerns. I hope this information is helpful.

Very truly yours,



Thomas J. Marshall

cc: Mr. Brent McIntosh

⁸ As explained earlier in this section, the FFB is headed by a Board of Directors chaired by the Treasury Secretary, with four other Directors appointed by the President (without Senate confirmation) from the ranks of Executive Branch "officers or employees." 12 U.S.C. § 2284(a). Because the FFB Directors are not subject to Senate confirmation, they cannot be considered principal officers under the Appointments Clause, except, arguably, for the Treasury Secretary and any other Directors who are principal officers of another agency. At present, however, four of the five current FFB Directors are inferior officers or employees at Treasury. FFB, 2018 Annual Report at 6. The FFB Board makes decisions by majority vote, meaning that those four Directors could override the Treasury Secretary's vote. Bylaws of the Federal Financing Bank § 3.08 (2006), <https://go.usa.gov/xmvGN>.

⁹ Here, too, the situation with Fannie Mae and Freddie Mac is distinguishable. To the extent that Treasury was exercising significant governmental authority to control the institutions (on par with the authority that Congress delegated to the FHFA, see 12 U.S.C. § 4617), it is notable that Congress conferred that authority on the Secretary of the Treasury, a principal officer, and not on the FFB. See 12 U.S.C. § 1455(l). The agreements that resulted were executed by Treasury, and not by the FFB as a delegee. Amended and Restated Senior Preferred Stock Purchase Agreement Between Treasury and Freddie Mac.



August 6, 2019

Steven D. Laughton
Assistant General Counsel (Banking and Finance)
United States Department of the Treasury
1500 Pennsylvania Avenue, NW
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SUBJECT: Continuing Legal Concerns Regarding the Federal Financing Bank's Proposed
Lending Conditions

Dear Mr. Laughton:

Thank you for your letter dated June 28, 2019 (June 28 letter), discussing the concerns we expressed in our May 31 letter with the proposal from the Federal Financing Bank (FFB), which would subject renewal of our Note Purchase Agreement (NPA) to a number of new conditions. We did not previously respond to your letter based upon the advice of Gary Grippo, but given the more recent communications between Mr. Grippo and our Chief Financial Officer, it now seems incumbent on us to do so. Unfortunately, as discussed below, your letter does not adequately address the substantial constitutional and statutory issues at stake, and our concerns therefore remain.

There appears to be no dispute between us that Congress vested the exercise of most of the decision-making powers of the Postal Service in the Board of Governors, with certain significant powers reserved to the Governors alone. 39 U.S.C. § 202(a)(1), (c)-(e); *see id.* § 402. Those powers include pricing, product management, control of expenses, collective bargaining, structural organization, and performance planning. *Id.* §§ 205(a), 401, 404, 1206, 2803-2804, 3632; *accord Silver v. U.S. Postal Serv.*, 951 F.2d 1033, 1038 (9th Cir. 1991) (Congress gave the Governors "ultimate control and authority" over the Postal Service). There is likewise no dispute between us that these powers are the subject of FFB's proposed Conditions 4-7. Finally, we both recognize the proposition that, when Congress vests certain decision-making authority and responsibilities in one Executive Branch entity, that entity cannot transfer (or "subdelegate") such authority and responsibilities to another Executive Branch entity without explicit congressional authorization to that effect. *See U.S. Telecom. Ass'n v. FCC*, 359 F.3d 554, 565-66 (D.C. Cir. 2004); *accord Centralizing Border Control Policy Under the Supervision of the Attorney General*, 26 Op. Off. Legal Counsel 22, 22-24 (2002).

Where we diverge is over the issue of whether FFB's proposal violates that "subdelegation" doctrine. In our letter of May 31, we articulated at length that Congress specifically designated the officers responsible for postal decision-making and gave such officers no authority to transfer their powers outside the Postal Service, and asserted that agreeing to the NPA conditions would accordingly be an impermissible subdelegation. Your June 28 letter appears to be suggesting that the NPA conditions do not even implicate the "subdelegation" doctrine because they would merely give FFB an opportunity to provide "input," which the Postal Service is free to reject. Alternatively, your letter contends that, even if the NPA conditions would require the Postal Service to cede statutory authority and thereby implicate the subdelegation doctrine, they still do not violate it, either because Congress explicitly authorized the Postal Service to agree to "conditions" on borrowing or because the scope of such subdelegation would be narrow. As discussed below, however, these arguments are based on both an inaccurate summary of the proposed NPA conditions and a misreading of the relevant legal authorities, and do not adequately address (let alone minimize) the concerns we previously raised.

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I. FAR FROM MERELY ALLOWING FFB TO PROVIDE “INPUT,” THE PROPOSED CONDITIONS WOULD CEDE SIGNIFICANT DECISION-MAKING AUTHORITY TO FFB

Your June 28 letter appears to be asserting that the proposed NPA conditions would not effectuate a transfer of authority in the first place, and that they therefore do not implicate the subdelegation doctrine at all. The central premise for this argument is that, rather than transferring decision-making authority to FFB, the NPA conditions would merely be allowing FFB “to provide input on USPS’s activities in exchange for financing, but final decision-making authority would remain in all instances with USPS.” June 28 letter at 1; *accord id.* at 2 (the NPA conditions “would give FFB high-level input”).

This premise is undermined by the plain terms of the proposed conditions. Despite your claims to the contrary, such conditions are framed in terms not of “input,” but of “consent” (conditions 4-6) and a “right to approve” (condition 7). Those words mean the opposite of “input.” “Input” connotes providing advice to a decision-maker, which the decision-maker may consider but is not bound to accept, whereas “consent” or “approval” indicate that the purported decision-maker cannot implement a proposal without the “advising” party’s agreement.¹ By their very terms, then, Conditions 4-7 would not allow FFB merely to provide “input” for the Postal Service’s Governors and Board to consider in making decisions. To the contrary, the conditions are worded to bar the Governors and Board from making significant decisions without obtaining FFB approval, thereby converting FFB into the ultimate decision-maker.²

Your June 28 letter goes on to suggest that the FFB’s proposed role would be “modest” and that the Postal Service “would retain substantial authority” and “considerable discretion” even over the activities described in Conditions 4-7. June 28 letter at 2. For example, although FFB’s consent would be required for business strategies and performance targets (Conditions 4 and 6), the Postal Service would still be responsible for “draft[ing] these strategies and targets,” as well as decisions regarding how to implement FFB-approved strategies and meet FFB-approved targets. *Id.* Similarly, for major NSAs (Condition 5), FFB’s consent role would still leave the Postal Service with discretion “to negotiate [covered] agreements.” *Id.* However, in all respects, the Postal Service’s exercise of any such “authority” would be wholly subordinate to FFB’s decision-making. In that regard, the proposed Postal Service-FFB relationship would essentially mirror the current relationship between Postal Service management and the Governors or Board, with the former carrying out the strategic decisions of the latter. By substituting FFB for the Governors and Board as the ultimate decision-maker on major Postal Service initiatives, the proposed conditions would strip, not preserve, Postal Service decision-makers’ authority.

Finally, your letter asserts that, despite the “consent” and “approve” language in Conditions 4-7, the Postal Service is always free to ignore FFB’s wishes and therefore would remain in “full control” over the covered activities, because the only consequence of disobeying FFB’s demands is that it would lose “FFB’s financial support” and would therefore need to seek alternative financing. June 28 letter

¹ Compare BLACK’S LAW DICTIONARY, “consent” (11th ed. 2019) (“A voluntary yielding to what another proposes or desires; agreement, approval, or permission regarding some act or purpose, esp. given voluntarily by a competent person; legally effective assent.”) and *id.*, “approve” (“To give formal sanction to; to confirm authoritatively.”), with Merriam-Webster.com, “input,” <https://www.merriam-webster.com/dictionary/input> (last visited July 2, 2019) (“something that is put in: such as: advice, opinion, comment”).

² See *Cooling Water Intake Structure Coalition v. EPA*, 905 F.3d 49, 79-80 (2d Cir. 2018) (EPA did not delegate decisionmaking authority to separate federal agencies by promulgating rule requiring program directors to consult with agencies and allowing them to provide technical assistance, because the rule did not require EPA to accept the agencies’ recommendations and clearly contemplated that EPA would independently make a final determination); *accord U.S. Telecom. Ass’n*, 359 F.3d at 568 (“a federal agency may turn to an outside entity for advice and policy recommendations, provided the agency makes the final decisions itself”).

at 1-2. Put differently, you appear to be suggesting that, because the Postal Service could theoretically breach the conditions of the NPA, and because the consequences of such a breach are relatively minor, agreeing to be bound to such conditions cannot really constitute a subdelegation of power to FFB.

This suggestion is incorrect in two fundamental respects. First, it ignores the legal effect of the NPA, which would become a binding legal document through which, pursuant to its terms, the Postal Service would agree to legally transfer decision-making powers to FFB. It therefore ignores the key underpinning of the subdelegation doctrine, which is that a federal entity cannot agree to cede such powers absent congressional authorization. It is no answer that the Postal Service can later undo one legal violation (transferring decision-making powers without congressional authorization) only by committing a separate legal violation (breaching the agreement to transfer those powers). The point of the subdelegation doctrine is that the Postal Service cannot transfer its decision-making powers in the first place.

Second, your letter's suggestion that the consequences of breach are insubstantial stands in stark contrast to the legislative history of the Postal Reorganization Act (PRA), which created the Postal Service and which enacted the borrowing provisions at issue. In crafting the statutory provisions that authorize Treasury-Postal Service lending (including lending from the FFB), Congress was plainly concerned that Treasury's lending power might place the Postal Service in a position where it would have to choose between forgoing the ability to access financing from Treasury and conforming to Treasury's preferences and directives. Treasury explicitly disavowed the notion that it would use the substantial threat of cutting off credit as leverage in an attempt to shape Postal Service decisions, or would otherwise use its lending authority to "arrogat[e] to the Secretary any control over the operations of the Postal Service." *Postal Modernization: Hearings Before the Senate Comm. on Post Off. & Civil Serv.*, 91st Cong., at 305-06 (1969) (remarks of Under Secretary Paul A. Volcker).³ Yet that is exactly what your letter is proposing here. Treasury is free under the statute to decline to purchase the Postal Service's obligations. 39 U.S.C. § 2006(a). It is not free to elect to purchase the Postal Service's obligations while conditioning the purchase on a surrender to Treasury or FFB of decisions that the Congress vested in the Postal Service.

II. YOUR LETTER DID NOT ADDRESS THE SIGNIFICANT LEGAL PROBLEMS WITH SUCH A CESSION OF CONTROL

Because the proposed NPA conditions would require the Postal Service to transfer to Treasury or FFB powers that Congress vested in the Postal Service, the remaining issue is whether Congress has explicitly authorized such a transfer. In our May 31 letter, we explained that Congress has not authorized the Postal Service to cede to Treasury, FFB, or any other outside party its statutory powers to make decisions concerning prices, agreements, budgets, or the other matters implicated by Conditions 4-7.⁴ Your June 28 letter makes three basic points in response, but none of the points comes close to establishing that the transfer of power contemplated by the NPA conditions is legally permissible.

First, your letter reprises the position advanced in your earlier correspondence that FFB and the Postal Service have broad statutory authority to agree on borrowing "terms and conditions," June 28

³ As noted in our May 10 and 31 letters, DOJ's Office of Legal Counsel (OLC) has relied on Under Secretary Volcker's statements of "legislative purpose" when interpreting the nature of the Postal Service-Treasury/FFB borrowing relationship. *Authority of the Secretary of the Treasury Regarding Postal Service Bond Offering*, 17 Op. Off. Legal Counsel 6, 8-10 (1993); see *Scope of Treasury Department Purchase Rights with Respect to Financing Initiatives of the U.S. Postal Service*, 19 Op. Off. Legal Counsel 238, 245 n.5 (1995).

⁴ As we previously noted, the Postal Service's governing statute is distinguishable, in this regard, from statutory schemes that have expressly allowed Treasury to assume control of distressed financial institutions.

letter at 1, 3, such that the Postal Service would be “exercising its own specific statutory authority” by agreeing to the terms and conditions proposed by FFB. *Id.* at 1 (emphasis in original). In other words, you appear to contend that relinquishment of the Postal Service’s statutory authority to FFB is a valid subject of the “terms and conditions” that the parties can attach to borrowing. As we explained in our May 31 letter, however, that vague “terms and conditions” phrase must be read in the context of the statute as a whole and in light of the legislative history of both the PRA and the Federal Financing Bank Act, which made clear that Congress did not intend to give either Treasury or FFB any power to control Postal Service decision-making through its lending authority. Your June 28 letter does not respond to these points, let alone explain the basis for your departure from the consistent expressions of intent from Congress, the Administration, and Treasury set forth in that legislative history. As we pointed out previously, when read in their full statutory context, vague statutory references to “conditions” of borrowing cannot subvert the clearly expressed Congressional intent to specifically designate the officers responsible for postal decision-making, and to provide them with no authority to delegate or transfer that authority outside the Postal Service.⁵ For similar reasons, the Postal Service could not cede control to a private lender, and so it is irrelevant whether private lenders might demand such terms of other borrowers or whether such terms are commercially reasonable in other contexts. There is therefore also nothing “surprising” about the fact that Congress did not give FFB and the Postal Service the freedom to “mutually agree on commercially reasonable terms” without regard to the statutory scheme governing both entities.

Second, your June 28 letter notes the absence of any cases “where courts have found that an agency lacks authority to consent to a lending arrangement such as this one.” June 28 letter at 2. That may be true, but there are also no cases holding that an agency has that authority, let alone in this context. The absence of directly relevant case-law proves nothing except that this situation may be unprecedented. Indeed, the case-law on which we both have relied, as well as the OLC opinions that we have cited, clearly support the principle that one agency cannot transfer control of a statutory function to another agency without Congressional authorization, so it should not be surprising that Treasury and other agencies have simply tended to act in cognizance of the Constitution’s separation of powers requirements.

Third, your June 28 letter suggests that, because the NPA conditions would shift only a “limited band” of the Postal Service’s decision-making authority to FFB, and “would also not expressly shift any regulatory authorities,” concerns about improper subdelegation are misplaced. June 28 letter at 2-3. This position is based on a misreading of the cases cited in your letter, which wholly support our position. To be sure, the NPA conditions would not shift all of the Postal Service’s authority to the FFB – as your letter notes, the Postal Service would still retain the power to exercise “other statutory authorities” and to approve negotiated service agreements (NSAs) below the \$70 million revenue threshold. *Id.* at 1, 2. But the issue is not whether one agency has usurped every power that Congress has vested in a different agency, but rather whether one agency has arrogated to itself the decision on how to exercise any of another agency’s powers. That much is clear from *U.S. Telecom Ass’n*, the leading case on the subdelegation doctrine. There, the D.C. Circuit concluded that the Federal Communications Commission (FCC) had improperly delegated to state commissions the determination of whether “a specific statutory requirement” had been satisfied. 359 F.3d at 567. The fact that the FCC would still have had other statutory duties, arising under different statutory provisions, did not give the court pause: indeed, it was not a factor in the court’s analysis at all.

⁵ By contrast, in *Gentiva Healthcare Corp. v. Sebelius*, 723 F.3d 292, 296 (D.C. Cir. 2013), the court found an “affirmative showing” of congressional intent to allow the HHS Secretary to subdelegate decision-making to a private contractor, where a statutory provision granted the Secretary broad power to “perform any of [her] functions under this subchapter directly, or by contract . . . , as [she] may deem necessary.” 42 U.S.C. § 1395kk(a) (emphasis added). No similar language appears in Title 39. And as noted in our May 31 letter, Title 39’s “terms and conditions” language is nowhere near as explicit as other statutory provisions that have expressly allowed Treasury to assume decision-making for other Federal entities.

The other cases on which your letter relies also do not support your position. Those cases involve a wholly different factual scenario, in which an agency that possesses the statutory authority to render a multi-factor decision may condition one element of such decision on an outside party's assessment or approval. See generally *La. Forestry Ass'n v. Sec'y, U.S. Dep't of Labor*, 745 F.3d 653, 672-73 (3d Cir. 2014); *Fund for Animals v. Kempthorne*, 538 F.3d 124, 133-34 (2d Cir. 2008). While there is some (but not unanimous) support for the proposition that such a scenario would not constitute an improper delegation, *La. Forestry Ass'n*, 745 F.3d at 672-73,⁶ that proposition has no utility here. Instead, Conditions 4-7 would have FFB making final decisions that would cover the totality, not merely a discrete factor, of decisions on strategic planning, budgets, pricing, contracts, and structure, and would effectively allow FFB to make the Postal Service's most significant business decisions for it.⁷ As such, the situation is closer to that in *Defenders of Wildlife v. Gutierrez*, 532 F.3d 913, 926-27 (D.C. Cir. 2008), where the court held the Coast Guard to have impermissibly subdelegated its authority to establish traffic separation schemes when it merely entered into the Code of Federal Regulations schemes dictated by the International Maritime Organization. Nor does the "narrow[] band of discretion" principle announced in *Kempthorne* apply here: under no condition would the Postal Service exercise ultimate oversight and revocation. See *Kempthorne*, 538 F.3d at 133-34. Simply put, these cases bolster our point that a shift of decision-making power from the Board or the Governors to FFB, such as the proposed conditions seek to compel, would be unlawful.

III. CONCLUSION AND NEW PROPOSAL

In sum, whether or not terms like proposed Conditions 4-7 might be customary in commercial transactions between private parties, the case-law clearly indicates that the Postal Service cannot cede to Treasury the entirety of significant decisions that Congress vested in the Postal Service. That is precisely what proposed Conditions 4-7 would require. FFB would not merely be submitting input for the Postal Service's consideration (and possible rejection) or determining one part of a larger decision that would still ultimately be made by the Postal Service. Whatever other "conditions" the Postal Service and FFB might enter into as part of a revised NPA, they cannot include terms that would vitiate Congress's carefully considered intent and the Constitution's separation of powers. Accordingly, the Postal Service cannot agree to Conditions 4-7 in FFB's term sheet in their current form.

In an effort to maintain our longstanding financing relationship and to address your concerns over having adequate input on key postal decisions, but upon terms that are within the bounds of the law, we are prepared to make a counter-proposal to the term sheet you provided. Specifically, our counter-proposal largely memorializes those changes to Conditions 1-3 and 8-12 on which we appear to agree, and would replace Conditions 4-7 with new conditions stating that:

⁶ It should be noted that the holding in *Louisiana Forestry Association* remains a matter of contention. In that case, the Third Circuit held that the Department of Homeland Security (DHS), which had the authority to administer the H-2B visa program after "consultation" with appropriate agencies, did not impermissibly subdelegate its authority by deciding that one criterion for granting such visas was a petitioner's receipt of a temporary labor certification from the Department of Labor (DOL). That holding was rejected by the Tenth Circuit, which concluded that the role DHS afforded to DOL exceeded mere "consultation." See *G.H. Daniels III & Assocs. v. Perez*, 626 Fed. Appx. 205, 210-12 (10th Cir. 2015).

⁷ Additionally, even where an agency may condition one element of a multi-factor determination on a decision by an outside agency, such condition is permissible only if "there is a reasonable connection between the outside agency's decision and the federal agency's determination." *U.S. Telecom Ass'n*, 359 F.3d at 567. As noted in the previous footnote, it is arguably reasonable for DHS to condition a grant of an H-2B visa on temporary labor certification from DOL, given DOL's expertise in labor and employment matters and the long history of its involvement in visa certifications. See *La. Forestry Ass'n*, 745 F.3d at 673-74. Here, by contrast, Treasury has no particular expertise in such matters as postal operations, pricing, or collective bargaining, and there is no history of conditions like those proposed here.

- The Postal Service shall provide FFB with advance notice of official annual performance goals that it intends to publish in its annual reports that are submitted to Congress and the Postal Regulatory Commission, and shall provide FFB with an opportunity to comment and provide input upon such proposed performance goals before they are published and submitted.
- At least quarterly, the Postal Service shall orally brief the FFB's officers and/or board members on its broad strategy to return the Postal Service to financial stability, and shall provide FFB with an opportunity to comment and provide input upon such strategy. The Postal Service shall also provide FFB with any comprehensive, multi-year business plan that it develops for the purpose of returning the Postal Service to financial stability, and shall provide FFB with an opportunity to comment and provide input on such business plan.

A copy of our counter-proposal is enclosed. I understand that the Postmaster General will be communicating directly with Secretary Mnuchin concerning this matter. In the interim, please do not hesitate to give me a call if you have any questions or concerns. I hope this information is helpful, and that this matter can be brought to a successful resolution.

Very truly yours,

A handwritten signature in blue ink, reading "Thomas J. Marshall". The signature is fluid and cursive, with the first name "Thomas" and last name "Marshall" clearly legible.

Thomas J. Marshall

Enclosed



May 22, 2019

GOVERNORS

SUBJECT: Authority to Cede Operational Control to the Federal Financing Bank as a Condition of Borrowing

Last week, we received a proposal from the Federal Financing Bank (FFB) to subject renewal of our Note Purchase Agreement (NPA) to a number of new conditions. Broadly speaking, the proposed conditions fall into three general categories. Conditions 1-3 are debt security terms that would require the Postal Service to establish an escrow account to cover 15 months of interest. Conditions 4-6 would require the Postal Service to obtain FFB consent in the establishment of postal policy and before engaging in various business activities, such as establishment of annual performance targets, and management of major negotiated service agreements. Condition 7 would require the Postal Service, under certain circumstances, to potentially cede to FFB the decision-making authority for matters concerning pricing, collective bargaining, major contracting, structural organization, and the composition of senior management. Finally, conditions 8-11 are transparency and reporting requirements that would require various reports and briefings to the FFB. (A twelfth condition is a remedy provision that provides that the breach of any other condition would entitle the FFB to refuse to purchase a Postal Service obligation issued under the NPA.)

The majority of these proposed conditions—specifically, the escrow and reporting conditions—raise no immediate legal concerns, although they represent a significant departure from our current agreements, and seem unnecessary in the context of intergovernmental borrowing. Whether to accept them or make a counter-offer is a business decision.

By contrast, conditions 4-7 would essentially turn the FFB into a sort of “control board” that supersedes the authority vested by Congress in the Board of Governors (Board) and the Governors. In particular:

- Condition 4 would require the Postal Service to obtain prior written consent from FFB before establishing annual performance goals.
- Condition 5 would require FFB consent before the Postal Service enters into major negotiated service agreements.
- Condition 6 would give the FFB control over the most central aspect of postal policy, by requiring that the FFB consent to a plan to “stabilize and reverse [the Postal Service’s] financial decline.” Moreover, under that plan, the Postal Service has been advised that it could only rely on those powers available to the Postal Service under current law, as Treasury noted in a May 17, 2019 phone conference with Postal Service Finance. In other words, in contrast to the Board’s Ten-Year Business Plan, the FFB would forbid the Postal Service’s plan from relying on legislative changes to the Postal Service’s business model.

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- If that FFB-approved plan fails to achieve its goals in the eyes of the FFB (as it inevitably would, particularly given the fact that the Postal Service lacks the authority under current law to achieve financial stability), then condition 7 would allow the FFB to assume control over the most central aspects of business decision-making.

Regardless of whether these terms might be appropriate in a commercial transaction between private parties,¹ they pose significant constitutional and statutory problems in the context of a transaction between the Postal Service and Department of the Treasury (Treasury), whether acting through FFB or in its own name. For that reason, they cannot legally be a legitimate part of any covenants or additional provisions to any Note Purchase Agreement between the Postal Service and FFB. Simply put, these conditions are not within the power of the FFB to demand or within the power of the Postal Service to accept.

The remainder of this memo will explain why (1) the Board and the Governors cannot lawfully cede decision-making authority over the Postal Service to the FFB, Treasury, or private creditors, and (2) why the FFB's separate statutory authority does not change that conclusion. In this regard, it is irrelevant whether a private creditor might customarily impose similar control-oriented conditions on a financially distressed private borrower in the course of a market transaction. The Postal Service is not a private entity, but an independent establishment of the Executive Branch created and governed by statute. 39 U.S.C. § 201; *see U.S. Postal Serv. v. Flamingo Indus. (USA) Ltd.*, 540 U.S. 736, 740-41 (2004). Title 39 of the United States Code sets forth a carefully constructed governance structure for the Postal Service, in which postal powers are vested in the Board and in the Governors. By instead vesting ultimate control and authority over the Postal Service in the hands of the FFB (and hence Treasury), the FFB's proposed conditions 4-7 would vitiate the statutory scheme and usurp Congress's authority over postal organization. Treasury officials have clarified that, in proposing these terms, they did not analyze whether they were legally consistent with the Postal Service's status as an entity of the Executive Branch.

I. THE POSTAL SERVICE CANNOT LAWFULLY CEDE DECISION-MAKING AUTHORITY TO TREASURY, THE FFB, OR ANY OTHER CREDITOR

Under the Constitution, Congress holds the power to establish the postal system and to make all necessary and proper laws related to that power. U.S. CONST. art. I, § 8, cl. 7, 18. It is also Congress's power to establish "offices" for carrying out the postal laws it enacts. *Id.* art. II, § 2, cl. 2. Only the President can appoint officers to those Congressionally-established offices: for so-called principal officers, this requires Senate confirmation, whereas Congress can alternatively provide for appointment of inferior officers by the President alone or by a designated principal officer. *Id.*

To apply these precepts to the situation at hand, Congress established the Postal Service to fulfill the various operational and business functions in Title 39, United States Code. Congress created particular offices in which it vested decision-making powers: specifically, Congress vested the exercise of most of the powers of the Postal Service in the Board, with certain significant powers reserved to the Governors alone. 39 U.S.C. § 202(a)(1), (c)-(e); *see id.* § 402. Those powers include pricing, product management, control of expenses, collective bargaining, structural

¹ Based on a May 15, 2019, letter from Stephen Laughton, Assistant General Counsel (Banking and Finance) at Treasury, we understand Treasury's argument in support of these proposed conditions to rest on two basic points. First, whatever statutory restrictions might arguably apply to the Postal Service-Treasury borrowing relationship under the Postal Reorganization Act of 1970 (PRA), Congress's establishment of the FFB in 1973 created a separate borrowing option free of those restrictions. Second, the borrowing-authority statutes give the FFB and the Postal Service broad authority as to the terms and conditions of borrowing. Based on the May 17, 2019, phone conference as well as a subsequent discussion held with Treasury officials yesterday, we understand that the FFB sees these conditions as customary terms that would be imposed on a financially distressed company seeking to borrow money from the market.

organization, and performance planning: the very subjects of the FFB's proposed conditions 4-7. *Id.* §§ 205(a), 401, 404, 1206, 2803-2804, 3632. Powers assigned to the Board can be delegated to committees of the Board or to the Postmaster General and can be re-delegated within the Postal Service. *Id.* § 402. Powers assigned to the Governors cannot be delegated. *Id.* Congress provided for the Governors, as principal officers, to be appointed by the President with Senate confirmation; inferior officers (including the Postmaster General and Deputy Postmaster General) to be appointed by the Governors; and employees of the Postal Service to be appointed by the inferior officers or other employees. *See id.* §§ 202, 402, 1001(a).

Congress gave the Governors "ultimate control and authority" over the Postal Service. *Silver v. U.S. Postal Serv.*, 951 F.2d 1033, 1038 (9th Cir. 1991). It might have been constitutionally valid for Congress to place postal decision-making under Treasury's control. But that is not what Congress and the President chose in the PRA. Indeed, the legislative history of the PRA attests to Congress's manifest intent that the Postal Service be removed from direct control by the President or officers who serve at the pleasure of the President, such as the Treasury Secretary. *See S. REP. NO. 91-912*, at 4, 8 (1970); *H.R. REP. NO. 91-1104*, at 13 (1970); President's Message to Congress Transmitting Postal Reform, *H.R. Doc. No. 91-313*, at 51-52 (1970); *see also Status of the United States Postal Service as an "Executive Agency" Under Executive Order No. 12,250*, 5 Op. Off. Legal Counsel 241 (1981) ("Moreover, both the Act and its history reveal that Congress intended to grant the Service at least some measure of insulation from control by the President and to place the Service in a separate category from the conventional executive departments." (citation omitted)).

Hence, the Governors are subject to Presidential removal only for cause, in the interest of vesting the Governors with the independent ability to determine postal policy, including in the establishment of postal prices and in the selection of senior management. 39 U.S.C. § 202(a); *Mail Order Ass'n of Am. v. U.S. Postal Serv.*, 986 F.2d 509, 519-520 (D.C. Cir. 1993) (noting that the governance structure of the Postal Service is designed to confer "independence from political pressures and independence to manage its operations in a professional, businesslike manner," with the Board exercising "policy control [over postal affairs] with functions similar to a board of directors") (citations omitted); *see also Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 502 (2010); *Buckley v. Valeo*, 424 U.S. 1, 133 (1976) ("The Court in [*Humphrey's Executor*] carefully emphasized that . . . the members of such agencies were to be independent of the Executive in their day-to-day operations[.]"); *In re Aiken County*, 645 F.3d 428, 442 (D.C. Cir. 2011) (Kavanaugh, J., concurring) ("Because of *Humphrey's Executor*, the President cannot remove an independent agency's officers when the agency pursues policies or makes decisions the President disagrees with.").

Within Congressionally-set parameters, the President and his subordinates may only "take care that the laws are faithfully executed"; they cannot themselves remake the laws. U.S. CONST. art. II, § 3; *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952). Since it is Congress's prerogative to create Executive Branch entities, define their functions, and designate offices to execute those functions, the President and his subordinates cannot transfer functions from one Executive Branch unit to another without Congressional authorization. *Centralizing Border Control Policy Under the Supervision of the Attorney General*, 26 Op. Off. Legal Counsel 22, 22-24 (2002) ("This Office has long held that transfers of statutory authority from one department to another 'may normally be accomplished only by legislation or by executive reorganization under the [since-lapsed] Reorganization Act.'" (citations omitted)). As was noted by the Office of Legal Counsel (OLC):

It has long been established that, if the laws . . . require a particular officer by name to perform a duty, not only is that officer bound to perform it, but no other officer can perform it without a violation of the law; and were the President to perform it, he would not only be not taking care that the laws were faithfully executed, but he would be violating them himself.

Id. (citing *The President and Accounting Officers*, 1 Op. Att'y Gen. 624, 625 (1823)).²

As noted above, Congress designated the officers responsible for postal decision-making. Congress also gave those officers no authority to delegate their authority outside the Postal Service (if at all). The Executive Branch does not have the constitutional power to supersede Congress's choice to delegate the execution of the postal laws to the Postal Service, rather than to Treasury or the FFB.³

As Mr. Laughton's letter points out, the statutory provisions on Postal Service borrowing allow the Postal Service to agree to conditions and covenants in any sale of its obligations. See 39 U.S.C. §§ 2005-2006. Section 2006, for instance, notes that the Postal Service obligations purchased by Treasury may be "under such terms . . . as [the Treasury Secretary] and the Postal Service may agree." Mr. Laughton suggests that the plain language of these provisions is broad enough to authorize the FFB's proposed conditions. While it is true that these provisions give the Postal Service discretion regarding the terms it may agree to, that discretion is not limitless. Those statutory provisions cannot be read in isolation; rather, they must be read in the context of the statute as a whole. *E.g.*, *Sturgeon v. Frost*, 136 S. Ct. 1061, 1070 (2016). As explained above, the same PRA that enacted Sections 2005 and 2006 created the Postal Service as an independent establishment, insulated it from direct political control, and designated the Governors and Board as the officers responsible for making postal policy and business decisions. A provision that simply authorizes the Postal Service to agree to conditions when exercising its borrowing authority cannot reasonably be construed to allow the Postal Service and another Executive Branch entity to agree to make an end-run around the governance structure that Congress painstakingly established in the same Act. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) ("Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions – it does not, one might say, hide elephants in mouseholes." (citations omitted)).⁴

² Topically, the *President and Accounting Officers* opinion illustrates the point with a hypothetical about the President appointing a postmaster notwithstanding Congress's vesting of that power in the Postmaster General. Absent some other role in the structure that Congress established, the President's constitutional role is limited to removing and replacing an officer who is not faithfully executing the laws. *The President and Accounting Offices*, 1 Op. Att'y Gen. at 626.

³ In addition to subverting the structure that Congress enacted, there is yet another constitutional problem with Treasury/FFB supervision of the Postal Service. The Constitution gives the President alone the power to supervise principal officers like the Governors, as an incident of his removal power. That constitutional responsibility cannot be delegated to Treasury or FFB, *Centralizing Border Control Policy*, 26 Op. Off. Legal Counsel at 24-25, let alone assumed by Treasury/FFB amid Presidential silence.

⁴ As noted earlier, Treasury apparently believes that private lenders would demand a similar cession of control. However, the Postal Service could not accede to such a demand under Section 2005, any more than it can accede to transferring control of the Postal Service to another Executive Branch entity. In effect, this scenario would involve the Board and the Governors re-delegating their governmental decision-making authority to a private party. Such a cession would violate another principle of constitutional law. According to the so-called non-delegation doctrine, "Congress may employ private entities for ministerial or advisory roles, but it may not give these entities governmental power over others." *Pittston Co. v. United States*, 368 F.3d 385, 395 (4th Cir. 2004) (agreeing with the Third Circuit's summary of the doctrine in *United States v. Frame*, 885 F.2d 1119 (1989)) (emphasis omitted); see *Am. Ass'n of R.R. v. U.S. Dep't of Transp.*, 721 F.3d 666, 670-72 (D.C. Cir. 2013), *vacated on other grounds*, 135 S. Ct. 1225 (2015); see also *Dep't of Transp. v. Am. Ass'n of R.R.*, 135 S. Ct. at 1252-53 (Thomas, J., concurring). Where an agency delegates to private individuals its decisionmaking authority vested by statute, the harm to political accountability "is doubled in degree in the context of a transfer of authority from Congress to an agency and then from agency to private individuals. The vitality of challenges to the former type of transfer is suspect, but to the latter, unquestionable." *Nat'l Ass'n of Regulatory Utility Comm'rs v. FCC*, 737 F.2d 1095,

The legislative history of the PRA supports this understanding of the Postal Service's borrowing authority. Prior to enactment, Treasury's Under Secretary for Monetary Affairs explained that, under the PRA provisions concerning borrowing, the Treasury Secretary should neither "assert substantive control over the Postal Service" nor "[j]ever put himself in a position where he is preventing the postal authority from obtaining what financing [the Postal Service] think[s] is necessary." *Postal Modernization: Hearings Before the Senate Comm. on Post Off. & Civil Serv.*, 91st Cong., at 311-12 (1969) (remarks of Under Secretary Paul A. Volcker); see also *id.* at 305-06 ("stress[ing]" that the Treasury Secretary's purchase option would not "interfer[e] with the financing of essential Postal Service activities or arrogat[e] to the Secretary any control over the operations of the Postal Service"); *Post Office Reorganization, Part III: Hearings Before the House Comm. on Post Off. & Civil Serv.*, 91st Cong. 1165 (1969) (statement of Under Secretary Volcker) (Treasury's role should be understood as limited, lest "some outsider looking at the bill" might construe it as "giv[ing] the Secretary of the Treasury] certain powers over the Post Office Department that he shouldn't have"); see H.R. REP. NO. 91-1104, at 21 (1970).⁵ Therefore, the borrowing provisions were intended simply to ensure that Treasury could coordinate overall Government debt issuances (including those of the Postal Service), without in any way suggesting that they could be used to cede to Treasury substantive control of the Postal Service.

Case-law on the analogous relationship between the Postal Service and the Department of Justice (DOJ) further buttresses the analysis here. In at least two cases, DOJ has asserted a prerogative to control the Postal Service's litigating position, settlement of claims, and ability to represent itself. On both occasions, courts held that, notwithstanding statutory authority for DOJ involvement in Postal Service litigation, DOJ's assertions of control ran afoul of Congress's decision to confer independent decision-making authority on the Postal Service. *Mail Order Ass'n of Am.*, 986 F.2d at 522-23 ("Respect for the language of the [PRA] and its underlying purposes simply will not permit the conclusion that Congress intended simultaneously to give the Postal Service such broad and unfettered discretion and to condition its judicial review options on [DOJ]'s – or even the President's – approval."); *Leonard v. U.S. Postal Serv.*, 489 F.2d 814, 817-18 (1st Cir. 1974). To paraphrase the court in *Leonard*, "It was the intent of the Congress to create an independent Postal Service. It would be anomalous to hold that decisions normally committed wholly to the independent discretion of the Service are made subject to [Treasury or FFB] veto power when incident to [borrowing]." *Leonard*, 489 F.2d at 817-18.

To be sure, Congress could vest ultimate decision-making powers concerning postal operations in officers outside the Postal Service, if it wished. Indeed, the Postal Service is already subject to final decision-making authority exercised by various other Executive Branch entities, such as the Federal Trade Commission, the Postal Regulatory Commission, and the Equal Employment Opportunity Commission. *E.g.*, 39 U.S.C. §§ 409(d)-(e), 3662(c)-(d); 42 U.S.C. § 2000e-16. And Congress has considered (but not enacted) legislation to create a "control board" that would assume decision-making powers in a manner similar to those proposed in NPA conditions 4-7. H.R. 2748, 113th

1143 n.41 (D.C. Cir. 1984). This conclusion further demonstrates that, while commercial principles can play a role in the interpretation and application of 39 U.S.C. §§ 2005 and 2006, those principles must be applied within limits imposed by the Constitution and by statute. *Cf. Scope of Treasury Department Purchase Rights with Respect to Financing Initiatives of the U.S. Postal Service* [hereinafter "*Treasury Purchase Rights*"], 19 Op. Off. Legal Counsel 238, 245 (1995) (using commercial principles to interpret Section 2006(a) only "[i]n the absence of contrary language in the statute").

⁵ OLC expressly relied on this legislative history to interpret the meaning of 39 U.S.C. §§ 2005-2006. See *Treasury Purchase Rights*, 19 Op. Off. Legal Counsel at 245 n.5; *Authority of the Secretary of the Treasury Regarding Postal Service Bond Offering*, 17 Op. Off. Legal Counsel 6, 8-10 (1993) (quoting both the House and Senate Hearings in explaining that the statute itself may be ambiguous, but the "legislative purpose" behind the statute is clear).

Cong. §§ 201-209, 503 (2015) (as reported); H.R. 2309, 112th Cong. §§ 201-232 (2012) (as reported). In contrast to all of those explicit provisions, however, there is no statutory authority that would allow Treasury to supervise and potentially supersede decisions of the Governors and the Board.⁶

Congress did not delegate postal decision-making to Treasury, and there is no reasonable basis to construe the borrowing provisions of the Postal Service's statute as a tacit grant of authority to the Postal Service and Treasury to agree to such a transfer of control. To do so would completely subvert the statutory structure that Congress carefully and deliberately created. Under the Constitution, such choices lie with Congress, not with the Executive Branch.

II. THE FFB'S GOVERNING STATUTE DOES NOT PROVIDE IT WITH AUTHORITY TO ESSENTIALLY ASSUME CONTROL OVER THE POSTAL SERVICE

Mr. Laughton's letter also suggests that, whatever limitations Congress imposed on the borrowing relationship between the Postal Service and Treasury, the FFB somehow exists outside those limitations. To the extent Mr. Laughton is suggesting that Congress implicitly authorized the FFB to exercise substantive control over postal decision-making when it enacted the Federal Financing Bank Act of 1973 (FFBA), the statute creating the FFB, such an interpretation finds no support in the FFBA's text or legislative history.

As Mr. Laughton notes, the FFBA was enacted a mere three years after the PRA and created the FFB as "a body corporate" and "an instrumentality of the United States Government" that is "subject to the general supervision and direction of the Secretary of the Treasury." 12 U.S.C. § 2283. The FFB is governed by a five-member Board of Directors with the Treasury Secretary serving as Chairman, and with the other four directors "appointed by the President from among the officers or employees of the Bank or of any Federal agency." *Id.* § 2284(a). Currently, the directors are all officials of the Treasury. FFB, 2018 Annual Report 6, <https://go.usa.gov/xmvzY>. By statute, the FFB is authorized to purchase obligations of any federal agency, and each federal agency that is authorized to sell obligations is authorized to sell such obligations to the FFB. *Id.* § 2285(a).

As explained in the preceding section, when Congress intends to vest one Executive Branch entity with the power to assume substantive control over a separate entity, Congress says so explicitly. Congress did not do so in the FFBA. Rather, the FFB was created merely to "assure coordination of [Federal financing] programs with the overall economic and fiscal policies of the Government" and to reduce the cost and market disruption of federal borrowings. *Id.* § 2281. The FFB exercises powers otherwise vested in Treasury and is expressly "subject to the direction and supervision of the Secretary of the Treasury." 31 U.S.C. § 305. For example, the FFB can exercise the powers assigned to Treasury under 39 U.S.C. § 2006. Nothing in the FFBA's language suggests that the FFB's lending powers were designed to be broader than those afforded Treasury as a general matter. Accordingly, while FFB has the authority to purchase Postal Service obligations "on terms and conditions determined by the [FFB]," 12 U.S.C. § 2285(a), the statute nowhere suggests that

⁶ The lack of such statutory authority is also distinguishable from statutes that have expressly permitted Treasury and other agencies to assume control of an institution. 12 U.S.C. § 1455(l) (providing Treasury with temporary authority to acquire equity in the Federal Home Loan Mortgage Association (Freddie Mac), and authorizing Treasury to consider "[r]estrictions on the use of Corporation resources, including limitations on the payment of dividends and executive compensation and any such other terms and conditions as appropriate for those purposes," among other things); see 12 U.S.C. § 4617 (authorizing the Federal Housing Finance Agency to place Freddie Mac and other housing-finance institutions into conservatorship). In contrast to these statutory authorities, the PRA is devoid of any similarly explicit provision allowing Treasury, through its purchase of obligations, to assume control over Postal Service decisions. As noted above, the legislative history of the PRA indicates that quite the opposite is true.

such terms and conditions can extend beyond the terms and conditions that the Secretary could otherwise establish. Indeed, the FFB's purpose of simply coordinating overall Federal financing programs aligns precisely with the role that Congress contemplated for Treasury under 39 U.S.C. § 2006(a), as discussed above.

The FFBA's legislative history confirms that Congress did not intend for the FFB to have any authority to exercise substantive control over the Postal Service's statutory duties or powers. To the contrary, the committee reports accompanying the FFBA explained that the FFB was not authorized to lend money to the Postal Service beyond the scope of Treasury's powers under 39 U.S.C. § 2006(a):

Your committee has reviewed the status of the authorities of the U.S. Postal Service to issue obligations as to whether this authority under the Postal Reorganization Act would be affected by any provision of this bill. Your committee intends that this bill will not impair or diminish the authority of the Postal Service to issue obligations under the financing provisions of the Postal Reorganization Act. Under the Postal Reorganization Act, the Secretary of the Treasury may purchase all Postal Service obligations if he does so within the time period prescribed in 39 U.S.C. 2006(a). The bill would have the effect of giving the Secretary the authority to exercise this right by requiring the Postal Service to sell its securities to the Federal Financing Bank. However, if the Bank or the Secretary did not act to take up a proposed Postal borrowing within the prescribed time limit, the Postal Service could, on its own initiative, borrow in the private market under its independent Postal Reorganization Act authority. Your Committee believes that no specific amendment is required to preserve the independent financing authority of the Postal Service.

H.R. REP. NO. 93-299, at 5 (1973); accord S. REP. NO. 93-166, at 3 (1973); H.R. REP. NO. 92-1478, at 6-7 (1972);⁷ see also *Treasury Purchase Rights*, 19 Op. Off. Legal Counsel at 243 (interpreting the 1973 House committee report as "intended to provide broad assurance that the FFBA would not unduly impair USPS' existing financing authority under the PRA"). The FFB thus was conceived of as an agent for Treasury's exercise of its purchase option under 39 U.S.C. § 2006(a), and not as an entity with an independent purchase option.

As with the PRA, Congress's expression of the FFBA's intent was largely based on the view of Treasury itself. *Federal Financing Bank Act: Hearings Before the House Comm. on Ways & Means*, 93d Cong. at 18 (1973) (remarks of Under Secretary Volcker) ("The principal effect of the Federal Financing Bank in this respect is that the Secretary of the Treasury could say to the postal service that he is going to take that issue [under 39 U.S.C. § 2006(a)] for the Federal Financing Bank rather than for the Treasury itself."); *Federal Financing Bank Act: Hearings Before the House Comm. on Ways & Means*, 92d Cong. at 26 (1972) (remarks of Under Secretary Volcker) (characterizing "the only really essential" effect of the FFBA on Postal Service borrowing as "that the Secretary of the

⁷ As noted in Mr. Laughton's letter, the 1972 House committee report, at slight variance from the later reports, cast the FFB as "another potential purchaser of postal obligations." H.R. REP. NO. 92-1478 at 7. This stray characterization, however, does not support an inference that the FFB's purchase option is independent from Treasury's, for three reasons. First, the sentence is facially ambiguous: given Treasury's oversight of the FFB, the FFB's separate corporate identity does not necessarily imply separate substantive authority regarding Postal Service borrowing. Second, contrary to any such implication and consistent with the later committee report language excerpted above, the sentence that follows characterizes the FFB or Treasury exercising the purchase option under 39 U.S.C. § 2006(a). *Id.* Finally, the 1972 committee report was superseded by the 1973 committee reports in any event, and those later reports are unambiguous on this point.

Treasury or the Board of Directors of the Federal Financing Bank would" exercise the right of first purchase).⁸

Moreover, and perhaps most to the point here, the Administration that proposed the creation of the FFB assured the Postal Service and Congress that the FFB would not give the FFB or Treasury the power to control Postal Service decision-making. Upon receiving a letter outlining the Postmaster General's concerns about the proposed FFBA, the Office of Management and Budget (OMB) replied that the FFB's role would be limited to coordinating Federal borrowing activities;

The proposed legislation does not require or intend that the Treasury Department have any role in or any veto power over the development or implementation of the programs of the various agencies. Thus, the proposed legislation contemplates no involvement of the Treasury or the Federal Financing Bank in formulating, reviewing, or otherwise affecting the structure or scope of agency programs.

Letter from Frank C. Carlucci, Executive Director, OMB, to Postmaster General E.T. Klassen, Apr. 8, 1972, *reprinted in Federal Financing Authority: Hearings Before the Senate Comm. on Banking, Housing & Urban Affairs*, 92d Cong. at 77 (1972).

In sum, the provision of the FFB's statute allowing it to set terms and conditions for the purchase of Postal Service debt cannot reasonably be interpreted as giving FFB the authority to assert substantive control over the Postal Service. A contrary conclusion is unsupported by the FFBA's text and contrary to the expressed intent of the Congress and Administration that enacted the FFBA.

Of course, even if there were some indication of legislative intent to allow the FFB to assume decision-making powers as a condition of lending (which there clearly is not), it would be unconstitutional for the FFB to exercise such powers. As noted in section I above, the Constitution's Appointments Clause requires each freestanding component of the Executive Branch to be headed by a "principal officer" appointed by the President and confirmed by the Senate. *See Free Enter. Fund*, 561 U.S. at 511. Because the Postal Service is such a freestanding component, and because the FFB Board of Directors consists predominantly of inferior officers or employees,⁹ the Appointments Clause bars the FFB from acting as an agency head and subordinating the Postal Service Governors, whom Title 39 designates as principal officers. *See Silver*, 951 F.2d at 1038-39.¹⁰ Even if the FFB were headed by a principal officer, however, it would violate the Constitution's

⁸ The Postal Service expressed its satisfaction with these assurances that the FFBA would not impair its ability to borrow under the PRA. *Federal Financing Bank Act*, 92d Cong. at 40-41.

⁹ As explained earlier in this section, the FFB is headed by a Board of Directors chaired by the Treasury Secretary, with four other Directors appointed by the President (without Senate confirmation) from the ranks of Executive Branch "officers or employees." 12 U.S.C. § 2284(a). Because the FFB Directors are not subject to Senate confirmation, they cannot be considered principal officers under the Appointments Clause, except, arguably, for the Treasury Secretary and any other Directors who are principal officers of another agency. At present, however, four of the five current FFB Directors are inferior officers or employees at Treasury. FFB, 2018 Annual Report at 6. The FFB Board makes decisions by majority vote, meaning that the four inferior-officer Directors can override the Treasury Secretary's vote. Bylaws of the Federal Financing Bank § 3.08 (2006), <https://go.usa.gov/xmvGN>.

¹⁰ Here, too, the situation with Fannie Mae and Freddie Mac is distinguishable. To the extent that Treasury was exercising significant governmental authority to control the institutions (on par with the authority that Congress delegated to the FHFA, *see* 12 U.S.C. § 4617), it is notable that Congress conferred that authority on the Secretary of the Treasury, a principal officer, and not on the FFB. *See* 12 U.S.C. § 1455(f). The agreements that resulted were executed by Treasury, and not by the FFB as a delegee. Amended and Restated Senior Preferred Stock Purchase Agreement Between Treasury and Freddie Mac.

separation of powers at any rate for the FFB to assume control of the Postal Service without express Congressional authorization.

For the reasons noted above, constitutional doctrine, the relevant statutory text, and the legislative history, strongly support the conclusion that proposed conditions 4-7 are unlawful.

III. TACTICAL OPTIONS AND CONSIDERATIONS

We believe that the logical next step would be to send a memorandum to Treasury counsel explaining our legal analysis and to see how Treasury/FFB responds. In our view, this type of engagement was effective in obtaining more clarity from Treasury about recommendations in the White House Task Force report. In addition, from discussions that we have had with Treasury, we understand that they have proposed these terms based on private-sector principles; they have not considered the specific legal issues that are implicated by imposing such terms on the Postal Service, as an entity of the Executive Branch with a specific and unique statute. Therefore, we believe this engagement on a lawyer-to-lawyer level could prove effective. A draft letter for this purpose to the Treasury Assistant General Counsel (Banking and Finance) is attached for your review and consideration.

Perhaps after sending the memorandum to Treasury counsel described in the previous paragraph, and receiving a response, the Board may also consider whether to offer a counter-proposal, such as an array of conditions that does not include proposed conditions 4-7, or one that includes proposed conditions that are modified in such a way as to be within lawful bounds (e.g., downgrading them to reporting requirements, or allowing Treasury/FFB to provide input, rather than ceding control). Additionally, the Board should consider briefing the leadership of relevant Congressional committees, either before or after obtaining more clarification about Treasury/FFB's position.

If Treasury/FFB insists on its proposed conditions notwithstanding our analysis of their unlawfulness, the Postal Service would have at least four options.

First, the Postal Service could request a legal ruling from OLC. For OLC to resolve the dispute, the Postal Service would have to agree to be bound by OLC's ultimate decision.¹¹

Second, the Postal Service could refuse to enter into a new NPA. If Treasury continues to insist on unlawful conditions in the context of an individual post-NPA bond issuance, the Postal Service could deem Treasury to have constructively declined to purchase the Postal Service's obligations within a reasonable period. This would entitle the Postal Service to proceed to a market issuance under 39 U.S.C. § 2005 (if such an issuance is deemed to be feasible). See *Treasury Purchase Rights*, 19 Op. Off. Legal Counsel at 244-45. If the Postal Service attempts a market issuance without express consent from Treasury, there is some risk that Treasury will seek an OLC ruling (although the Postal Service could block OLC from considering the matter by not agreeing to be bound) or that Treasury could adopt other means of influencing the matter, such as informal pressure on regulated banks or more direct Administration pressure.

¹¹ As an agency subject to Executive Order No. 12,146 whose head (the Governors) does not serve at the pleasure of the President, the Postal Service would have to agree to be bound by OLC's disposition. Memorandum from David J. Barron, Acting Assistant Attorney General, to OLC Attorneys, Best Practices for OLC Legal Advice and Written Opinions, at 3 (July 16, 2010), <https://go.usa.gov/xUwbq>. See *Treasury Purchase Rights*, 19 Op. Off. Legal Counsel at 239 n.2 (noting that the Postal Service, by letter dated March 17, 1995, "consented to be bound by the final opinion to be issued by this Office"). OLC does not require such an agreement of agencies whose heads serve at the pleasure of the President (as the Secretary of the Treasury does), presumably because it trusts that the threat of removal is adequate to ensure compliance.

Third, the Postal Service could forgo further borrowing from Treasury and seek some form of legislative relief from Congress. This could take the form of a measure (or informal pressure) specific to the borrowing relationship, or of a measure offering broader financial relief in light of the diminished capacity for borrowing.

Fourth and finally, the Board could, in theory, decide to accept proposed conditions 4-7 notwithstanding their abrogation of the statutory scheme. Doing so would create a significant risk that any business decisions made as a result of Treasury/FFB influence would be challenged in court – with a strong likelihood of success – by parties affected by those decisions, such as unions, suppliers, or mailers. An unlawful abdication of statutory authority could also serve as “cause” for Presidential removal of the Governors.¹² There could also be negative political consequences, in terms of public reaction and Congressional oversight or action. These risks would apply to any cession of decision-making authority by the Governors, whether to Treasury/FFB or to a private creditor.

As an adjunct to any of these four options, the Postal Service could exercise its statutory right to compel Treasury to purchase up to \$2 billion in Postal Service notes (within the annual and aggregate debt ceilings), subject to certain “conditions” of the general Postal Service issuance process. 39 U.S.C. § 2006(b). It is clear that these “conditions” include fifteen days’ advance notice to Treasury and consultation with Treasury about the terms. Although there is some ambiguity in the statutory language, there is a strong argument that the Postal Service has ultimate discretion to dictate the terms of notes issued through its “put option”; otherwise, if Treasury had a right to negotiate and veto, the put option would be ineffective. See H.R. REP. NO. 91-1104, at 21 (describing the option as “the right of the [Postal] Service to call upon [Treasury] to purchase up to \$2 billion of its obligations,” and discussing a number of uses to which the Postal Service can put the option, without any mention of any prerogative on Treasury’s part to affect the terms). The Postal Service has not exercised this put option in its existence; all Treasury purchases have been voluntary ones under Section 2006(a). This means that the put option remains fully available, subject to the limitations imposed by the debt ceiling.

IV. CONCLUSION

I hope you find this material to be useful as you consider ongoing and impending developments in our relationship with Treasury. Of course, if you have any additional questions or concerns, or if you need additional information, then please do not hesitate to let me know.



Thomas J. Marshall

cc: Ms. Brennan
Mr. Stroman
Mr. Elston

¹² This prospect might appear to be theoretical under the precise circumstances here, where Treasury might have the President’s support. But a subsequent President might have a different view of the situation. And even the current President might have a different perspective if the Postal Service were to agree to similar conditions offered by a private creditor. At any rate, once established, the grounds for removal would remain if this President, or a subsequent one, were later to deem it convenient to replace the Governors.

ANALYSIS OF WHITE HOUSE TASK FORCE RECOMMENDATIONS

Universal Service Obligation (USO)

Recommendation 1	Policy Action, per Task Force	Responsible Party, per Law Department
<p><u>Definition:</u> Clearly define the USO. Provide a targeted definition of minimum, essential postal services, that due to specific social and economic needs have a basis for government protection.</p>	Administrative	Congress, PRC, USPS
<p>Notes: The Task Force characterizes this recommendation as something for the Board of Governors to do “or [to] seek legislation to do.” To the extent that this redefinition would determine the scope of the USO, the current USO parameters are established by statute. Congress expressly reserved the power to change the USO to itself, as an issue of “broad public policy,” and declined to delegate it to the Postal Regulatory Commission (Commission). S. REP. NO. 108-318, at 38-39 (2004); <i>see also</i> H.R. REP. NO. 109-66, pt. 1, at 62-63 (2005). Thus, while the Commission might theoretically reconsider its 2008 opinion that the USO applies to all Postal Service products, Postal Regulatory Comm’n, Report on Universal Postal Service and the Postal Monopoly [hereinafter “USO Report”] 4, 23-25 (2008), any attempt to give regulatory or operational effect to that redetermination, without enabling action by Congress, would be subject to legal challenge and likely overturned. (The Commission would also face the challenge of articulating a non-arbitrary basis for revising its 2008 interpretation of the relevant statutes, which have not changed since that time.)</p> <p>The current statute’s lack of guidance on an “essential”-“commercial” distinction underscores that such a change would involve a Congressional determination of public policy. The term “essential” appears only once in Title 39 in a manner relevant to the USO, in a broad reference to customers’ access to “essential postal services.” 39 U.S.C. § 403(b)(3). We are unaware of any legislative history limiting the scope of this phrase; to the contrary, the Commission has interpreted it as “rang[ing] from postal products, to mail acceptance points (such as collection boxes), to access to letter carriers who accept mail for posting, to easily accessible information.” USO Report at 19. If anything, the governing statute indicates that the USO applies to “business correspondence” no less than other forms of correspondence. 39 U.S.C. § 101(a); <i>see also id.</i> § 403(a) (defining the USO in terms of “written and printed matter, parcels, and like materials” generally). In enacting the Postal Accountability and Enhancement Act of 2006 (PAEA), Congress not only decided to retain these broad provisions, it also decided to treat advertising mail and other forms of “commercial” mail as equally subject to the protections of the price cap that it enacted. 39 U.S.C. § 3622(d)(2)(A). Since the existing statute demonstrates Congress’s public-policy judgment to apply the USO broadly, a decision to</p>		

make distinctions between “essential” and “commercial” involves value distinctions that cannot be undertaken using statutory standards, and would likewise be a public-policy question for Congress.

To the extent that the recommendation is aimed at restructuring how products are classified for regulatory purposes, the Governors and Commission can only move incrementally toward the Task Force’s model without legislative changes.

The current governing statute accords different regulatory treatment to postal services based on market power: namely, the scope of the letter monopoly and the Postal Service’s pricing power, as measured by antitrust standards. 39 U.S.C. § 3642(b). The Task Force’s proposed “essential”-“commercial” distinction does not align with the statutory division, and so, unless Congress were to change the law, any attempt to reorganize product regulation would have to conform to the current statutory standards.

One possibility is that the Commission could take a closer look at localized market power within competitive products and, theoretically, could shift certain competitive product volumes (e.g., products sold in rural areas, or consumer-to-consumer shipments) to the market-dominant category. This would approximately resemble the Task Force’s vision of treating certain package-delivery products as “essential” and subject to price-cap regulation. The precedent for such an approach already exists in terms of how Post Office Boxes are classified according to levels of local competition, but the Commission has not yet extended this approach to other products. See *generally* Order No. 473, Order Approving Request to Transfer Selected Post Office Box Service Locations to the Competitive Product List, PRC Docket No. MC2010-20 (June 17, 2010). In doing so, the Commission would have to explain its departure from its own (or Congress’s) previous determinations that each competitive product as a whole was properly classified as such, and as noted above would have to predicate the decision on the existence of market power, not a consideration that the packages at issue are “essential.” See, e.g., 39 U.S.C. § 3631(a) (initially classifying as competitive all of “priority mail,” “expedited mail,” and other products).

Another possibility is a deregulation of “non-essential/commercial” volume by transferring it from the market-dominant product list to the competitive product list. Current statutory parameters leave little opportunity to do so, however. First, products within the scope of the letter monopoly, such as most First-Class Mail and Marketing Mail, are not eligible for transfer. 39 U.S.C. § 3642(b)(2). Second, products with statutory rate preferences (i.e., certain Periodicals, Library Mail, and nonprofit Marketing Mail) must be regulated as market-dominant; arguably, so, too, must the products against which those preferred rates are benchmarked (Outside-County Periodicals, Media Mail, and at least some regular-rate Marketing Mail). 39 U.S.C. § 3626(a)(1), (g)(4)(B). The only market-dominant mail services that fall outside of these two criteria are Marketing Mail delivered on a saturation basis with simplified addressing, Alaska Bypass Service, and certain Bound Printed Matter Flats and Parcels. In theory, the Commission could expand the range of services eligible for transfer by narrowing the definition of the letter monopoly. 39 U.S.C. § 601(c) (authorizing the Commission to promulgate “[a]ny regulations necessary to carry out” a key letter-monopoly statute);

see 39 C.F.R. § 310.1(a). But it is debatable whether such an exercise would be consistent with Congressional intent. See S. REP. NO. 108-318, at 39, 54 (2004) (characterizing Section 601 as delegating to the Commission only the power to administer the monopoly's exceptions, and explaining Congress's intent as reserving to itself the power to redefine the monopoly's scope). The Postal Service has taken the position that the Commission cannot redefine the scope of the monopoly through a fundamental change to the meaning of the term "letter," any more than it can redefine the scope of the USO.

For those products that clear the first two hurdles to transfer, the Commission could approve the transfer only if it is convinced that the Postal Service lacks pricing power. 39 U.S.C. § 3642(b)(1). The Postal Service would have to show that competing providers constrain its power over pricing and service quality. That is unlikely for Alaska Bypass Service, which was designed specifically to provide a supply line to remote areas that was otherwise absent. For document-based products like Marketing Mail and Bound Printed Matter Flats, the Commission might have to revisit its past refusal to consider electronic substitutes as part of its market-power analysis. See *generally* Order No. 2306, Order Denying Request, PRC Docket Nos. MC2013-57 & CP2013-75 (Dec. 23, 2014).

A third possibility is that, in the course of the Ten-Year Review or in another regulatory-review proceeding, the Commission could create an "essential"-*"commercial"* division within the market-dominant regulatory system, with "essential" market-dominant services subject to some form of price-cap regulation and "commercial" ones freed from price caps. To adopt that approach, the Commission would first have to decide that its review authority under 39 U.S.C. § 3622(d)(3) allows it to restructure the existing mail classes, notwithstanding a provision that ties at least the initial market-dominant rate-regulation system to the mail classes listed in the former Domestic Mail Classification Schedule (DMCS). 39 U.S.C. § 3622(d)(2)(A). (In the Ten-Year Review, we argued that the Commission has such authority. The Commission has not yet ruled on the issue.) Then the Commission would have to articulate a non-arbitrary basis for distinguishing between "essential" and "commercial" services, and for deregulating the latter, all of which would have to be squared with the objectives and factors in 39 U.S.C. § 3622(b)-(c). It is open to question whether such a distinction is consistent with the objectives and factors, given that, as noted above, an "essential"-*"commercial"* distinction is not reflected in the statute. The Commission would still have to determine the appropriate price-cap design for "essential" services (again based on the Section 3622 criteria), as well as how to administer the statutory rate preferences within or across the "essential" and "commercial" subcategories. These layers of legal determinations raise multiple opportunities for falling short of the Task Force's vision and/or for legal challenge, and would considerably draw out the Ten-Year Review in any event.

Ultimately, it would be more comprehensive, effective, and certain for Congress to implement this recommendation through reform of the product-classification statutes.

Recommendation 2	Policy Action, per Task Force	Responsible Party, per Law Department
<p><u>Geographic Scope:</u> Keep current practice, which designates that the USO includes all addresses in the country covering “the United States, its territories and possessions,” irrespective of population density.</p>	Administrative	Congress
<p>Notes: Because the Task Force proposes to maintain this aspect of the USO but apply it only to “essential” services, such a redefinition of the USO’s scope would require action by Congress, as discussed in connection with Recommendation 1 above.</p> <p>At p. 42, the Task Force argues that the prices for “essential services” “should be standard, regardless from where the products are sent or delivered – similar to the current flat postage rate for First-Class Mail.” Such a requirement would actually be more restrictive, on balance, than under current law. At present, uniform-rate requirements apply only to First-Class Mail, Media Mail, and Library Mail, not to all market-dominant services, and certainly not to all services that the Task Force appears to consider “essential.” 39 U.S.C. §§ 404(c), 3683(a). Moreover, flat postage rates are required only for Media Mail and Library Mail; First-Class Mail is not subject to a clear prohibition on distance-variable pricing, although the same price schedule must be uniformly available. See, e.g., 116 CONG. REC. 27,606 (1970) (remarks of Rep. Udall); Tentative Decision Concerning Proposals for Local and Nationwide Subclasses Within First-Class Mail, PRC Docket No. MC76-1, at 3-9 (July 15, 1977); USO Report at 30 n.10, 77-78, 117-18. <i>But see</i> USO Report at 139-41, 185 (assuming, for analytical purposes, that distance-variable pricing is prohibited for First-Class Mail). To be sure, some current First-Class Mail volumes might fit within the Task Force’s proposed “commercial” category and be freed from any uniformity requirements under this recommendation. But to the extent that Congress would be affirmatively prohibiting distance-variable pricing for First-Class Mail and extending that prohibition to “essential services” beyond First-Class Mail, that restriction would sweep more broadly than current requirements.</p>		

Recommendation 3	Policy Action, per Task Force	Responsible Party, per Law Department
<u>Number and Density of Post Offices and Collection Boxes:</u> Establish a rule that specifies that access to the postal system must only be sufficient to implement defined USO standards for delivery.	Administrative	USPS, PRC, Congress
<p>Notes: The Task Force identifies certain statutory parameters as responsible for the current breadth of the delivery and collection network. As noted in connection with Recommendation 1 above, Congress expressly reserved to itself, not the Commission, the power to redefine the USO. Within existing statutory parameters, there may be some room for incremental progress toward consolidating the collection network. Any large-scale consolidation would require an advisory opinion from the Commission and, potentially, favorable review of Post Office closing appeals. Ultimately, however, Congress might need to amend the governing statutory standards, such as allowing Post Offices to be closed for operating at a deficit. See 39 U.S.C. § 101(b).</p> <p>It should be noted that the Task Force does not discuss the “essential”-“commercial” distinction in connection with this USO recommendation; it is thus unclear whether and how such a distinction, if enacted, might translate into different degrees of latitude with respect to access to various postal services.</p>		

Recommendation 4	Policy Action, per Task Force	Responsible Party, per Law Department
<u>Delivery Frequency:</u> Provide greater flexibility to determine mail and package delivery frequency.	Legislative	Congress
<p>Notes: Congress would have to stop including the six-day-delivery rider in annual appropriations bills. It should also be noted that the Task Force’s vision of how the Postal Service would exercise that flexibility varies according to a product or service’s status as “essential” or “commercial.” Implementation of that underlying distinction is discussed in connection with Recommendation 1 above.</p>		

Recommendation 5	Policy Action, per Task Force	Responsible Party, per Law Department
<u>Mode of Delivery:</u> Maintain current discretion to determine mode of delivery consistent with a financially sustainable business model.	Administrative	Congress, USPS, PRC
<p>Notes: This recommendation could be interpreted as saying that the Postal Service should continue exploring opportunities to increase centralized delivery, with attention to both its finances and “customer needs,” and that Congress should not interfere with such efforts. (The Commission would also need to avoid creating political</p>		

roadblocks in any advisory opinion, which the Postal Service is required to seek under current law for sufficiently large-scale, programmatic changes in service.) That said, a number of considerations have given the Postal Service pause in converting existing addresses to centralized delivery, such as the likelihood of customer and political backlash (such as the backlash in Canada that caused Canada Post to halt its own delivery-mode conversion program in 2015); the uncertain effect on the perceived value of mail and, correspondingly, on mail volume; and the fact that, over the past several years, Congress has considered several bills on centralized delivery without settling on a coherent message. See Reply Comments of the United States Postal Service, PRC Docket No. R2013-11 (Dec. 6, 2013), at 103-105. And, as noted in a recent submission to the Government Accountability Office, there are a number of significant legal issues that would arise from any widespread move to centralized delivery, independent of whether it is allowable under the USO standards.

Thus, even though this is technically within our existing legal authority, if the Postal Service decided to implement this recommendation, it would be helpful for Congress to enact legislation expressly endorsing a shift toward centralized delivery, even if it adds some procedural constraints. Indeed, to the extent that the Task Force recommends that the Postal Service “be required” to have a transparent and public process for determining delivery mode, that implies action by Congress.

Like Recommendation 3, this recommendation is not framed in terms of the Task Force’s “essential”-“commercial” service distinction, so it is unclear which products and services would be impacted by this recommendation.

Recommendation 6	Policy Action, per Task Force	Responsible Party, per Law Department
<u>Processing Standards:</u> Keep current practices, which allow the USPS to manage processing standards.	Administrative	N/A
<p>Notes: Like Recommendation 2, this essentially recommends maintenance of the status quo in terms of the Postal Service’s authority. The Postal Service has discretion in this area, subject to certain procedural requirements. In establishing service standards, the Postal Service must account for various objectives and factors, and it must consult with the Commission. 39 U.S.C. § 3691(a)-(c). And pursuant to 39 U.S.C. § 3661, the Postal Service must request an advisory opinion from the Commission before making a change in the nature of postal services on a nationwide or substantially nationwide basis.</p> <p>But note that Recommendation 22 would appear to give the Commission the power to overrule the Postal Service’s establishment of service standards. The Task Force does not reconcile this apparent tension.</p>		

Recommendation 7	Policy Action, per Task Force	Responsible Party, per Law Department
<u>USO Funding:</u> Review and determine if income generated by activities defined to be outside of the USO could be optimized to cover the costs of funding the USO.	Administrative	Congress, PRC, USPS
<p>Notes: As the letter monopoly’s value has declined, the Postal Service has been aggressive in raising revenue from competitive products to contribute toward the institutional costs of the USO, and in seeking reform of the market-dominant rate-regulation system to provide more revenue-generating authority. The Task Force’s recommendation appears to be tied not to the existing legal framework, however, but to the Task Force’s vision of a redefined USO that does not apply to “products and activities not deemed essential services.” If postal products were to be reclassified per Recommendation 1 (which we consider to require Congressional action), then the Commission would structure the regulatory system for “commercial” services to maximize the Postal Service’s ability to generate revenue, and the Postal Service would be responsible for making full use of that authority (and for controlling “commercial” services’ costs to improve contribution). See Recommendation 1.</p>		

Mail and Package Markets

Recommendation 8	Policy Action, per Task Force	Responsible Party, per Law Department
<u>Business Model:</u> Develop a new model that can be used to both set rates and control costs to achieve sustainability.	Administrative	PRC, USPS
<p>Notes: The discussion in this portion of the Task Force report (pp. 50-51) is unclear, but it appears that the Task Force is recommending that, until a reclassification along “essential”-“commercial” lines can be conducted (see Recommendation 1), the Commission should do what it can through the Ten-Year Review to allow net-income maximization for “commercial” market-dominant services. The Task Force opines that many market-dominant services – ones that it appears to deem “commercial,” as well as governmental communications (which it elsewhere typifies as “essential”) – are fundamentally price-inelastic and could bear at least “modest price increases” to “boost overall mail revenue” and “increase the USPS’s net income.” While we have likewise advocated in the Ten-Year Review that the Commission can and should eliminate the price cap, our position applies to all market-dominant products, not just “commercial” ones. For a discussion of the issues in developing an “essential”-“commercial” distinction via the Ten-Year Review, see the discussion of Recommendation 1 above.</p>		

The Task Force does not explain the “control costs” language in the recommendation. To the extent that this can be interpreted as urging the Postal Service and/or Commission to do more to control costs, see Recommendations 21 and 22.

Recommendation 9	Policy Action, per Task Force	Responsible Party, per Law Department
<u>Business Model:</u> Require price increases, reduce service costs, or exit the business for any mail products that are not deemed an essential service and do not cover their direct costs.	Administrative	Congress, PRC, USPS
<p>Notes: The Task Force recommends abolishing the price cap on “non-essential services,” including Marketing Mail, while shifting certain competitive package volumes into the realm of (capped) “essential services.” See Recommendation 1. As the Postal Service has argued in the Ten-Year Review and elsewhere, a price-cap system provides little incentive to devote limited pricing authority to “underwater” products with rapidly declining volume, as the resulting price increases will not yield as much overall net income as would increases to other, more stable products. Without a price cap, there may be ways to address the situation that do not sacrifice overall remuneration.</p> <p>The Task Force also recommends that the Postal Service be required to price “non-essential services” at a “market rate” (p. 51). It is not apparent that such a requirement would conform to the statutory pricing criteria in 39 U.S.C. §§ 3622(b)-(c) and 3633(a)(1)-(3). Reform of these criteria would require Congressional action. To the extent that this aspect of the recommendation seeks prices that are artificially pegged to competitors’ prices, rather than reflecting intrinsic cost and demand factors, see Recommendation 14 below.</p>		

Recommendation 10	Policy Action, per Task Force	Responsible Party, per Law Department
<u>Product Classes:</u> Redefine mail classes by creating products defined by the type of sender and the declared purpose of the mail item.	Administrative	Congress, PRC, USPS
<p>Notes: The Postal Service has sought more extensive authority from the Commission to redefine market-dominant product classes as part of the 10-Year Review. However, see Recommendation 1 concerning the extent to which such a redefinition could be used to effectuate the Task Force’s “essential”-“commercial” distinction. With respect to competitive products, the Postal Service has broad authority to define and categorize products, subject to Commission review.</p>		

Recommendation 11	Policy Action, per Task Force	Responsible Party, per Law Department
<u>Product Classes</u> : Change USPS systems in order to track the purposes and uses of mail, to allow for better cost allocation, targeted pricing, and more business intelligence.	Administrative	USPS
Notes: This recommendation aims at mining Household Diary Survey responses to guide business decisions aimed at improving the value that senders and recipients place in the mail. It is not clear what the Task Force's reference to cost allocation means in this context.		

Recommendation 12	Policy Action, per Task Force	Responsible Party, per Law Department
<u>Strategic Options</u> : Evaluate areas of USPS operations where the USPS could expand third party relationships in order to provide services in a more cost efficient manner (e.g., mid-stream logistics and processing).	Administrative	USPS, PRC
Notes: The Postal Service could perform this evaluation. If any expansion of third-party relationships involves new workshare discounts or changes to existing workshare discounts, the Commission would need to approve the discount levels. New forms of outsourcing may also require consultation and/or bargaining with postal labor organizations. Even if the Postal Service can manage to scale down its in-house operations, there would be a delay in capturing labor-cost savings, due to the existence (and likely persistence, given the nature of binding arbitration) of no-layoff clauses in collective bargaining agreements and the resulting need to rely on attrition for workforce reduction.		

Recommendation 13	Policy Action, per Task Force	Responsible Party, per Law Department
<u>Strategic Options</u> : As a means of generating more income, the mailbox monopoly could be monetized.	Administrative	USPS, PRC
Notes: The mailbox monopoly statute, 18 U.S.C. § 1725, requires payment of postage on all mailable items placed in mailboxes. In theory, the Postal Service could establish special "postage" classifications and rates for items delivered by qualifying third-party delivery providers. The Commission would have to approve these classifications and rates. Such a move would affect other public benefits that the mailbox monopoly provides, however, particularly the secure, efficient provision of universal service. The mailbox monopoly does not merely protect revenue to support the		

USO. By channeling mailbox deliveries to a single universal service provider, it promotes efficient mail delivery: there is room in mailboxes for letter carriers to deliver, and carriers do not need to spend time at each mailbox distinguishing collection mailpieces from alternative-delivery mailpieces. The mailbox monopoly also protects the security of the mails, by giving recipients a stable expectation as to who can legitimately access a mailbox and who might warrant suspicion. That assurance of security, in turn, provides value to the “brand” of the mail. Opening mailbox access, even via franchising, could negatively impact both of these current benefits, as well as delivery costs and revenue.

To mitigate these potential harms, the Postal Service could attempt to impose and administer rigorous brand-protection and oversight measures in its franchise agreements. In doing so, however, it could face complaints of unreasonable discrimination under 39 U.S.C. § 403(c) or unfair preclusion of competition under 39 U.S.C. § 404a(1) and/or fair-competition statutes. See 39 U.S.C. §§ 404a(c), 409(d)-(e), 3622(a). The Task Force does not address these potential business and legal impacts, which would require further study before implementing its recommendation.

Recommendation 14	Policy Action, per Task Force	Responsible Party, per Law Department
Strategic Options: Price competitive products in a manner that maximizes revenues and generates income that can be used to fund capital expenditures and long-term liabilities.	Administrative	USPS, PRC
<p>Notes: This recommendation is at odds with the Task Force’s acknowledgment of the Postal Service’s competitive-product revenue and contribution growth since the PAEA, consistent with the PAEA’s aim of allowing the Postal Service to compete more effectively in the competitive marketplace and therefore grow competitive-product revenue and retain earnings. Additionally, the Task Force does not explain how competitive products can be priced substantially higher, since, by definition, they are products for which the market constrains the Postal Service’s pricing power. 39 U.S.C. § 3642(b)(1). (The Task Force explains that the Postal Service “has a dominant market position in B2C e-commerce segments” (p. 53), but also recognizes that “there are limits to how much consumers are willing to pay for delivery” and that “e-commerce consumers remain highly sensitive to delivery costs” (p. 50)).</p> <p>Alternatively, the Task Force recommends that the Postal Service consider, in its pricing decisions, “the potential market distortions that could drive industry participants out of the market” (p. 54). (It should be noted that, of the three major package and express delivery providers, the Postal Service holds the smallest share of the overall market when measured by revenue.) This consideration is not properly aimed at the Postal Service, whose pricing decisions are designed to maximize revenue to support the USO and its other statutory obligations, rather than to preserve its competitors’ market position. Safeguarding the overall health of the market is an object of regulation by the Commission, the Federal Trade Commission, or the Department of Justice’s Antitrust Division. Those authorities would</p>		

test for competitive fairness by looking not merely at differing price levels, which may reflect underlying cost or demand factors, but at whether prices cover marginal and incremental costs. See *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 339-40 (1990).

Moreover, to the extent that this recommendation implies that the Postal Service's prices should be higher, not for reasons of economic self-interest, but to protect competitors, that sort of artificial price increase would itself distort the market and harm the public policy interests of consumers. Various laws concerning fair competition, which apply to the Postal Service as well as its competitors, protect competition, not particular competitors, *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962), and they do not require a firm to make decisions based on ensuring the well-being of existing competitors. Doing so could actually draw antitrust scrutiny.

In theory, Congress could amend the relevant statutes to effectuate the Task Force's recommendation. However, it is unclear how the Postal Service could practically resolve the internal tension between protecting competitors and maximizing revenue to fund the USO, if artificially raising prices has the effect of driving down volume and overall revenue. Such an amendment would mark a departure from the PAEA's treatment of the Postal Service as a self-interested business actor on par with its private-sector peers.

It should be noted that this recommendation is framed in terms of the existing competitive-product category. It is unclear how it would bear on a potential future reclassification based on social policy rather than market power.

Recommendation 15	Policy Action, per Task Force	Responsible Party, per Law Department
<u>Costing Options:</u> Develop a new cost allocation model to establish full price transparency and fully distribute costs.	Administrative	Congress
<p>Notes: With respect to cost allocation, the recommendation could theoretically be fulfilled in one of two ways: full attribution of costs to products, or maintenance of some costs as non-attributable (or “institutional”) while apportioning explicit responsibility for covering them to competitive and market-dominant products.</p> <p>Implementation of fully-distributed costing through cost attribution would require legislative change. Current law requires costs to be attributed on the basis of “reliably identified causal relationships.” 39 U.S.C. §§ 3622(c)(2), 3631(b); see Dep’t of the Treasury, Accounting Principles and Practices for the Operation of the United States Postal Service’s Competitive Products Fund 7 (2007) (“This definition is consistent with the economic costing approach of the current USPS cost system.”). It is well-established in the regulatory, economic, and legal communities that fully-distributed costing is fundamentally arbitrary, meaning that the Commission cannot adopt it in administering its statutory framework. See, e.g., <i>Nat’l Ass’n of Greeting Card Publishers v. U.S. Postal Serv.</i>, 462 U.S. 810 (1983); S. REP. NO. 108-318, at 10, 30 (2004) (explaining statutory standard as codifying <i>Greeting Card Publishers</i>, and rejecting full cost attribution “or any other arbitrary percentage”). Therefore, fully-distributed costing would require Congress to abolish</p>		

the current, longstanding, and theoretically sound cost-attribution standard in favor of an arbitrary one. In doing so, Congress would be resurrecting a practice that was identified as a leading cause of inefficient pricing at the time of the Postal Reorganization Act, which rejected the practice. S. REP. NO. 91-912, at 17 (1970); see also Towards Postal Excellence: The Report of the President's Commission on Postal Organization 30-31, 133-35 (1968), *available at* <https://go.usa.gov/xQMhM>. As a court recently articulated, the Commission's role "is to carry out the particulars of the scheme Congress created, not to engineer specific market outcomes." *United Parcel Serv., Inc. v. Postal Regulatory Comm'n*, 890 F.3d 1053, 1067 (D.C. Cir. 2018). Contrary to the Task Force's statements, the current system set forth by the PAEA fully protects against cross-subsidization.

Implementation of fully-distributed costing through apportionment of institutional costs would likewise require statutory change, or a significant departure from recent Commission precedent. The Commission must periodically review the "appropriate share" of institutional costs that competitive products must cover. 39 U.S.C. § 3633(a)(3), (b). In doing so, the Commission must "consider all relevant circumstances, including the prevailing competitive conditions in the market, and the degree to which any costs are uniquely or disproportionately associated with any competitive products." *Id.* § 3633(b). The Commission must also consider a 2007 Federal Trade Commission (FTC) report on the laws that advantage or disadvantage the Postal Service's offering of competitive products, as well as any subsequent events that affect the validity of the FTC's estimates. Pub. L. No. 109-435, § 703(d), 120 Stat. 3198, 3244 (2006). The FTC concluded that the Postal Service suffers an enormous net competitive disadvantage. Fed. Trade Comm'n, Accounting for Laws That Apply Differently to the United States Postal Service and Its Private Competitors 64 (2007), <https://go.usa.gov/xQMu9>. In an ongoing review proceeding, the Commission has rejected a competitor's proposals that would apportion responsibility for institutional costs according to competitive products' share of total revenue or total attributable costs, on the basis that such proposals fail to account for competitive conditions, as required by statute, and amount to an effort to implement arbitrary cost attribution notwithstanding the statute's reliable-causation requirement. Order No. 4402, Notice of Proposed Rulemaking to Evaluate the Institutional Cost Contribution Requirement for Competitive Products, PRC Docket No. RM2017-1 (Feb. 8, 2018), at 81-82. While the Commission might have some leeway to distinguish a future "appropriate share" proposal from the ones that it recently rejected, it might be difficult for it to explain a reversal of its longstanding rejection of fully-distributed costing in a way that would withstand legal challenge. Here, too, legislative change would likely be necessary for the Commission to adopt an arbitrary cost-allocation method.

The Task Force does not explain what it means by "full price transparency." It is possible that this is simply another way of saying that costs should be fully distributed and "transparently" reflected in prices. However, the Task Force also asserts (p. 54) that negotiated service agreements (NSAs) make unfair distinctions between customers. If the intent is to require the publication of all NSA terms to give customers and competitors more leverage, then that would require a change to the statutory standards that govern confidentiality at the Commission. 39 U.S.C. § 504(g);

see *also id.* § 410(c)(2). Those standards give the Commission discretion to balance commercial injury to the Postal Service against the public interest in disclosure, but they clearly contemplate that some commercially sensitive information be protected from public disclosure. See H.R. REP. NO. 109-66, pt. 1 at 61; S. REP. NO. 108-318, at 20, 47-48. Courts have recognized that negotiated price information warrants this protection, as it would not be disclosed as a matter of good business practice. See *generally Wickwire Gavin v. U.S. Postal Serv.*, 356 F.3d 588 (4th Cir. 2004). Moreover, forcing or encouraging the Postal Service alone to disclose negotiated pricing would itself distort the market, since competitors and customers are not required to make similar disclosures. The current level of protection levels the playing field, while ensuring that the Commission (and counsel and consultants for parties appearing before the Commission) has the necessary information to regulate effectively. A change of the kind that the Task Force appears to advocate would accordingly be inconsistent with the intent of the Congress in the PAEA to enable the Postal Service to compete fairly in the package marketplace. See H.R. REP. NO. 109-66, pt. 1 at 44 (announcing intent to create level playing field, not one tilted against the Postal Service); S. REP. NO. 108-318 at 14 (same).

Recommendation 16	Policy Action, per Task Force	Responsible Party, per Law Department
<u>Costing Options:</u> Establish a separate balance sheet for packages to help prevent cross-subsidization between the mail and package business units.	Administrative	Congress, PRC
<p>Notes: It is not clear how this recommendation would “help prevent cross-subsidization.” As explained in connection with Recommendations 14 and 15 above, guarding against cross-subsidies involves measuring prices against costs, not the assets and liabilities reflected on a balance sheet.</p> <p>Current law already separates accounts for competitive products and all other products. 39 U.S.C. §§ 2003, 2011. Historically, the Treasury Department has favored a simplified accounting of competitive-product assets, apportioning total assets by competitive products’ cost of revenue. Dep’t of the Treasury, Accounting Principles and Practices for the Operation of the United States Postal Service’s Competitive Products Fund 25-27, 34 (2007). While a comprehensive study of each asset’s usage and each liability’s origin is theoretically possible, the Treasury Department deemed such an exercise to be unduly complicated. <i>Id.</i></p> <p>Before the Commission could adopt a different approach to asset assignment, it would have to determine that that approach would yield a greater allocation of assets to competitive products. 39 U.S.C. § 2011(e)(5). The PAEA does not specify a test for assignment of liabilities, although the 2007 Treasury Department report noted that liabilities would be more complicated to assign than assets. The Commission would also have to ensure that its measurement methodologies and assumptions are not arbitrary. <i>Id.</i> § 503; see 5 U.S.C. § 706(2)(A). Such an exercise would raise similar issues to fully-distributed costing and might ultimately require Congressional action. See Recommendation 15.</p>		

The Treasury Department's statutory role in competitive-product accounting is limited to the issuance of the 2007 report to inform the Commission's initial accounting rules. 39 U.S.C. § 2011(h)(1), (h)(2)(A)-(B). While the Commission may revisit its rules from time to time, *id.* § 2011(h)(2)(C)(ii), there is no provision for the Treasury Department to revisit its initial recommendations. That said, there is arguably no bar to the Treasury Department doing so voluntarily, or to the Commission using any new Treasury Department recommendations as a basis for its own consideration of revisions to the rules. The Treasury Department could also, as an "interested party," petition the Commission to initiate a revisionary rulemaking. *Id.*

Operating Model

Recommendation 17	Policy Action, per Task Force	Responsible Party, per Law Department
<u>Operations:</u> Align USPS employee rights with other federal employee rights by eliminating collective bargaining over compensation for USPS employees.	Legislative	Congress, USPS
<p>Notes: The Task Force's idea is that postal employees should be subject to the General Schedule pay system for Federal employees, and that they would be unable to bargain over compensation. As the Task Force recognizes, Congress would have to make the Postal Service subject to the Federal Service Labor-Management Relations Statute (FSLMRS), rather than the National Labor Relations Act. That step alone would not necessarily end bargaining over compensation, however. Congress would also have to make the General Schedule and related pay rules (or any successor statutes) specifically applicable to the Postal Service. Without that additional step, compensation would qualify, by default, as a condition of employment subject to bargaining. <i>See Fort Stewart Sch. v. Fed. Labor Relations Auth.</i>, 495 U.S. 641, 641 (1990). (Despite the general rule that agencies subject to the FSLMRS do not bargain over compensation, at least seven Federal agencies' employees do bargain over compensation as a result of specific statutory language or a judicial or administrative decision. <i>See</i> Cong. Res. Serv., No. 7-5700, Collective Bargaining and the Federal Service Labor-Management Relations Statute: Selected Legal Issues 3 (2017), https://fas.org/sqp/crs/misc/R44794.pdf.)</p> <p>In the meantime, the Task Force recommends that the Postal Service do what it can to that effect within its existing authority. With respect to bargaining-unit employees, this would require agreement by the unions or labor arbitrators. With respect to non-bargaining-unit employees, it would require consultation with postmaster/supervisor organizations.</p>		

Recommendation 18	Policy Action, per Task Force	Responsible Party, per Law Department
<u>Operations:</u> Pursue reforms to USPS employee wages consistent with those proposed for the broader federal workforce in the President's Management Agenda.	Legislative	Congress, USPS
<p>Notes: The President's Management Agenda proposes enhancement of performance-based pay incentives and a slowing of tenure-based step increases. Off. of Mgmt. & Budget, President's Management Agenda 18-19 (2018), https://go.usa.gov/xEa9Z. In theory, the Postal Service could seek similar reforms through collective bargaining. However, any impasse would be resolved through binding arbitration, a process that structurally favors the precedent of prior arbitral awards and collective bargaining agreements. 39 U.S.C. § 1207. It should be noted that non-bargaining-unit employees are already subject to a performance-based pay system that does not include step increases.</p> <p>In terms of non-wage compensation (see page 61), the Agenda refers to proposed pension reforms in the President's Budget, which would reduce benefits expense and increase employees' share of the funding obligation. <i>Id.</i> at 19; Off. of Mgmt. & Budget, Budget of the U.S. Government, Fiscal Year 2019: Major Savings and Reforms 181, 183-84 (2018) [hereinafter "<i>FY2019 Major Savings & Reforms</i>"], https://go.usa.gov/xPJPZ. These reforms concern structural aspects of the Federal pension system and would require legislative change.</p>		

Recommendation 19	Policy Action, per Task Force	Responsible Party, per Law Department
<u>Operations:</u> Explore and implement new business lines that generate revenue, and that present no balance sheet risk to the USPS.	Legislative	Congress, USPS
<p>Notes: The Task Force (at page 61) recommends that the Postal Service be allowed (a) to "explore supplying [certain] services for Federal, State, and local government entities," (b) to "convert[] post offices into contract post offices," (c) to "co-locat[e] with . . . complementary retail establishments," and (d) to "rent[] space to complementary retail establishments."</p> <p>Item (a): The Postal Service currently can partner with Federal agencies to offer new services. 39 U.S.C. § 411. An expansion of that authority to include state, local, and tribal agencies would require legislative change.</p> <p>Item (b): The Postal Service is already authorized to manage its retail network, contracts, and properties. <i>Id.</i> §§ 401(3)-(5), 404(a)(3). That authority is subject to procedural and substantive limitations, however. The Postal Service cannot close any Post Office solely for operating at a loss, and, in its closing decisions, it may not consider compliance with the Occupational Health and Safety Act of 1970. <i>Id.</i> §§ 101(d), 404(d)(2)(B). The Postal Service must also comply with public notice requirements, consider certain factors, and ensure that its decision is non-arbitrary and</p>		

evidence-based. *Id.* § 404(d)(1)-(5). In addition, expansion of outsourcing could require collective bargaining, consultation, and/or binding arbitration with postal labor organizations, as discussed in connection with Recommendation 12 above. To the extent that this recommendation entails expanding the Postal Service’s ability to close Post Offices and outsource bargaining-unit work beyond current legal bounds, such recommendation would require legislative change.

Item (c): The Postal Service’s existing authority to contract and lease would allow it lease space in non-Postal-Service-owned property. 39 U.S.C. § 401(3)-(5). To the extent that the Task Force envisions shifting bargaining-unit work to the business partner’s employees, the same labor considerations would come into play as for item (b).

Item (d): The Postal Service already has authority to lease its real property assets to private entities. *Id.*; Order No. 154, Review of Nonpostal Services Under the Postal Accountability and Enhancement Act, PRC Docket No. MC2008-1 (Dec. 19, 2008), at 64-68. Its ability to do so is limited by the fact that Postal Service real estate holdings must, in the first instance, be “necessary or convenient in the transaction of its business.” 39 U.S.C. § 401(5). In other words, the Postal Service must generally aim to align space with the operational requirements of offering postal services, with revenue-generating out-leasing relegated to a secondary use of excess space (to the extent that market opportunities exist). See Order No. 154 at 64-68. If the Task Force envisions expanding the Postal Service’s ability to hold real estate with the primary aim of generating revenue from out-leasing, that would likely require legislative change.

Recommendation 20	Policy Action, per Task Force	Responsible Party, per Law Department
<u>Governance and Oversight:</u> Strengthen the governance and regulatory oversight of USPS. This could be achieved through reforming, but maintaining, the existing institutional structures or by changing the institutional structures, which would require legislation.	Legislative	USPS, Congress
<p>Notes: It is not clear what is intended with this recommendation, as distinct from Recommendations 21 and 22. However, as discussed below, the Board of Governors and the Commission could make strategic decisions within the scope of their existing authority that could be interpreted as strengthening governance and regulatory oversight, respectively. As the recommendation recognizes, any changes to existing institutional structures would require legislation.</p> <p>To the extent that this recommendation corresponds to the report’s discussion of the currently low complement of sitting Governors (pages 61-62), appointment of additional Governors would require action by both the President and the Senate. 39 U.S.C. § 202(a)(1).</p>		

Recommendation 21	Policy Action, per Task Force	Responsible Party, per Law Department
<u>Governance and Oversight:</u> Institute a new policy mandate for management that sets organizational direction and financial targets, which align with a sustainable business model and establish an enforcement mechanism if the existing Board is unable to meet these targets.	Legislative	USPS, Congress
<p>Notes: The Board of Governors could set a new organizational direction and financial targets. (Earlier in the report, the Task Force described creating a new policy mandate as a task for the Board.) Congress could set its own parameters, although doing so would usurp discretion currently held by the Board. Only Congress can establish an “enforcement mechanism,” in the sense of turning control over to the Commission.</p> <p>However, the Task Force recognizes elsewhere that legislative and regulatory action is needed to establish a sustainable business model and avoid a liquidity crisis (p. 4; see, e.g., Recommendations 8, 17, 18, 19, 23, 24, and 25). Given the statutory constraints on the Postal Service’s ability to improve its financial health, it is unclear how reasonable or effective sustainability-oriented financial targets can be unless and until legislative and regulatory reforms give the Postal Service more control over costs and revenue.</p>		

Recommendation 22	Policy Action, per Task Force	Responsible Party, per Law Department
<u>Governance and Oversight:</u> Strengthen the regulatory oversight role of the PRC, providing the PRC with expanded controls, imposing increased accountability on the USPS.	Legislative	PRC, Congress
<p>Notes: From the discussion at p. 62, it seems that the Task Force envisions allowing the Commission to overturn and dictate Postal Service decisions on service standards, operations, and capital investments. (The Task Force does not explain how this recommendation aligns with Recommendations 3-6, which advocate for preserving or expanding the Postal Service’s operational discretion.)</p> <p>Existing law may already allow the Commission more authority in these areas than it has historically exercised. The Commission arguably has broad authority to order remedies upon finding a lack of Postal Service compliance with certain statutory requirements, and that authority could be brought to bear on service, operational, and investment decisions. 39 U.S.C. §§ 3653(c), 3662, 3691(d). (However, we would read the scope of the Commission’s remedial</p>		

authority in a more limited fashion.) To date, the Commission has been reticent to exercise what may arguably be the full extent of that authority, preferring to conduct inquiries and require reporting on the Postal Service's self-directed remedial efforts. In the Ten-Year Review, the Commission has also proposed to design the rate-regulation system in a way that disincentivizes the Postal Service from downgrading service standards. Order No. 4258, Notice of Proposed Rulemaking for the System for Regulating Rates and Classes for Market Dominant Products, PRC Docket No. RM2017-3 (Dec. 1, 2017), at 70-73. And some commenters have urged the Commission to discount the Postal Service's rate authority on account of investments that the Commission deems imprudent. While the Commission has historically shied away from using its authority in that fashion, doing so would arguably be within its statutory authority over the rate-regulation system.

Thus, the Task Force recommendation could spur the Commission to use its existing remedial and regulatory authorities more aggressively. If it did not do so, or if some additional enforcement powers were deemed desirable, Congress could amend the statute to that effect.

Recommendation 23	Policy Action, per Task Force	Responsible Party, per Law Department
<u>Benefits:</u> Pursue reforms proposed to the Federal Employees Compensation Act that are included in the President's FY2019 Budget.	Legislative	Congress
Notes: The Administration's proposals are "to provide a single rate of compensation for new injuries at 66 2/3 percent of the injured workers' pay; convert retirement-age beneficiaries to a retirement annuity-level benefit; establish an up-front waiting period for benefits for all beneficiaries; increase benefits for disfigurement and burial; suspend payments to indicted medical providers; and make other changes to improve the program integrity and reduce improper payments." Off. of Mgmt. & Budget, Budget of the U.S. Government, Fiscal Year 2019: Major Savings and Reforms 169 (2018) [hereinafter " <i>FY2019 Major Savings & Reforms</i> "], https://go.usa.gov/xPJPZ . OMB estimates that these changes will save only \$117 million across the entire Government over the next ten years. <i>Id.</i>		

Recommendation 24	Policy Action, per Task Force	Responsible Party, per Law Department
<u>Benefits:</u> Pursue reform of the Federal Employee Retirement System (FERS) that would increase employee contributions and move toward a defined contribution system.	Legislative	Congress
Notes: Currently, FERS employees contribute 0.8 to 4.4 percent of basic pay, depending on position and time of hire. The Administration has proposed to increase FERS employees' contribution rates by 1 percentage point per year, until		

all are contributing half of the normal-cost percentage of their basic pay (i.e., 7.25 percent, under the current normal-cost percentage). The Administration has also proposed reducing FERS's liability by eliminating annuity supplements and cost-of-living adjustments and basing annuity calculations on employees' "high-5" average salary, instead of the current "high-3" calculation. See Letter from Jeff T.H. Pon, Director, Office of Personnel Management, to Paul D. Ryan, Speaker, House of Representatives, May 4, 2018, <http://tiny.cc/OPM-FERS-proposal-letter>; OMB, *FY2019 Major Savings & Reforms* at 181, 183-84.

Recommendation 25	Policy Action, per Task Force	Responsible Party, per Law Department
<p><u>Benefits:</u> Maintain but restructure the retiree health benefits liability, including the \$43 billion in pre-funding payments that the USPS failed to pay into the Postal Service Retiree Health Benefits Fund (PSRHBF) and the unfunded actuarial liability, with the total liability re-amortized with a new actuarial calculation based on the population of employees at or near retirement age.</p>	Legislative	Congress
<p>Notes: The Task Force proposes to change how the actuarial liability is calculated, which would affect the Postal Service's annual prefunding payments to the (PSRHBF). It would not change the actual benefits that postal annuitants are eligible for, the payment of which are ultimately the responsibility of the Postal Service under the statute, either through payments to the PSRBF or through direct premium payments if the assets in the PSRHBF are exhausted.</p>		



March 23, 2020

Ms. Maria Bonner
Deputy Director
White House Domestic Policy Council
EOP Office of Policy Development
Washington, DC 20504-0002

RE: Essential Public Service Provided by the Postal Service as a Part of the Nation's Critical Infrastructure

Dear Deputy Director Bonner:

As a follow-up from our conversation on March 20, 2020, the Postal Service is committed to continuing to fulfill its role as a provider of essential government services, and to assist the Administration in whatever way we can during this national emergency. We are working closely with federal, state, and local authorities to ensure that our continued operations during this time of national emergency are conducted in a manner that protects the safety of our employees and the public. However, we are concerned that the implementation of state and local government actions restricting commercial and personal activities in response to the Coronavirus Disease 2019 (COVID-19) pandemic will inadvertently interfere with operations. This letter provides information concerning the Postal Service's status and our exemption from these state and local directives, as we are both a provider of essential services and part of the federal government.

Essential Government Service

The Postal Service's role as a provider of essential government services under federal law is clear. The postal system is used to deliver, among other things, important governmental information and benefits, mail that is essential to the functioning of our economy, elections materials, and packages containing vital necessities. For instance, the Postal Service assists with elections, the Census, and the provision of government benefits, like social security checks. We deliver transactional mail that is essential to the financial services industry and other commercial firms. We deliver medications and other necessary purchases made online. We consistently and continually fulfill our essential function as set forth by statute and Administration policy.

We are mandated by statute to operate "as a basic and fundamental service provided to the people by the Government of the United States, authorized by the Constitution, created by an Act of Congress, and supported by the people."¹ 39 U.S.C. §101(a). The Postal Service performs this role as "an independent establishment of the executive branch of the Government of the United States."² Pursuant to our statute, we are mandated to provide prompt, reliable, and efficient universal postal services throughout the United States.

In addition to this statutory mandate, the Postal Service carries out an essential function of the federal government and provides critical government services as part of the National Continuity Policy (established for national emergencies pursuant to Presidential Directive and implemented by

¹ 39 U.S.C. §101(a).

² *Id.* § 201.

FEMA). Specifically, “the delivery of postal services to the American Public” is defined as a Primary Mission Essential Function necessary for the continuation of critical government services.³

As background, Presidential Policy Directive 40 established that “it is the policy of the United States to maintain a comprehensive and effective continuity capability through Continuity of Operations (COOP), Continuity of Government (COG), and Enduring Constitutional Government (ECG) programs, ensuring the resilience and preservation of government structure under the United States Constitution and the continuous performance of National Essential Functions (NEFs) under all conditions.”⁴ National Security Presidential Directive 51 then instructed Executive Departments and Agencies to identify and submit a list of Primary Mission Essential Functions (PMEFs) that the Department or Agency plans in support of the NEFs.⁵ PMEFs are those mission essential government functions that must be continuously performed in order to support or implement the uninterrupted performance of NEFs before, during, and in the aftermath of an emergency.⁶

In addition to the PMEF designation, “postal and shipping workers” are considered essential critical infrastructure workers, as defined in recent guidance issued by the Department of Homeland Security’s Cybersecurity and Infrastructure Security Agency (CISA).⁷ In its guidance materials issued on March 19, 2020, CISA explained that promoting the ability of essential critical infrastructure workers “to continue to work during periods of community restriction, access management, social distancing, or closure orders/directives is crucial to community resilience and continuity of essential functions.”

White House Guidance further provides that if individuals work in a critical infrastructure industry, as defined by the Department of Homeland Security, they have a responsibility to maintain their normal work schedule, while following CDC guidance to protect individuals’ health at work.⁸

In addition to our employees, the Postal Service relies heavily on our contractors, suppliers, and industry partners. Contractors and suppliers support all aspects of our operations, including in the transportation and delivery of the mail. This network of contractors and suppliers are likewise critical to the provision of this essential function. In addition, our mailing and printing industry partners are vital because they print and mail the critical items that are sent through the mail, and hence ensure that the government and businesses can access the mail. Our industry partners are also important in ensuring the efficiency of our package delivery network, through which we deliver vital necessities, including medicines and other goods. Moreover, the DHS guidance regarding essential critical infrastructure workers is not specific to the Postal Service, but rather extends to postal and shipping

³ See List of List of Validated PMEFs by Department/Agency (available at: https://www.dhs.gov/sites/default/files/publications/list_of_validated_pmefts_by_department_v2_fema.pdf).

⁴ U.S. Department of Homeland Security Federal Emergency Management Agency Federal Continuity Directive 1 at 3 (January 17, 2017) (available at: <https://www.gpo.gov/docs/default-source/accessibility-privacy-coop-files/January2017FCD1-2.pdf>).

⁵ National Security Presidential Directive/NSPD 51 (available at: <https://fas.org/irp/offdocs/nspd/nspd-51.htm>).

⁶ See, e.g., U.S. Department of Homeland Security Federal Emergency Management Agency Federal Continuity Directive 1 at 3, 16, Annex B.

⁷ Krebs, Christopher C., Director Cybersecurity and Infrastructure Security Agency (CISA), Memorandum on Identification of Essential Critical Infrastructure Workers During COVID-19 Response (March 19, 2020) (available at: <https://www.cisa.gov/sites/default/files/publications/CISA-Guidance-on-Essential-Critical-Infrastructure-Workers-1-20-508c.pdf>).

⁸ https://www.whitehouse.gov/wp-content/uploads/2020/03/03.16.20_coronavirus-guidance_8.5x11_315PM.pdf.

workers, including those in the private sector. We believe this reasonably includes our contractors, suppliers, and industry partners.

Given all of the above, we believe it is clear that the Postal Service is exempt from state and local ordinances restricting commercial and personal activities, and that this exemption should also apply as a general matter to our contractors and suppliers who are critical for our operations, and our industry partners who are printing, distributing, and entering items into the postal system. We are already seeing, however, that there is some confusion in the implementation of these ordinances. And the text of several such ordinances does not make clear that the Postal Service, and others in our supply chain, are excluded.

Supremacy Clause

The above conclusions are further buttressed by the Supremacy Clause of the United States Constitution, which otherwise limits the ability of state and local laws to affect the performance of federal functions. First, the “intergovernmental immunity” doctrine provides that states and localities are not allowed to directly regulate the actions of any arm of the federal government,⁹ unless the federal government clearly and unambiguously submits to state regulation.¹⁰ Second, the “preemption” doctrine provides that state and local laws are preempted by federal law if they seek to regulate an activity that is the subject of a comprehensive federal scheme, or would otherwise frustrate the achievement of the purposes and objectives of federal law.

The U.S. Constitution grants to Congress the enumerated power “to establish post offices and post roads,”¹¹ a power which “embraces the regulation of the entire Postal System of the country.”¹² As noted above, Congress has in turn established the U.S. Postal Service as an “independent establishment of the executive branch of the Government of the United States” to provide postal services throughout the Nation.¹³ To support this mission, Congress delegated to the Postal Service the power “to construct, operate, lease, and maintain buildings, facilities, equipment, and any improvements on any property owned or controlled by it.”¹⁴ Postal facilities serve the basic function of providing prompt, reliable, and efficient postal services nationwide, and must be maintained in “such character and in such locations, that postal patrons throughout the Nation will, consistent with reasonable economies of postal operations, have ready access to essential postal services.”¹⁵ Congress also granted comprehensive powers to the Postal Service to direct and maintain its operations, including the right to enter into contracts,¹⁶ and broad personnel rights to hire its own

⁹ U.S. CONST. art. 6, cl. 2 (“This Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.”); *M’Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 406 (1819) (“The government of the United States, then, though limited in its powers, is supreme; and its laws, when made in pursuance of the constitution, form the supreme law of the land, ‘anything in the constitution or laws of any state to the contrary notwithstanding.’”).

¹⁰ *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 180 (1988) (“It is well settled that the activities of federal installations are shielded by the Supremacy Clause from direct state regulation unless Congress provides ‘clear and unambiguous’ authorization for such regulation.”) (citations omitted).

¹¹ U.S. Const. art. I, § 8, cl. 7.

¹² *Ex parte Jackson*, 96 U.S. 727, 732 (1878).

¹³ 39 U.S.C. § 201. See also *id.* § 101, 403.

¹⁴ 39 U.S.C. § 401(6).

¹⁵ *Id.* §§ 101(a), 403(b)(3).

¹⁶ *Id.* § 401(3).

employees and direct the performance of their duties and “to take whatever actions may be necessary to carry out its mission in emergency situations.”¹⁷

In light of the clear congressional mandate that the Postal Service provide economical and efficient mail service on a nationwide basis – including during times of emergency – courts have consistently found that Congress intended the Postal Service to have broad immunity from state or local regulation.¹⁸ Where local regulation affecting Postal Service operations is inconsistent with postal regulations, courts will deem it to be preempted under the Supremacy Clause as “an unconstitutional obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”¹⁹ Thus, any state or local law purportedly directing postal employees to follow procedures inconsistent with Postal Service authority presents a clear conflict with federal law, which entrusts the Postal Service with the task of maintaining facilities and operations in accordance with federal law: “[W]here a postal worker is performing duties pursuant to federal law, a state cannot impose requirements that interfere with the performance of those duties.”²⁰

Moreover, the express authority allocated to the Postal Service to “operate” and “maintain” its facilities in the service of providing an efficient network of postal services on a nationwide basis and “to take whatever actions may be necessary to carry out its mission in emergency situations” “leaves no room” for state or local regulatory authority over health or safety matters and evidences a “federal

¹⁷ *Id.* § 1001(e) (“The Postal Service shall have the right, consistent with . . . applicable laws, regulations, and collective-bargaining agreements—(1) to direct officers and employees of the Postal Service in the performance of official duties; . . . (4) to maintain the efficiency of the operations entrusted to it; (5) to determine the methods, means, and personnel by which such operations are to be conducted; . . . and (7) to take whatever actions may be necessary to carry out its mission in emergency situations.”).

¹⁸ See, e.g., *Goldsmith v. U.S.*, 42 Fed.Cl. 664, 669, n.3 (Fed. Cl. 1999) (“The Postal Service may ignore local town or city requirements by virtue of the powers conferred by the Supremacy Clause of the United States Constitution.”) (citation omitted); *Barbieri v. Hartsdale Post Office*, 863 F.Supp. 152 (S.D.N.Y. 1994) (holding local taxing authority to be preempted to the extent it purported to interfere with Postal Service’s ability to correct erroneous postmarks); *Grover City v. U.S. Postal Service*, 391 F.Supp. 982, 986-87 (C.D.Cal. 1975) (dismissing city’s suit to require door delivery on Supremacy Clause preemption grounds). Particularly in the area of municipal regulation, a long line of case law supports the supremacy of Postal Service regulations. See, e.g., *U.S. v. City of Pittsburg, Cal.*, 661 F.2d 783 (9th Cir.1981) (trespass ordinance); *U.S. Postal Service v. Town of Greenwich, Conn.*, 901 F.Supp. 500 (D.Conn., 1995) (construction code); *Middletown Tp. v. N/E Regional Office, U.S. Postal Service*, 601 F.Supp. 125 (D.N.J., 1985) (zoning ordinance); *Crivello v. Board of Adjustment of Borough of Middlesex*, 183 F.Supp. 826 (D.N.J.1960) (zoning ordinance); *City of N. Miami, Fla. v. Grant-Sholk Constr. Co.*, 237 F.Supp. 573 (S.D.Fla., 1965) (zoning ordinance); *Breeze v. Town of Bethlehem*, 573 N.Y.S.2d 122 (N.Y.Sup., 1991) (zoning and land use); *Thanet Corp. v. Bd. of Adjustment of Princeton Tp.*, 260 A.2d 1 (N.J.Super.A.D., 1969) (zoning ordinance); *Stewart v. U.S. Postal Service*, 508 F.Supp. 112, 115 (N.D.Cal.1980) (zoning ordinance).

¹⁹ *City of Pittsburg, Cal.*, 661 F.2d at 785 (citing *Hines v. Davidowitz*, 312 U.S. 52 (1941) (internal quotation marks omitted)). Courts have held this to be true even in the traditionally local area of public safety. *City of Hollywood*, 974 F.Supp. at 1465 & n.5 (noting in dicta that, public safety concerns being shared equally by both state and federal levels of government, the Postal Service’s interest in a uniform system of facility construction and design would be paramount).

²⁰ *City of Pittsburg, Cal.*, at 785-86 (holding that local criminal trespass ordinance conflicted with Postal Service regulations regarding the manner in which delivery employees performed their duties and was thus preempted by the “Congressional mandate to provide efficient mail delivery service”); cf. *U.S. v. City of St. Louis, Branch 343, Nat. Ass’n of Letter Carriers*, 597 F.2d 121 (8th Cir. 1979) (holding that a municipal ordinance prohibiting letter carriers from crossing the private property of patrons without their express or implied consent was permissible only because it did not conflict with the same Postal Service regulation).

interest . . . so dominant that the federal system will be assumed to preclude enforcement of state law on the same subject.”²¹ Furthermore, the constitutional enumeration of the postal powers supports the supremacy of the federal interest in this field. Even where express preemption language is absent, any state or local law which “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress”—such as a local determination to close a postal facility—would be impliedly preempted by conflict.²²

While it does not specifically invoke the Supremacy Clause, the Attorney General issued a memorandum to all United States Attorneys on March 20, 2020, in which he requested that they communicate with state and local law enforcement partners “to ensure that local law enforcement officials enforcing travel restrictions are aware of the fact that federal employees must be allowed to travel and commute to perform law enforcement and other functions and should not be prevented from doing so, even when travel restrictions are in place.” This is consistent with the fact that the state and local ordinances should not apply to the Postal Service as part of the federal government, even if we were not providing an essential service as defined by the relevant ordinance.

Finally, to the extent that state and local ordinances would impede the Postal Service’s functions, those ordinances are subject to the same preemption analysis regardless of whether the functions are performed by postal employees or contractors.²³ This principle has already been applied to Postal Service contractors.²⁴

Conclusion

As stated at the outset, we are committed to continuing to fulfill our role as a provider of essential government services, and we appreciate your consideration of this information. Thank you for your time last Friday and for any assistance you can provide to reinforce the conclusions of this memorandum.

In that regard, please let us know if you have any questions or if additional information would be helpful.

Sincerely,



Thomas J. Marshall

²¹ *Hillsborough*, 471 U.S. 707 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

²² *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

²³ See, e.g., *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 181 (1988) (analyzing *Hancock v. Train*, 426 U.S. 167 (1976), as “establish[ing] that a federally owned facility performing a federal function is shielded from direct state regulation, even though the federal function is carried out by a private contractor, unless Congress clearly authorizes such regulation.”); *United States v. California*, 921 F.3d 865, 882 n.7 (9th Cir. 2019) (“For purposes of intergovernmental immunity, federal contractors are treated the same as the federal government itself.”) (citing *Goodyear*).

²⁴ *U.S. Postal Serv. v. Town of Greenwich, Conn.*, 901 F. Supp. 500, 507 (D. Conn. 1991) (“In the absence of such specific Congressional authorization, the Court finds that the state building code cannot be applied to the lessors of land to the Postal Service and to the contractors hired to construct postal facilities because it conflicts with federal law.”) (citing, *inter alia*, *Hancock*, *Goodyear*, and *Leslie Miller*).



March 23, 2020

Ms. Maria Bonner
Deputy Director
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EOP Office of Policy Development
Washington, DC 20504-0002

RE: Essential Public Service Provided by the Postal Service as a Part of the Nation's Critical Infrastructure

Dear Deputy Director Bonner:

As a follow-up from our conversation on March 20, 2020, the Postal Service is committed to continuing to fulfill its role as a provider of essential government services, and to assist the Administration in whatever way we can during this national emergency. We are working closely with federal, state, and local authorities to ensure that our continued operations during this time of national emergency are conducted in a manner that protects the safety of our employees and the public. However, we are concerned that the implementation of state and local government actions restricting commercial and personal activities in response to the Coronavirus Disease 2019 (COVID-19) pandemic will inadvertently interfere with operations. This letter provides information concerning the Postal Service's status and our exemption from these state and local directives, as we are both a provider of essential services and part of the federal government.

Essential Government Service

The Postal Service's role as a provider of essential government services under federal law is clear. The postal system is used to deliver, among other things, important governmental information and benefits, mail that is essential to the functioning of our economy, elections materials, and packages containing vital necessities. For instance, the Postal Service assists with elections, the Census, and the provision of government benefits, like social security checks. We deliver transactional mail that is essential to the financial services industry and other commercial firms. We deliver medications and other necessary purchases made online. We consistently and continually fulfill our essential function as set forth by statute and Administration policy.

We are mandated by statute to operate "as a basic and fundamental service provided to the people by the Government of the United States, authorized by the Constitution, created by an Act of Congress, and supported by the people."¹ 39 U.S.C. §101(a). The Postal Service performs this role as "an independent establishment of the executive branch of the Government of the United States."² Pursuant to our statute, we are mandated to provide prompt, reliable, and efficient universal postal services throughout the United States.

In addition to this statutory mandate, the Postal Service carries out an essential function of the federal government and provides critical government services as part of the National Continuity Policy (established for national emergencies pursuant to Presidential Directive and implemented by

¹ 39 U.S.C. §101(a).

² *Id.* § 201.

FEMA). Specifically, “the delivery of postal services to the American Public” is defined as a Primary Mission Essential Function necessary for the continuation of critical government services.³

As background, Presidential Policy Directive 40 established that “it is the policy of the United States to maintain a comprehensive and effective continuity capability through Continuity of Operations (COOP), Continuity of Government (COG), and Enduring Constitutional Government (ECG) programs, ensuring the resilience and preservation of government structure under the United States Constitution and the continuous performance of National Essential Functions (NEFs) under all conditions.”⁴ National Security Presidential Directive 51 then instructed Executive Departments and Agencies to identify and submit a list of Primary Mission Essential Functions (PMEFs) that the Department or Agency plans in support of the NEFs.⁵ PMEFs are those mission essential government functions that must be continuously performed in order to support or implement the uninterrupted performance of NEFs before, during, and in the aftermath of an emergency.⁶

In addition to the PMEF designation, “postal and shipping workers” are considered essential critical infrastructure workers, as defined in recent guidance issued by the Department of Homeland Security’s Cybersecurity and Infrastructure Security Agency (CISA).⁷ In its guidance materials issued on March 19, 2020, CISA explained that promoting the ability of essential critical infrastructure workers “to continue to work during periods of community restriction, access management, social distancing, or closure orders/directives is crucial to community resilience and continuity of essential functions.”

White House Guidance further provides that if individuals work in a critical infrastructure industry, as defined by the Department of Homeland Security, they have a responsibility to maintain their normal work schedule, while following CDC guidance to protect individuals’ health at work.⁸

In addition to our employees, the Postal Service relies heavily on our contractors, suppliers, and industry partners. Contractors and suppliers support all aspects of our operations, including in the transportation and delivery of the mail. This network of contractors and suppliers are likewise critical to the provision of this essential function. In addition, our mailing and printing industry partners are vital because they print and mail the critical items that are sent through the mail, and hence ensure that the government and businesses can access the mail. Our industry partners are also important in ensuring the efficiency of our package delivery network, through which we deliver vital necessities, including medicines and other goods. Moreover, the DHS guidance regarding essential critical infrastructure workers is not specific to the Postal Service, but rather extends to postal and shipping

³ See List of List of Validated PMEFs by Department/Agency (available at: https://www.dhs.gov/sites/default/files/publications/list_of_validated_pmefts_by_department_v2_fema.pdf).

⁴ U.S. Department of Homeland Security Federal Emergency Management Agency Federal Continuity Directive 1 at 3 (January 17, 2017) (available at: <https://www.gpo.gov/docs/default-source/accessibility-privacy-coop-files/January2017FCD1-2.pdf>).

⁵ National Security Presidential Directive/NSPD 51 (available at: <https://fas.org/irp/offdocs/nspd/nspd-51.htm>).

⁶ See, e.g., U.S. Department of Homeland Security Federal Emergency Management Agency Federal Continuity Directive 1 at 3, 16, Annex B.

⁷ Krebs, Christopher C., Director Cybersecurity and Infrastructure Security Agency (CISA), Memorandum on Identification of Essential Critical Infrastructure Workers During COVID-19 Response (March 19, 2020) (available at: <https://www.cisa.gov/sites/default/files/publications/CISA-Guidance-on-Essential-Critical-Infrastructure-Workers-1-20-508c.pdf>).

⁸ https://www.whitehouse.gov/wp-content/uploads/2020/03/03.16.20_coronavirus-guidance_8.5x11_315PM.pdf.

workers, including those in the private sector. We believe this reasonably includes our contractors, suppliers, and industry partners.

Given all of the above, we believe it is clear that the Postal Service is exempt from state and local ordinances restricting commercial and personal activities, and that this exemption should also apply as a general matter to our contractors and suppliers who are critical for our operations, and our industry partners who are printing, distributing, and entering items into the postal system. We are already seeing, however, that there is some confusion in the implementation of these ordinances. And the text of several such ordinances does not make clear that the Postal Service, and others in our supply chain, are excluded.

Supremacy Clause

The above conclusions are further buttressed by the Supremacy Clause of the United States Constitution, which otherwise limits the ability of state and local laws to affect the performance of federal functions. First, the “intergovernmental immunity” doctrine provides that states and localities are not allowed to directly regulate the actions of any arm of the federal government,⁹ unless the federal government clearly and unambiguously submits to state regulation.¹⁰ Second, the “preemption” doctrine provides that state and local laws are preempted by federal law if they seek to regulate an activity that is the subject of a comprehensive federal scheme, or would otherwise frustrate the achievement of the purposes and objectives of federal law.

The U.S. Constitution grants to Congress the enumerated power “to establish post offices and post roads,”¹¹ a power which “embraces the regulation of the entire Postal System of the country.”¹² As noted above, Congress has in turn established the U.S. Postal Service as an “independent establishment of the executive branch of the Government of the United States” to provide postal services throughout the Nation.¹³ To support this mission, Congress delegated to the Postal Service the power “to construct, operate, lease, and maintain buildings, facilities, equipment, and any improvements on any property owned or controlled by it.”¹⁴ Postal facilities serve the basic function of providing prompt, reliable, and efficient postal services nationwide, and must be maintained in “such character and in such locations, that postal patrons throughout the Nation will, consistent with reasonable economies of postal operations, have ready access to essential postal services.”¹⁵ Congress also granted comprehensive powers to the Postal Service to direct and maintain its operations, including the right to enter into contracts,¹⁶ and broad personnel rights to hire its own

⁹ U.S. CONST. art. 6, cl. 2 (“This Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.”); *M’Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 406 (1819) (“The government of the United States, then, though limited in its powers, is supreme; and its laws, when made in pursuance of the constitution, form the supreme law of the land, ‘anything in the constitution or laws of any state to the contrary notwithstanding.’”).

¹⁰ *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 180 (1988) (“It is well settled that the activities of federal installations are shielded by the Supremacy Clause from direct state regulation unless Congress provides ‘clear and unambiguous’ authorization for such regulation.”) (citations omitted).

¹¹ U.S. Const. art. I, § 8, cl. 7.

¹² *Ex parte Jackson*, 96 U.S. 727, 732 (1878).

¹³ 39 U.S.C. § 201. See also *id.* § 101, 403.

¹⁴ 39 U.S.C. § 401(6).

¹⁵ *Id.* §§ 101(a), 403(b)(3).

¹⁶ *Id.* § 401(3).

employees and direct the performance of their duties and “to take whatever actions may be necessary to carry out its mission in emergency situations.”¹⁷

In light of the clear congressional mandate that the Postal Service provide economical and efficient mail service on a nationwide basis – including during times of emergency – courts have consistently found that Congress intended the Postal Service to have broad immunity from state or local regulation.¹⁸ Where local regulation affecting Postal Service operations is inconsistent with postal regulations, courts will deem it to be preempted under the Supremacy Clause as “an unconstitutional obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”¹⁹ Thus, any state or local law purportedly directing postal employees to follow procedures inconsistent with Postal Service authority presents a clear conflict with federal law, which entrusts the Postal Service with the task of maintaining facilities and operations in accordance with federal law: “[W]here a postal worker is performing duties pursuant to federal law, a state cannot impose requirements that interfere with the performance of those duties.”²⁰

Moreover, the express authority allocated to the Postal Service to “operate” and “maintain” its facilities in the service of providing an efficient network of postal services on a nationwide basis and “to take whatever actions may be necessary to carry out its mission in emergency situations” “leaves no room” for state or local regulatory authority over health or safety matters and evidences a “federal

¹⁷ *Id.* § 1001(e) (“The Postal Service shall have the right, consistent with . . . applicable laws, regulations, and collective-bargaining agreements—(1) to direct officers and employees of the Postal Service in the performance of official duties; . . . (4) to maintain the efficiency of the operations entrusted to it; (5) to determine the methods, means, and personnel by which such operations are to be conducted; . . . and (7) to take whatever actions may be necessary to carry out its mission in emergency situations.”).

¹⁸ See, e.g., *Goldsmith v. U.S.*, 42 Fed.Cl. 664, 669, n.3 (Fed. Cl. 1999) (“The Postal Service may ignore local town or city requirements by virtue of the powers conferred by the Supremacy Clause of the United States Constitution.”) (citation omitted); *Barbieri v. Hartsdale Post Office*, 863 F.Supp. 152 (S.D.N.Y. 1994) (holding local taxing authority to be preempted to the extent it purported to interfere with Postal Service’s ability to correct erroneous postmarks); *Grover City v. U.S. Postal Service*, 391 F.Supp. 982, 986-87 (C.D.Cal. 1975) (dismissing city’s suit to require door delivery on Supremacy Clause preemption grounds). Particularly in the area of municipal regulation, a long line of case law supports the supremacy of Postal Service regulations. See, e.g., *U.S. v. City of Pittsburg, Cal.*, 661 F.2d 783 (9th Cir.1981) (trespass ordinance); *U.S. Postal Service v. Town of Greenwich, Conn.*, 901 F.Supp. 500 (D.Conn., 1995) (construction code); *Middletown Tp. v. N/E Regional Office, U.S. Postal Service*, 601 F.Supp. 125 (D.N.J., 1985) (zoning ordinance); *Crivello v. Board of Adjustment of Borough of Middlesex*, 183 F.Supp. 826 (D.N.J.1960) (zoning ordinance); *City of N. Miami, Fla. v. Grant-Sholk Constr. Co.*, 237 F.Supp. 573 (S.D.Fla., 1965) (zoning ordinance); *Breeze v. Town of Bethlehem*, 573 N.Y.S.2d 122 (N.Y.Sup., 1991) (zoning and land use); *Thanet Corp. v. Bd. of Adjustment of Princeton Tp.*, 260 A.2d 1 (N.J.Super.A.D., 1969) (zoning ordinance); *Stewart v. U.S. Postal Service*, 508 F.Supp. 112, 115 (N.D.Cal.1980) (zoning ordinance).

¹⁹ *City of Pittsburg, Cal.*, 661 F.2d at 785 (citing *Hines v. Davidowitz*, 312 U.S. 52 (1941) (internal quotation marks omitted)). Courts have held this to be true even in the traditionally local area of public safety. *City of Hollywood*, 974 F.Supp. at 1465 & n.5 (noting in dicta that, public safety concerns being shared equally by both state and federal levels of government, the Postal Service’s interest in a uniform system of facility construction and design would be paramount).

²⁰ *City of Pittsburg, Cal.*, at 785-86 (holding that local criminal trespass ordinance conflicted with Postal Service regulations regarding the manner in which delivery employees performed their duties and was thus preempted by the “Congressional mandate to provide efficient mail delivery service”); cf. *U.S. v. City of St. Louis, Branch 343, Nat. Ass’n of Letter Carriers*, 597 F.2d 121 (8th Cir. 1979) (holding that a municipal ordinance prohibiting letter carriers from crossing the private property of patrons without their express or implied consent was permissible only because it did not conflict with the same Postal Service regulation).

interest . . . so dominant that the federal system will be assumed to preclude enforcement of state law on the same subject.”²¹ Furthermore, the constitutional enumeration of the postal powers supports the supremacy of the federal interest in this field. Even where express preemption language is absent, any state or local law which “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress”—such as a local determination to close a postal facility—would be impliedly preempted by conflict.²²

While it does not specifically invoke the Supremacy Clause, the Attorney General issued a memorandum to all United States Attorneys on March 20, 2020, in which he requested that they communicate with state and local law enforcement partners “to ensure that local law enforcement officials enforcing travel restrictions are aware of the fact that federal employees must be allowed to travel and commute to perform law enforcement and other functions and should not be prevented from doing so, even when travel restrictions are in place.” This is consistent with the fact that the state and local ordinances should not apply to the Postal Service as part of the federal government, even if we were not providing an essential service as defined by the relevant ordinance.

Finally, to the extent that state and local ordinances would impede the Postal Service’s functions, those ordinances are subject to the same preemption analysis regardless of whether the functions are performed by postal employees or contractors.²³ This principle has already been applied to Postal Service contractors.²⁴

Conclusion

As stated at the outset, we are committed to continuing to fulfill our role as a provider of essential government services, and we appreciate your consideration of this information. Thank you for your time last Friday and for any assistance you can provide to reinforce the conclusions of this memorandum.

In that regard, please let us know if you have any questions or if additional information would be helpful.

Sincerely,



Thomas J. Marshall

²¹ *Hillsborough*, 471 U.S. 707 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

²² *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

²³ See, e.g., *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 181 (1988) (analyzing *Hancock v. Train*, 426 U.S. 167 (1976), as “establish[ing] that a federally owned facility performing a federal function is shielded from direct state regulation, even though the federal function is carried out by a private contractor, unless Congress clearly authorizes such regulation.”); *United States v. California*, 921 F.3d 865, 882 n.7 (9th Cir. 2019) (“For purposes of intergovernmental immunity, federal contractors are treated the same as the federal government itself.”) (citing *Goodyear*).

²⁴ *U.S. Postal Serv. v. Town of Greenwich, Conn.*, 901 F. Supp. 500, 507 (D. Conn. 1991) (“In the absence of such specific Congressional authorization, the Court finds that the state building code cannot be applied to the lessors of land to the Postal Service and to the contractors hired to construct postal facilities because it conflicts with federal law.”) (citing, *inter alia*, *Hancock*, *Goodyear*, and *Leslie Miller*).



March 23, 2020

Ms. Maria Bonner
Deputy Director
White House Domestic Policy Council
EOP Office of Policy Development
Washington, DC 20504-0002

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We are mandated by statute to operate "as a basic and fundamental service provided to the people by the Government of the United States, authorized by the Constitution, created by an Act of Congress, and supported by the people."¹ 39 U.S.C. §101(a). The Postal Service performs this role as "an independent establishment of the executive branch of the Government of the United States."² Pursuant to our statute, we are mandated to provide prompt, reliable, and efficient universal postal services throughout the United States.

In addition to this statutory mandate, the Postal Service carries out an essential function of the federal government and provides critical government services as part of the National Continuity Policy (established for national emergencies pursuant to Presidential Directive and implemented by

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FEMA). Specifically, “the delivery of postal services to the American Public” is defined as a Primary Mission Essential Function necessary for the continuation of critical government services.³

As background, Presidential Policy Directive 40 established that “it is the policy of the United States to maintain a comprehensive and effective continuity capability through Continuity of Operations (COOP), Continuity of Government (COG), and Enduring Constitutional Government (ECG) programs, ensuring the resilience and preservation of government structure under the United States Constitution and the continuous performance of National Essential Functions (NEFs) under all conditions.”⁴ National Security Presidential Directive 51 then instructed Executive Departments and Agencies to identify and submit a list of Primary Mission Essential Functions (PMEFs) that the Department or Agency plans in support of the NEFs.⁵ PMEFs are those mission essential government functions that must be continuously performed in order to support or implement the uninterrupted performance of NEFs before, during, and in the aftermath of an emergency.⁶

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The above conclusions are further buttressed by the Supremacy Clause of the United States Constitution, which otherwise limits the ability of state and local laws to affect the performance of federal functions. First, the “intergovernmental immunity” doctrine provides that states and localities are not allowed to directly regulate the actions of any arm of the federal government,⁹ unless the federal government clearly and unambiguously submits to state regulation.¹⁰ Second, the “preemption” doctrine provides that state and local laws are preempted by federal law if they seek to regulate an activity that is the subject of a comprehensive federal scheme, or would otherwise frustrate the achievement of the purposes and objectives of federal law.

The U.S. Constitution grants to Congress the enumerated power “to establish post offices and post roads,”¹¹ a power which “embraces the regulation of the entire Postal System of the country.”¹² As noted above, Congress has in turn established the U.S. Postal Service as an “independent establishment of the executive branch of the Government of the United States” to provide postal services throughout the Nation.¹³ To support this mission, Congress delegated to the Postal Service the power “to construct, operate, lease, and maintain buildings, facilities, equipment, and any improvements on any property owned or controlled by it.”¹⁴ Postal facilities serve the basic function of providing prompt, reliable, and efficient postal services nationwide, and must be maintained in “such character and in such locations, that postal patrons throughout the Nation will, consistent with reasonable economies of postal operations, have ready access to essential postal services.”¹⁵ Congress also granted comprehensive powers to the Postal Service to direct and maintain its operations, including the right to enter into contracts,¹⁶ and broad personnel rights to hire its own

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employees and direct the performance of their duties and “to take whatever actions may be necessary to carry out its mission in emergency situations.”¹⁷

In light of the clear congressional mandate that the Postal Service provide economical and efficient mail service on a nationwide basis – including during times of emergency – courts have consistently found that Congress intended the Postal Service to have broad immunity from state or local regulation.¹⁸ Where local regulation affecting Postal Service operations is inconsistent with postal regulations, courts will deem it to be preempted under the Supremacy Clause as “an unconstitutional obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”¹⁹ Thus, any state or local law purportedly directing postal employees to follow procedures inconsistent with Postal Service authority presents a clear conflict with federal law, which entrusts the Postal Service with the task of maintaining facilities and operations in accordance with federal law: “[W]here a postal worker is performing duties pursuant to federal law, a state cannot impose requirements that interfere with the performance of those duties.”²⁰

Moreover, the express authority allocated to the Postal Service to “operate” and “maintain” its facilities in the service of providing an efficient network of postal services on a nationwide basis and “to take whatever actions may be necessary to carry out its mission in emergency situations” “leaves no room” for state or local regulatory authority over health or safety matters and evidences a “federal

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interest . . . so dominant that the federal system will be assumed to preclude enforcement of state law on the same subject.”²¹ Furthermore, the constitutional enumeration of the postal powers supports the supremacy of the federal interest in this field. Even where express preemption language is absent, any state or local law which “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress”—such as a local determination to close a postal facility—would be impliedly preempted by conflict.²²

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Finally, to the extent that state and local ordinances would impede the Postal Service’s functions, those ordinances are subject to the same preemption analysis regardless of whether the functions are performed by postal employees or contractors.²³ This principle has already been applied to Postal Service contractors.²⁴

Conclusion

As stated at the outset, we are committed to continuing to fulfill our role as a provider of essential government services, and we appreciate your consideration of this information. Thank you for your time last Friday and for any assistance you can provide to reinforce the conclusions of this memorandum.

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²¹ *Hillsborough*, 471 U.S. 707 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

²² *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

²³ See, e.g., *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 181 (1988) (analyzing *Hancock v. Train*, 426 U.S. 167 (1976), as “establish[ing] that a federally owned facility performing a federal function is shielded from direct state regulation, even though the federal function is carried out by a private contractor, unless Congress clearly authorizes such regulation.”); *United States v. California*, 921 F.3d 865, 882 n.7 (9th Cir. 2019) (“For purposes of intergovernmental immunity, federal contractors are treated the same as the federal government itself.”) (citing *Goodyear*).

²⁴ *U.S. Postal Serv. v. Town of Greenwich, Conn.*, 901 F. Supp. 500, 507 (D. Conn. 1991) (“In the absence of such specific Congressional authorization, the Court finds that the state building code cannot be applied to the lessors of land to the Postal Service and to the contractors hired to construct postal facilities because it conflicts with federal law.”) (citing, *inter alia*, *Hancock*, *Goodyear*, and *Leslie Miller*).

Call to Order and Opening Remarks

Robert M. Duncan
Chairman, Board of Governors

Sensitive Commercial Information – Do Not Disclose / Attorney-Client Privileged / Attorney Work Product

April 8, 2020

1

Waiver of Advance Public Notice of Meeting – Vote –

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April 8, 2020

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PMG Items

Megan J. Brennan

Postmaster General and Chief Executive Officer

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April 8, 2020

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Legislative Update

Megan J. Brennan

Postmaster General

Ronald A. Stroman

Deputy Postmaster General

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April 8, 2020

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COVID-19 Legislative Request

Megan J. Brennan

Postmaster General

Ronald A. Stroman

Deputy Postmaster General

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April 8, 2020

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Financial Impact COVID-19

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April 8, 2020

6

- I. Aligned on volume assumptions in the short, medium and long-term with the Audit and Finance Committee

Short-Term Outlook – Volume

	Index value – Pre-COVID				Index value – Post-COVID (compared to pre-Covid)								Previous baseline indices	
	2019Q3 Actual	2019Q4 Actual	2020Q1 Actual	2020Q2 Projected	Depth of Impact		Duration of Impact				Level of Return		Q1 2022	Q2 2022
Volume Index					2020Q3	2020Q4	2021Q1	2021Q2	2021Q3	2021Q4	2022Q1	2022Q2		
First Class	100	100	100	100	■	■	■	■	■	■	■	■	■	■
Marketing Mail	100	100	100	100	■	■	■	■	■	■	■	■	■	■
Periodicals	100	100	100	100	■	■	■	■	■	■	■	■	■	■
Shipping & Packages	100	100	100	100	■	■	■	■	■	■	■	■	■	■
International	100	100	100	100	■	■	■	■	■	■	■	■	■	■
Other	100	100	100	100	■	■	■	■	■	■	■	■	■	■
Total	100	100	100	100	■	■	■	■	■	■	■	■	■	■

Volume:	2019Q3 Actual	2019Q4 Actual	2020Q1 Actual	2020Q2 Projected	2020Q3	2020Q4	2021Q1	2021Q2	2021Q3	2021Q4	2022Q1	2022Q2
First Class	13,101	12,712	14,318	14,050	■	■	■	■	■	■	■	■
Marketing Mail	17,673	18,293	20,302	17,581	■	■	■	■	■	■	■	■
Periodicals	1,183	1,091	1,109	1,082	■	■	■	■	■	■	■	■
Shipping & Packages	1,420	1,451	1,737	1,430	■	■	■	■	■	■	■	■
International	202	180	240	187	■	■	■	■	■	■	■	■
Other	85	72	94	65	■	■	■	■	■	■	■	■
Total	33,664	33,799	37,801	34,395	■	■	■	■	■	■	■	■
4 Quarter Rolling Total:	139,658				■	■	■	■	■	■	■	■

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April 8, 2020

- I. Aligned on volume assumptions in the short, medium and long-term with the Audit and Finance Committee
- II. Flowed those volumes through the financial forecast models to assess the P&L and cash flow impacts

Short-Term P&L and Cash Flow Statement Impacts

FY2020 Actual/Forecast	Actual	Actual	Actual	Actual	Actual	Forecast	Forecast	Forecast	Forecast	Forecast	Forecast	Forecast	Forecast
\$-Millions	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	FY2020 Total
Revenue	\$ 6,205	\$ 6,042	\$ 7,148	\$ 6,089	\$ 5,717	\$							
Controllable Expenses	\$ 6,310	\$ 6,090	\$ 7,382	\$ 6,478	\$ 5,872	\$							
Controllable income (Loss)	\$ (105)	\$ (48)	\$ (235)	\$ (389)	\$ (155)	\$							
Non-Controllable Expenses	\$ 265	\$ 63	\$ 33	\$ 1,188	\$ 1,132	\$							
Net income (Loss)	\$ (370)	\$ (111)	\$ (267)	\$ (1,577)	\$ (1,287)	\$							

Cash Balance (No changes)	\$ 8,507	\$ 7,670	\$ 8,430	\$ 8,892	\$ 9,148	\$ 9,588							
+Social Security Holiday													
+Borrow \$3.4B													
+Borrow \$10B Additional													
+Default of FERS Normal Cost													

Note: Average bi-weekly payroll ~\$2B / Assumes year-end defaults on RHB, CSRS and FERS lump sums.

Short-Term Strategies to Remain Liquid
✂ - BOG approved strategies

(\$ in millions)

	Month:	No Changes	Social Security Holiday - CY2020	Borrow/repay \$3.4B	Borrow \$10B	Default on FERS
CY 2020						
CY 2021						

Note: Average bi-weekly payroll ~\$2B / Assumes year-end defaults on RHB, CSRS and FERS lump sums.

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April 8, 2020

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Long-Term Comparison of Pre-COVID and Post-COVID 10 Year Impacts

- [REDACTED]
- [REDACTED]
- [REDACTED]

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- I. Aligned on volume assumptions in the short, medium and long-term with the Audit and Finance Committee
- II. Flowed those volumes through the financial forecast models to assess the P&L and cash flow impacts
- III. Assessed the business plan initiatives against the new P&L post-COVID**

[illegible]

- I. Aligned on volume assumptions in the short, medium and long-term with the Audit and Finance Committee
- II. Flowed those volumes through the financial forecast models to assess the P&L and cash flow impacts
- III. Assessed the business plan initiatives against the new P&L post-COVID
- IV. Aligned on a short-term legislative ask with the Strategy & Innovation Committee given the immediate COVID impact on the financials

Short-Term Legislative Relief:

1. \$25B grant to cover COVID losses over the next two year period
2. \$25B modernization grant to ensure USPS can maintain and modernize the infrastructure to support the nation
3. Debt forgiveness of the \$14.4B in outstanding debt
4. Unrestricted borrowing authority up to \$25B

Longer-Term 10-Year Scenario 3 Business Plan Initiatives:

1. Prospective Medicare Integration with vested liability
 - Investment of RHB funds
2. Pension Relief
3. Price Flexibility
4. Product Opportunities

[illegible]

Approve S&IC recommendation for immediate relief in Stimulus 4:

1. \$25B grant to cover COVID losses over the next two year period
2. \$25B modernization grant to ensure USPS can maintain and modernize the infrastructure to support the nation
3. Debt forgiveness of the \$14.4B in outstanding debt
4. Unrestricted borrowing authority up to \$25B

Approve the recommendation of the Strategy & Innovation Committee regarding the 10-Year Strategy, which will include the following elements:

1. The Mission Statement approved on 4/1
2. Revised 10-year forecast based on COVID-19 impact
3. Scenario A (a/k/a Scenario 3)
4. The approved Legislative Request
5. [REDACTED]



Appendix

Sensitive Commercial Information – Do Not Disclose / Attorney-Client Privileged / Attorney Work Product

April 8, 2020

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[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

Additional Regulatory Reform Proposals

Proposal	Explanation	Estimated 10 Yr. Value	Stakeholder Analysis	Tie to Mission Statement
				Direct
				Indirect
				Indirect

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Long-Term P&L and Cash Flow Statement Impacts

Note: Average bi-weekly payroll ~\$2B / Assumes year-end defaults on RHB, CSRS and FERS lump sums.

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April 8, 2020

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SEC. 2302. DELAY OF PAYMENT OF EMPLOYER PAYROLL TAXES.(a) **IN GENERAL.**—

- (1) **TAXES.**—Notwithstanding any other provision of law, the payment for applicable employment taxes for the payroll tax deferral period shall not be due before the applicable date.
- (2) **DEPOSITS.**—Notwithstanding [section 6302](#) of the Internal Revenue Code of 1986, an employer shall be treated as having timely made all deposits of applicable employment taxes that are required to be made (without regard to this section) for such taxes during the payroll tax deferral period if all such deposits are made not later than the applicable date.
- (3) **EXCEPTION.**—This subsection shall not apply to any taxpayer if such taxpayer has had indebtedness forgiven under section 1106 of this Act with respect to a loan under paragraph (36) of section 7(a) of the Small Business Act ([15 U.S.C. 636\(a\)](#)), as added by section 1102 of this Act, or indebtedness forgiven under section 1109 of this Act.

(b) **SECA.**—

- (1) **IN GENERAL.**—Notwithstanding any other provision of law, the payment for 50 percent of the taxes imposed under [section 1401\(a\)](#) of the Internal Revenue Code of 1986 for the payroll tax deferral period shall not be due before the applicable date.
- (2) **ESTIMATED TAXES.**—For purposes of applying [section 6654](#) of the Internal Revenue Code of 1986 to any taxable year which includes any part of the payroll tax deferral period, 50 percent of the taxes imposed under section 1401(a) of such Code for the payroll tax deferral period shall not be treated as taxes to which such section 6654 applies.

(c) **LIABILITY OF THIRD PARTIES.**—

- (1) **ACTS TO BE PERFORMED BY AGENTS.**—For purposes of [section 3504](#) of the Internal Revenue Code of 1986, in the case of any person designated pursuant to such section (and any regulations or other guidance issued by the Secretary with respect to such section) to perform acts otherwise required to be performed by an employer under such Code, if such employer directs such person to defer payment of any applicable employment taxes during the payroll tax deferral period under this section, such employer shall be solely liable for the payment of such applicable employment taxes before the applicable date for any wages paid by such person on behalf of such employer during such period.
- (2) **CERTIFIED PROFESSIONAL EMPLOYER ORGANIZATIONS.**—For purposes of section 3511, in the case of a certified professional employer organization (as defined in subsection (a) of [section 7702](#) of the Internal Revenue Code of 1986) that has entered into a service contract described in subsection (e)(2) of such section with a customer, if such customer directs such organization to defer payment of any applicable employment taxes during the payroll tax deferral period under this section, such customer shall, notwithstanding subsections (a) and (c) of section 3511, be solely liable for the payment of such applicable employment taxes before the applicable date for any wages paid by such organization to any work site employee performing services for such customer during such period.

(d) **DEFINITIONS.**—For purposes of this section—

- (1) **APPLICABLE EMPLOYMENT TAXES.**—The term “applicable employment taxes” means the following:

- (A) The taxes imposed under [section 3111\(a\)](#) of the Internal Revenue Code of 1986.
- (B) So much of the taxes imposed under section 3211(a) of such Code as are attributable to the rate in effect under section 3111(a) of such Code.
- (C) So much of the taxes imposed under section 3221(a) of such Code as are attributable to the rate in effect under section 3111(a) of such Code.

- (2) **PAYROLL TAX DEFERRAL PERIOD.**—The term “payroll tax deferral period” means the period beginning on the date of the enactment of this Act and ending before January 1, 2021.

- (3) **APPLICABLE DATE.**—The term “applicable date” means—

- (A) December 31, 2021, with respect to 50 percent of the amounts to which subsection (a) or (b), as the case may be, apply, and
- (B) December 31, 2022, with respect to the remaining such amounts.

- (4) **SECRETARY.**—The term “Secretary” means the Secretary of the Treasury (or the Secretary's delegate).

- (e) **TRUST FUNDS HELD HARMLESS.**—There are hereby appropriated (out of any money in the Treasury not otherwise appropriated) for each fiscal year to the Federal Old-Age and Survivors Insurance Trust Fund and the Federal Disability Insurance Trust Fund established under section 201 of the Social Security Act ([42 U.S.C. 401](#)) and the Social Security Equivalent Benefit Account established under section 15A(a) of the Railroad Retirement Act of 1974 ([45 U.S.C. 231n-1\(a\)](#)) an amount equal to the reduction in the transfers to such fund for such fiscal year by reason of this section. Amounts appropriated by the preceding sentence shall be transferred from the general fund at such times and in such manner as to replicate to the extent possible the transfers which would have occurred to such Trust Fund had such amendments not been enacted.

- (f) **REGULATORY AUTHORITY.**—The Secretary shall issue such regulations or other guidance as necessary to carry out the purposes of this section, including rules for the administration and enforcement of subsection (c).



Strategies for a Financially Sustainable Postal Service - 10-Year Outlook & Options

Megan J. Brennan

Postmaster General and Chief Executive Officer

Sensitive Commercial Information – Do Not Disclose / Attorney-Client Privileged / Attorney Work Product

April 8, 2020

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Closure of Transcripts of April 8 Meeting

– Vote –

Adjournment

Sensitive Commercial Information – Do Not Disclose / Attorney-Client Privileged / Attorney Work Product

April 8, 2020

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April 14, 2020

**PRIVILEGED AND CONFIDENTIAL
ATTORNEY-CLIENT COMMUNICATION**

GOVERNORS

SUBJECT: Additional Borrowing Authority Under the CARES Act

This memorandum examines the parameters for \$10 billion in additional borrowing authority that Congress recently made available to the Postal Service in response to the ongoing Coronavirus Disease 2019 ("COVID-19") outbreak.

EXECUTIVE SUMMARY

- The new borrowing authority can be accessed only if the Postal Service determines that additional liquidity is necessary to fund operating expenses due to the COVID-19 emergency. Various aspects of this threshold requirement are subject to interpretation: "operating expenses," "due to," the degree of necessity, and the timing of the financial need. Because the statute charges the Postal Service with determining necessity, we arguably have primary discretion to interpret and apply this aspect of the statute. In this regard, we have a clear basis to determine, based on our current forecasts concerning the impact of the COVID-19 outbreak on Postal Service volumes, revenues, and liquidity, that receiving this additional \$10 billion in full is consistent with the language of the statute; we are therefore legally authorized to request the full amount at any time. Nevertheless, the consent role of the Treasury Department ("Treasury") means that it could seek to hold up borrowing if it disagrees with the Postal Service's interpretation, or if it questions the assumptions that the Postal Service is using to make our determination.
- Treasury must agree to the terms and conditions of borrowing. In light of recent experience, Treasury could attempt to condition its assent on conditions that enhance its oversight over Postal Service business decisions, and that even intrude upon the Board's and the Governors' discretion to lead the Postal Service. We think such an outcome is unlikely, for the reasons noted below, but as we have previously advised, such conditions would violate constitutional and statutory parameters. In this case we believe that the circumstances and scrutiny from Members of Congress and others could lead Treasury to take a more flexible approach, and our preliminary indications are that Treasury will not insist upon consent rights.

- Borrowing is limited to \$10 billion. This limitation applies at all times; it cannot be temporarily exceeded so long as outstanding debt is returned to \$10 billion later. Although we could attempt to access the borrowing authority repeatedly so long as we remain within the \$10 billion limit, and Treasury could agree with that approach, the statutory language could also give Treasury (and other decision-makers) a reasonable basis to view the borrowing authority as being available only once.
- Under a reasonable interpretation of the statutory language, funds borrowed under the CARES Act cannot be used for capital expenses or to pay principal, interest, or fees on obligations issued under Title 39. Although there is no specific accounting or reporting requirement, Treasury or Congressional stakeholders could insist that the Postal Service demonstrate its compliance with the requirement that borrowed funds be used only for operating expenses.

ANALYSIS

On March 27, 2020, Congress enacted the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"), Pub. L. No. 116-136. Section 6001(b) of the CARES Act permits the Postal Service to borrow up to \$10 billion from the Department of the Treasury, separately from the \$15 billion of borrowing authority already available to the Postal Service under 39 U.S.C. § 2005. This additional borrowing authority is subject to a number of conditions, however, the precise import of which are not immediately clear from the statutory text.¹

Section 6001(b) provides as follows:

(b) Additional borrowing authority.—Notwithstanding section 2005 of title 39, United States Code, or any other provision of law, if the Postal Service determines that, due to the COVID-19 emergency, the Postal Service will not be able to fund operating expenses without borrowing money—

(1) the Postal Service may borrow money from the Treasury in an amount not to exceed \$10,000,000,000—

(A) to be used for such operating expenses; and

(B) which may not be used to pay any outstanding debt of the Postal Service; and

¹ Because the legislation was negotiated largely behind the scenes by Congressional leaders and the Secretary of the Treasury, there are no committee reports or other normal incidents of legislative history to serve as an interpretive aid. The few floor statements by individual Members of Congress that discuss the Postal Service provisions do so only in general terms, and therefore are of no probative value.

(2) the Secretary of the Treasury may lend up to the amount described in paragraph (1) at the request of the Postal Service, upon terms and conditions mutually agreed upon by the Secretary and the Postal Service.

This provision plainly establishes at least four principal conditions: two prior to borrowing, one concerning the amount of borrowing, and one on the use of borrowed funds. The Postal Service must first determine that it needs to borrow money in order to fund operating expenses due to the COVID-19 emergency. And it must reach mutual agreement with Treasury over the terms and conditions of borrowing. The borrowing is limited to “an amount not to exceed” \$10 billion. The borrowed moneys must be used only for “operating expenses,” which cannot include “pay[ing] any outstanding debt.” Each condition raises various questions of interpretation.

I. Postal Service Determination of Necessity to Fund Operating Expenses

Under the opening paragraph of Section 6001(b), prior to borrowing any funds, the Postal Service must first determine “that, due to the COVID-19 emergency, the Postal Service will not be able to fund operating expenses without borrowing money.” At least six aspects of this proviso are noteworthy.

First, the term “operating expenses” is not defined, but given the term’s usage in a related context, “operating expenses” should be construed as distinct from “capital expenses.” Specifically, the term “operating expenses” is used in the Postal Service’s longstanding borrowing statute. Currently, that provision caps the net increase in borrowing “for the purpose of capital improvements and . . . for the purpose of defraying operating expenses” at \$3 billion per fiscal year. 39 U.S.C. § 2005(a). Prior to the enactment of the Postal Accountability and Enhancement Act of 2006 (PAEA), the same sentence set separate annual caps on borrowing used for capital expenses and for operating expenses (\$2 billion and \$1 billion, respectively). See 39 U.S.C. § 2005(a) (2005). Because Section 6001(b) of the CARES Act relates to the same subject matter as 39 U.S.C. § 2005(a) – a fact recognized by the express citation of the Title 39 provision in CARES Act Section 6001’s “notwithstanding” clause – it is reasonable to construe the two provisions *in pari materia*: that is, consonant with one another due to their related subject matter. See, e.g., *Pasquantino v. United States*, 544 U.S. 349, 355 n.2 (2005) (noting that wire- and mail-fraud statutes have been construed *in pari materia*); *Nat’l Fed’n of Fed. Employees, Local 1309 v. Dep’t of Interior*, 526 U.S. 86, 105 (1999); 2B Sutherland Statutes & Statutory Construction §§ 51:1-51:2, 53:2 (7th ed. 2020).

Under pre-PAEA 39 U.S.C. § 2005(a), the term “operating expenses” was understood by the Postal Service to mean all expenses other than capital expenses. “Operating expenses” therefore included not only expenses intuitively viewed as related to operations

(e.g., salaries and supplier costs), but also post-retirement benefits expenses and even interest expense on borrowed funds.²

Second, the borrowing of funds is conditioned on the Postal Service “not be[ing] able to fund operating expenses without borrowing money.” This implies that the additional borrowing authority is a true necessity: that is, the Postal Service must borrow money to continue funding its operating expenses, because the other available means of doing so will come up short. That said, access to the borrowing authority can precede an actual inability to fund operating expenses, as the relevant language is phrased in the future tense (“will not be able to fund”).

Third, “due to” is not defined. The plain meaning of this phrase is “because of”: there must be a causal relationship between the inability to fund operating expenses and the COVID-19 emergency. See *U.S. Postal Serv. v. Postal Regulatory Comm’n*, 640 F.3d 1263, 1267 (D.C. Cir. 2011) (construing “due to” in the statute authorizing exigent price increases). What is less clear is how close the causal nexus must be (and hence the level of proof that must be provided to substantiate that causal nexus). On that question, courts have recognized that “the phrase ‘due to’ is ambiguous. . . . The causal nexus of ‘due to’ has been given a broad variety of meanings in the law ranging from sole and proximate cause at one end of the spectrum to contributing cause at the other.” *Id.* at 1268 (quoting *Kimber v. Thiokol Corp.*, 196 F.3d 1092, 1100 (10th Cir. 1999)) (brackets, internal quotation marks, and further citation omitted). Thus, it would certainly be possible to read Section 6001(b) as authorizing borrowing to the sole extent that financial strains can be specifically attributed to the COVID-19 emergency and that those strains overrun all other sources of funding. Cf. *id.* at 1267-68 (describing the Postal Regulatory Commission’s (Commission’s) initially strict application of “due to” in the exigency statute). But “due to”

can mean ‘due in part to’ as well as ‘due only to.’ A financial crisis can often result from multiple contributing factors[.] It would not be incorrect to say that [a need for relief] is ‘due to’ [one] factor simply because it is also ‘due to’ other factors as well.

² We are aware of at least two alternative uses of “operating expenses” in relation to the Postal Service. First, in the Postal Service’s periodic financial reports, “operating expenses” encompass all expenses (including depreciation on capital investments) other than interest expense. *E.g.*, U.S. Postal Serv., FY2019 Form 10-K, at 24-39. Second, under the pre-PAEA provision that governed the Governors’ ratemaking authority, rates were required to cover “total estimated costs,” the definition of which, in turn, distinguished operating expenses from depreciation on capital investments, interest and other debt-related expense, and an amount for contingencies. 39 U.S.C. § 3621 (2005). Although an argument could be made for applying a different reading, the permanent borrowing statute (39 U.S.C. § 2005(a)) is clearly more directly relevant to the CARES Act’s borrowing provision than either periodic financial reporting or ratemaking.

Id. at 1268 (emphasis in original). Hence, in the Section 6001(b) context, it could be enough for the Postal Service to face an inability to fund operating expenses because of the COVID-19 emergency as well as other factors.³

Fourth, the inability to fund operating expenses must be “due to the COVID-19 emergency.” The “COVID-19 emergency” is expressly defined in relation to the President’s declaration of a national emergency under the Robert T. Stafford Disaster Relief and Emergency Assistance Act. CARES Act § 6001(a)(1). Once the President has rescinded that emergency declaration, then the predicate condition for borrowing could be curtailed. More precisely, to access the CARES Act borrowing authority thereafter, the Postal Service would need to determine that the inability to fund operating expenses remains “due to” emergency conditions prior to rescission.

The Postal Service can certainly argue that, to the extent that mail volumes remain lower and/or costs remain higher at a given point in time than they would have been had the pandemic not occurred, such continuing effects are “due to” the pandemic, even if the emergency declaration has been rescinded. This would justify continued funding under this provision if these continuing effects mean that the Postal Service cannot fund operating expenses without borrowing. That said, assuming that Treasury cooperates in lending money during the COVID-19 emergency, it could decide to stop doing so earlier than the Postal Service believes to be warranted, if Treasury decides that the Postal Service’s inability to fund operating expenses is no longer “due to” the emergency. Such a prospect would resemble the Commission’s decision to truncate the amount of Great-Recession-era losses that the Postal Service was able to recover through an above-inflation rate increase. There, the Commission relied on the “due to” language in the exigency statute discussed above to establish a cut-off point, after which it would no longer deem continuing mail-volume losses to be “due to” the Great Recession. The Commission based this cut-off point on a determination of when the Postal Service theoretically entered a “new normal,” based on macroeconomic indicators and when the Postal Service began to gain an “ability to adjust” its operations at the depth of the recession’s impact. See Order No. 1926, Order

³ In *USPS v. PRC*, the court remanded the case to the Commission to interpret “due to” in the exigency statute. The Commission subsequently adopted a view close to the stricter end of the interpretive spectrum by requiring the Postal Service to quantify financial impacts attributable to the exigent circumstance (in that case, the Great Recession) rather than to other causes, although it granted that the quantification need not be absolutely precise. See generally Order No. 864, Order Resolving Issues on Remand, PRC Docket No. R2010-4R (Sept. 20, 2011). Key factors in the Commission’s reasoning were the Postal Service’s econometric resources, the scale of relief that it could seek (into the billions of dollars), and the fact that the exigency provision “is not intended as a remedial provision, but rather as a narrow exception to the price cap.” *Id.* at 44. In the context of borrowing under the CARES Act, the Postal Service’s resources and the scale of relief are comparable to what the Commission considered, and the additional borrowing authority could arguably (albeit not necessarily) be seen as a narrow exception to the Postal Service’s normal borrowing authority. That said, critical differences between the two contexts militate against applying the Commission’s logic here: the CARES Act’s “due to” language is to be applied by the Postal Service itself, not by an external oversight body, and borrowing money that must be repaid (with interest) – unlike a price increase – does not permanently affect any other party’s property interest.

Granting Exigent Price Increase, PRC Docket No. R2013-11 (Dec. 24, 2013), at 83-94.⁴ Even if the Postal Service might assert that COVID-19 impacts persist beyond the emergency declaration's rescission, Treasury, taking a page from the Commission's book, could nonetheless point not only to the emergency's formal end, but also impute (however unrealistically) to the Postal Service an "ability to adjust" that renders its inability to fund operating expenses no longer "due to" the emergency.

Fifth, another interpretative ambiguity in the statute is the relationship between the necessity determination and the actual amount of borrowing that the Postal Service may request. In particular, the statute requires that the Postal Service determine that we could not fund operating expenses due to the pandemic "without borrowing money," but does not directly limit the size of the resulting request in any way other than by imposing a \$10 billion cap. In this regard, the Postal Service could argue that so long as we demonstrate a need to borrow money, we can borrow the full \$10 billion under the statute, and need not justify the precise amount requested within that overall cap. On the other hand, Treasury could argue that while the \$10 billion is an overall cap, the statute also is most reasonably read to limit the size of a request to only what is strictly necessary to ensure that operating expenses are funded.

Sixth, all of this analysis is to be conducted as part of a determination by the Postal Service, but the scope of our actual discretion is unspecified. Section 6001(b)(2) provides that Treasury "may" – not "must" – lend money requested by the Postal Service. *Cf.* 39 U.S.C. § 2006(b) (authorizing the Postal Service to "require the Secretary of the Treasury to purchase" up to \$2 billion in Postal Service obligations). Treasury could point to this discretionary language as allowing it to refuse to lend money on the basis that it disagrees with the Postal Service's determination of need. As further support, Treasury could contrast the CARES Act language with an earlier House version of the bill, which would have required Treasury to lend moneys requested by the Postal Service. H.R. 6379, 116th Cong. § 140001(a)(2) (2020) ("[T]he Secretary of the Treasury shall lend up to such amount at the request of the Postal Service."). This mandatory language was abandoned in favor of the discretionary language in the final bill. Given the intense negotiations between Congressional leaders and Treasury that produced the final CARES Act, as well as the attention that the Administration reportedly gave to the postal provisions, this result is almost surely meaningful, rather than accidental. In the end, even if the Postal Service is correct that we have discretion regarding the necessity determination as a legal matter, as a practical matter the Treasury could still refuse to provide the money for other reasons.

⁴ The Postal Service challenged this cut-off as arbitrary, as macroeconomic indicators did not necessarily correspond to mail-volume trends, and as it made little sense to cut off recovery at the depth of the losses, when the Postal Service had merely begun to adjust but had not yet adequately adjusted. These challenges were unsuccessful. *See Alliance for Nonprofit Mailers v. Postal Regulatory Comm'n*, 790 F.3d 186, 196 & n.3 (D.C. Cir. 2015); Order No. 2623, Order Resolving Issues on Remand, PRC Docket No. R2013-11R (July 29, 2015) (denying reconsideration), at 15-28, *aff'd*, *U.S. Postal Serv. v. Postal Regulatory Comm'n*, 841 F.3d 509 (D.C. Cir. 2016).

In the event that Treasury attempts to second-guess the Postal Service's determination of need, the Postal Service could point to Congress's express conferral on the Postal Service of discretion to determine need; if Congress had intended to subject that determination to Treasury's oversight, it easily could have so provided. Given our recent experience with disagreements over statutory construction, it is possible that we would be unable to persuade Treasury of our interpretation, and resolution of any interagency dispute might ultimately lie with the Office of Legal Counsel (OLC) at the Department of Justice. To minimize the risk of a time-consuming and uncertain dispute, the Postal Service would be well-advised to seek a common understanding with Treasury concerning this aspect of the statute.

While these interpretative issues present room for potential dispute with Treasury, the Postal Service does have a very strong argument that borrowing the full amount of the \$10 billion is clearly necessary under the terms of the statute at this time. In this regard, our projections show that the Postal Service will experience a cash shortfall, and hence an inability to fund operating expenses, this calendar year unless the \$10 billion is borrowed, and that we will need the full \$10 billion to continue operations for as long as possible next fiscal year.⁵ This circumstance is a direct result of the precipitous declines in mail volumes that we forecast for Quarter 3 of FY2020, which would not have occurred but for the onset of the pandemic. Therefore, the Postal Service is legally authorized under the statute to request the full \$10 billion at this time. While the above-mentioned interpretive issues may complicate our ability to utilize this funding source, we think that such issues are more likely to arise as time passes than they would if we seek these funds now, when the longer-term effects of the pandemic are unclear.

II. Treasury Agreement to Conditions

Under Section 6001(b)(2), any borrowing must be "upon terms and conditions mutually agreed upon by the Secretary and the Postal Service." As you know, in adopting this language, Congress declined our proposed alternative, which would have allowed for negotiation against a backdrop of default terms from the now-expired note purchase agreement. Without such a backdrop, Treasury could seek to reject our proposed terms and to propose terms that we would view as unlawful, inappropriate, or otherwise undesirable. (Indeed, Treasury's insistence on such terms is what led to the expiration, rather than the renewal, of the note purchase agreement last year.)

Treasury might argue that, regardless of any disagreement concerning the appropriate terms and conditions of borrowing under Title 39, it has freer rein to propose such conditions under the CARES Act. As OLC has recognized, the legislative history of the

⁵ The projections show the potential for a cash shortfall by October. However, as noted above, the statute arguably requires capital expenses to be excluded from the determination of necessity. The Postal Service's projection assumes capital expenses of \$2.0 billion over the rest of this fiscal year, and \$2.5 billion for next fiscal year. If these capital expenses are excluded, the Postal Service would still likely experience a cash shortfall this calendar year, or early next calendar year.

Title 39 borrowing provision, as well as legislation establishing the Federal Financing Bank enacted shortly thereafter, is replete with Treasury's disavowals of any intent to interfere with the Postal Service's operational and business decisions. See *Scope of Treasury Department Purchase Rights with Respect to Financing Initiatives of the U.S. Postal Service*, 19 Op. Off. Legal Counsel 238, 245 n.5 (1995); *Authority of the Secretary of the Treasury Regarding Postal Service Bond Offering*, 17 Op. Off. Legal Counsel 6, 8-10 (1993). By contrast, the CARES Act contains no such legislative history, and its additional borrowing authority is expressly distinguished from, rather than subordinate to, the Title 39 borrowing provision. If anything, the contrast between the final CARES Act and the House bill demonstrates that the "mutual agreement" requirement was intentionally added. See H.R. 6379, 116th Cong. § 140001(a)(2) (containing no language about terms and conditions).

That said, any attempt by Treasury to use even this borrowing authority to oversee or second-guess the Governors' and Board's decisions would still vitiate Congress's intent in creating the Postal Service to be insulated from direct political control, and hence would violate constitutional and statutory parameters in the same manner as its prior attempt to impose such terms on our Title 39 borrowing. In this regard, the absence of any direct legislative history is simply not a material legal consideration. Let me know if you would like me to send to you our prior memorandum to the Board explaining these constitutional and statutory issues.

Our experience with non-renewal of the note purchase agreement shows that Treasury may not be swayed by the legal bona fides of our position and may insist on inappropriate terms regardless. In such an event, we may be able to seek a legal opinion from OLC supporting our view. Alternatively, Congress clearly expected that Treasury would facilitate borrowing under Section 6001(b), and any significant delay or lack of cooperation by Treasury could become a subject of Congressional inquiry and oversight. As noted above, at present Treasury has advised us that it does not intend to seek to impose "consent" rights.

III. Amount of Borrowing

Section 6001(b)(1) provides that the borrowing shall be "in an amount not to exceed" \$10 billion. In contrast to the Title 39 borrowing provisions, this language does not specify whether the \$10 billion limit applies to the amount of CARES Act borrowing "outstanding at any one time" or only as of a certain point in time (e.g., the end of a fiscal year), such that greater amounts can be borrowed so long as the outstanding amount is reduced by the cut-off time. See 39 U.S.C. § 2005(a)(1) (containing both types of cap). Without further qualification, however, a plain reading of "not to exceed" indicates that the \$10 billion limit applies at all times; the limit cannot be exceeded temporarily so long as it is met later.

A related question concerns whether the \$10 billion is a cap similar to the \$15 billion cap on Title 39 borrowing, meaning that the Postal Service may access the borrowing authority multiple times (with aggregate borrowing at any one time remaining within the limit), or

whether the statute only authorizes the provision of \$10 billion in total. If the latter is true, another question is whether this borrowing authority can only be accessed in a one-time loan, or if multiple loans are allowed.

Based on existing practice and the uncertain duration of the current emergency, the Postal Service could reasonably take the view that it can repeatedly borrow money within the \$10 billion limit. It is possible, however, that Treasury (or OLC, in the event of a dispute) could interpret the CARES Act as providing for a provision of \$10 billion in total. A contrast with the Title 39 provision shows that Congress had a template for making the limit apply to an aggregate amount of borrowing “outstanding at any time,” *id.*, which was not used in the CARES Act. This, coupled with the plain meaning of the CARES Act language, arguably indicates that Congress did not intend for the CARES Act borrowing limit to operate in the same manner as the \$15 billion borrowing cap. It is also conceivable that Treasury could assert that the statute only authorizes a single loan, based on the fact that the statute refers to a singular “amount” of borrowing, and not a multiple “amount of obligations,” as in Section 2005, though this argument would be weaker.

Ultimately, this question only becomes relevant if we attempt to access the CARES Act borrowing authority a second time. Because of the possibility that we could be denied a second round of borrowing, it would be advisable to seek to borrow the maximum amount available (\$10 billion) at the outset, which is advisable in any event given all of the interpretative issues concerning the “due to” language. In addition, it might also be advisable to seek to secure as long of a maturity as is feasible.

IV. Restrictions on the Use of Borrowed Funds

Section 6001(b)(1)(A) and (B) provide that borrowed funds can only be used to fund operating expenses and cannot be used to pay outstanding debt.

As discussed in section I above, it would be consistent with the history of the Postal Service’s permanent borrowing statute to construe the reference to “operating expenses” as excluding capital expenses.

In addition, we think it evident that “debt” means liabilities from borrowing. See 39 U.S.C. § 2001(3) (referring to “debt instruments” in the context of the Title 39 borrowing provisions).⁶ However, the limitation on using these additional funds to “pay any outstanding debt” is ambiguous in several respects.

⁶ One definition of “debt” refers broadly to any “liability” or “specific sum of money due by agreement or otherwise,” such as payments to a supplier or employee for services rendered. See BLACK’S LAW DICTIONARY, “debt” (11th ed. 2019). However, as noted above, it is appropriate to read the terms of the CARES Act consistently with the terms of Title 39’s borrowing provisions. In addition, it is functionally implausible to believe that Congress intended “debt” to refer to the Postal Service’s liabilities generally, since that would mean that the funds borrowed under the CARES Act could be used only to provide liquidity for future operating expenses, and not for expenses already incurred (and thus “outstanding”).

First, it is unclear whether “outstanding debt” includes all payments on borrowed debt, or only payments on principal. On the one hand, to “pay [down] debt” might generally connote payment that has the effect of reducing or eliminating the principal owed. Perhaps for this reason, the Postal Service reports interest expense as a distinct line item in its periodic financial reports. On the other hand, a debt has not been repaid if accrued interest or prepayment fees remain outstanding. Indeed, the statutory language here does not distinguish between principal and other debt, and contextual definitions are broad enough to encompass any amounts (including interest and fees) that are owed under a loan agreement. See 39 U.S.C. § 2001(3); BLACK’S LAW DICTIONARY, “debt.” In our view, the more reasonable construction is that “outstanding debt” includes principal, interest, and any fees arising under a loan agreement.

Second, it is unclear whether “outstanding debt” refers to debt outstanding when the newly borrowed moneys are spent, or only to debt outstanding at the time of enactment. The former reading is more plausible. Other CARES Act provisions, as well as the Title 39 borrowing provisions, use “outstanding” in ways that appear clearly to connote “outstanding at the time of the relevant event,” and in no case “outstanding at the time of enactment.” See CARES Act, Pub. L. No. 116-136, § 4003(c)(1)(A) (requiring rates for certain Treasury loans to be based on “the current average yield on outstanding marketable obligations of the United States of comparable maturity”); 39 U.S.C. § 2006(a) (same).

On a functional level, Congress placed specific conditions on borrowing under the CARES Act that do not apply to borrowing under Title 39, and so a broader reading of CARES Act’s “outstanding debt” preclusion makes sense as an anti-circumvention measure. Otherwise, the Postal Service could borrow under the CARES Act (while eligible) to pay down Title 39 loans, with the newly liberated Title 39 borrowing authority remaining available even after the COVID-19 emergency had ended. To the extent that Congress was seeking to foreclose that possibility, as the language of the statute indicates that it was, the concern applies equally whether moneys are borrowed under Title 39 before or after the date of enactment.

Third, it is unclear whether “any outstanding debt” means only debt acquired under other authorities (i.e., the Title 39 borrowing provisions), or whether it also precludes using CARES Act borrowing to retire and renew earlier CARES Act debt. Under either reading, the CARES Act would preclude borrowing to repay funds borrowed under Title 39. That much would be consistent with Congress’s apparent concern that the CARES Act borrowing authority remain distinct from Title 39 borrowing.⁷ The additional question is whether the preclusion extends to repayment of earlier CARES Act debt. On a formal level, the statutory text – “any outstanding debt of the Postal Service,” without further qualification

⁷ That much is evident from Congress’s decision not to adopt the House’s proposal to cancel all Title 39 debt outstanding on the date of enactment. See H.R. 6379, 116th Cong. § 140001(a)(1). The House bill would then have authorized the Postal Service to borrow \$15 billion from Treasury. H.R. 6379, 116th Cong. § 140001(a)(2). In light of the bill’s resetting of outstanding debt to zero, it is unclear whether this additional borrowing authority would have been coextensive with or additional to the \$15 billion debt ceiling in 39 U.S.C. § 2005(a).

– would plainly include CARES Act debt. Therefore, it arguably would be most prudent for the Postal Service to not use these borrowed funds in such a manner. However, on a functional level, we could argue that precluding the use of these funds to pay outstanding CARES Act debt would make little sense. So long as all relevant borrowing meets the CARES Act criteria, using new borrowing to repay old debt merely consolidates (a) the use of cash to repay an old loan and (b) attainment of new cash by acquiring a new loan. If emergency circumstances remain such that repayment of the old loan would deprive the Postal Service of cash needed to fund operating expenses, then we would immediately qualify for a new loan under the CARES Act. Neither activity would be inconsistent with the CARES Act's purposes on its own, and so there is no apparent reason why they should be precluded in combination. Therefore, despite the facial breadth of "any outstanding debt," it would be reasonable to construe the preclusion as limited to borrowing under Title 39, not under the CARES Act.

In sum, it is reasonable to construe the CARES Act as prohibiting borrowed funds from being used for either capital expenses or the payment of any principal, interest, or fees arising from obligations issued under Title 39. As noted earlier, however, the CARES Act gives Treasury the discretion to refuse to lend, or to limit its lending, to the Postal Service if it disagrees with the Postal Service's interpretation of the law. It would be advisable to seek a common understanding with Treasury about these legal questions, to the extent possible.

Finally, the statute does not explicitly specify any accountability for the use of borrowed funds. It is unclear at this time whether current Treasury leadership (or Congress) will insist on such an accounting.⁸

CONCLUSION

On its face, the statute imposes conditions on borrowing but gives the Postal Service discretion to determine when and to what extent additional borrowing is needed. But given Treasury's discretion and the requirement to attain Treasury's agreement on borrowing terms, Treasury could simply refuse to lend if it disagrees with the Postal Service's interpretation, desires accountability for the use of funds, or insists on terms of its choosing (regardless of their legality or acceptability to the Postal Service). The only checks on Treasury are Congressional oversight and potential OLC resolution of a legal dispute.

Please let me know if you have any questions or concerns. Of course, the situation regarding our financial situation is very fluid, so if conditions change in a way that warrants

⁸ According to the Corporate Treasury office, Treasury historically did not insist on a rigid accounting of the Postal Service's use of pre-PAEA borrowing authority, and the Postal Service thus had a fairly free hand to characterize the use of borrowed funds vis-à-vis the statute's distinct annual caps. However, Treasury might require clearer requirements in this circumstance.

material revision of the analysis in this memorandum, we will reexamine our analysis and advise you accordingly.

A handwritten signature in black ink, appearing to read "Thomas J. Marshall". The signature is fluid and cursive, with the first name "Thomas" and last name "Marshall" clearly distinguishable.

Thomas J. Marshall

cc: Ms. Brennan
Mr. Stroman
Mr. Corbett
Mr. Elston



April 14, 2020

**PRIVILEGED AND CONFIDENTIAL
ATTORNEY-CLIENT COMMUNICATION**

GOVERNORS

SUBJECT: Additional Borrowing Authority Under the CARES Act

This memorandum examines the parameters for \$10 billion in additional borrowing authority that Congress recently made available to the Postal Service in response to the ongoing Coronavirus Disease 2019 ("COVID-19") outbreak.

EXECUTIVE SUMMARY

- The new borrowing authority can be accessed only if the Postal Service determines that additional liquidity is necessary to fund operating expenses due to the COVID-19 emergency. Various aspects of this threshold requirement are subject to interpretation: "operating expenses," "due to," the degree of necessity, and the timing of the financial need. Because the statute charges the Postal Service with determining necessity, we arguably have primary discretion to interpret and apply this aspect of the statute. In this regard, we have a clear basis to determine, based on our current forecasts concerning the impact of the COVID-19 outbreak on Postal Service volumes, revenues, and liquidity, that receiving this additional \$10 billion in full is consistent with the language of the statute; we are therefore legally authorized to request the full amount at any time. Nevertheless, the consent role of the Treasury Department ("Treasury") means that it could seek to hold up borrowing if it disagrees with the Postal Service's interpretation, or if it questions the assumptions that the Postal Service is using to make our determination.
- Treasury must agree to the terms and conditions of borrowing. In light of recent experience, Treasury could attempt to condition its assent on conditions that enhance its oversight over Postal Service business decisions, and that even intrude upon the Board's and the Governors' discretion to lead the Postal Service. We think such an outcome is unlikely, for the reasons noted below, but as we have previously advised, such conditions would violate constitutional and statutory parameters. In this case we believe that the circumstances and scrutiny from Members of Congress and others could lead Treasury to take a more flexible approach, and our preliminary indications are that Treasury will not insist upon consent rights.

- Borrowing is limited to \$10 billion. This limitation applies at all times; it cannot be temporarily exceeded so long as outstanding debt is returned to \$10 billion later. Although we could attempt to access the borrowing authority repeatedly so long as we remain within the \$10 billion limit, and Treasury could agree with that approach, the statutory language could also give Treasury (and other decision-makers) a reasonable basis to view the borrowing authority as being available only once.
- Under a reasonable interpretation of the statutory language, funds borrowed under the CARES Act cannot be used for capital expenses or to pay principal, interest, or fees on obligations issued under Title 39. Although there is no specific accounting or reporting requirement, Treasury or Congressional stakeholders could insist that the Postal Service demonstrate its compliance with the requirement that borrowed funds be used only for operating expenses.

ANALYSIS

On March 27, 2020, Congress enacted the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"), Pub. L. No. 116-136. Section 6001(b) of the CARES Act permits the Postal Service to borrow up to \$10 billion from the Department of the Treasury, separately from the \$15 billion of borrowing authority already available to the Postal Service under 39 U.S.C. § 2005. This additional borrowing authority is subject to a number of conditions, however, the precise import of which are not immediately clear from the statutory text.¹

Section 6001(b) provides as follows:

(b) Additional borrowing authority.—Notwithstanding section 2005 of title 39, United States Code, or any other provision of law, if the Postal Service determines that, due to the COVID-19 emergency, the Postal Service will not be able to fund operating expenses without borrowing money—

(1) the Postal Service may borrow money from the Treasury in an amount not to exceed \$10,000,000,000—

(A) to be used for such operating expenses; and

(B) which may not be used to pay any outstanding debt of the Postal Service; and

¹ Because the legislation was negotiated largely behind the scenes by Congressional leaders and the Secretary of the Treasury, there are no committee reports or other normal incidents of legislative history to serve as an interpretive aid. The few floor statements by individual Members of Congress that discuss the Postal Service provisions do so only in general terms, and therefore are of no probative value.

(2) the Secretary of the Treasury may lend up to the amount described in paragraph (1) at the request of the Postal Service, upon terms and conditions mutually agreed upon by the Secretary and the Postal Service.

This provision plainly establishes at least four principal conditions: two prior to borrowing, one concerning the amount of borrowing, and one on the use of borrowed funds. The Postal Service must first determine that it needs to borrow money in order to fund operating expenses due to the COVID-19 emergency. And it must reach mutual agreement with Treasury over the terms and conditions of borrowing. The borrowing is limited to “an amount not to exceed” \$10 billion. The borrowed moneys must be used only for “operating expenses,” which cannot include “pay[ing] any outstanding debt.” Each condition raises various questions of interpretation.

I. Postal Service Determination of Necessity to Fund Operating Expenses

Under the opening paragraph of Section 6001(b), prior to borrowing any funds, the Postal Service must first determine “that, due to the COVID-19 emergency, the Postal Service will not be able to fund operating expenses without borrowing money.” At least six aspects of this proviso are noteworthy.

First, the term “operating expenses” is not defined, but given the term’s usage in a related context, “operating expenses” should be construed as distinct from “capital expenses.” Specifically, the term “operating expenses” is used in the Postal Service’s longstanding borrowing statute. Currently, that provision caps the net increase in borrowing “for the purpose of capital improvements and . . . for the purpose of defraying operating expenses” at \$3 billion per fiscal year. 39 U.S.C. § 2005(a). Prior to the enactment of the Postal Accountability and Enhancement Act of 2006 (PAEA), the same sentence set separate annual caps on borrowing used for capital expenses and for operating expenses (\$2 billion and \$1 billion, respectively). See 39 U.S.C. § 2005(a) (2005). Because Section 6001(b) of the CARES Act relates to the same subject matter as 39 U.S.C. § 2005(a) – a fact recognized by the express citation of the Title 39 provision in CARES Act Section 6001’s “notwithstanding” clause – it is reasonable to construe the two provisions *in pari materia*: that is, consonant with one another due to their related subject matter. See, e.g., *Pasquantino v. United States*, 544 U.S. 349, 355 n.2 (2005) (noting that wire- and mail-fraud statutes have been construed *in pari materia*); *Nat’l Fed’n of Fed. Employees, Local 1309 v. Dep’t of Interior*, 526 U.S. 86, 105 (1999); 2B Sutherland Statutes & Statutory Construction §§ 51:1-51:2, 53:2 (7th ed. 2020).

Under pre-PAEA 39 U.S.C. § 2005(a), the term “operating expenses” was understood by the Postal Service to mean all expenses other than capital expenses. “Operating expenses” therefore included not only expenses intuitively viewed as related to operations

(e.g., salaries and supplier costs), but also post-retirement benefits expenses and even interest expense on borrowed funds.²

Second, the borrowing of funds is conditioned on the Postal Service “not be[ing] able to fund operating expenses without borrowing money.” This implies that the additional borrowing authority is a true necessity: that is, the Postal Service must borrow money to continue funding its operating expenses, because the other available means of doing so will come up short. That said, access to the borrowing authority can precede an actual inability to fund operating expenses, as the relevant language is phrased in the future tense (“will not be able to fund”).

Third, “due to” is not defined. The plain meaning of this phrase is “because of”: there must be a causal relationship between the inability to fund operating expenses and the COVID-19 emergency. See *U.S. Postal Serv. v. Postal Regulatory Comm’n*, 640 F.3d 1263, 1267 (D.C. Cir. 2011) (construing “due to” in the statute authorizing exigent price increases). What is less clear is how close the causal nexus must be (and hence the level of proof that must be provided to substantiate that causal nexus). On that question, courts have recognized that “the phrase ‘due to’ is ambiguous. . . . The causal nexus of ‘due to’ has been given a broad variety of meanings in the law ranging from sole and proximate cause at one end of the spectrum to contributing cause at the other.” *Id.* at 1268 (quoting *Kimber v. Thiokol Corp.*, 196 F.3d 1092, 1100 (10th Cir. 1999)) (brackets, internal quotation marks, and further citation omitted). Thus, it would certainly be possible to read Section 6001(b) as authorizing borrowing to the sole extent that financial strains can be specifically attributed to the COVID-19 emergency and that those strains overrun all other sources of funding. Cf. *id.* at 1267-68 (describing the Postal Regulatory Commission’s (Commission’s) initially strict application of “due to” in the exigency statute). But “due to”

can mean ‘due in part to’ as well as ‘due only to.’ A financial crisis can often result from multiple contributing factors[.] It would not be incorrect to say that [a need for relief] is ‘due to’ [one] factor simply because it is also ‘due to’ other factors as well.

² We are aware of at least two alternative uses of “operating expenses” in relation to the Postal Service. First, in the Postal Service’s periodic financial reports, “operating expenses” encompass all expenses (including depreciation on capital investments) other than interest expense. *E.g.*, U.S. Postal Serv., FY2019 Form 10-K, at 24-39. Second, under the pre-PAEA provision that governed the Governors’ ratemaking authority, rates were required to cover “total estimated costs,” the definition of which, in turn, distinguished operating expenses from depreciation on capital investments, interest and other debt-related expense, and an amount for contingencies. 39 U.S.C. § 3621 (2005). Although an argument could be made for applying a different reading, the permanent borrowing statute (39 U.S.C. § 2005(a)) is clearly more directly relevant to the CARES Act’s borrowing provision than either periodic financial reporting or ratemaking.

Id. at 1268 (emphasis in original). Hence, in the Section 6001(b) context, it could be enough for the Postal Service to face an inability to fund operating expenses because of the COVID-19 emergency as well as other factors.³

Fourth, the inability to fund operating expenses must be “due to the COVID-19 emergency.” The “COVID-19 emergency” is expressly defined in relation to the President’s declaration of a national emergency under the Robert T. Stafford Disaster Relief and Emergency Assistance Act. CARES Act § 6001(a)(1). Once the President has rescinded that emergency declaration, then the predicate condition for borrowing could be curtailed. More precisely, to access the CARES Act borrowing authority thereafter, the Postal Service would need to determine that the inability to fund operating expenses remains “due to” emergency conditions prior to rescission.

The Postal Service can certainly argue that, to the extent that mail volumes remain lower and/or costs remain higher at a given point in time than they would have been had the pandemic not occurred, such continuing effects are “due to” the pandemic, even if the emergency declaration has been rescinded. This would justify continued funding under this provision if these continuing effects mean that the Postal Service cannot fund operating expenses without borrowing. That said, assuming that Treasury cooperates in lending money during the COVID-19 emergency, it could decide to stop doing so earlier than the Postal Service believes to be warranted, if Treasury decides that the Postal Service’s inability to fund operating expenses is no longer “due to” the emergency. Such a prospect would resemble the Commission’s decision to truncate the amount of Great-Recession-era losses that the Postal Service was able to recover through an above-inflation rate increase. There, the Commission relied on the “due to” language in the exigency statute discussed above to establish a cut-off point, after which it would no longer deem continuing mail-volume losses to be “due to” the Great Recession. The Commission based this cut-off point on a determination of when the Postal Service theoretically entered a “new normal,” based on macroeconomic indicators and when the Postal Service began to gain an “ability to adjust” its operations at the depth of the recession’s impact. See Order No. 1926, Order

³ In *USPS v. PRC*, the court remanded the case to the Commission to interpret “due to” in the exigency statute. The Commission subsequently adopted a view close to the stricter end of the interpretive spectrum by requiring the Postal Service to quantify financial impacts attributable to the exigent circumstance (in that case, the Great Recession) rather than to other causes, although it granted that the quantification need not be absolutely precise. See generally Order No. 864, Order Resolving Issues on Remand, PRC Docket No. R2010-4R (Sept. 20, 2011). Key factors in the Commission’s reasoning were the Postal Service’s econometric resources, the scale of relief that it could seek (into the billions of dollars), and the fact that the exigency provision “is not intended as a remedial provision, but rather as a narrow exception to the price cap.” *Id.* at 44. In the context of borrowing under the CARES Act, the Postal Service’s resources and the scale of relief are comparable to what the Commission considered, and the additional borrowing authority could arguably (albeit not necessarily) be seen as a narrow exception to the Postal Service’s normal borrowing authority. That said, critical differences between the two contexts militate against applying the Commission’s logic here: the CARES Act’s “due to” language is to be applied by the Postal Service itself, not by an external oversight body, and borrowing money that must be repaid (with interest) – unlike a price increase – does not permanently affect any other party’s property interest.

Granting Exigent Price Increase, PRC Docket No. R2013-11 (Dec. 24, 2013), at 83-94.⁴ Even if the Postal Service might assert that COVID-19 impacts persist beyond the emergency declaration's rescission, Treasury, taking a page from the Commission's book, could nonetheless point not only to the emergency's formal end, but also impute (however unrealistically) to the Postal Service an "ability to adjust" that renders its inability to fund operating expenses no longer "due to" the emergency.

Fifth, another interpretative ambiguity in the statute is the relationship between the necessity determination and the actual amount of borrowing that the Postal Service may request. In particular, the statute requires that the Postal Service determine that we could not fund operating expenses due to the pandemic "without borrowing money," but does not directly limit the size of the resulting request in any way other than by imposing a \$10 billion cap. In this regard, the Postal Service could argue that so long as we demonstrate a need to borrow money, we can borrow the full \$10 billion under the statute, and need not justify the precise amount requested within that overall cap. On the other hand, Treasury could argue that while the \$10 billion is an overall cap, the statute also is most reasonably read to limit the size of a request to only what is strictly necessary to ensure that operating expenses are funded.

Sixth, all of this analysis is to be conducted as part of a determination by the Postal Service, but the scope of our actual discretion is unspecified. Section 6001(b)(2) provides that Treasury "may" – not "must" – lend money requested by the Postal Service. *Cf.* 39 U.S.C. § 2006(b) (authorizing the Postal Service to "require the Secretary of the Treasury to purchase" up to \$2 billion in Postal Service obligations). Treasury could point to this discretionary language as allowing it to refuse to lend money on the basis that it disagrees with the Postal Service's determination of need. As further support, Treasury could contrast the CARES Act language with an earlier House version of the bill, which would have required Treasury to lend moneys requested by the Postal Service. H.R. 6379, 116th Cong. § 140001(a)(2) (2020) ("[T]he Secretary of the Treasury shall lend up to such amount at the request of the Postal Service."). This mandatory language was abandoned in favor of the discretionary language in the final bill. Given the intense negotiations between Congressional leaders and Treasury that produced the final CARES Act, as well as the attention that the Administration reportedly gave to the postal provisions, this result is almost surely meaningful, rather than accidental. In the end, even if the Postal Service is correct that we have discretion regarding the necessity determination as a legal matter, as a practical matter the Treasury could still refuse to provide the money for other reasons.

⁴ The Postal Service challenged this cut-off as arbitrary, as macroeconomic indicators did not necessarily correspond to mail-volume trends, and as it made little sense to cut off recovery at the depth of the losses, when the Postal Service had merely begun to adjust but had not yet adequately adjusted. These challenges were unsuccessful. *See Alliance for Nonprofit Mailers v. Postal Regulatory Comm'n*, 790 F.3d 186, 196 & n.3 (D.C. Cir. 2015); Order No. 2623, Order Resolving Issues on Remand, PRC Docket No. R2013-11R (July 29, 2015) (denying reconsideration), at 15-28, *aff'd*, *U.S. Postal Serv. v. Postal Regulatory Comm'n*, 841 F.3d 509 (D.C. Cir. 2016).

In the event that Treasury attempts to second-guess the Postal Service's determination of need, the Postal Service could point to Congress's express conferral on the Postal Service of discretion to determine need; if Congress had intended to subject that determination to Treasury's oversight, it easily could have so provided. Given our recent experience with disagreements over statutory construction, it is possible that we would be unable to persuade Treasury of our interpretation, and resolution of any interagency dispute might ultimately lie with the Office of Legal Counsel (OLC) at the Department of Justice. To minimize the risk of a time-consuming and uncertain dispute, the Postal Service would be well-advised to seek a common understanding with Treasury concerning this aspect of the statute.

While these interpretative issues present room for potential dispute with Treasury, the Postal Service does have a very strong argument that borrowing the full amount of the \$10 billion is clearly necessary under the terms of the statute at this time. In this regard, our projections show that the Postal Service will experience a cash shortfall, and hence an inability to fund operating expenses, this calendar year unless the \$10 billion is borrowed, and that we will need the full \$10 billion to continue operations for as long as possible next fiscal year.⁵ This circumstance is a direct result of the precipitous declines in mail volumes that we forecast for Quarter 3 of FY2020, which would not have occurred but for the onset of the pandemic. Therefore, the Postal Service is legally authorized under the statute to request the full \$10 billion at this time. While the above-mentioned interpretive issues may complicate our ability to utilize this funding source, we think that such issues are more likely to arise as time passes than they would if we seek these funds now, when the longer-term effects of the pandemic are unclear.

II. Treasury Agreement to Conditions

Under Section 6001(b)(2), any borrowing must be "upon terms and conditions mutually agreed upon by the Secretary and the Postal Service." As you know, in adopting this language, Congress declined our proposed alternative, which would have allowed for negotiation against a backdrop of default terms from the now-expired note purchase agreement. Without such a backdrop, Treasury could seek to reject our proposed terms and to propose terms that we would view as unlawful, inappropriate, or otherwise undesirable. (Indeed, Treasury's insistence on such terms is what led to the expiration, rather than the renewal, of the note purchase agreement last year.)

Treasury might argue that, regardless of any disagreement concerning the appropriate terms and conditions of borrowing under Title 39, it has freer rein to propose such conditions under the CARES Act. As OLC has recognized, the legislative history of the

⁵ The projections show the potential for a cash shortfall by October. However, as noted above, the statute arguably requires capital expenses to be excluded from the determination of necessity. The Postal Service's projection assumes capital expenses of \$2.0 billion over the rest of this fiscal year, and \$2.5 billion for next fiscal year. If these capital expenses are excluded, the Postal Service would still likely experience a cash shortfall this calendar year, or early next calendar year.

Title 39 borrowing provision, as well as legislation establishing the Federal Financing Bank enacted shortly thereafter, is replete with Treasury's disavowals of any intent to interfere with the Postal Service's operational and business decisions. See *Scope of Treasury Department Purchase Rights with Respect to Financing Initiatives of the U.S. Postal Service*, 19 Op. Off. Legal Counsel 238, 245 n.5 (1995); *Authority of the Secretary of the Treasury Regarding Postal Service Bond Offering*, 17 Op. Off. Legal Counsel 6, 8-10 (1993). By contrast, the CARES Act contains no such legislative history, and its additional borrowing authority is expressly distinguished from, rather than subordinate to, the Title 39 borrowing provision. If anything, the contrast between the final CARES Act and the House bill demonstrates that the "mutual agreement" requirement was intentionally added. See H.R. 6379, 116th Cong. § 140001(a)(2) (containing no language about terms and conditions).

That said, any attempt by Treasury to use even this borrowing authority to oversee or second-guess the Governors' and Board's decisions would still vitiate Congress's intent in creating the Postal Service to be insulated from direct political control, and hence would violate constitutional and statutory parameters in the same manner as its prior attempt to impose such terms on our Title 39 borrowing. In this regard, the absence of any direct legislative history is simply not a material legal consideration. Let me know if you would like me to send to you our prior memorandum to the Board explaining these constitutional and statutory issues.

Our experience with non-renewal of the note purchase agreement shows that Treasury may not be swayed by the legal bona fides of our position and may insist on inappropriate terms regardless. In such an event, we may be able to seek a legal opinion from OLC supporting our view. Alternatively, Congress clearly expected that Treasury would facilitate borrowing under Section 6001(b), and any significant delay or lack of cooperation by Treasury could become a subject of Congressional inquiry and oversight. As noted above, at present Treasury has advised us that it does not intend to seek to impose "consent" rights.

III. Amount of Borrowing

Section 6001(b)(1) provides that the borrowing shall be "in an amount not to exceed" \$10 billion. In contrast to the Title 39 borrowing provisions, this language does not specify whether the \$10 billion limit applies to the amount of CARES Act borrowing "outstanding at any one time" or only as of a certain point in time (e.g., the end of a fiscal year), such that greater amounts can be borrowed so long as the outstanding amount is reduced by the cut-off time. See 39 U.S.C. § 2005(a)(1) (containing both types of cap). Without further qualification, however, a plain reading of "not to exceed" indicates that the \$10 billion limit applies at all times; the limit cannot be exceeded temporarily so long as it is met later.

A related question concerns whether the \$10 billion is a cap similar to the \$15 billion cap on Title 39 borrowing, meaning that the Postal Service may access the borrowing authority multiple times (with aggregate borrowing at any one time remaining within the limit), or

whether the statute only authorizes the provision of \$10 billion in total. If the latter is true, another question is whether this borrowing authority can only be accessed in a one-time loan, or if multiple loans are allowed.

Based on existing practice and the uncertain duration of the current emergency, the Postal Service could reasonably take the view that it can repeatedly borrow money within the \$10 billion limit. It is possible, however, that Treasury (or OLC, in the event of a dispute) could interpret the CARES Act as providing for a provision of \$10 billion in total. A contrast with the Title 39 provision shows that Congress had a template for making the limit apply to an aggregate amount of borrowing “outstanding at any time,” *id.*, which was not used in the CARES Act. This, coupled with the plain meaning of the CARES Act language, arguably indicates that Congress did not intend for the CARES Act borrowing limit to operate in the same manner as the \$15 billion borrowing cap. It is also conceivable that Treasury could assert that the statute only authorizes a single loan, based on the fact that the statute refers to a singular “amount” of borrowing, and not a multiple “amount of obligations,” as in Section 2005, though this argument would be weaker.

Ultimately, this question only becomes relevant if we attempt to access the CARES Act borrowing authority a second time. Because of the possibility that we could be denied a second round of borrowing, it would be advisable to seek to borrow the maximum amount available (\$10 billion) at the outset, which is advisable in any event given all of the interpretative issues concerning the “due to” language. In addition, it might also be advisable to seek to secure as long of a maturity as is feasible.

IV. Restrictions on the Use of Borrowed Funds

Section 6001(b)(1)(A) and (B) provide that borrowed funds can only be used to fund operating expenses and cannot be used to pay outstanding debt.

As discussed in section I above, it would be consistent with the history of the Postal Service’s permanent borrowing statute to construe the reference to “operating expenses” as excluding capital expenses.

In addition, we think it evident that “debt” means liabilities from borrowing. See 39 U.S.C. § 2001(3) (referring to “debt instruments” in the context of the Title 39 borrowing provisions).⁶ However, the limitation on using these additional funds to “pay any outstanding debt” is ambiguous in several respects.

⁶ One definition of “debt” refers broadly to any “liability” or “specific sum of money due by agreement or otherwise,” such as payments to a supplier or employee for services rendered. See BLACK’S LAW DICTIONARY, “debt” (11th ed. 2019). However, as noted above, it is appropriate to read the terms of the CARES Act consistently with the terms of Title 39’s borrowing provisions. In addition, it is functionally implausible to believe that Congress intended “debt” to refer to the Postal Service’s liabilities generally, since that would mean that the funds borrowed under the CARES Act could be used only to provide liquidity for future operating expenses, and not for expenses already incurred (and thus “outstanding”).

First, it is unclear whether “outstanding debt” includes all payments on borrowed debt, or only payments on principal. On the one hand, to “pay [down] debt” might generally connote payment that has the effect of reducing or eliminating the principal owed. Perhaps for this reason, the Postal Service reports interest expense as a distinct line item in its periodic financial reports. On the other hand, a debt has not been repaid if accrued interest or prepayment fees remain outstanding. Indeed, the statutory language here does not distinguish between principal and other debt, and contextual definitions are broad enough to encompass any amounts (including interest and fees) that are owed under a loan agreement. See 39 U.S.C. § 2001(3); BLACK’S LAW DICTIONARY, “debt.” In our view, the more reasonable construction is that “outstanding debt” includes principal, interest, and any fees arising under a loan agreement.

Second, it is unclear whether “outstanding debt” refers to debt outstanding when the newly borrowed moneys are spent, or only to debt outstanding at the time of enactment. The former reading is more plausible. Other CARES Act provisions, as well as the Title 39 borrowing provisions, use “outstanding” in ways that appear clearly to connote “outstanding at the time of the relevant event,” and in no case “outstanding at the time of enactment.” See CARES Act, Pub. L. No. 116-136, § 4003(c)(1)(A) (requiring rates for certain Treasury loans to be based on “the current average yield on outstanding marketable obligations of the United States of comparable maturity”); 39 U.S.C. § 2006(a) (same).

On a functional level, Congress placed specific conditions on borrowing under the CARES Act that do not apply to borrowing under Title 39, and so a broader reading of CARES Act’s “outstanding debt” preclusion makes sense as an anti-circumvention measure. Otherwise, the Postal Service could borrow under the CARES Act (while eligible) to pay down Title 39 loans, with the newly liberated Title 39 borrowing authority remaining available even after the COVID-19 emergency had ended. To the extent that Congress was seeking to foreclose that possibility, as the language of the statute indicates that it was, the concern applies equally whether moneys are borrowed under Title 39 before or after the date of enactment.

Third, it is unclear whether “any outstanding debt” means only debt acquired under other authorities (i.e., the Title 39 borrowing provisions), or whether it also precludes using CARES Act borrowing to retire and renew earlier CARES Act debt. Under either reading, the CARES Act would preclude borrowing to repay funds borrowed under Title 39. That much would be consistent with Congress’s apparent concern that the CARES Act borrowing authority remain distinct from Title 39 borrowing.⁷ The additional question is whether the preclusion extends to repayment of earlier CARES Act debt. On a formal level, the statutory text – “any outstanding debt of the Postal Service,” without further qualification

⁷ That much is evident from Congress’s decision not to adopt the House’s proposal to cancel all Title 39 debt outstanding on the date of enactment. See H.R. 6379, 116th Cong. § 140001(a)(1). The House bill would then have authorized the Postal Service to borrow \$15 billion from Treasury. H.R. 6379, 116th Cong. § 140001(a)(2). In light of the bill’s resetting of outstanding debt to zero, it is unclear whether this additional borrowing authority would have been coextensive with or additional to the \$15 billion debt ceiling in 39 U.S.C. § 2005(a).

– would plainly include CARES Act debt. Therefore, it arguably would be most prudent for the Postal Service to not use these borrowed funds in such a manner. However, on a functional level, we could argue that precluding the use of these funds to pay outstanding CARES Act debt would make little sense. So long as all relevant borrowing meets the CARES Act criteria, using new borrowing to repay old debt merely consolidates (a) the use of cash to repay an old loan and (b) attainment of new cash by acquiring a new loan. If emergency circumstances remain such that repayment of the old loan would deprive the Postal Service of cash needed to fund operating expenses, then we would immediately qualify for a new loan under the CARES Act. Neither activity would be inconsistent with the CARES Act's purposes on its own, and so there is no apparent reason why they should be precluded in combination. Therefore, despite the facial breadth of "any outstanding debt," it would be reasonable to construe the preclusion as limited to borrowing under Title 39, not under the CARES Act.

In sum, it is reasonable to construe the CARES Act as prohibiting borrowed funds from being used for either capital expenses or the payment of any principal, interest, or fees arising from obligations issued under Title 39. As noted earlier, however, the CARES Act gives Treasury the discretion to refuse to lend, or to limit its lending, to the Postal Service if it disagrees with the Postal Service's interpretation of the law. It would be advisable to seek a common understanding with Treasury about these legal questions, to the extent possible.

Finally, the statute does not explicitly specify any accountability for the use of borrowed funds. It is unclear at this time whether current Treasury leadership (or Congress) will insist on such an accounting.⁸

CONCLUSION

On its face, the statute imposes conditions on borrowing but gives the Postal Service discretion to determine when and to what extent additional borrowing is needed. But given Treasury's discretion and the requirement to attain Treasury's agreement on borrowing terms, Treasury could simply refuse to lend if it disagrees with the Postal Service's interpretation, desires accountability for the use of funds, or insists on terms of its choosing (regardless of their legality or acceptability to the Postal Service). The only checks on Treasury are Congressional oversight and potential OLC resolution of a legal dispute.

Please let me know if you have any questions or concerns. Of course, the situation regarding our financial situation is very fluid, so if conditions change in a way that warrants

⁸ According to the Corporate Treasury office, Treasury historically did not insist on a rigid accounting of the Postal Service's use of pre-PAEA borrowing authority, and the Postal Service thus had a fairly free hand to characterize the use of borrowed funds vis-à-vis the statute's distinct annual caps. However, Treasury might require clearer requirements in this circumstance.

material revision of the analysis in this memorandum, we will reexamine our analysis and advise you accordingly.

A handwritten signature in black ink, appearing to read "Thomas J. Marshall". The signature is fluid and cursive, with the first name "Thomas" and last name "Marshall" clearly distinguishable.

Thomas J. Marshall

cc: Ms. Brennan
Mr. Stroman
Mr. Corbett
Mr. Elston



April 14, 2020

**PRIVILEGED AND CONFIDENTIAL
ATTORNEY-CLIENT COMMUNICATION**

GOVERNORS

SUBJECT: Additional Borrowing Authority Under the CARES Act

This memorandum examines the parameters for \$10 billion in additional borrowing authority that Congress recently made available to the Postal Service in response to the ongoing Coronavirus Disease 2019 ("COVID-19") outbreak.

EXECUTIVE SUMMARY

- The new borrowing authority can be accessed only if the Postal Service determines that additional liquidity is necessary to fund operating expenses due to the COVID-19 emergency. Various aspects of this threshold requirement are subject to interpretation: "operating expenses," "due to," the degree of necessity, and the timing of the financial need. Because the statute charges the Postal Service with determining necessity, we arguably have primary discretion to interpret and apply this aspect of the statute. In this regard, we have a clear basis to determine, based on our current forecasts concerning the impact of the COVID-19 outbreak on Postal Service volumes, revenues, and liquidity, that receiving this additional \$10 billion in full is consistent with the language of the statute; we are therefore legally authorized to request the full amount at any time. Nevertheless, the consent role of the Treasury Department ("Treasury") means that it could seek to hold up borrowing if it disagrees with the Postal Service's interpretation, or if it questions the assumptions that the Postal Service is using to make our determination.
- Treasury must agree to the terms and conditions of borrowing. In light of recent experience, Treasury could attempt to condition its assent on conditions that enhance its oversight over Postal Service business decisions, and that even intrude upon the Board's and the Governors' discretion to lead the Postal Service. We think such an outcome is unlikely, for the reasons noted below, but as we have previously advised, such conditions would violate constitutional and statutory parameters. In this case we believe that the circumstances and scrutiny from Members of Congress and others could lead Treasury to take a more flexible approach, and our preliminary indications are that Treasury will not insist upon consent rights.

- Borrowing is limited to \$10 billion. This limitation applies at all times; it cannot be temporarily exceeded so long as outstanding debt is returned to \$10 billion later. Although we could attempt to access the borrowing authority repeatedly so long as we remain within the \$10 billion limit, and Treasury could agree with that approach, the statutory language could also give Treasury (and other decision-makers) a reasonable basis to view the borrowing authority as being available only once.
- Under a reasonable interpretation of the statutory language, funds borrowed under the CARES Act cannot be used for capital expenses or to pay principal, interest, or fees on obligations issued under Title 39. Although there is no specific accounting or reporting requirement, Treasury or Congressional stakeholders could insist that the Postal Service demonstrate its compliance with the requirement that borrowed funds be used only for operating expenses.

ANALYSIS

On March 27, 2020, Congress enacted the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"), Pub. L. No. 116-136. Section 6001(b) of the CARES Act permits the Postal Service to borrow up to \$10 billion from the Department of the Treasury, separately from the \$15 billion of borrowing authority already available to the Postal Service under 39 U.S.C. § 2005. This additional borrowing authority is subject to a number of conditions, however, the precise import of which are not immediately clear from the statutory text.¹

Section 6001(b) provides as follows:

(b) Additional borrowing authority.—Notwithstanding section 2005 of title 39, United States Code, or any other provision of law, if the Postal Service determines that, due to the COVID-19 emergency, the Postal Service will not be able to fund operating expenses without borrowing money—

(1) the Postal Service may borrow money from the Treasury in an amount not to exceed \$10,000,000,000—

(A) to be used for such operating expenses; and

(B) which may not be used to pay any outstanding debt of the Postal Service; and

¹ Because the legislation was negotiated largely behind the scenes by Congressional leaders and the Secretary of the Treasury, there are no committee reports or other normal incidents of legislative history to serve as an interpretive aid. The few floor statements by individual Members of Congress that discuss the Postal Service provisions do so only in general terms, and therefore are of no probative value.

(2) the Secretary of the Treasury may lend up to the amount described in paragraph (1) at the request of the Postal Service, upon terms and conditions mutually agreed upon by the Secretary and the Postal Service.

This provision plainly establishes at least four principal conditions: two prior to borrowing, one concerning the amount of borrowing, and one on the use of borrowed funds. The Postal Service must first determine that it needs to borrow money in order to fund operating expenses due to the COVID-19 emergency. And it must reach mutual agreement with Treasury over the terms and conditions of borrowing. The borrowing is limited to “an amount not to exceed” \$10 billion. The borrowed moneys must be used only for “operating expenses,” which cannot include “pay[ing] any outstanding debt.” Each condition raises various questions of interpretation.

I. Postal Service Determination of Necessity to Fund Operating Expenses

Under the opening paragraph of Section 6001(b), prior to borrowing any funds, the Postal Service must first determine “that, due to the COVID-19 emergency, the Postal Service will not be able to fund operating expenses without borrowing money.” At least six aspects of this proviso are noteworthy.

First, the term “operating expenses” is not defined, but given the term’s usage in a related context, “operating expenses” should be construed as distinct from “capital expenses.” Specifically, the term “operating expenses” is used in the Postal Service’s longstanding borrowing statute. Currently, that provision caps the net increase in borrowing “for the purpose of capital improvements and . . . for the purpose of defraying operating expenses” at \$3 billion per fiscal year. 39 U.S.C. § 2005(a). Prior to the enactment of the Postal Accountability and Enhancement Act of 2006 (PAEA), the same sentence set separate annual caps on borrowing used for capital expenses and for operating expenses (\$2 billion and \$1 billion, respectively). See 39 U.S.C. § 2005(a) (2005). Because Section 6001(b) of the CARES Act relates to the same subject matter as 39 U.S.C. § 2005(a) – a fact recognized by the express citation of the Title 39 provision in CARES Act Section 6001’s “notwithstanding” clause – it is reasonable to construe the two provisions *in pari materia*: that is, consonant with one another due to their related subject matter. See, e.g., *Pasquantino v. United States*, 544 U.S. 349, 355 n.2 (2005) (noting that wire- and mail-fraud statutes have been construed *in pari materia*); *Nat’l Fed’n of Fed. Employees, Local 1309 v. Dep’t of Interior*, 526 U.S. 86, 105 (1999); 2B Sutherland Statutes & Statutory Construction §§ 51:1-51:2, 53:2 (7th ed. 2020).

Under pre-PAEA 39 U.S.C. § 2005(a), the term “operating expenses” was understood by the Postal Service to mean all expenses other than capital expenses. “Operating expenses” therefore included not only expenses intuitively viewed as related to operations

(e.g., salaries and supplier costs), but also post-retirement benefits expenses and even interest expense on borrowed funds.²

Second, the borrowing of funds is conditioned on the Postal Service “not be[ing] able to fund operating expenses without borrowing money.” This implies that the additional borrowing authority is a true necessity: that is, the Postal Service must borrow money to continue funding its operating expenses, because the other available means of doing so will come up short. That said, access to the borrowing authority can precede an actual inability to fund operating expenses, as the relevant language is phrased in the future tense (“will not be able to fund”).

Third, “due to” is not defined. The plain meaning of this phrase is “because of”: there must be a causal relationship between the inability to fund operating expenses and the COVID-19 emergency. See *U.S. Postal Serv. v. Postal Regulatory Comm’n*, 640 F.3d 1263, 1267 (D.C. Cir. 2011) (construing “due to” in the statute authorizing exigent price increases). What is less clear is how close the causal nexus must be (and hence the level of proof that must be provided to substantiate that causal nexus). On that question, courts have recognized that “the phrase ‘due to’ is ambiguous. . . . The causal nexus of ‘due to’ has been given a broad variety of meanings in the law ranging from sole and proximate cause at one end of the spectrum to contributing cause at the other.” *Id.* at 1268 (quoting *Kimber v. Thiokol Corp.*, 196 F.3d 1092, 1100 (10th Cir. 1999)) (brackets, internal quotation marks, and further citation omitted). Thus, it would certainly be possible to read Section 6001(b) as authorizing borrowing to the sole extent that financial strains can be specifically attributed to the COVID-19 emergency and that those strains overrun all other sources of funding. *Cf. id.* at 1267-68 (describing the Postal Regulatory Commission’s (Commission’s) initially strict application of “due to” in the exigency statute). But “due to”

can mean ‘due in part to’ as well as ‘due only to.’ A financial crisis can often result from multiple contributing factors[.] It would not be incorrect to say that [a need for relief] is ‘due to’ [one] factor simply because it is also ‘due to’ other factors as well.

² We are aware of at least two alternative uses of “operating expenses” in relation to the Postal Service. First, in the Postal Service’s periodic financial reports, “operating expenses” encompass all expenses (including depreciation on capital investments) other than interest expense. *E.g.*, U.S. Postal Serv., FY2019 Form 10-K, at 24-39. Second, under the pre-PAEA provision that governed the Governors’ ratemaking authority, rates were required to cover “total estimated costs,” the definition of which, in turn, distinguished operating expenses from depreciation on capital investments, interest and other debt-related expense, and an amount for contingencies. 39 U.S.C. § 3621 (2005). Although an argument could be made for applying a different reading, the permanent borrowing statute (39 U.S.C. § 2005(a)) is clearly more directly relevant to the CARES Act’s borrowing provision than either periodic financial reporting or ratemaking.

Id. at 1268 (emphasis in original). Hence, in the Section 6001(b) context, it could be enough for the Postal Service to face an inability to fund operating expenses because of the COVID-19 emergency as well as other factors.³

Fourth, the inability to fund operating expenses must be “due to the COVID-19 emergency.” The “COVID-19 emergency” is expressly defined in relation to the President’s declaration of a national emergency under the Robert T. Stafford Disaster Relief and Emergency Assistance Act. CARES Act § 6001(a)(1). Once the President has rescinded that emergency declaration, then the predicate condition for borrowing could be curtailed. More precisely, to access the CARES Act borrowing authority thereafter, the Postal Service would need to determine that the inability to fund operating expenses remains “due to” emergency conditions prior to rescission.

The Postal Service can certainly argue that, to the extent that mail volumes remain lower and/or costs remain higher at a given point in time than they would have been had the pandemic not occurred, such continuing effects are “due to” the pandemic, even if the emergency declaration has been rescinded. This would justify continued funding under this provision if these continuing effects mean that the Postal Service cannot fund operating expenses without borrowing. That said, assuming that Treasury cooperates in lending money during the COVID-19 emergency, it could decide to stop doing so earlier than the Postal Service believes to be warranted, if Treasury decides that the Postal Service’s inability to fund operating expenses is no longer “due to” the emergency. Such a prospect would resemble the Commission’s decision to truncate the amount of Great-Recession-era losses that the Postal Service was able to recover through an above-inflation rate increase. There, the Commission relied on the “due to” language in the exigency statute discussed above to establish a cut-off point, after which it would no longer deem continuing mail-volume losses to be “due to” the Great Recession. The Commission based this cut-off point on a determination of when the Postal Service theoretically entered a “new normal,” based on macroeconomic indicators and when the Postal Service began to gain an “ability to adjust” its operations at the depth of the recession’s impact. See Order No. 1926, Order

³ In *USPS v. PRC*, the court remanded the case to the Commission to interpret “due to” in the exigency statute. The Commission subsequently adopted a view close to the stricter end of the interpretive spectrum by requiring the Postal Service to quantify financial impacts attributable to the exigent circumstance (in that case, the Great Recession) rather than to other causes, although it granted that the quantification need not be absolutely precise. See generally Order No. 864, Order Resolving Issues on Remand, PRC Docket No. R2010-4R (Sept. 20, 2011). Key factors in the Commission’s reasoning were the Postal Service’s econometric resources, the scale of relief that it could seek (into the billions of dollars), and the fact that the exigency provision “is not intended as a remedial provision, but rather as a narrow exception to the price cap.” *Id.* at 44. In the context of borrowing under the CARES Act, the Postal Service’s resources and the scale of relief are comparable to what the Commission considered, and the additional borrowing authority could arguably (albeit not necessarily) be seen as a narrow exception to the Postal Service’s normal borrowing authority. That said, critical differences between the two contexts militate against applying the Commission’s logic here: the CARES Act’s “due to” language is to be applied by the Postal Service itself, not by an external oversight body, and borrowing money that must be repaid (with interest) – unlike a price increase – does not permanently affect any other party’s property interest.

Granting Exigent Price Increase, PRC Docket No. R2013-11 (Dec. 24, 2013), at 83-94.⁴ Even if the Postal Service might assert that COVID-19 impacts persist beyond the emergency declaration's rescission, Treasury, taking a page from the Commission's book, could nonetheless point not only to the emergency's formal end, but also impute (however unrealistically) to the Postal Service an "ability to adjust" that renders its inability to fund operating expenses no longer "due to" the emergency.

Fifth, another interpretative ambiguity in the statute is the relationship between the necessity determination and the actual amount of borrowing that the Postal Service may request. In particular, the statute requires that the Postal Service determine that we could not fund operating expenses due to the pandemic "without borrowing money," but does not directly limit the size of the resulting request in any way other than by imposing a \$10 billion cap. In this regard, the Postal Service could argue that so long as we demonstrate a need to borrow money, we can borrow the full \$10 billion under the statute, and need not justify the precise amount requested within that overall cap. On the other hand, Treasury could argue that while the \$10 billion is an overall cap, the statute also is most reasonably read to limit the size of a request to only what is strictly necessary to ensure that operating expenses are funded.

Sixth, all of this analysis is to be conducted as part of a determination by the Postal Service, but the scope of our actual discretion is unspecified. Section 6001(b)(2) provides that Treasury "may" – not "must" – lend money requested by the Postal Service. *Cf.* 39 U.S.C. § 2006(b) (authorizing the Postal Service to "require the Secretary of the Treasury to purchase" up to \$2 billion in Postal Service obligations). Treasury could point to this discretionary language as allowing it to refuse to lend money on the basis that it disagrees with the Postal Service's determination of need. As further support, Treasury could contrast the CARES Act language with an earlier House version of the bill, which would have required Treasury to lend moneys requested by the Postal Service. H.R. 6379, 116th Cong. § 140001(a)(2) (2020) ("[T]he Secretary of the Treasury shall lend up to such amount at the request of the Postal Service."). This mandatory language was abandoned in favor of the discretionary language in the final bill. Given the intense negotiations between Congressional leaders and Treasury that produced the final CARES Act, as well as the attention that the Administration reportedly gave to the postal provisions, this result is almost surely meaningful, rather than accidental. In the end, even if the Postal Service is correct that we have discretion regarding the necessity determination as a legal matter, as a practical matter the Treasury could still refuse to provide the money for other reasons.

⁴ The Postal Service challenged this cut-off as arbitrary, as macroeconomic indicators did not necessarily correspond to mail-volume trends, and as it made little sense to cut off recovery at the depth of the losses, when the Postal Service had merely begun to adjust but had not yet adequately adjusted. These challenges were unsuccessful. *See Alliance for Nonprofit Mailers v. Postal Regulatory Comm'n*, 790 F.3d 186, 196 & n.3 (D.C. Cir. 2015); Order No. 2623, Order Resolving Issues on Remand, PRC Docket No. R2013-11R (July 29, 2015) (denying reconsideration), at 15-28, *aff'd*, *U.S. Postal Serv. v. Postal Regulatory Comm'n*, 841 F.3d 509 (D.C. Cir. 2016).

In the event that Treasury attempts to second-guess the Postal Service's determination of need, the Postal Service could point to Congress's express conferral on the Postal Service of discretion to determine need; if Congress had intended to subject that determination to Treasury's oversight, it easily could have so provided. Given our recent experience with disagreements over statutory construction, it is possible that we would be unable to persuade Treasury of our interpretation, and resolution of any interagency dispute might ultimately lie with the Office of Legal Counsel (OLC) at the Department of Justice. To minimize the risk of a time-consuming and uncertain dispute, the Postal Service would be well-advised to seek a common understanding with Treasury concerning this aspect of the statute.

While these interpretative issues present room for potential dispute with Treasury, the Postal Service does have a very strong argument that borrowing the full amount of the \$10 billion is clearly necessary under the terms of the statute at this time. In this regard, our projections show that the Postal Service will experience a cash shortfall, and hence an inability to fund operating expenses, this calendar year unless the \$10 billion is borrowed, and that we will need the full \$10 billion to continue operations for as long as possible next fiscal year.⁵ This circumstance is a direct result of the precipitous declines in mail volumes that we forecast for Quarter 3 of FY2020, which would not have occurred but for the onset of the pandemic. Therefore, the Postal Service is legally authorized under the statute to request the full \$10 billion at this time. While the above-mentioned interpretive issues may complicate our ability to utilize this funding source, we think that such issues are more likely to arise as time passes than they would if we seek these funds now, when the longer-term effects of the pandemic are unclear.

II. Treasury Agreement to Conditions

Under Section 6001(b)(2), any borrowing must be "upon terms and conditions mutually agreed upon by the Secretary and the Postal Service." As you know, in adopting this language, Congress declined our proposed alternative, which would have allowed for negotiation against a backdrop of default terms from the now-expired note purchase agreement. Without such a backdrop, Treasury could seek to reject our proposed terms and to propose terms that we would view as unlawful, inappropriate, or otherwise undesirable. (Indeed, Treasury's insistence on such terms is what led to the expiration, rather than the renewal, of the note purchase agreement last year.)

Treasury might argue that, regardless of any disagreement concerning the appropriate terms and conditions of borrowing under Title 39, it has freer rein to propose such conditions under the CARES Act. As OLC has recognized, the legislative history of the

⁵ The projections show the potential for a cash shortfall by October. However, as noted above, the statute arguably requires capital expenses to be excluded from the determination of necessity. The Postal Service's projection assumes capital expenses of \$2.0 billion over the rest of this fiscal year, and \$2.5 billion for next fiscal year. If these capital expenses are excluded, the Postal Service would still likely experience a cash shortfall this calendar year, or early next calendar year.

Title 39 borrowing provision, as well as legislation establishing the Federal Financing Bank enacted shortly thereafter, is replete with Treasury's disavowals of any intent to interfere with the Postal Service's operational and business decisions. See *Scope of Treasury Department Purchase Rights with Respect to Financing Initiatives of the U.S. Postal Service*, 19 Op. Off. Legal Counsel 238, 245 n.5 (1995); *Authority of the Secretary of the Treasury Regarding Postal Service Bond Offering*, 17 Op. Off. Legal Counsel 6, 8-10 (1993). By contrast, the CARES Act contains no such legislative history, and its additional borrowing authority is expressly distinguished from, rather than subordinate to, the Title 39 borrowing provision. If anything, the contrast between the final CARES Act and the House bill demonstrates that the "mutual agreement" requirement was intentionally added. See H.R. 6379, 116th Cong. § 140001(a)(2) (containing no language about terms and conditions).

That said, any attempt by Treasury to use even this borrowing authority to oversee or second-guess the Governors' and Board's decisions would still vitiate Congress's intent in creating the Postal Service to be insulated from direct political control, and hence would violate constitutional and statutory parameters in the same manner as its prior attempt to impose such terms on our Title 39 borrowing. In this regard, the absence of any direct legislative history is simply not a material legal consideration. Let me know if you would like me to send to you our prior memorandum to the Board explaining these constitutional and statutory issues.

Our experience with non-renewal of the note purchase agreement shows that Treasury may not be swayed by the legal bona fides of our position and may insist on inappropriate terms regardless. In such an event, we may be able to seek a legal opinion from OLC supporting our view. Alternatively, Congress clearly expected that Treasury would facilitate borrowing under Section 6001(b), and any significant delay or lack of cooperation by Treasury could become a subject of Congressional inquiry and oversight. As noted above, at present Treasury has advised us that it does not intend to seek to impose "consent" rights.

III. Amount of Borrowing

Section 6001(b)(1) provides that the borrowing shall be "in an amount not to exceed" \$10 billion. In contrast to the Title 39 borrowing provisions, this language does not specify whether the \$10 billion limit applies to the amount of CARES Act borrowing "outstanding at any one time" or only as of a certain point in time (e.g., the end of a fiscal year), such that greater amounts can be borrowed so long as the outstanding amount is reduced by the cut-off time. See 39 U.S.C. § 2005(a)(1) (containing both types of cap). Without further qualification, however, a plain reading of "not to exceed" indicates that the \$10 billion limit applies at all times; the limit cannot be exceeded temporarily so long as it is met later.

A related question concerns whether the \$10 billion is a cap similar to the \$15 billion cap on Title 39 borrowing, meaning that the Postal Service may access the borrowing authority multiple times (with aggregate borrowing at any one time remaining within the limit), or

whether the statute only authorizes the provision of \$10 billion in total. If the latter is true, another question is whether this borrowing authority can only be accessed in a one-time loan, or if multiple loans are allowed.

Based on existing practice and the uncertain duration of the current emergency, the Postal Service could reasonably take the view that it can repeatedly borrow money within the \$10 billion limit. It is possible, however, that Treasury (or OLC, in the event of a dispute) could interpret the CARES Act as providing for a provision of \$10 billion in total. A contrast with the Title 39 provision shows that Congress had a template for making the limit apply to an aggregate amount of borrowing “outstanding at any time,” *id.*, which was not used in the CARES Act. This, coupled with the plain meaning of the CARES Act language, arguably indicates that Congress did not intend for the CARES Act borrowing limit to operate in the same manner as the \$15 billion borrowing cap. It is also conceivable that Treasury could assert that the statute only authorizes a single loan, based on the fact that the statute refers to a singular “amount” of borrowing, and not a multiple “amount of obligations,” as in Section 2005, though this argument would be weaker.

Ultimately, this question only becomes relevant if we attempt to access the CARES Act borrowing authority a second time. Because of the possibility that we could be denied a second round of borrowing, it would be advisable to seek to borrow the maximum amount available (\$10 billion) at the outset, which is advisable in any event given all of the interpretative issues concerning the “due to” language. In addition, it might also be advisable to seek to secure as long of a maturity as is feasible.

IV. Restrictions on the Use of Borrowed Funds

Section 6001(b)(1)(A) and (B) provide that borrowed funds can only be used to fund operating expenses and cannot be used to pay outstanding debt.

As discussed in section I above, it would be consistent with the history of the Postal Service’s permanent borrowing statute to construe the reference to “operating expenses” as excluding capital expenses.

In addition, we think it evident that “debt” means liabilities from borrowing. See 39 U.S.C. § 2001(3) (referring to “debt instruments” in the context of the Title 39 borrowing provisions).⁶ However, the limitation on using these additional funds to “pay any outstanding debt” is ambiguous in several respects.

⁶ One definition of “debt” refers broadly to any “liability” or “specific sum of money due by agreement or otherwise,” such as payments to a supplier or employee for services rendered. See BLACK’S LAW DICTIONARY, “debt” (11th ed. 2019). However, as noted above, it is appropriate to read the terms of the CARES Act consistently with the terms of Title 39’s borrowing provisions. In addition, it is functionally implausible to believe that Congress intended “debt” to refer to the Postal Service’s liabilities generally, since that would mean that the funds borrowed under the CARES Act could be used only to provide liquidity for future operating expenses, and not for expenses already incurred (and thus “outstanding”).

First, it is unclear whether “outstanding debt” includes all payments on borrowed debt, or only payments on principal. On the one hand, to “pay [down] debt” might generally connote payment that has the effect of reducing or eliminating the principal owed. Perhaps for this reason, the Postal Service reports interest expense as a distinct line item in its periodic financial reports. On the other hand, a debt has not been repaid if accrued interest or prepayment fees remain outstanding. Indeed, the statutory language here does not distinguish between principal and other debt, and contextual definitions are broad enough to encompass any amounts (including interest and fees) that are owed under a loan agreement. See 39 U.S.C. § 2001(3); BLACK’S LAW DICTIONARY, “debt.” In our view, the more reasonable construction is that “outstanding debt” includes principal, interest, and any fees arising under a loan agreement.

Second, it is unclear whether “outstanding debt” refers to debt outstanding when the newly borrowed moneys are spent, or only to debt outstanding at the time of enactment. The former reading is more plausible. Other CARES Act provisions, as well as the Title 39 borrowing provisions, use “outstanding” in ways that appear clearly to connote “outstanding at the time of the relevant event,” and in no case “outstanding at the time of enactment.” See CARES Act, Pub. L. No. 116-136, § 4003(c)(1)(A) (requiring rates for certain Treasury loans to be based on “the current average yield on outstanding marketable obligations of the United States of comparable maturity”); 39 U.S.C. § 2006(a) (same).

On a functional level, Congress placed specific conditions on borrowing under the CARES Act that do not apply to borrowing under Title 39, and so a broader reading of CARES Act’s “outstanding debt” preclusion makes sense as an anti-circumvention measure. Otherwise, the Postal Service could borrow under the CARES Act (while eligible) to pay down Title 39 loans, with the newly liberated Title 39 borrowing authority remaining available even after the COVID-19 emergency had ended. To the extent that Congress was seeking to foreclose that possibility, as the language of the statute indicates that it was, the concern applies equally whether moneys are borrowed under Title 39 before or after the date of enactment.

Third, it is unclear whether “any outstanding debt” means only debt acquired under other authorities (i.e., the Title 39 borrowing provisions), or whether it also precludes using CARES Act borrowing to retire and renew earlier CARES Act debt. Under either reading, the CARES Act would preclude borrowing to repay funds borrowed under Title 39. That much would be consistent with Congress’s apparent concern that the CARES Act borrowing authority remain distinct from Title 39 borrowing.⁷ The additional question is whether the preclusion extends to repayment of earlier CARES Act debt. On a formal level, the statutory text – “any outstanding debt of the Postal Service,” without further qualification

⁷ That much is evident from Congress’s decision not to adopt the House’s proposal to cancel all Title 39 debt outstanding on the date of enactment. See H.R. 6379, 116th Cong. § 140001(a)(1). The House bill would then have authorized the Postal Service to borrow \$15 billion from Treasury. H.R. 6379, 116th Cong. § 140001(a)(2). In light of the bill’s resetting of outstanding debt to zero, it is unclear whether this additional borrowing authority would have been coextensive with or additional to the \$15 billion debt ceiling in 39 U.S.C. § 2005(a).

– would plainly include CARES Act debt. Therefore, it arguably would be most prudent for the Postal Service to not use these borrowed funds in such a manner. However, on a functional level, we could argue that precluding the use of these funds to pay outstanding CARES Act debt would make little sense. So long as all relevant borrowing meets the CARES Act criteria, using new borrowing to repay old debt merely consolidates (a) the use of cash to repay an old loan and (b) attainment of new cash by acquiring a new loan. If emergency circumstances remain such that repayment of the old loan would deprive the Postal Service of cash needed to fund operating expenses, then we would immediately qualify for a new loan under the CARES Act. Neither activity would be inconsistent with the CARES Act's purposes on its own, and so there is no apparent reason why they should be precluded in combination. Therefore, despite the facial breadth of "any outstanding debt," it would be reasonable to construe the preclusion as limited to borrowing under Title 39, not under the CARES Act.

In sum, it is reasonable to construe the CARES Act as prohibiting borrowed funds from being used for either capital expenses or the payment of any principal, interest, or fees arising from obligations issued under Title 39. As noted earlier, however, the CARES Act gives Treasury the discretion to refuse to lend, or to limit its lending, to the Postal Service if it disagrees with the Postal Service's interpretation of the law. It would be advisable to seek a common understanding with Treasury about these legal questions, to the extent possible.

Finally, the statute does not explicitly specify any accountability for the use of borrowed funds. It is unclear at this time whether current Treasury leadership (or Congress) will insist on such an accounting.⁸

CONCLUSION

On its face, the statute imposes conditions on borrowing but gives the Postal Service discretion to determine when and to what extent additional borrowing is needed. But given Treasury's discretion and the requirement to attain Treasury's agreement on borrowing terms, Treasury could simply refuse to lend if it disagrees with the Postal Service's interpretation, desires accountability for the use of funds, or insists on terms of its choosing (regardless of their legality or acceptability to the Postal Service). The only checks on Treasury are Congressional oversight and potential OLC resolution of a legal dispute.

Please let me know if you have any questions or concerns. Of course, the situation regarding our financial situation is very fluid, so if conditions change in a way that warrants

⁸ According to the Corporate Treasury office, Treasury historically did not insist on a rigid accounting of the Postal Service's use of pre-PAEA borrowing authority, and the Postal Service thus had a fairly free hand to characterize the use of borrowed funds vis-à-vis the statute's distinct annual caps. However, Treasury might require clearer requirements in this circumstance.

material revision of the analysis in this memorandum, we will reexamine our analysis and advise you accordingly.

A handwritten signature in black ink, appearing to read "Thomas J. Marshall". The signature is fluid and cursive, with the first name "Thomas" and last name "Marshall" clearly distinguishable.

Thomas J. Marshall

cc: Ms. Brennan
Mr. Stroman
Mr. Corbett
Mr. Elston

BRIEFING SHEET

Legal Update

MEETING OF THE BOARD OF GOVERNORS

May 7, 2020

Closed Session

PRESENTER:

Tom Marshall, General Counsel (Note: Mr. Marshall will be prepared to respond to questions on the matters discussed below).

ISSUE/PURPOSE:

The purpose of this Briefing Sheet is to summarize communications from the General Counsel to the Governors or Board of Governors (Board) since the meeting of the Board on April 1, 2020, and to summarize information sent in support of matters on the Board agenda for May 7, 2020

BACKGROUND:

This summary is informational in nature.

CURRENT STATUS:

- I. **Communications since the April 1, 2020 Board meeting:** Since the April 1, 2020 meeting, the General Counsel forwarded the following communications to the Governors or to the Board.
 - **Closing Justification for April 28, 2020 Meeting:** By memorandum dated April 27, 2020, the General Counsel advised the Secretary of the Board of Governors of the reasons why each of the items on the agenda for the Board meeting on April 28, 2020 could be closed to the public under the Government in the Sunshine Act.
 - **Closing Justification for May 7, 2020 Meeting:** By memorandum dated April 23, 2020, the General Counsel advised the Secretary of the Board of Governors of the reasons why each of the items on the agenda for the Board meeting on May 7, 2020 could be closed to the public under the Government in the Sunshine Act.

- **Closing Justification for April 23, 2020 Meeting:** By memorandum dated April 23, 2020, the General Counsel advised the Secretary of the Board of Governors of the reasons why each of the items on the agenda for the Board meeting held on April 23, 2020 could be closed to the public under the Government in the Sunshine Act.
- **Cease and Desist Letter:** By email dated April 23, 2020, the General Counsel advised Chairman Duncan and Governor Barger of the response of a political action committee to a Postal Service's cease and desist letter, which agreed to cease the unauthorized use of Postal Service intellectual property.
- **The American Spectator:** By emails dated April 19 and 20, 2020, the General Counsel provided to the Governors information concerning a potential Op-Ed concerning the Postal Service's nonpartisan nature.
- **Draft Letter to Congressional Leadership:** By email dated April 17, 2020, the General Counsel provided to Governors Bloom and Barger a working draft of a letter to Congressional leadership.
- **More Letters:** By emails dated April 16 and 17, 2020, the General Counsel discussed with Chairman Duncan and Governors Barger and Bloom the unauthorized use by a political action committee of Postal Service intellectual property.
- **Cease and Desist Letter:** By email dated April 16, 2020, the General Counsel provided Chairman Duncan and Governor Barger with the final cease and desist letter to address misuse of the Postal Service's intellectual property by a political action committee, as well as the issued public statement by the Postal Service regarding the use of our intellectual property.
- **Closing Justification for April 9, 2020 Meeting:** By memorandum dated April 15, 2020, the General Counsel advised the Secretary of the Board of Governors of the reasons why each of the items on the agenda for the Board meeting held on April 9, 2020 could be closed to the public under the Government in the Sunshine Act.
- **Appropriate Share D.C. Circuit Decision (UPS v. PRC; D.C. Cir. No. 19-1026):** By email dated April 14, 2020, the General Counsel provided the Governors with information concerning the decision by

the D.C. Circuit Court of Appeals to remand the Postal Regulatory Commission's appropriate share order.

- **Treasury Borrowing Pursuant to the CARES Act:** By email dated April 14, 2020, the General Counsel provided the Governors with a memorandum analyzing the provision in the CARES Act that gives the Postal Service an additional \$10 billion in borrowing authority, subject to agreement with the Department of the Treasury on terms and conditions.
- **USPS IP Issue:** By emails dated April 13 and 14, 2020, the General Counsel provided to Chairman Duncan and Governor Barger information regarding a draft cease and desist letter to address misuse of the Postal Service's intellectual property by a political action committee, as well as a public statement by the Postal Service regarding the use of our intellectual property.
- **Legislative Package:** By email dated April 9, 2020, the General Counsel provided to Governors Bloom and Barger draft legislative language regarding the Postal Service's immediate legislative request to address the impacts of COVID-19.
- **NY Times Story:** By emails dated April 9, 2020, the General Counsel provided to Governors Bloom and Barger information regarding a story in the *New York Times* concerning the Postal Service's briefing to Congress on the financial impact of the COVID-19 pandemic on the Postal Service, and our legislative request.
- **Today's Call with Our Oversight Committee:** By email dated April 9, 2020, the General Counsel provided to Governors Bloom and Barger a summary of the briefing that was held with the House Oversight Committee on the financial impact of the COVID-19 pandemic on the Postal Service, and our legislative request.
- **Closing Justification for the April 8, 2020 Meeting:** By memorandum dated April 7, 2020, the General Counsel advised the Secretary of the Board of Governors of the reasons why each of the items on the agenda for the Board meeting on April 8, 2020 could be closed to the public under the Government in the Sunshine Act.

II. **Communications to the Board Members Sent in Preparation for the May 7, 2020 meeting of the Board of Governors:** The following items were sent to the Board in preparation for the May 7, 2020 meeting:

- **PowerPoint Presentation:** The General Counsel forwarded a PowerPoint presentation encompassing the Legal Update. The PowerPoint contains updates on the following matters:
 - Appropriate Share Decision
 - Northrop Grumman Litigation Update
 - Greeting Card Association Complaint Update
- **Commercial P.O. Box Redirect Service Market Test:** By memorandum dated April 30, 2020, the General Counsel advised the Governors as to why the market test proposal to establish the Commercial P.O. Box Redirect service conforms to applicable statutory requirements and will likely be authorized by the Postal Regulatory Commission. A draft Governors' resolution authorizing the market test was also provided.
- **Loyalty Program for Small Businesses:** By memorandum dated April 30, 2020, the General Counsel advised the Governors as to why the proposal to change competitive prices to establish a loyalty program for small businesses conforms to applicable statutory requirements and will likely be authorized by the Postal Regulatory Commission. A draft Governors' resolution authorizing the competitive price change was also provided.
- **New Priority Mail—Non-Published Rates Product:** By memorandum dated April 30, 2020, the General Counsel advised the Governors as to why the proposal to establish a new Priority Mail Non-Published Rates (PMNPR) product conforms to applicable statutory requirements and will likely be authorized by the Postal Regulatory Commission.

BRIEFING SHEET

Legal Update

MEETING OF THE BOARD OF GOVERNORS

May 7, 2020

Closed Session

PRESENTER:

Tom Marshall, General Counsel (Note: Mr. Marshall will be prepared to respond to questions on the matters discussed below).

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- **Cease and Desist Letter:** By email dated April 23, 2020, the General Counsel advised Chairman Duncan and Governor Barger of the response of a political action committee to a Postal Service's cease and desist letter, which agreed to cease the unauthorized use of Postal Service intellectual property.
- **Draft Letter to Congressional LeadershipOur Discussion Yesterday:** By email dated April 20, 2020, the General Counsel provided Governor Barger with a revised version of the draft communication to Congressional leadership regarding legislative relief.
- **Potential Op-Ed from the GovernorsThe American Spectator:** By emails dated April 19, 20, and 21, 2020, the General Counsel discussed with the Governors a potential Op-Ed concerning the Postal Service's nonpartisan nature.
- **Draft Letter to Congressional Leadership:** By emails dated April 17, 2020, the General Counsel provided to Governors Bloom and Barger a working draft of a letter to Congressional leadership.
- **Misuse of Postal Service Intellectual PropertyMore Letters:** By emails dated April 16 and 17, 2020, the General Counsel discussed with Chairman Duncan and Governors Barger and Bloom the unauthorized use by a political action committee of Postal Service intellectual property.
- **PostCom Bulletin Issue 16-20:** By email dated April 16, 2020, the General Counsel provided Chairman Duncan and Governors Bloom and Barger with two opinion pieces regarding the Postal Service.
- **Cease and Desist Letter:** By email dated April 16, 2020, the General Counsel provided Chairman Duncan and Governor Barger with the final cease and desist letter to address misuse of the Postal Service's intellectual property by a political action committee, as well as the issued public statement by the Postal Service regarding the use of our intellectual property.

- **Closing Justification for April 9, 2020 Meeting:** By memorandum dated April 15, 2020, the General Counsel advised the Secretary of the Board of Governors of the reasons why each of the items on the agenda for the Board meeting held on April 9, 2020 could be closed to the public under the Government in the Sunshine Act.
- **PMG Call with Chairman Johnson:** By emails dated April 15, 2020, the General Counsel provided the Governors with a summary of the call held by the Postmaster General with the Chairman of the Senate Oversight Committee.
- **Appropriate Share D.C. Circuit Decision (UPS v. PRC; D.C. Cir. No. 19-1026):** By email dated April 14, 2020, the General Counsel provided the Governors with information concerning the decision by the D.C. Circuit Court of Appeals to remand the Postal Regulatory Commission's appropriate share order.
- **Treasury Borrowing Pursuant to the CARES Act:** By email dated April 14, 2020, the General Counsel provided the Governors with a memorandum analyzing the provision in the CARES Act that gives the Postal Service an additional \$10 billion in borrowing authority, subject to agreement with the Department of the Treasury on terms and conditions.
- **USPS IP Issue:** By emails dated April 13 and 14, 2020, the General Counsel provided to Chairman Duncan and Governor Barger information regarding a draft cease and desist letter to address misuse of the Postal Service's intellectual property by a political action committee, as well as a public statement by the Postal Service regarding the use of our intellectual property.
- **Legislative Package:** By email dated April 9, 2020, the General Counsel provided to Governors Bloom and Barger draft legislative language regarding the Postal Service's immediate legislative request to address the impacts of COVID-19.
- **NY Times Story:** By emails dated April 9, 2020, the General Counsel provided to Governors Bloom and Barger information regarding a story in the *New York Times* concerning the Postal Service's briefing to Congress on the financial impact of the COVID-19 pandemic on the Postal Service, and our legislative request.
- **Today's Call with Our Oversight Committee:** By email dated April 9, 2020, the General Counsel provided to Governors Bloom

and Barger a summary of the briefing that was held with the House Oversight Committee on the financial impact of the COVID-19 pandemic on the Postal Service, and our legislative request.

- **Closing Justification for the April 8, 2020 Meeting:** By memorandum dated April 7, 2020, the General Counsel advised the Secretary of the Board of Governors of the reasons why each of the items on the agenda for the Board meeting on April 8, 2020 could be closed to the public under the Government in the Sunshine Act.

II. **Communications to the Board Members Sent in Preparation for the May 7, 2020 meeting of the Board of Governors:** The following items were sent to the Board in preparation for the May 7, 2020 meeting:

- **PowerPoint Presentation:** The General Counsel forwarded a PowerPoint presentation encompassing the Legal Update. The PowerPoint contains updates on the following matters:
 - Appropriate Share Decision
 - Northrop Grumman Litigation Update
 - Greeting Card Association Complaint Update
- **Commercial P.O. Box Redirect Service Market Test:** By memorandum dated April 30, 2020, the General Counsel advised the Governors as to why the market test proposal to establish the Commercial P.O Box Redirect service conforms to applicable statutory requirements and will likely be authorized by the Postal Regulatory Commission. A draft Governors' resolution authorizing the market test was also provided.
- **Loyalty Program for Small Businesses:** By memorandum dated ~~May 1~~~~April 30~~, 2020, the General Counsel advised the Governors as to why the proposal to change competitive prices to establish a loyalty program for small businesses conforms to applicable statutory requirements and will likely be authorized by the Postal Regulatory Commission. A draft Governors' resolution authorizing the competitive price change was also provided.
- **New Priority Mail—Non-Published Rates Product:** By memorandum dated April 30, 2020, the General Counsel advised the Governors as to why the proposal to establish a new Priority Mail Non-Published Rates (PMNPR) product conforms to applicable statutory requirements and will likely be authorized by the Postal Regulatory Commission.

UNITED STATES POSTAL SERVICE
PAYMENT TO POSTAL SERVICE FUND

For payment to the “Postal Service Fund”, ~~for revenue forgone due to the coronavirus pandemic, \$20,000,000,000, to remain available until expended September 30, 2022:~~ *Provided*, That such amount is designated by the Congress as being for an emergency requirement pursuant to section 251(b)(2)(A)(i) of the Balanced Budget and Emergency Deficit Control Act of 1985, without regard to any requirement for a Presidential designation under such section.

* * * * *

SEC. 140001. ELIMINATION OF USPS DEBT; ADDITIONAL BORROWING
AUTHORITY.

(a) IN GENERAL.—Notwithstanding any other provision of law—

(1) any outstanding debt of the United States Postal Service owed to the Treasury pursuant to sections 2005 and 2011 of title 5, United States Code, on the date of the enactment of this Act is hereby cancelled without penalty; and

(2) after the date of the enactment of this Act, the United States Postal Service is authorized to borrow money from the Treasury in an amount not to exceed \$15,000,000,000 (in addition to any other borrowing in which the Postal Service is authorized to engage) to carry out the duties and responsibilities of the Postal Service, including those under title 39, United States Code, and the Secretary of the Treasury shall lend up to such amount at the request of the Postal Service.

(b) REPEAL OF FISCAL YEAR BORROWING LIMIT.—Section 2005(a)(1) of title 39, United States Code, is amended by striking “In any one fiscal year,” and all that follows through the period.

(c) TERMS OF BORROWING FROM THE TREASURY.—Any purchase by the Secretary of the Treasury of obligations issued by the Postal Service, either pursuant to subsection (a)(2) of this section or pursuant to section 2006 of title 39, United States Code, shall be subject to the terms and conditions of the note purchase agreement between the Postal Service and the Federal Financing Bank in effect on September 29, 2018 (subject to any modifications on which the Postal Service and the Secretary may mutually agree, pursuant to section 2006(a) of title 39, United States Code), except that no expiration date provided in such note purchase agreement shall apply.

SEC. 120003. EARLY VOTING AND VOTING BY MAIL

(a) REQUIREMENTS.—Title III of the Help America Vote Act of 2002 (52 U.S.C. 21081 et seq.) is amended by adding at the end the following new subtitle:

Commented [HJD-WD1]: We recommend striking this, lest it give rise to arguments later over how the \$20 billion ends up comparing to the actual pandemic-related revenue loss (if that can even be accurately determined), when, in fact, the pandemic will have other impacts on us beyond revenue loss. If some sort of purposive language is desired here, it could read “for revenue forgone and other impacts due to the coronavirus pandemic”.

Commented [HJD-WD2]: USPS funds tied to revenues are not otherwise limited in their availability. Limiting the availability of this revenue-forgone appropriation to FY2022 would require us to track obligations of these amounts separately from our general revenues. To avoid the administrative complication of doing so, it would be appropriate to cast this as a no-year appropriation (“until expended”), on par with the rest of our revenues.

Commented [HJD-WD3]: Since 1970, Congress has removed the Postal Service’s funds from direct Presidential control. But, unless waived, BBEDCA § 251(b)(2)(A)(i) would only make this funding available if the President designates it as emergency spending. Thus, to avoid the possible implication that the President could veto emergency spending for the Postal Service, this provision should waive the requirement for Presidential designation (given the Postal Service’s unique circumstances).

Commented [HJD-WD4]: This is necessary to ensure the intended effect, lest Treasury try to charge us a penalty for early cancellation of the debt under the relevant debt instruments.

Commented [HJD-WD5]: Given the “Notwithstanding” clause above, it seems that this \$15 billion in new borrowing authority is intended to be additional to, not coextensive with, the normal \$15 billion in borrowing authority under 39 USC 2005(a). But there is some ambiguity, particularly given the effect of the other provisions, which would reset the debt level to zero. This language would clarify the apparent intent.

Commented [HJD-WD6]: As drafted, the language is silent about the terms of borrowing, and so we would presumably have to negotiate with Treasury, which could take some time and could even be inconclusive. To ensure the intended effect (ready access to borrowing), the language here should provide that our most recent borrowing agreement should apply by default, in the event that we can’t agree on alternative terms.

We would also propose that this set of default terms apply to normal borrowing from Treasury as well, not just in the context of borrowing under (a)(2) above. Hence casting this as a standalone provision related to all borrowing from Treasury. (If it is preferred to clarify the default terms only in the context of new borrowing authority, this language could easily be adapted to refer to borrowing pursuant to (a)(2), and even grafted onto that paragraph.)

“Subtitle C—Other Requirements”

* * *

“SEC. 322. PROMOTING ABILITY OF VOTERS TO VOTE BY MAIL.

* * *

“(c) METHODS AND TIMING FOR TRANSMISSION OF BALLOTS AND BALLOTING MATERIALS TO VOTERS.—

* * *

“(2) ENSURING DELIVERY PRIOR TO ELECTION.—If an individual requests to vote by absentee ballot in an election for Federal office, the appropriate State or local election official shall ensure that the ballot and relating voting materials are received by the individual prior to the date of the election so long as the individual’s request is received by the official not later than 510 days (excluding Saturdays, Sundays, and legal public holidays) before the date of the election, except that nothing in this paragraph shall preclude a State or local jurisdiction from allowing for the acceptance and processing of ballot requests submitted or received after such required period.”

Commented [BDC-WD7]: This change will give states adequate time to allow ballots to reach voters before Election Day.

April 10, 2020

***PRIVILEGED AND CONFIDENTIAL
ATTORNEY-CLIENT COMMUNICATION***

MEGAN J. BRENNAN

SUBJECT: Additional Borrowing Authority Under the CARES Act

This memorandum examines the parameters for \$10 billion in additional borrowing authority that Congress recently made available to the Postal Service in response to the ongoing Coronavirus Disease 2019 (“COVID-19”) outbreak.

EXECUTIVE SUMMARY

- The new borrowing authority can be accessed only if the Postal Service determines that additional liquidity is necessary to fund operating expenses due to the COVID-19 emergency. Various aspects of this threshold requirement are subject to interpretation: “operating expenses,” “due to,” the degree of necessity, and the timing of the financial need. Because the statute charges the Postal Service with determining necessity, we arguably have primary discretion to interpret and apply this aspect of the statute. In this regard, we have a clear basis to determine, based on our current forecasts concerning the impact of the COVID-19 outbreak on Postal Service volumes, revenues, and liquidity, that receiving this additional \$10 billion in full is consistent with the language of the statute; we are therefore legally authorized to request the full amount at any time. Nevertheless, the consent role of the Treasury Department (“Treasury”) means that it could hold up borrowing if it disagrees with the Postal Service’s interpretation, or if it questions the assumptions that the Postal Service is using to make our determination.
- Treasury must agree to the terms and conditions of borrowing. In light of recent experience, Treasury could attempt to condition its assent on conditions that enhance its oversight over Postal Service business decisions, and that even intrude upon the Board’s and the Governors’ discretion to lead the Postal Service. As we have previously advised, such conditions would violate constitutional and statutory parameters. On the other hand, it is possible that the circumstances and scrutiny from Members of Congress could lead Treasury to take a more flexible approach, and our preliminary indications are that Treasury will not insist upon consent rights.

- Borrowing is limited to \$10 billion. This limitation applies at all times; it cannot be temporarily exceeded so long as outstanding debt is returned to \$10 billion later. Although we could attempt to access the borrowing authority repeatedly so long as we remain within the \$10 billion limit, and Treasury could agree with that approach, the statutory language could also give Treasury (and other decision-makers) a reasonable basis to view the borrowing authority as being available only once.
- Under a reasonable interpretation of the statutory language, funds borrowed under the CARES Act cannot be used for capital expenses or to pay principal, interest, or fees on obligations issued under Title 39. Although there is no specific accounting or reporting requirement, Treasury or Congressional stakeholders could insist that the Postal Service demonstrate its compliance with the requirement that borrowed funds be used only for operating expenses.

ANALYSIS

On March 27, 2020, Congress enacted the Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”), Pub. L. No. 116-136. Section 6001(b) of the CARES Act permits the Postal Service to borrow up to \$10 billion from the Department of the Treasury, separately from the \$15 billion of borrowing authority already available to the Postal Service under 39 U.S.C. § 2005. This additional borrowing authority is subject to a number of conditions, however, the precise import of which are not immediately clear from the statutory text.¹

Section 6001(b) provides as follows:

(b) Additional borrowing authority.—Notwithstanding section 2005 of title 39, United States Code, or any other provision of law, if the Postal Service determines that, due to the COVID-19 emergency, the Postal Service will not be able to fund operating expenses without borrowing money—

(1) the Postal Service may borrow money from the Treasury in an amount not to exceed \$10,000,000,000—

(A) to be used for such operating expenses; and

(B) which may not be used to pay any outstanding debt of the Postal Service; and

¹ Because the legislation was negotiated largely behind the scenes by Congressional leaders and the Secretary of the Treasury, there are no committee reports or other normal incidents of legislative history to serve as an interpretive aid. The few floor statements by individual Members of Congress that discuss the Postal Service provisions do so only in general terms, and therefore are of no probative value.

(2) the Secretary of the Treasury may lend up to the amount described in paragraph (1) at the request of the Postal Service, upon terms and conditions mutually agreed upon by the Secretary and the Postal Service.

This provision plainly establishes at least four principal conditions: two prior to borrowing, one concerning the amount of borrowing, and one on the use of borrowed funds. The Postal Service must first determine that it needs to borrow money in order to fund operating expenses due to the COVID-19 emergency. And it must reach mutual agreement with Treasury over the terms and conditions of borrowing. The borrowing is limited to “an amount not to exceed” \$10 billion. The borrowed moneys must be used only for “operating expenses,” which cannot include “pay[ing] any outstanding debt.” Each condition raises various questions of interpretation.

I. Postal Service Determination of Necessity to Fund Operating Expenses

Under the opening paragraph of Section 6001(b), prior to borrowing any funds, the Postal Service must first determine “that, due to the COVID-19 emergency, the Postal Service will not be able to fund operating expenses without borrowing money.” At least six aspects of this proviso are noteworthy.

First, the term “operating expenses” is not defined, but given the term’s usage in a related context, “operating expenses” should be construed as distinct from “capital expenses.” Specifically, the term “operating expenses” is used in the Postal Service’s longstanding borrowing statute. Currently, that provision caps the net increase in borrowing “for the purpose of capital improvements and . . . for the purpose of defraying operating expenses” at \$3 billion per fiscal year. 39 U.S.C. § 2005(a). Prior to the enactment of the Postal Accountability and Enhancement Act of 2006 (PAEA), the same sentence set separate annual caps on borrowing used for capital expenses and for operating expenses (\$2 billion and \$1 billion, respectively). See 39 U.S.C. § 2005(a) (2005). Because Section 6001(b) of the CARES Act relates to the same subject matter as 39 U.S.C. § 2005(a) – a fact recognized by the express citation of the Title 39 provision in CARES Act Section 6001’s “notwithstanding” clause – it is reasonable to construe the two provisions *in pari materia*: that is, consonant with one another due to their related subject matter. See, e.g., *Pasquantino v. United States*, 544 U.S. 349, 355 n.2 (2005) (noting that wire- and mail-fraud statutes have been construed *in pari materia*); *Nat’l Fed’n of Fed. Employees, Local 1309 v. Dep’t of Interior*, 526 U.S. 86, 105 (1999); 2B Sutherland Statutes & Statutory Construction §§ 51:1-51:2, 53:2 (7th ed. 2020).

Under pre-PAEA 39 U.S.C. § 2005(a), the term “operating expenses” was understood by the Postal Service to mean all expenses other than capital expenses. “Operating expenses” therefore included not only expenses intuitively viewed as related to operations

(e.g., salaries and supplier costs), but also post-retirement benefits expenses and even interest expense on borrowed funds.²

Second, the borrowing of funds is conditioned on the Postal Service “not be[ing] able to fund operating expenses without borrowing money.” This implies that the additional borrowing authority is a true necessity: that is, the Postal Service must borrow money to continue funding its operating expenses, because the other available means of doing so will come up short. That said, access to the borrowing authority can precede an actual inability to fund operating expenses, as the relevant language is phrased in the future tense (“will not be able to fund”).

Third, “due to” is not defined. The plain meaning of this phrase is “because of”: there must be a causal relationship between the inability to fund operating expenses and the COVID-19 emergency. See *U.S. Postal Serv. v. Postal Regulatory Comm’n*, 640 F.3d 1263, 1267 (D.C. Cir. 2011) (construing “due to” in the statute authorizing exigent price increases). What is less clear is how close the causal nexus must be (and hence the level of proof that must be provided to substantiate that causal nexus). On that question, courts have recognized that “the phrase ‘due to’ is ambiguous. . . . The causal nexus of ‘due to’ has been given a broad variety of meanings in the law ranging from sole and proximate cause at one end of the spectrum to contributing cause at the other.” *Id.* at 1268 (quoting *Kimber v. Thiokol Corp.*, 196 F.3d 1092, 1100 (10th Cir. 1999)) (brackets, internal quotation marks, and further citation omitted). Thus, it would certainly be possible to read Section 6001(b) as authorizing borrowing to the sole extent that financial strains can be specifically attributed to the COVID-19 emergency and that those strains overrun all other sources of funding. Cf. *id.* at 1267-68 (describing the Postal Regulatory Commission’s (Commission’s) initially strict application of “due to” in the exigency statute). But “due to”

can mean ‘due in part to’ as well as ‘due only to.’ A financial crisis can often result from multiple contributing factors[.] It would not be incorrect to say that [a need for relief] is ‘due to’ [one] factor simply because it is also ‘due to’ other factors as well.

² We are aware of at least two alternative uses of “operating expenses” in relation to the Postal Service. First, in the Postal Service’s periodic financial reports, “operating expenses” encompass all expenses (including depreciation on capital investments) other than interest expense. *E.g.*, U.S. Postal Serv., FY2019 Form 10-K, at 24-39. Second, under the pre-PAEA provision that governed the Governors’ ratemaking authority, rates were required to cover “total estimated costs,” the definition of which, in turn, distinguished operating expenses from depreciation on capital investments, interest and other debt-related expense, and an amount for contingencies. 39 U.S.C. § 3621 (2005). Although an argument could be made for applying a different reading, the permanent borrowing statute (39 U.S.C. § 2005(a)) is clearly more directly relevant to the CARES Act’s borrowing provision than either periodic financial reporting or ratemaking.

Id. at 1268 (emphasis in original). Hence, in the Section 6001(b) context, it could be enough for the Postal Service to face an inability to fund operating expenses because of the COVID-19 emergency as well as other factors.³

Fourth, the inability to fund operating expenses must be “due to the COVID-19 emergency.” The “COVID-19 emergency” is expressly defined in relation to the President’s declaration of a national emergency under the Robert T. Stafford Disaster Relief and Emergency Assistance Act. CARES Act § 6001(a)(1). Once the President has rescinded that emergency declaration, then the predicate condition for borrowing could be curtailed. More precisely, to access the CARES Act borrowing authority thereafter, the Postal Service would need to determine that the inability to fund operating expenses remains “due to” emergency conditions prior to rescission.

The Postal Service can certainly argue that, to the extent that mail volumes remain lower and/or costs remain higher at a given point in time than they would have been had the pandemic not occurred, such continuing effects are “due to” the pandemic, even if the emergency declaration has been rescinded. This would justify continued funding under this provision if these continuing effects mean that the Postal Service cannot fund operating expenses without borrowing. That said, assuming that Treasury cooperates in lending money during the COVID-19 emergency, it could decide to stop doing so earlier than the Postal Service believes to be warranted, if Treasury decides that the Postal Service’s inability to fund operating expenses is no longer “due to” the emergency. Such a prospect would resemble the Commission’s decision to truncate the amount of Great-Recession-era losses that the Postal Service was able to recover through an above-inflation rate increase. There, the Commission relied on the “due to” language in the exigency statute discussed above to establish a cut-off point, after which it would no longer deem mail-volume losses to be “due to” the Great Recession. The Commission based this cut-off point on a determination of when the Postal Service theoretically entered a “new normal,” based on macroeconomic indicators and when the Postal Service began to gain an “ability to adjust” its operations at the depth of the recession’s impact. See Order No. 1926, Order Granting

³ In *USPS v. PRC*, the court remanded the case to the Commission to interpret “due to” in the exigency statute. The Commission subsequently adopted a view close to the stricter end of the interpretive spectrum by requiring the Postal Service to quantify financial impacts attributable to the exigent circumstance rather than to other causes, although it granted that the quantification need not be absolutely precise. See *generally* Order No. 864, Order Resolving Issues on Remand, PRC Docket No. R2010-4R (Sept. 20, 2011). Key factors in the Commission’s reasoning were the Postal Service’s econometric resources, the scale of relief that it could seek (into the billions of dollars), and the fact that the exigency provision “is not intended as a remedial provision, but rather as a narrow exception to the price cap.” *Id.* at 44. In the context of borrowing under the CARES Act, the Postal Service’s resources and the scale of relief are comparable to what the Commission considered, and the additional borrowing authority could arguably (albeit not necessarily) be seen as a narrow exception to the Postal Service’s normal borrowing authority. That said, critical differences between the two contexts militate against applying the Commission’s logic here: the CARES Act’s “due to” language is to be applied by the Postal Service itself, not by an external oversight body, and borrowing money that must be repaid (with interest) – unlike a price increase – does not permanently affect any other party’s property interest.

Exigent Price Increase, PRC Docket No. R2013-11 (Dec. 24, 2013), at 83-94.⁴ Even if the Postal Service might assert that COVID-19 impacts persist beyond the emergency declaration's rescission, Treasury, taking a page from the Commission's book, could nonetheless point not only to the emergency's formal end, but also impute (however unrealistically) to the Postal Service an "ability to adjust" that renders its inability to fund operating expenses no longer "due to" the emergency.

Fifth, another interpretative ambiguity is the relationship between the necessity determination and the actual amount of borrowing that the Postal Service may request. In particular, the statute requires that the Postal Service determine that we could not fund operating expenses due to the pandemic "without borrowing money," but does not directly limit the size of the resulting request in any way other than by imposing a \$10 billion cap. In this regard, the Postal Service could argue that so long as we demonstrate a need to borrow money, we can borrow the full \$10 billion under the statute, and need not justify the precise amount requested within that overall cap. On the other hand, Treasury could argue that while the \$10 billion is an overall cap, the statute also is most reasonably read to limit the size of a request to only what is strictly necessary to ensure that operating expenses are funded.

Sixth, all of this analysis is to be conducted as part of a determination by the Postal Service, but the scope of its actual discretion is unclear. Section 6001(b)(2) provides that Treasury "may" – not "must" – lend money requested by the Postal Service. *Cf.* 39 U.S.C. § 2006(b) (authorizing the Postal Service to "require the Secretary of the Treasury to purchase" up to \$2 billion in Postal Service obligations). Treasury could point to this discretionary language as a basis to refuse to lend money on the basis that it disagrees with the Postal Service's determination of need. As further support, Treasury could contrast the CARES Act language with an earlier House version of the bill, which would have required Treasury to lend moneys requested by the Postal Service. H.R. 6379, 116th Cong. § 140001(a)(2) (2020) ("[T]he Secretary of the Treasury shall lend up to such amount at the request of the Postal Service."). This mandatory language was abandoned in favor of the discretionary language in the final bill. Given the intense negotiations between Congressional leaders and Treasury that produced the final CARES Act, as well as the attention that the Administration reportedly gave to the postal provisions, this result is almost surely meaningful, rather than accidental. In the end, even if the Postal Service is correct that we have discretion regarding the necessity determination as a legal matter, as a practical matter the Treasury could still refuse to provide the money for other reasons.

⁴ The Postal Service challenged this cut-off as arbitrary, as macroeconomic indicators did not necessarily correspond to mail-volume trends, and as it made little sense to cut off recovery at the depth of the losses, when the Postal Service had merely begun to adjust but had not yet adequately adjusted. These challenges were unsuccessful. *See Alliance for Nonprofit Mailers v. Postal Regulatory Comm'n*, 790 F.3d 186, 196 & n.3 (D.C. Cir. 2015); Order No. 2623, Order Resolving Issues on Remand, PRC Docket No. R2013-11R (July 29, 2015) (denying reconsideration), at 15-28, *aff'd*, *U.S. Postal Serv. v. Postal Regulatory Comm'n*, 841 F.3d 509 (D.C. Cir. 2016).

In the event that Treasury attempts to second-guess the Postal Service's determination of need, the Postal Service could point to Congress's express conferral on the Postal Service of discretion to determine need; if Congress had intended to subject that determination to Treasury's oversight, it easily could have so provided. Given our recent experience with disagreements over statutory construction, it is possible that we would be unable to persuade Treasury of our interpretation, and resolution of any interagency dispute might ultimately lie with the Office of Legal Counsel (OLC) at the Department of Justice. To minimize the risk of a time-consuming and uncertain dispute, the Board would be well-advised to seek a common understanding with Treasury concerning this aspect of the statute.

While these interpretative issues present room for potential dispute with Treasury, the Postal Service does have a very strong argument that borrowing the full amount of the \$10 billion is clearly necessary under the terms of the statute at this time. In this regard, our projections show that the Postal Service will experience a cash shortfall, and hence an inability to fund operating expenses, this calendar year unless the \$10 billion is borrowed, and that we will need the full \$10 billion to continue operations for as long as possible next fiscal year.⁵ This circumstance is a direct result of the precipitous declines in mail volumes that we forecast for Quarter 3 of FY2020, which would not have occurred but for the onset of the pandemic. Therefore, the Postal Service is legally authorized under the statute to request the full \$10 billion at this time. While the above-mentioned interpretive issues may complicate our ability to utilize this funding source, we think that such issues are more likely to arise as time passes than they would if we seek these funds now, when the longer-term effects of the pandemic are unclear.

II. Treasury Agreement to Conditions

Under Section 6001(b)(2), any borrowing must be "upon terms and conditions mutually agreed upon by the Secretary and the Postal Service." As you know, in adopting this language, Congress declined our proposed alternative, which would have allowed for negotiation against a backdrop of default terms from the now-expired note purchase agreement. Without such a backdrop, Treasury could seek to reject our proposed terms and to propose terms that we would view as unlawful, inappropriate, or otherwise undesirable. (Indeed, Treasury's insistence on such terms is what led to the expiration, rather than the renewal, of the note purchase agreement last year.)

Treasury might argue that, regardless of any disagreement concerning the appropriate terms and conditions of borrowing under Title 39, it has freer rein to propose such

⁵ The projections show the potential for a cash shortfall by October. However, as noted above, the statute arguably requires capital expenses to be excluded from the determination of necessity. The Postal Service's projection assumes capital expenses of \$2.0 billion over the rest of this fiscal year, and \$2.5 billion for next fiscal year. If these capital expenses are excluded, the Postal Service would still experience a cash shortfall this calendar year.

conditions under the CARES Act. As OLC has recognized, the legislative history of the Title 39 borrowing provision, as well as legislation establishing the Federal Financing Bank enacted shortly thereafter, is replete with Treasury's disavowals of any intent to interfere with the Postal Service's operational and business decisions. *See Scope of Treasury Department Purchase Rights with Respect to Financing Initiatives of the U.S. Postal Service*, 19 Op. Off. Legal Counsel 238, 245 n.5 (1995); *Authority of the Secretary of the Treasury Regarding Postal Service Bond Offering*, 17 Op. Off. Legal Counsel 6, 8-10 (1993). By contrast, the CARES Act contains no such legislative history, and its additional borrowing authority is expressly distinguished from, rather than subordinate to, the Title 39 borrowing provision. If anything, the contrast between the final CARES Act and the House bill demonstrates that the "mutual agreement" requirement was intentionally added. *See* H.R. 6379, 116th Cong. § 140001(a)(2) (containing no language about terms and conditions).

That said, any attempt by Treasury to use even this borrowing authority to oversee or second-guess the Governors' and Board's decisions would still vitiate Congress's intent in creating the Postal Service to be insulated from direct political control, and hence would violate constitutional and statutory parameters in the same manner as its prior attempt to impose such terms on our Title 39 borrowing. In this regard, the absence of any direct legislative history is simply not a material legal consideration. For reference, I am attaching our prior memorandum to the Board explaining these constitutional and statutory issues.

Our experience with non-renewal of the note purchase agreement shows that Treasury may not be swayed by the legal bona fides of our position and may insist on inappropriate terms regardless. In such an event, we may be able to seek a legal opinion from OLC supporting our view. Alternatively, Congress clearly expected that Treasury would facilitate borrowing under Section 6001(b), and any significant delay or lack of cooperation by Treasury could become a subject of Congressional inquiry and oversight.

III. Amount of Borrowing

Section 6001(b)(1) provides that the borrowing shall be "in an amount not to exceed" \$10 billion. In contrast to the Title 39 borrowing provisions, this language does not specify whether the \$10 billion limit applies to the amount of CARES Act borrowing "outstanding at any one time" or only as of a certain point in time (e.g., the end of a fiscal year), such that greater amounts can be borrowed so long as the outstanding amount is reduced by the cut-off time. *See* 39 U.S.C. § 2005(a)(1) (containing both types of cap). Without further qualification, however, a plain reading of "not to exceed" indicates that the \$10 billion limit applies at all times; the limit cannot be exceeded temporarily so long as it is met later.

A related question concerns whether the \$10 billion is a cap similar to the \$15 billion cap on Title 39 borrowing, meaning that the Postal Service may access the borrowing authority multiple times (with aggregate borrowing at any one time remaining within the limit), or whether the statute only authorizes the provision of \$10 billion in total. If the latter is true,

another question is whether this borrowing authority can only be accessed in a one-time loan, or if multiple loans are allowed.

Based on existing practice and the uncertain duration of the current emergency, the Postal Service could reasonably take the view that it can repeatedly borrow money within the \$10 billion limit. It is possible, however, that Treasury (or OLC, in the event of a dispute) could interpret the CARES Act as providing for a provision of \$10 billion in total. A contrast with the Title 39 provision shows that Congress had a template for making the limit apply to an aggregate amount of borrowing “outstanding at any time,” *id.*, which it chose not to use in the CARES Act. This, coupled with the plain meaning of the CARES Act language, arguably indicates that Congress did not intend for the CARES Act borrowing limit to operate in the same manner as the \$15 billion borrowing cap. It is also conceivable that Treasury could assert that the statute only authorizes a single loan, based on the fact that the statute refers to a singular “amount” of borrowing, and not a multiple “amount of obligations,” as in Section 2005, though this argument would be weaker.

Ultimately, this question only becomes relevant if we attempt to access the CARES Act borrowing authority a second time. Because of the possibility that we could be denied a second round of borrowing, it would be advisable to seek to borrow the maximum amount available (\$10 billion) at the outset, which is advisable in any event given all of the interpretative issues concerning the “due to” language. In addition, it might also be advisable to seek to secure as long of a maturity as is feasible.

IV. Restrictions on the Use of Borrowed Funds

Section 6001(b)(1)(A) and (B) provide that borrowed funds can only be used to fund operating expenses and cannot be used to pay outstanding debt.

As discussed in section I above, it would be consistent with the history of the Postal Service’s permanent borrowing statute to construe the reference to “operating expenses” as excluding capital expenses.

In addition, we think it evident that “debt” means liabilities from borrowing. See 39 U.S.C. § 2001(3) (referring to “debt instruments” in the context of the Title 39 borrowing provisions).⁶ However, the limitation on using these additional funds to “pay any outstanding debt” is ambiguous in several respects.

⁶ One definition of “debt” refers broadly to any “liability” or “specific sum of money due by agreement or otherwise,” such as payments to a supplier or employee for services rendered. See BLACK’S LAW DICTIONARY, “debt” (11th ed. 2019). However, as noted above, it is appropriate to read the terms of the CARES Act consistently with the terms of Title 39’s borrowing provisions. In addition, it is functionally implausible to believe that Congress intended “debt” to refer to the Postal Service’s liabilities generally, since that would mean that the funds borrowed under the CARES Act could be used only to provide liquidity for future operating expenses, and not for expenses already incurred (and thus “outstanding”).

First, it is unclear whether “outstanding debt” includes all payments on borrowed debt, or only payments on principal. On the one hand, to “pay [down] debt” might generally connote payment that has the effect of reducing or eliminating the principal owed. Perhaps for this reason, the Postal Service reports interest expense as a distinct line item in its periodic financial reports. On the other hand, a debt has not been repaid if accrued interest or prepayment fees remain outstanding. Indeed, the statutory language here does not distinguish between principal and other debt, and contextual definitions are broad enough to encompass any amounts (including interest and fees) that are owed under a loan agreement. See 39 U.S.C. § 2001(3); BLACK’S LAW DICTIONARY, “debt.” In our view, the more reasonable construction is that “outstanding debt” includes principal, interest, and any fees arising under a loan agreement.

Second, it is unclear whether “outstanding debt” refers to debt outstanding when the newly borrowed moneys are spent, or only to debt outstanding at the time of enactment. The former reading is more plausible. Other CARES Act provisions, as well as the Title 39 borrowing provisions, use “outstanding” in ways that appear clearly to connote “outstanding at the time of the relevant event,” and in no case “outstanding at the time of enactment.” See CARES Act, Pub. L. No. 116-136, § 4003(c)(1)(A) (requiring rates for certain Treasury loans to be based on “the current average yield on outstanding marketable obligations of the United States of comparable maturity”); 39 U.S.C. § 2006(a) (same).

On a functional level, Congress placed specific conditions on borrowing under the CARES Act that do not apply to borrowing under Title 39, and so a broader reading of CARES Act’s “outstanding debt” preclusion makes sense as an anti-circumvention measure. Otherwise, the Postal Service could borrow under the CARES Act (while eligible) to pay down Title 39 loans, with the newly liberated Title 39 borrowing authority remaining available even after the COVID-19 emergency had ended. To the extent that Congress was seeking to foreclose that possibility, as the language of the statute indicates that it was, the concern applies equally whether moneys are borrowed under Title 39 before or after the date of enactment.

Third, it is unclear whether “any outstanding debt” means only debt acquired under other authorities (i.e., the Title 39 borrowing provisions), or whether it also precludes using CARES Act borrowing to retire and renew earlier CARES Act debt. Under either reading, the CARES Act would preclude borrowing to repay funds borrowed under Title 39. That much would be consistent with Congress’s apparent concern that the CARES Act borrowing authority remain distinct from Title 39 borrowing.⁷ The additional question is

⁷ That much is evident from Congress’s decision not to adopt the House’s proposal to cancel all Title 39 debt outstanding on the date of enactment. See H.R. 6379, 116th Cong. § 140001(a)(1). The House bill would then have authorized the Postal Service to borrow \$15 billion from Treasury. H.R. 6379, 116th Cong. § 140001(a)(2). In light of the bill’s resetting of outstanding debt to zero, it is unclear whether this additional borrowing authority would have been coextensive with or additional to the \$15 billion debt ceiling in 39 U.S.C. § 2005(a).

whether the preclusion extends to repayment of earlier CARES Act debt. On a formal level, the statutory text – “any outstanding debt of the Postal Service,” without further qualification – would plainly include CARES Act debt. Therefore, it arguably would be most prudent for the Postal Service to not use these borrowed funds in such a manner. However, on a functional level, we could argue that precluding the use of these funds to pay outstanding CARES Act debt would make little sense. So long as all relevant borrowing meets the CARES Act criteria, using new borrowing to repay old debt merely consolidates (a) the use of cash to repay an old loan and (b) attainment of new cash by acquiring a new loan. If emergency circumstances remain such that repayment of the old loan would deprive the Postal Service of cash needed to fund operating expenses, then we would immediately qualify for a new loan under the CARES Act. Neither activity would be inconsistent with the CARES Act’s purposes on its own, and so there is no apparent reason why they should be precluded in combination. Therefore, despite the facial breadth of “any outstanding debt,” it would be reasonable to construe the preclusion as limited to borrowing under Title 39, not under the CARES Act.

In sum, it is reasonable to construe the CARES Act as prohibiting borrowed funds from being used for either capital expenses or the payment of any principal, interest, or fees arising from obligations issued under Title 39. As noted earlier, however, the CARES Act gives Treasury the discretion to refuse to lend, or to limit its lending, to the Postal Service if it disagrees with the Postal Service’s interpretation of the law. It would be advisable to seek a common understanding with Treasury about these legal questions, to the extent possible.

Finally, the statute does not explicitly specify any accountability for the use of borrowed funds. It is unclear at this time whether current Treasury leadership (or Congress) will insist on such an accounting.⁸

CONCLUSION

On its face, the statute imposes conditions on borrowing but gives the Postal Service discretion to determine when and to what extent additional borrowing is needed. But given Treasury’s discretion and the requirement to attain Treasury’s agreement on borrowing terms, Treasury could simply refuse to lend if it disagrees with the Postal Service’s interpretation, desires accountability for the use of funds, or insists on terms of its choosing (regardless of their legality or acceptability to the Postal Service). The only checks on Treasury are Congressional oversight and potential OLC resolution of a legal dispute.

Please let me know if you have any questions or concerns. Of course, the situation regarding our financial situation is very fluid, so if conditions change in a way that warrants

⁸ According to the Corporate Treasury office, Treasury historically did not insist on a rigid accounting of the Postal Service’s use of pre-PAEA borrowing authority, and the Postal Service thus had a fairly free hand to characterize the use of borrowed funds vis-à-vis the statute’s distinct annual caps.

material revision of the analysis in this memorandum, we will reexamine our analysis and advise you accordingly.

Thomas J. Marshall

Attachment

cc: Mr. Corbett

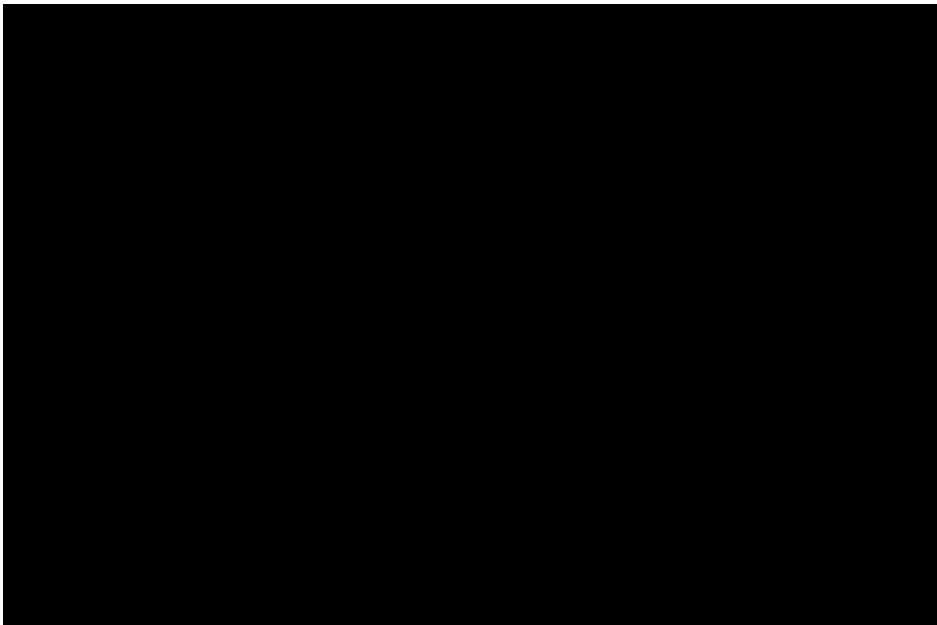
Brief on Amazon-USPS Relationship

Context

During the April 7th White House Coronavirus Task Force Briefing, President Trump made a number of statements about the United States Postal Service and its unprofitability being tied to the relationship with Amazon and other internet companies. This document outlines a response to many of those key statements and provides background on the current customer relationship with Amazon.

Fact-checking Statements

1. **The demise of the Postal Service is “internet companies, [like AMAZON] ... that give their [packages] to the Postal Service”**
 - **While Amazon is the USPS’ largest package customer** (\$3.9B of revenue in FY19), it represents <10% of USPS total annual revenue, and is a high-contribution relationship (>150% cost coverage in its largest product relationship).
 - Additionally, **other marketplace partners (eBay and Etsy) represent high-contribution partnerships** worth >\$1B in revenue.
 - Further, UPS, as a competitor, **has priced its full-network product competitively to compete against USPS to win Amazon business** while also sustaining relatively consistent profit margins year-over-year.
2. **“They lose money every time they deliver a package, for Amazon or internet companies.”**
 - **FY 19 contribution from Amazon was \$1.6B.** Revenue was \$3.9B
 - **USPS derives incremental margin dollars from every parcel**, for every product, for every customer. Package business (both last-mile and full-network) represents a net improvement in profitability for USPS versus a detractor.
 - **USPS net unprofitability is tied more closely to its unfunded governmental mandates that drive down net profitability**
 - Unfunded universal service obligation to deliver to all addresses 6-days / week and to fund operations only through mail and package sales.
 - Expectation to charge equitable prices for all of the United States and to not increase prices relative to the operational cost to serve a highly-urban or highly-rural region.
 - Requirements that no other private company or federal agency is required to meet. For example: pre-funding retirement.
3. **“If they raised prices by a little [...] or a lot, you’d find that the Post Office could make money or break even.”**
 - **USPS had the largest price increases in recent history from 2018-2019 including ~10% price increases for Parcel Select** (product that Amazon, UPS, and FedEx use most heavily). In addition to regular January price increase, USPS introduced an additional charge for **large parcels (DIM-weight) in June 2019. This had significant impact to Amazon effective rates.**
 - Historical relationships with customers have consistently shown that raising prices would only drive them to our competitors. **USPS would see a net contribution loss with a significant share of its package business if prices were to be raised significantly.** USPS competitors could take share in these instances.
 - In the past year, competitors have increasingly insourced the share of B2C volume they deliver themselves. **FedEx has walked away from USPS, indicating Parcel Select prices were no longer economical relative to self-delivery.**



4. **“These are independent Boards, ... appointed by other administrations ... they’re sort of long-term”**
- The Board of Governors serve 7-year terms, at a maximum of 2 terms. **Additionally, all current members of the Board of Governors (less the Postmaster General and Deputy Postmaster General) were appointed by President Trump with the advice and consent of the US Senate.**
 - The Postal Regulatory Commission is a Federal Agency composed of five Commissioners appointed by the President of the United States with advice and consent of the senate. President Trump appointed 2 of the 5 current serving Commissioners.
5. **“They have to raise prices, but this Postal Commission won’t do it”**
- The Postal Regulatory Commission regulates Negotiated Service Agreements. In relationship to these agreements, its core objective is to ensure that all contracts with discounted rates are profitable.

Overview of Business with Amazon

Amazon views USPS as a key business partner, relying on USPS to deliver [REDACTED]. USPS is competitively positioned in the market to serve [REDACTED] to flex its internal network to handle large amounts of volume and provide capacity relief, its full 7-day delivery operating model, and its unique advantage of having access to every home and mailbox in the United States. **Amazon has relied on USPS to pioneer innovative shipping solutions**, such as Sunday, Same-Day, and grocery deliveries, which enable Amazon to remain at the forefront of the eCommerce space. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]		[REDACTED]		[REDACTED]	
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

Back-up and additional information

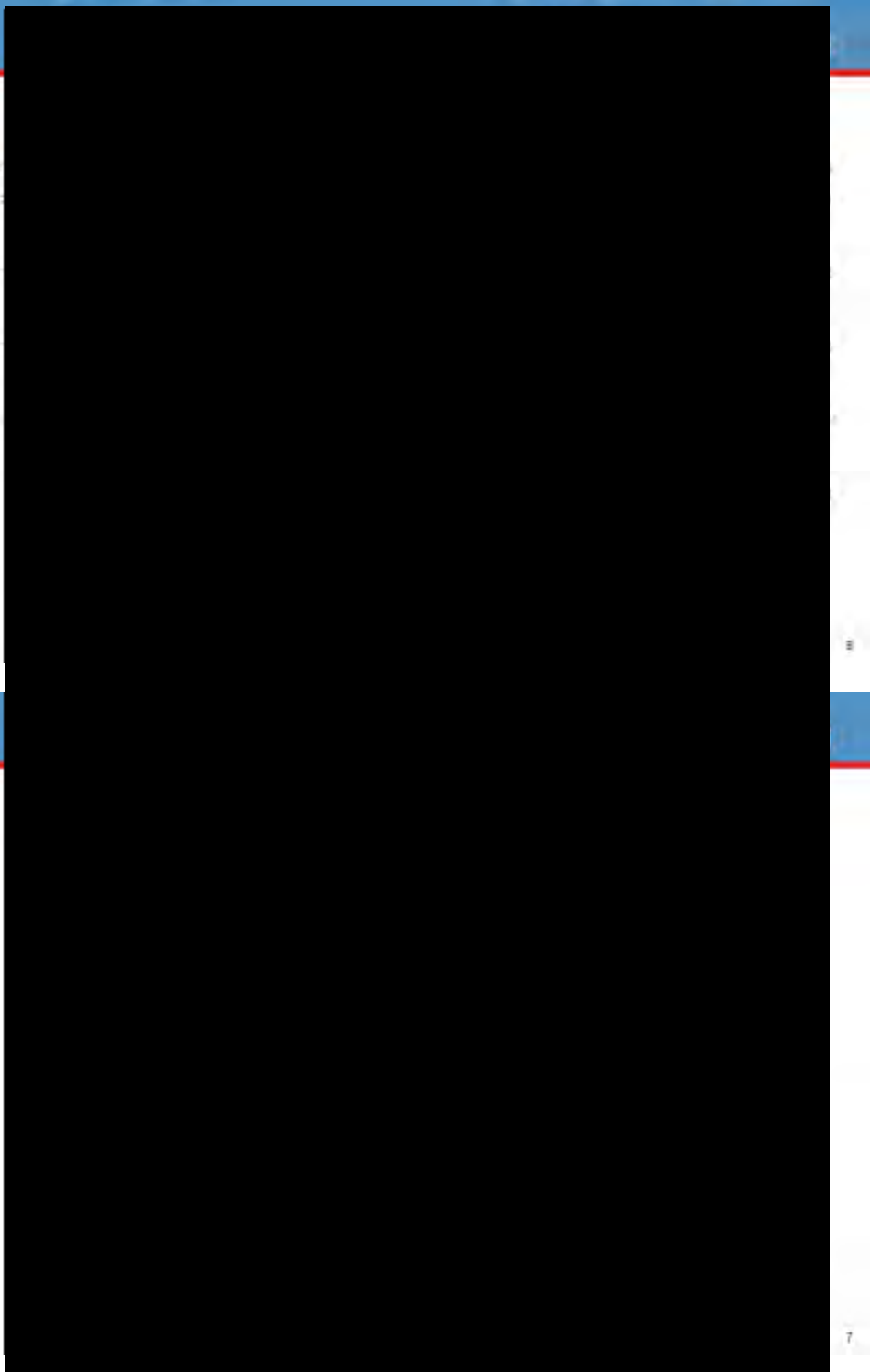
Summary of price changes below.

Date of Price Change Implementation	Price Change % for Published Parcel Select	Summary Reasoning for Price Change
Jan 2014	DDU: 5.1% DSCF: 5.6% DNDC: 5.1% PSLW: 10.1%	
April 2015	PSHW: 8.0% PSLW: 9.8%	
Jan 2016	PSHW: 4.9% PSLW: 23.5%	
Jan 2017	PSHW: 3.5% PSLW: 8.0%	
Jan 2018	PSHW: 4.9% PSLW: 7.0%	
Jan 2019	PSHW: 9.3% PSLW: 12.3%	
Jun 2019	Introduction of DIM	
Jan 2020	PSHW: 2.5% PSLW: 4.2%	

[REDACTED]



[REDACTED]



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The COVID pandemic has already begun, and will continue to, permanently make changes to the e-commerce and broader retail landscape. Online sales are up over 25% according to Bloomberg ^[1] - with outsized growth in online grocery, pharmacy, mass retail and Amazon. Key trends that will likely have long lasting impact beyond COVID:

- Increase in prescriptions by mail - USPS CVS shipping up over 800K / week vs. ~40K / week pre-COVID. USPS consumers are being forced to become more comfortable with home-drug-delivery.
- Conversion of brick and mortar stores to fulfillment centers to accommodate online orders (e.g. Nordstrom predicting online orders to cause 15-20% increase in SFS volumes). This new shipping infrastructure will subsist beyond the crisis.
- Similar to large retailers, SMBs are forced to accelerate infrastructure development to bring services and product online. SMB survivors and winners of COVID will have built deeper e-commerce presences
- E-commerce enablers (e.g., eBay, Shopify, Shippo, Etsy)are taking share of e-commerce market and increasing their role in influencing shipping as they help new e-commerce shippers enter the online market. Adoption of these platforms will persist post-COVID as consumers gain fluency with how to use them to buy and sell goods in new ways.
- Mass retailers Walmart and Target benefitting from slowdowns in Amazon shipping and reduction of Amazon's 2-day inventory (mostly focused on essentials). This has enabled them to expand their customer base (Walmart seeing a surge in orders, increasing density and growing viability of its DDU inject model with USPS).
- Accelerated adoption of online grocery (Transactions increasing ~60%, Instacart hiring 300K workers, significant VC inflows)

[REDACTED]

^[1] <https://www.bloomberg.com/news/articles/2020-03-31/americans-adopting-e-commerce-faster-than-ever-amid-pandemic>

FedEx Advantage[®] Savings Program for eBay Sellers



- Overview
- Benefits
- FAQs
- Program Agreement

Frequently Asked Questions

Program Description and Qualifications

Hide

What is the FedEx Advantage Savings Program for eBay Sellers?

The FedEx Advantage Savings Program for eBay Sellers is an exclusive offer from FedEx for eBay sellers to save up to 37% on eligible FedEx Express[®] services and up to 20% on eligible FedEx Ground[®] and FedEx Home Delivery[®] services.

Who is eligible for the FedEx Advantage Savings Program for eBay Sellers?

What are the eligible FedEx[®] services for this program?

Where can I find the Terms and Conditions to read?



Upgrade your UPS My Choice[®] Membership

More than ever, you need visibility and control of your home deliveries.

With a premium UPS My Choice membership you get all the benefits you're used to, plus you can do all of the following as many times as you need without the fees basic members would pay:

- Redirect a package to a more convenient location
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Use code **CTJTO3DX6** (no credit card necessary)

[illegible]

Click to visit our [COVID-19 Resource Center & CARES Act Relief Resource Center](#) with the latest updates on business & legal implications related to the coronavirus.

From: Passantino, Stefan (59582)
Sent: Wednesday, April 01, 2020 4:04 PM
To: Marshall, Thomas J - Washington, DC <thomas.j.marshall@usps.gov>; Weidner, Keith E - Washington, DC <Keith.E.Weidner@usps.gov>
Cc: Olson, Joseph L (13465) <JLOLSON@michaelbest.com>
Subject: RE: USPS--Background

Following up on this project, our team is putting together the requested analysis and I would like to try to set a time to provide either or both of you with a quick briefing on where we are and where we are headed. Is there a convenient time later this afternoon or tomorrow morning to discuss all of this?

Stefan Passantino

Partner

Practice Group Chair, Government Relations, Political Law & Public Policy

T 202.747.9582 | michaelbest.com

Click to visit our [COVID-19 Resource Center & CARES Act Relief Resource Center](#) with the latest updates on business & legal implications related to the coronavirus.

From: Passantino, Stefan (59582) <spassantino@michaelbest.com>
Sent: Monday, March 30, 2020 7:44 PM
To: Marshall, Thomas J - Washington, DC <thomas.j.marshall@usps.gov>
Subject: Re: USPS--Background

Thank you. I spoke with Keith. We are good. Hopefully we can get you and Keith a preview of everything on Wednesday and then turn it all over Thursday.

On Mar 30, 2020, at 7:42 PM, Marshall, Thomas J - Washington, DC <thomas.j.marshall@usps.gov> wrote:

Sorry, Stefan, but I have been in meetings since we talked until now. I think Keith called you on my behalf, but in any event I believe we are on the same page. Frankly, I suggested I would call you later largely so as not to put you on the spot concerning when you were going to complete your work.

That said, if you would prefer to talk, I am still in the office at 202-268-5555.

-Tom

Thomas J. Marshall
General Counsel and Executive Vice President
United States Postal Service

From: Passantino, Stefan (59582) [<mailto:spassantino@michaelbest.com>]
Sent: Monday, March 30, 2020 5:07 PM
To: Marshall, Thomas J - Washington, DC <thomas.j.marshall@usps.gov>
Subject: [EXTERNAL] RE: USPS--Background

I just left a message following our call. I can be reached at 202-400-1530 at your convenience.

Stefan Passantino

Partner
Practice Group Chair, Government Relations, Political Law & Public Policy
E spassantino@michaelbest.com
T 202.747.9582 | M 202.400.1530 | F 202.347.1819

<image001.png>

Michael Best & Friedrich LLP

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<image002.gif>

From: Barger/NorthernCrossPartners <jbarger@northerncrosspartners.com>
Sent: Monday, March 30, 2020 3:51 PM
To: Marshall, Thomas J - Washington, DC <thomas.j.marshall@usps.gov>; Rick Hohlt <rick@hohlt.com>;
M. -Mike- Duncan Robert <mike@rmduncan.com>; Keith.E.Weidner@usps.gov; Passantino, Stefan (59582)
<spassantino@michaelbest.com>; Olson, Joseph L (13465) <JLOLSON@michaelbest.com>
Subject: USPS--Background

All—

Here is background on USPS:

- Mission Statement (to be adopted 4/01/20);
- Two interesting articles from Wired and NY Times that provide color on critical role the USPS has (and will continue) to play in supporting the American People.

Email Disclaimer

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Republican Outreach Strategy

Purpose: To improve the likelihood of the Board of Governors' legislative requests being included in a COVID-19 package by emphasizing the bipartisan support for the Postal Service and dampening the current partisan news coverage of the Postal Service.

Action: Engage with Republican Senators and Members of Congress that have a history of supporting postal service issues by briefing them on the Postal Service's actions during the COVID-19 crisis, the organization's current financial condition, and the Board's legislative recommendations.

Timeline: These briefings should occur after Chairman Duncan and Secretary Mnuchin have discussed the Board's request that the Postal Service be included in an upcoming coronavirus legislative package. Ideally, the briefings would begin after meaningful progress has been made in the Postal Service's discussions with the Treasury department. The Postal Service's request to be included in the coronavirus relief package will not be honored unless the Secretary and the President support it, and any perceived effort by the Postal Service to enlist Members of Congress to pressure the Administration publicly could harm the chances of success. Even if the Members privately engage, given the media coverage of the last COVID-19 negotiations, it is likely that any discussions with them will be made public and politicized. Further, even our solid friends on Postal Service issues may be reluctant to put a stake in the ground in support of the Postal Service without first obtaining a more clear understanding of the Administration's position on the issues.

Details: Briefings will include what has happened, and what will happen to the Postal Service's finances and operations that could lead to direct impact on service in the Member's state or district. The legislative request will also be discussed, ideally with a positive update on discussions with the Department of Treasury. The intent of briefings will be to inform Members of the Postal Service's vital role during the crisis, but also to ask that they support the legislative package agreement with Treasury. We have heard from our consultants that members to the right of the Administration have raised concerns about the previous COVID-19 response packages, and based on the public statements of several Republican members, we anticipate pushback on the next bill as well. Having the support of key Republican members, even after Treasury has agreed to support our request, should help reduce partisan reaction to postal relief, both by Members of Congress and by the media.

Members:

House of Representatives

Senate

Critical Infrastructure

- The Postal Service provides an essential public service pursuant to statute and Trump Administration policy.
 - As part of the National Continuity Policy (established pursuant to Presidential Directive), "the delivery of postal services to the American Public" is defined by the National Security Council as an essential function that is necessary to ensure the Government provides "critical government services" during an emergency.
 - "Postal and shipping workers" are considered essential critical infrastructure workers, as defined by the Department of Homeland Security.
- As Americans are increasingly subject to shelter-in-place requirements and quarantines, the Postal Service's mandate to bind the Nation together is more vital than ever.
 - We are used to deliver important government information and material (e.g., the White House Coronavirus Task Force mailing, Department of Health and Human Services face coverings, both to all American households), Census materials, ballots, government benefits checks, and packages containing vital necessities, including medicines and goods purchased online.
 - We are also communicating vital health information from the Administration at our retail units, by displaying all of the relevant CDC posters, and by using the digital message boards at our 4,000 largest Post Offices to convey critical information in a more interactive fashion.
 - We have also worked with the CDC to use the banner page on our digital informed delivery tool to convey important instructions from the CDC to our 23 million Informed Delivery subscribers.
- The Governors and Postal Service management are committed to continue providing this critical government service, and being a source of consistency and reliability for the American people throughout this national emergency. Management has established a dedicated COVID-19 leadership team to direct all issues related to our employees, operations, and customers. The Board is meeting regularly to be briefed by management on these efforts and to provide strategic direction.
 - We do not expect significant disruption of the services we provide, though there will be temporary service impacts as we are required to adjust operations to account for contingencies and local conditions.
 - If we need to curtail or adjust operations in a particular facility or area, management will activate our localized continuity of operations plans, just as it does for natural disasters, and we will recover quickly.

- The Postal Service can also play a critical role in the all-of-government response to the pandemic, and we want to help in any way we can. We are participating in the National Response Coordination Center headed by FEMA. We have unique capabilities, given our role as the most frequent touchpoint between the American people and the federal government through our nationwide retail and delivery network.
 - By way of example, we have offered our two large training/conference centers to the effort. One, in Potomac, Maryland, has a hotel facility with over 400 rooms, and the other, in Norman, Oklahoma, has over 900 rooms. Both also have catering/dining facilities, as well as ample multi-purpose and conference rooms.

Financial Situation

- There is no doubt that pandemic will have a very negative impact on our financial situation. While the exact impact on volumes and revenue is of course uncertain, we will experience steep declines in mail volume and revenue this year, and likely next year.
- We face a liquidity crisis: our present forecast is that we will run out of money this fiscal year if we cannot borrow the \$10B pursuant to the CARES Act, and that even with that money we will run out of money by March of 2021.
- This dramatic reduction in mail volume in a short period of time due to the pandemic only deepens the significant financial challenges that we are facing.
- We have already taken several steps to address our short term liquidity condition, but they are temporary and not sufficient to address the liquidity crisis.
 - We recently borrowed an additional amount of \$3.4 billion from the FFB under our line of credit, which will be partly repaid in September, and partly repaid in April of next year.
 - We will also delay paying the Social Security tax, as authorized by the CARES Act.

Next Steps

- The Governors' focus is on ensuring the Postal Service's long-term financial sustainability, so that we can provide our critical public services both today, and in the years to come. We recently approved a mission statement to guide our efforts and those of management, and have been hard at work on developing consensus around a long-term financial plan.

- There is now an immediate need to address the liquidity crisis caused by the pandemic.
- We appreciate the inclusion of \$10 billion in additional borrowing authority in the CARES Act, though we understand that you opposed the inclusion of an appropriation agreed to by the Members of Congress, and also insisted that any borrowing be discretionary on the part of Treasury. We would like to understand why you took those positions, and whether you would support additional relief for the Postal Service in the next stimulus bill.
- We also need to know whether we should count on receiving the \$10 billion.
 - Our forecasts show that the \$10 billion will be critical to allowing us to continue operations.
 - We would like Postal Service management and your staff to begin discussions as to the terms and conditions that would apply if we request to borrow those funds.
 - We hope that we could come to an agreement that meets the needs of both parties, and is consistent with the law expeditiously, so that we can have confidence that we will those funds will be available and can be accessed quickly.
- While the \$10 billion is a good start, further action is needed to improve our liquidity, and we want to work with the Administration and Congress on measures to achieve that goal and ensure the continuation of our operations.
- We also want to work with you and the Administration not only to address our short term liquidity needs, but also to position the Postal Service to be financially stable in long-term.
 - Once the current emergency ends, the Postal Service will continue to face the same challenges that existed before: declining mail volumes, a very competitive marketplace, a limited ability to reduce costs, and a compelling need to make long-deferred capital expenditures, including with respect to delivery vehicles.
 - And, we will face these challenges from an even weaker position than before, since the pandemic will erode our volume basis.
 - We need structural reforms to our business model to address these challenges now more than ever, and we believe that we can work together to identify certain changes that can be implemented now.

- Moving forward, the Board will continue its work on a plan to develop consensus on additional, longer-term solutions that will directly address our current structural problems.

Critical Infrastructure

- The Postal Service provides an essential public service pursuant to statute and Trump Administration policy.
 - As part of the National Continuity Policy (established pursuant to Presidential Directive), "the delivery of postal services to the American Public" is defined by the National Security Council as an essential function that is necessary to ensure the Government provides "critical government services" during an emergency.
 - "Postal and shipping workers" are considered essential critical infrastructure workers, as defined by the Department of Homeland Security.
- As Americans are increasingly subject to shelter-in-place requirements and quarantines, the Postal Service's mandate to bind the Nation together is more vital than ever. We are used to deliver important government information and material (e.g., the White House Coronavirus Task Force mailing, Department of Health and Human Services face coverings, both to all American households), Census materials, ballots, government benefits checks, and packages containing vital necessities, including medicines and goods purchased online.
- We are also communicating vital health information from the Administration at our retail units, by displaying all of the relevant CDC posters, and by using the digital message boards at our 4,000 largest Post Offices to convey critical information in a more interactive fashion.
- We have also worked with the CDC to use the banner page on our digital informed deliver tool to convey important instructions from the CDC to our 23 million Informed Delivery subscribers.
- The Governors and Postal Service management are committed to continue providing this critical government service, and being a source of consistency and reliability for the American people throughout this national emergency. Management has established a dedicated COVID-19 leadership team to direct all issues related to our employees, operations, and customers. The Board is meeting regularly to be briefed by management on these efforts and to provide strategic direction.
 - We do not expect significant disruption of the services we provide, though there will may be temporary service impacts as we are required to adjust operations to account for contingencies and local conditions.
 - If we need to curtail or adjust operations in a particular facility or area, management will activate our localized continuity of operations plans, just as it does for natural disasters, and we will recover quickly.

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• The Postal Service can also play a critical role in the all-of-government response to the pandemic, and we want to help in any way we can. We are participating in the National Response Coordination Center headed by FEMA. We have unique capabilities, given our role as the most frequent touchpoint between the American people and the federal government through our nationwide retail and delivery network.

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• By way of example, we have offered our two large training/conference centers to the effort. One, in Potomac, Maryland, has a hotel facility with over 400 rooms, and the other, in Norman, Oklahoma, has over 900 rooms. Both also have catering/dining facilities, as well as ample multi-purpose and conference rooms.

Financial Situation

• There is no doubt that pandemic will have a very negative impact on our financial situation. While the exact impact is of course uncertain, we will experience steep declines in mail volume and revenue this year, and ~~likely possibly also~~ next year.

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• Our present forecast is that we will run out of money this fiscal year if we cannot borrow the \$10B pursuant to the CARES Act, and that even with that money we will run out of money by March of 2021.

• This dramatic reduction in mail volume in a short period of time due to the pandemic only deepens the significant financial challenges that we are facing. We face a liquidity crisis: we expect to run out of cash at some point either this year or next, depending on how quickly volumes decline and our access to borrowing.

• We have already taken several steps to address our short term liquidity condition, but they are temporary and not sufficient to address the liquidity crisis.

- We recently borrowed an additional amount of \$3.4 billion from the FFB under our line of credit, which will be partly repaid in September, and partly repaid in April of next year.
- We will also delay paying the Social Security tax, as authorized by the CARES Act.

Next Steps

• The Governors' focus is on ensuring the Postal Service's long-term financial sustainability, so that we can provide our critical public services both today, and in the years to come. We recently approved a mission statement to guide our efforts and those of management, and have been hard at work on developing consensus around a long-term financial plan.

- There is now an immediate need to address the liquidity crisis caused by the pandemic.
- We appreciate the inclusion of \$10 billion in additional borrowing authority in the CARES Act, though we understand that you opposed the inclusion of an appropriation agreed to by the Members of Congress, and also insisted that any borrowing be discretionary on the part of Treasury. We would like to understand why you took those positions, and whether you would support additional relief for the Postal Service in the next stimulus bill.
- We also need to know whether we should count on receiving the \$10 billion.
 - Our forecasts show that the \$10 billion will be critical to allowing us to continue operations.
 - We would like Postal Service management and your staff to begin discussions as to the terms and conditions that would apply if we request to borrow those funds.
 - We hope that we could come to an agreement that meets the needs of both parties, and is consistent with the law expeditiously, so that we can have confidence that we will those funds will be available and can be accessed quickly.
- While the \$10 billion is a good start, further action is needed to improve our liquidity, and we want to work with the Administration and Congress on measures to achieve that goal and ensure the continuation of our operations.
- We also want to work with you and the Administration not only to address our short term liquidity needs, but also to position the Postal Service to be financially stable in long-term.
 - Once the current emergency ends, the Postal Service will continue to face the same challenges that existed before: declining mail volumes, a very competitive marketplace, a limited ability to reduce costs, and a compelling need to make long-deferred capital expenditures, including with respect to delivery vehicles.
 - And, we will face these challenges from an even weaker position than before, since the pandemic will erode our volume basis.
 - We need structural reforms to our business model to address these challenges now more than ever, and we believe that we can work together to identify certain changes that can be implemented now.

- Moving forward, the Board will continue its work on a plan to develop consensus on additional, longer-term solutions that will directly address our current structural problems.

Critical Infrastructure

- The Postal Service provides an essential function pursuant to statute and Administration policy.
 - As part of the National Continuity Policy (established pursuant to Presidential Directive), "the delivery of postal services to the American Public" is defined as an essential function that is necessary to ensure the Government provides "critical government services" during an emergency.
 - "Postal and shipping workers" are considered essential critical infrastructure workers, as defined by the Department of Homeland Security.
- As Americans are increasingly subject to shelter-in-place requirements and quarantines, the Postal Service's mandate to bind the Nation together is more vital than ever. We are used to deliver important government information (e.g., the White House Coronavirus Task Force mailing), Census materials, ballots, government benefits checks, and packages containing vital necessities, including medicines and goods purchased online.
- The Governors and Postal Service management are committed to continue providing this critical government service, and being a source of consistency and reliability for the American people throughout this national emergency. Management has established a dedicated COVID-19 leadership team to direct all issues related to our employees, operations, and customers. The Board is meeting regularly to be briefed by management on these efforts and to provide strategic direction.
 - We do not expect significant disruption of the services we provide, though there may be temporary service impacts as we adjust operations to account for contingencies and local conditions. If, for some reason, we need to curtail or adjust operations in a particular facility or area, we will activate our localized continuity of operations plans, just as we do for natural disasters.
- The Postal Service can also play a critical role in the all-of-government response to the pandemic. We are participating in the National Response Coordination Center headed by FEMA. We have unique capabilities, given our role as the most frequent touchpoint between the American people and the federal government through our nationwide retail and delivery network.

Financial Situation

- There is no doubt that pandemic will have a significant negative impact on our financial situation. While the exact impact is uncertain, we are likely to experience very significant declines in mail volume and revenue this year, and possibly also next year.

- This dramatic reduction in mail volume only deepens the significant financial challenges that we were already facing, and threatens our ability to continue providing our critical public service.
- We have taken several steps to address our short term liquidity position, but they are not sufficient to ensure that we have enough liquidity.
 - We recently borrowed an additional amount of \$3.4 billion from the FFB under our line of credit, and will also benefit from being able to delay paying the Social Security tax under the CARES Act. These are both only temporary measures.
- Depending on the volume declines that occur, there is a significant risk that we will run out of money to fund operations either this year or next year.
- And, even if we can maintain some level of positive liquidity, we will not be in a position to ensure that we can make the investments necessary to continue providing our services in the manner expected by the American people (e.g. new delivery vehicles), or to be in a position to weather future adverse events.

Next Steps



Headquarters COVID Town Hall

April 28th, 2020



AMERICAN
OVERSIGHT



USPS-20-1215-A-008171



Opening Remarks

Megan J. Brennan

Postmaster General and Chief Executive Officer

General Election outreach to States

- Expected surge in absentee ballots
- Contact all 50 states, prioritizing 19 states with excuse required to vote with absentee ballot
- Educate states on absentee ballot envelope design and mailing requirements
- Election Mail Teams will be comprised of HQ, Area, and District staff with election mail expertise
- Efforts in progress to support increased use of absentee ballots for primaries



Legal Landscape

- Continued daily legal support to the COVID-19 Command Team and COVID-19 Work Group.
- Continued advice on the parameters and implementation of the Families First Coronavirus Response Act.
- Providing legal advice related to the staggered reopening of the country particularly as it pertains to quarantines, shelter in place orders and travel restriction orders
- Assist in the negotiations with Treasury of the CARES Act loan
- Continued advice on legislative initiatives, pricing, new products and revenue protection

Employee Response

Continue to support our employees as the nation ramps back up for business

- Employee health, safety and wellness
- Partnership with Unions and Management Associations
- Targeted fast track hiring
- Telework approach



Operational Continuity

Continue to deliver vital goods and services as we help the country transition

- Economic Impact Payment
- Medications
- Package platform utilization
- Manage to workload and employee availability



Technology Enabled

Continue to leverage technology to enable the Postal Service to achieve its mission

- Resume Equipment Deployment
- Accelerate eCommerce Initiatives
- Increase Telework Effectiveness
- Expand Identity Verification Services
- Continue IT Modernization



Business Continuity

Continue to ensure health of critical business processes to drive Postal operations

- Cash
- Supply Management
- Gift Cards



Customer Continuity

Continue to meet our customers where they are to provide creative, meaningful and effective mailing & shipping solutions

- Daily outreach for customer/consumer/industry support and solution development
- Pursue new sales opportunities for COVID based products
- Develop products, services and solutions for COVID recovery and post COVID



Continue to communicate with our employees, customers and stakeholders

- COVID-19 Blue and LiteBlue sites
- HERO Messaging
- Field Positive Feedback
- Social Media
- Media Stories



Continue to support and coordinate all of Postal response to COVID-19

- Integrated transition plan
- Coordinated & prioritized solutions
- Speed & thoroughness in decision making
- Removal of barriers & allocation of resources
- Navigating the new normal



Thank You





Headquarters COVID Town Hall

April 28th, 2020



AMERICAN
OVERSIGHT



USPS-20-1215-A-008183



Opening Remarks

Megan J. Brennan

Postmaster General and Chief Executive Officer

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- Removal of barriers & allocation of resources
- Navigating the new normal



Thank You





<AUTODATE>

To Whom It May Concern,

This letter is to provide information to you regarding the functions being performed by Contract Postal Units, Community Post Offices, and Village Post Offices in support of the essential government services being provided by the United States Postal Service ("USPS" or "Postal Service") to the American people. These facilities are under contract with the Postal Service to provide access to postal products and services in support of the Postal Service's ongoing operations.

The Postal Service's provision of postal services throughout the United States is not affected by State and local government actions that are restricting commercial and personal activities in response to the Coronavirus Disease 2019 (COVID)-19 pandemic. The Postal Service is an entity of the federal government, and the continued provision of postal services to the American people is designated as an essential function under federal law.

The Postal Service relies on its suppliers to provide this critical government service. The Postal Service's network of contractor-operated retail facilities enables the Postal Service to provide the American people with the ability to reasonably access postal services in communities throughout the United States, in conformance with federal law. Many of these contractor-operated facilities also provide postal delivery services, by providing P.O Boxes.

Postal and shipping workers, including those in the private sector, are also considered essential critical infrastructure workers under recent guidance issued by the Department of Homeland Security. Guidance issued by the White House and CDC has also indicated that such industries have a special responsibility to maintain normal work schedules.

Therefore, the Postal Service considers that the continued operations of this network of contractor-operated facilities is vital to the Postal Service's continued performance of its essential functions.

Questions regarding this letter may be directed to the Supply Management group within the Postal Service at (insert phone number).

USPS Supply Management
475 L'Enfant Plaza SW
Washington, DC 20260

March 19, 2020

The President
The White House
1600 Pennsylvania Avenue, NW
Washington, DC 20500

Dear Mr. President:

We, the undersigned organizations, applaud the Administration and Congress for their swift actions to mitigate the impact of the unfolding Coronavirus pandemic. As our nation deals with this unprecedented public health crisis, we would like to emphasize to you and our senior government leaders that the transportation and goods movement industry stands ready and able to play a pivotal role in promoting economic growth while assisting with pandemic healthcare relief.

Commercial transportation firms will be essential in our country's ability to restore economic health, vitality and a return to everyday life. As the federal, state and local governments take steps to limit the spread of the Coronavirus, it is crucial that such actions do not inadvertently encumber the vital role of package and mail delivery services. We therefore write to encourage you, the Vice President, and the Coronavirus Task Force to reaffirm that transportation and shipping service providers, to include air, ground and ocean networks, are critical industries that should not be hindered by unnecessary restrictions impeding our ability to deliver.

Transportation service providers and shipping/postal operators have already been recognized by the Department of Homeland Security and Presidential Policy Directives as Critical Infrastructure industries. All of these firms utilize sophisticated networks of transportation modes including aviation, rail, ocean and truck to provide final-mile delivery for consumer goods, food, medical supplies and devices, among other items. Given the current disruption to the daily life of many Americans, there is even greater demand, and reliance upon, our services. Our organizations have implemented increased measures to ensure the safety of our people, our customers, and the general public.

It is imperative that precautionary actions taken by federal, state or municipal governments do not impose unnecessary burdens or logistical complications on package and mail delivery services, or on the people that provide those services, including our pilots, couriers, hub operators and truck drivers. Such unintended negative consequences will hamper our ability to reach businesses and consumers that are relying upon timely and dependable delivery. Neither restrictive public policies that impede interstate commerce (i.e. – Article I, Section 8 of the U.S. Constitution) should be enacted, nor should new local government initiatives create a regulatory patchwork that hinders operational efficiency.


Mr. President, the spread of the Coronavirus in the U.S. is testing government institutions, challenging private industry, and placing inordinate demands on our fellow citizens. As our nation mobilizes to mitigate the impact of the pandemic, we ask that you and your Coronavirus Task Force reiterate the valuable role our firms play in this regard, and discourage states and localities from implementing public policies that restrict our ability to serve the American people.

We stand ready and willing to continue this important service to our nation, and will continue to work with federal, state and local governments in a coordinated fashion to help our employees deliver for America in the safest possible manner while also keeping our employees and the customers they serve safe too.

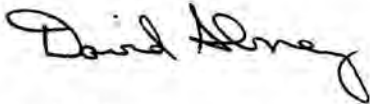
Sincerely,



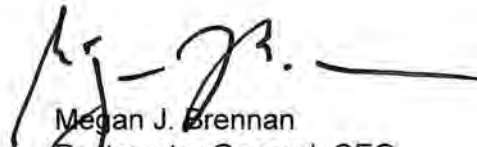
Chris Spear
President & CEO
American Trucking Associations



Frederick W. Smith
Chairman and CEO
FedEx



David Abney
Chairman and Chief Executive Officer
UPS



Megan J. Brennan
Postmaster General, CEO
United States Postal Service

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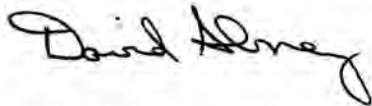
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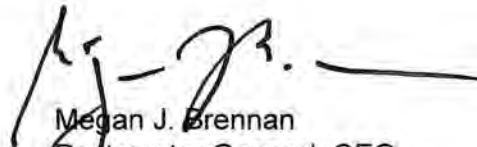
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UPS



Megan J. Brennan
Postmaster General, CEO
United States Postal Service



POSTAL NEWS

DRAFT

FOR IMMEDIATE RELEASE
April XX, 2020

Contact: XXXXX
XXX.XXX@usps.gov
202.268.XXXX
usps.com/news



U.S. Postal Service to Deliver Face Coverings to Every American Household

Historic Delivery of 650 Million Face Coverings is in Partnership with the White House Coronavirus Task Force, the Department of Health and Human Services and a Consortium of Textile Manufacturers

WASHINGTON — The U.S. Postal Service today announced it will distribute 650 million reusable cotton face coverings on behalf of the Department of Health and Human Services (HHS) to every residential delivery point in America, beginning in areas which HHS has identified as experiencing high transmission rates of COVID-19 and to workers providing essential services throughout the nation during this pandemic.

This unprecedented undertaking is being done in partnership with the White House Coronavirus Task Force, ~~the Department of Health and Human Services (HHS)~~ and a consortium of textile manufacturers. Project: America Strong sub-task force within the Federal Emergency Management Agency (FEMA) Unified Command Structure, is complementing the Administration's whole-of-nation response to COVID-19

The first shipments are expected to reach U.S. households as early as April xx.

"The United States Postal Service is proud to partner with the White House Coronavirus Task Force, the Department of Health and Human Services and a consortium of textile manufacturers in delivering on this critical national initiative," said Postmaster General and CEO Megan J. Brennan. "Our organization is uniquely suited to undertake this historic mission of delivering face coverings to every American household in the fight against the COVID-19 virus. Our employees have been providing essential service to the American people throughout the frontlines of this crisis delivering vital goods and services and serving as a lifeline for millions of people as this pandemic tragedy has unfolded. Today, we stand ready to deliver, as we have for 240 years, ~~to the American public to help~~ our country combat the pandemic."

The Postal Service will utilize its unrivaled distribution network to deliver the face coverings. Letter carriers, rural carriers and others will deliver one pack of five face coverings to each residential delivery point and PO Box. The packs will arrive labeled with a generic Postal Service barcode, not a specific address, and will include HHS instructions on proper use.

HHS will determine the delivery points and timetable by counties within select geographic areas. Orleans and Jefferson parishes in Louisiana will be the first areas to receive face coverings, followed by King County, WA; Wayne County, MI, and New York.

The Postal Service provides a vital public service that is a part of this nation's critical infrastructure.

The Postal Service receives no tax dollars for operating expenses and relies on the sale of postage, products and services to fund its operations.

###

For U.S. Postal Service media resources, including broadcast-quality video and audio and photo stills, visit the [USPS Newsroom](#). Follow us on [Twitter](#), [Instagram](#), [Pinterest](#), and [LinkedIn](#). Subscribe to the [USPS YouTube channel](#), like us on [Facebook](#) and enjoy our [Postal Posts blog](#). For more information about the Postal Service, visit [usps.com](#) and [facts.usps.com](#).

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Draft - Reactive Media Statement

The United States Postal Service is proud to partner with the White House Coronavirus Task Force, the Department of Health and Human Services (HHS), and ~~the a~~ consortium of textile manufacturers in delivering on this critical national initiative of distributing xxx million reusable cotton face coverings to every household in America, beginning in some of the areas experiencing ~~the highest~~ transmission rates of COVID-19.

The packs will arrive labeled with a generic Postal Service barcode, not a specific address, and HHS instructions on proper use. They will include five reusable face cloths, which can be used up to 15 times each.

This effort will be rolled out in phases with HHS determining the order of delivery locations. Today's announcement is another example of the Postal Service's critical role in delivering for America during the COVID-19 crisis. With our unrivaled network, which includes 630,000 employees, 31,000 Post Offices and delivery 6 days a week to 160 million addresses, the Postal Service is uniquely positioned to provide nationwide support during this historic crisis.

~~Recently, the Postal Service also strongly encouraged its employees to follow additional CDC recommendations, advising people to wear cloth face coverings in public settings where other social distancing measures are difficult to maintain. We continue to follow the strategies and measures of the CDC.~~

Commented [KRC1]: This paragraph does not seem to fit with the main purpose of this statement and takes away from the effort. ¶

¶ Also, if the media sees carriers and clerks in the area not wearing face coverings, this message probably won't land well.

Talking points for Concerning Legislative Strategy for the Fourth Stimulus Bill
April 1, 2020

- We need to start preparing immediately for the fourth stimulus bill.
- Based upon everything we have heard, the vote on the fourth stimulus bill, which will originate in the House, will occur on or about April 20, 2020. That is two and one half weeks away.
- In addition, we have a meeting scheduled with Congressman Connelly next week, and we fully expect that he will ask us for our legislative ask.
- Further, Democratic staffers from both our House and Senate Oversight Committees have scheduled an exploratory call with Ron Stroman later this afternoon.
- **As an initial matter, we need to agree on what our legislative ask will be.**
 - Initial Board approved legislative ask (\$44.5B)
 - Subsequent Board approved ask in response to a request from the Speaker (\$15B plus elimination of our debt, as the minimum prudent amount necessary to hedge against the substantial risk that the Postal Service will lose all of our liquidity this fiscal year)
 - Support the provisions in the Speaker's draft bill (\$25B/debt forgiveness/\$15B loan)
 - Support the deal approved by Chairman Johnson/Peters (\$13B)
 - Develop a broader set of legislative asks
 - Negotiate directly with POTUS and/or the Treasury Secretary
- In making our decision in this regard, one fact I should point out is that during our meeting yesterday with our union leadership, they stressed that they are hearing that any legislative asks need to be closely tied to COVID-19 issues, and that broader reform requests would not be looked upon favorably.
- While we recognize that this may be in the self-interests of the Unions, we note that Speaker Pelosi was widely criticized by Republicans on the Senate floor with regard to the last stimulus bill, and she has stated publically that she would like a quick consensus bill here.
- She has stated that while the bill should be COVID-19 related, she also wants it to be economic stimulus oriented, which could work in our favor.
- Once we have agreed upon our legislative request, we need to move out quickly. I believe that personal outreach by the Governors to certain key political figures

can help reframe the narrative about the Postal Service as a part of the nation's critical infrastructure that will be needed to perform essential services for the American people.

- Where the Governors can provide the most help in this round is to be focused on changing the Administration's views.
- There seems to be a growing consensus amongst the Board that the best way to do this would be through a direct meeting with POTUS. I am not opposed to this and would be happy to participate in any way I can.
- That said, I still have some concerns that the only way an appropriation for the Postal Service ultimately gets support in the Senate is for the Governors to reach an agreement on a legislative package with the Treasury Secretary, and we may not have sufficient time to make the connections between POTUS and the Secretary.
- In that regard, in a conversation that Ron Stroman had with Chairman Johnson's Chief of Staff, he advised Ron that we needed to be negotiating with the Treasury Secretary.
- Therefore we should think through whether we can have a meaningful dialogue with POTUS that will result in him giving instructions to the Secretary, or whether we should proceed on parallel tracks with the Secretary.
- Assuming parallel tracks are in order, I would suggest the following meetings/calls in an effort to change the Administration's view.
- We would recommend that Reince Priebus arrange a call for Governors Barger and Bloom with POTUS, and I could try to do the same through Peter Navarro. I would also be happy to participate in the call if it would be helpful.
- We would recommend that Chairman Duncan and Governor Martinez arrange a call with the Treasury Secretary to try to determine his issues with providing relief to the Postal Service. I still believe such a call could be important as a hedge strategy in case we can't make enough progress with POTUS, since in that instance the Secretary's views will have outsized influence on the process.
- We would recommend that Reince Priebus arrange a call for Chairman Duncan and Governor Barger with the Chief of Staff to the President, Mark Meadows.
- Assuming some of these conversations bear fruit, and that we reach an accommodation with POTUS and/or Secretary Mnuchin, we would recommend

outreach to our key legislative oversight leaders to inform them that we have such accommodation.

- We would recommend that Reince Priebus set up a call with Chairman Ron Johnson.
- Also, we would recommend that Governor Bloom arrange a call with Chairperson Maloney.
- We would recommend Governor Williams reach out to Majority Leader Steny Hoyer

As I noted, time is of the essence.

Talking points for Concerning Legislative Strategy for the Fourth Stimulus Bill
March 31, 2020

- Thank you Mr. Chairman, and I certainly agree with your point that we need to start preparing immediately for the fourth stimulus bill.
- I appreciate the willingness of the Governors to get personally involved since I believe the primary work that we need to do will be with the Administration, the political access that the Governors have will be invaluable.
- I fully agree with the Chairman's statement that where the Governors can provide the most help in this round is to be focused on changing the Administration's views.
- As the Chairman noted, the financial relief provided through the last stimulus bill was substantially undercut when the Administration would only support a loan, and that loan may come with terms and conditions that are not acceptable to the Postal Service.
- **As an initial matter, we need to agree on what our legislative ask will be.**
 - Initial Board approved legislative ask (\$44.5B)
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 - Support the provisions in the Speaker's draft bill (\$25B/debt forgiveness/\$15B loan)
 - Support the deal approved by Chairman Johnson/Peters (\$13B)
 - Develop a broader set of legislative asks
 - Negotiate directly with the Treasury Secretary
- Once we reach a collective resolution of this issue, I believe there are two primary areas where the personal participation of the Governors will help most.
- First, as the Chairman indicated, it would be very helpful, if we can reach agreement this week, we need to finish the 10-year strategy document. Both the Treasury Secretary and the President's Chief of Staff have let us know that they expect to see our plan, and our credibility would be markedly enhanced I don't think we can develop credibility with the Administration, even for short term relief, if they don't have faith that we have a longer term plan that is more in line with the Administration's expectations.

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- That said, given the pace with which the fourth stimulus bill is moving, we cannot afford to wait beyond this week to reach a consensus on the 10-year strategy document. To put it bluntly, time is of the essence. We need to map out an integrated political strategy that includes a holistic view of the manner we intend to portray the Postal Service, both in response to the present crisis, and for the future.
- Once we have agreed upon our legislative request, we need to move out quickly. are ready to roll out; I believe that personal outreach by the Governors to certain key political figures can help reframe the narrative about the Postal Service as a part of the nation's critical infrastructure that will be need to perform as essential service for the American people.
- We believe the only way an appropriation for the Postal Service gets support in the Senate is for the Governor to reach an agreement on a legislative package with the Treasury Secretary. For that reason, the single most important activity that needs to occur is a discussion with the Secretary, as soon as it can be arranged.
- In that regard, once we are ready to go, I would suggest the following meetings/calls in an effort to change the Administration's view
- We would recommend that Chairman Duncan and Governor Martinez arrange a call with the Treasury Secretary to work out a legislative package that could get support in the Senate. I can't emphasize enough the importance of this call, since the Secretary's views will inform all of our other activities we will purpose to get legislation, given that we believe he has outsized influence on the process.
- We would recommend that Reince Priebus arrange a call for Chairman Duncan and Governor Barger with the Chief of Staff to the President, Mark Meadows.
- Assuming some of these conversations bear fruit, and that we reach an accommodation with Secretary Mnuchin, we would recommend outreach to our key legislative oversight leaders to inform them that we have such accomodation.
- We would recommend that Reince Priebus set up a call with Chairman Ron Johnson.
- Also, we would recommend that Governor Bloom arrange a call with Chairperson Maloney.
- We would recommend Governor Williams reach out to Majority Leader Steny Hoyer

• As I noted, Time is of the essence – given what we're hearing – I'll ask Ron to provide some insight on timing.

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DISCUSSION WITH DEPARTMENT OF TREASURY
CONCERNING BORROWING UNDER THE CARES ACT
4/9/2020

Department of Treasury

Gary Grippio
Kip Kranbuhl
Various others, who did not
identify themselves
and provided no input

Postal Service

Joe Corbett
Tom Marshall
Elizabeth Schafer
Mark Berthold
Walter Alesevich

Major discussion points (mostly presented by Gary Grippio):

- Loan to be directly from the Treasury, not the FFB
 - Don't want to run this through books of the FFB
- Note Agreement to be premised on Treasury's Basic Interagency Borrowing Document (MOU)
 - Similar to what Treasury presented to Ginny Mae
- Not a future advance promissory note; the note would be in a maximum amount and the Postal Service would draw down on that amount
- Terms and Conditions
 - No Consent Rights
 - Triggering Events for Borrowing
 - § Reporting to Treasury amount Postal Service cash position
 - § Report of Postal Service actual volumes compared to projections
 - § Condition—when permissible draw relative to cash on hand
 - Interest Rate—Ensure the Treasury's cost of funds were covered
- Maturity—Haven't thought this condition through
- Reporting at the time of draw
 - Satisfaction of covenants as a prerequisite to exercising a draw
 - Certification of Postal Service amount operating losses
- Secretary Mnuchin is reviewing everything related to CARES Act.
 - He reviews every press release
 - He will review documents related to the \$10B Postal Service borrowing

Liz Schafer asked to forward a copy of the MOU; Grippio responded to Joe that the MOU embodies the process and accounting aspects of the loan and that we would have an initial copy in a week to 10 days

In response to Tom Marshall's questions about discussions with Mike Elston about potential debt forgiveness, Kip Kranbuhl noted that the outstanding obligations needs to be repaid so as to avoid the FFB booking a loss. Kip Kranbuhl also noted that Treasury is looking for a sense of where the Postal Service's financial are (what is the burn rate?) Gary Grippio noted that he had discussions with the Postal Service and he would brief Kip Kranbuhl.

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**PRIVILEGED & CONFIDENTIAL
ATTORNEY-CLIENT COMMUNICATION
ATTORNEY WORK PRODUCT**

MEMORANDUM

April 24, 2020

TO: Thomas J. Marshall and Keith E. Weidner
FROM: Mayer Brown LLP
RE: Ceding control of Postal Service operations to the Federal Financing Bank

This memo sets out a summary of our central conclusions on the legality of an agreement that would cede effective operational control of key Postal Service functions to the Secretary of the Treasury or the Federal Financing Bank (FFB). In conducting this analysis, we assume that the terms of the proposed agreement would be substantially similar to those that the Postal Service discussed with the FFB in 2019. We base our conclusions both on a review of all the relevant materials prepared by the Postal Service and Treasury in 2019, and on our own independent research into the governing constitutional and statutory law.

We agree with the conclusion reached by the Postal Service at that time that such a surrender of Postal Service decision-making authority would be impermissible as a matter of law. By statute, Congress has given control over postal operations to the Governors and the Board of Governors. Under settled principles of constitutional law and statutory interpretation, the Governors may not “subdelegate” that authority to another department of the Executive Branch unless there is affirmative evidence that Congress permitted them to do so. And Congress has not affirmatively provided the Governors permission to subdelegate control over Postal Service operations to Treasury or the FFB, either in the recent CARES Act or in the Postal Service’s organic statute, the Postal Reorganization Act (PRA). Any agreement by the Postal Service to surrender its authority to the Secretary of the Treasury or to the FFB therefore would be illegal.

In particular:

- The Postal Service is an independent authority of the Executive Branch whose powers are statutorily assigned by Congress to the Governors and the Board of Governors. The courts uniformly have held that, when Congress has conferred specified powers on a particular agency, a different agency may not exercise those powers unless there is “affirmative evidence” that Congress permitted subdelegation of that authority from the first to the second agency; “[a] general delegation of decision-making authority to a federal administrative agency does *not*, in the ordinary course of things, include the power to subdelegate that authority” to a different agency. *U.S. Telecom Ass’n v. FCC*, 359 F.3d 554, 566 (D.C. Cir. 2004). Consequently, the questions here are whether (1) an agreement between the Postal Service and Treasury/FFB giving the latter control over core Postal Service operations would in fact constitute a subdelegation of the Postal Service’s authority; and (2) if so, whether that subdelegation has been authorized by Congress with sufficient clarity.
- On the first of these questions, an agreement that would give the Treasury/FFB control over Postal Service policy and decision-making **would** constitute a subdelegation. There is little case law precisely on point, but that likely is because no agency has proposed ceding to another government department effective control over central aspects of its decision making, including its relations with third parties and its policymaking—which is the sort of control demanded by the FFB in 2019. Indeed, the FFB did not really argue otherwise in 2019. The more limited points that it did offer in support of its argument that the proposed agreement would not constitute a subdelegation are unpersuasive.
 - The FFB suggested that, by entering into the proposed agreement, the Postal Service would not be subdelegating its authority, but instead exercising its own choice to accept FFB control. This distinction is plainly wrong; it is simply another way of stating that the Postal Service (by accepting the proposal) would have chosen to subdelegate its authority. That doesn’t distinguish the situation here from every case of subdelegation, in which the delegating agency (whether by contract or by regulation) will have voluntarily sought to delegate an element of its authority.

- The FFB also contended that the Postal Service would retain ultimate control over its policies because it could break its agreement with the FFB, subject only to the loss of financing that the FFB had not been obligated to provide in the first place and that the Postal Service could seek from other sources. Although the FFB did not put its position in these terms, it could analogize this theory to decisions that have recognized the propriety of agencies consulting with other executive departments (or with private parties), so long as the principal agency retains final decision-making authority. On that view, Treasury or the FFB would simply be seeking input into Postal Service decision making that the Postal Service would be free to reject.

Our view, however, is that the subdelegation doctrine makes it impermissible for an Executive Branch instrumentality to enter into what purports to be a binding agreement to illegally subdelegate its authority. That is so for a number of reasons.

- ✓ **First**, even if there is a theoretical possibility that the Postal Service could terminate its loan agreement rather than accede to particular future Treasury/FFB directions, so long as the contract is in force there would be an illegal subdelegation, which would make it improper for the Postal Service to agree to the proposed contract terms.
- ✓ **Second**, and relatedly, by accepting funds from the Treasury/FFB on the condition that it submit to their control, the Postal Service would be taking action—and would be inducing Treasury/FFB also to take action—expressly premised on the existence of an illegal subdelegation. This looks nothing like the sort of mechanism for offering nonbinding advice from one agency to another that has been found to be consistent with the subdelegation doctrine. We doubt that courts would find such an agreement lawful on the “wink and

a nod” understanding that the facially binding contract is only for show.

- ✓ And *third*, the PRA specifically authorizes the Postal Service to enter into “binding covenants” with the holders of its obligations relating to use of Postal Service revenues and receipts, indicating the congressional expectation that Postal Service contracts would in fact be binding in the ordinary sense. Against this background, there is no basis to believe that Congress authorized the Postal Service to subdelegate its authority by entering into facially “binding” contractual obligations that it intends to disregard.

This problem could not be avoided by including a contract term that allows the Postal Service to terminate the lending agreement and return the borrowed funds. In those circumstances, there still would be an illegal subdelegation while the contract was in force. And the reality is that the Postal Service would be unlikely to be able to return the funds in light of its other legal obligations (*e.g.*, union contracts, retirement funding obligations, and operational requirements), making the possibility of termination—and the avoidance of impermissible subdelegation—illusory..

- The FFB invoked court decisions that recognize the authority of federal agencies to condition their actions on determinations made by other federal agencies, by state agencies, or even by nongovernmental entities. Although the limits of this principle are a little murky, we believe that courts would find these decisions inapposite here. The decisions cited by the FFB generally involve circumstances where it was reasonable for the principal agency to defer to the judgments of, or to rely on factual findings made by, a separate entity that has special knowledge or expertise bearing on the principal agency’s action. This sort of incorporation of a secondary determination constitutes only a very limited form of subdelegation. The proposal here,

which would delegate central Postal Service policymaking authority to an entity that has no programmatic connection to postal operations, is materially different. If the proposed agreement here is legal, the limit on subdelegation would effectively be read out of the law.

- On the second question posed by the prospect of awarding control over Postal Service operations to Treasury/FFB, Congress has not authorized that sort of subdelegation of Postal Service authority. Here, two interpretive rules apply: as a general matter, Congress does not use ordinary language to achieve extraordinary results (what the Supreme Court has called the “no elephants in mouseholes” principle); and, in particular, courts will not find subdelegation unless Congress has authorized it with unmistakable clarity. Both principles establish that the proposed subdelegation is not authorized.
 - In 2019 the FFB suggested that the Postal Service’s general authority under the PRA to enter into contracts related to financing that it deems “necessary and desirable” authorizes it to contract away its authority. 39 U.S.C. § 2005(b)(1); *see also* 39 U.S.C. § 2005(c)(8) (obligations may be subject to such “terms and conditions” as the Postal Service determines); 39 U.S.C. § 2006(a) (Secretary of the Treasury and the Postal Service may enter into financing agreements under “such terms” as they agree). The CARES Act contains very similar language, providing that the Secretary of the Treasury may lend to the Postal Service “upon terms and conditions mutually agreed upon by the Secretary and the Postal Service.” § 6001(b)(2). Although this language may be literally consistent the Postal Service entering into a contract on terms that surrender its core powers, the statutory text is insufficiently clear to authorize a subdelegation of Postal Service authority.
 - ✓ So far as the PRA is concerned, the remainder of Sections 2005 and 2006 are technical or general; nothing in them suggests that Congress meant to authorize the Postal Service to cede control over central aspects of its operations. Even if contractual

provisions of the sort proposed by the FFB in 2019 might appear in a private contract, read in context it is very unlikely that Congress meant the boilerplate “terms and conditions” language of Sections 2005 and 2006 to authorize a governmental entity to surrender its core decision-making authority.

- ✓ As for the CARES Act, it provides simply that the Postal Service may borrow funds from Treasury to be used for “operating expenses” if additional amounts are necessary “due to the COVID-19 emergency.” § 6001(b). Here, too, there is no suggestion in the statutory language or structure that Congress had it in mind to allow for a fundamental reallocation of Postal Service powers, let alone “affirmative evidence” that Congress meant to authorize subdelegation of Postal Service authority.
- ✓ That conclusion is confirmed by unambiguous evidence that Congress meant to safeguard the independence of the Postal Service and, to the greatest extent possible, to insulate it from direct control by the President or other Executive Branch officials. That is why the PRA gives the Governors ultimate authority over the Postal Service and permits their removal only for cause. The legislative history of the PRA also contains clear indications that, in particular, Congress did not want the Secretary of the Treasury to use control over financing as a means of interfering with Postal Service operations. The PRA’s anodyne contracting language is wholly consistent with these indications of congressional intent.
- ✓ The even more cursory terms of the CARES Act cannot reasonably be read to reverse this fundamental and long-settled congressional policy favoring Postal Service independence. The Congress that enacted the CARES Act is presumed to have been aware that the PRA was designed to limit direct presidential control

over the Postal Service and to differentiate the Postal Service from conventional executive departments. Given that understanding, a simple authorization for the Postal Service to enter into a loan agreement with the Secretary of the Treasury—which is all the CARES Act contains—does not authorize the Secretary to demand, or the Postal Service to accept, Treasury control over Postal Service operations.

- The FFB argued in 2019 that its own statute authorizes subdelegation of Postal Service authority, but that contention is insupportable. The FFB is authorized generally to purchase or sell obligations issued, sold, or guaranteed by a federal agency “on terms and conditions determined by the bank.” 12 U.S.C. § 1285(a). As with the similar language in the PRA and the CARES Act, that phrase is not reasonably understood to give the FFB authority to demand control over the policy making of myriad federal agencies. In fact, the legislative history shows that the FFB was created to coordinate federal financing programs and, in particular, that Congress did *not* intend the FFB to be a mechanism by which the Treasury Secretary could assert authority over Postal Service policy. Nothing here provides the clarity necessary to support subdelegation.
- Entering into an agreement that creates an illegal subdelegation, even if that were something the Postal Service might consider, would create serious practical problems. Third parties that were adversely affected by policy changes demanded by Treasury/FFB—including, among other parties, Postal Service employees and customers—would have standing to bring lawsuits challenging the legality of those changes as inconsistent with the bar on subdelegation. In our view, those suits would likely be successful. Courts might respond by invalidating the changes, and perhaps the lending agreement itself. Although the ways in which such judicial decisions might be implemented are not entirely clear, at a minimum such decisions would cause great uncertainty and could result in substantial disruption of Postal Service operations and funding.



Memorandum

VIA EMAIL

To: Keith Weidner, Deputy Legal Counsel, United States Postal Service
From: Stefan Passantino
CC: Joe Olson, Nicholas Boerke and Nathan Groth
Date: March 26, 2020
Subject: The Defense Production Act of 1950 and COVID-19 Pandemic

THE DEFENSE PRODUCTION ACT OF 1950

(50 U.S.C. §4501 *et seq.*)

And its implications for the United States Postal Service (“USPS”) during the COVID-19 Pandemic

Introduction

The Defense Production Act of 1950 (“DPA”) was originally enacted as a response to the outbreak of the Korean War and was modeled after the War Powers Acts of World War II. The DPA, however, far outlasted active hostilities in Korea and Congress has amended, extended and or renewed portions of the DPA more than 50 times—most recently Congress extended the DPA until September 30, 2025 in the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (P.L. 115-232). In the DPA Congress declared that

the security of the United States is dependent on the ability of the domestic industrial base to ***supply materials and services*** for the national defense and to prepare for and respond to military conflicts, ***natural or man-caused disasters***, or acts of terrorism within the United States.

50 U.S.C. §4502(a)(1) (emphasis added).

In general the DPA confers significant powers on to the Executive Branch to impact, direct, prioritize and incentivize industries as is necessary in the “national defense.” Three main sections of the DPA remain, (I) Title III: Strengthening Domestic Capability; (II) Title I: Priorities and Allocations; and (III) Title VII: General Provisions. Because Title III is most applicable to the USPS and the COVID-19 Pandemic, we will discuss Title II before Title I, below.

The DPA expressly provides the Executive Branch with an “array of authorities to shape ***national defense*** preparedness programs and to take appropriate steps to maintain and enhance the domestic industrial base.” 50 U.S.C. §4502(a)(4) (emphasis added). The term “national defense” is defined very broadly in the DPA, including many of the functions provided by the USPS; national defense is defined as

programs for military and energy production or construction, military or critical infrastructure assistance to any foreign nation, homeland security, stockpiling, space, and any directly related activity. Such term includes emergency preparedness activities conducted pursuant to title VI of The Robert T. Stafford Disaster Relief and Emergency Assistance Act [42 U.S.C. §§5195 et seq.] and critical infrastructure protection and restoration.

50 U.S.C. §4552(14).

“Critical infrastructure” is further broadly defined in the DPA to include “any systems and assets, whether physical or cyber-based, so vital to the United States that the degradation or destruction of such systems and assets would have a debilitating impact on national security, including, but not limited to, national economic security and national public health and safety.” 50 U.S.C. §4552(2). With over 500,000 employees and 187.8 Million items processed and delivered each day, 47% of the World’s mail, the USPS is unquestionably critical to a functioning U.S. and World economy. See <https://facts.usps.com>. The Department of Homeland Security, Cybersecurity and Infrastructure Security Agency has further classified “postal and shipping workers” as part of the “Essential Critical Infrastructure Workforce” in light of the COVID-19 Pandemic by memorandum dated March 19, 2020. See https://www.cisa.gov/sites/default/files/publications/CISA_Guidance_on_the_Essential_Critical_Infrastructure_Workforce_508C_0.pdf.

Moreover, the DPA references 42 U.S.C. §5195(a)(3) for the definition of “emergency preparedness” activities, which includes

all those activities and measures designed or undertaken to prepare for or minimize the effects of a hazard upon the civilian population, to deal with the immediate emergency conditions which would be created by the hazard, and to effectuate emergency repairs to, or the emergency restoration of, vital utilities and facilities destroyed or damaged by the hazard.

As a result the DPA extends well beyond military preparedness and support and is an important tool for the response and recovery from various types of national emergencies both foreign and domestic, including the current COVID-19 Pandemic. In fact, the essential services provided by the USPS, including the universal services mandate, during times where individuals are quarantined, and in many circumstances isolated from other services, is an important aspect of minimizing the effect of such a hazard upon the public.

I. Title III of the DPA: *Strengthening Domestic Capability*

Title III of the DPA allows the President, or other portions of the Executive Branch through delegation, to provide incentives and assistance, including loans and loan guarantees, to, *inter alia*, “assure that critical components, critical technology items, essential materials, and industrial resources are available from reliable sources when needed to meet defense requirements during peacetime, graduated mobilization, and national emergency.” U.S.C. §4517(b). As explained above, the USPS is likely considered part of the “critical infrastructure” of the United States, and the World, and Title III of the DPA allows for assistance and incentives to the USPS to assure that its critical function is provided in both peacetime and during a national emergency such as the COVID-19 Pandemic.

Pursuant to 50 U.S.C. §4531(a) the President has the authority under the DPA to reduce current shortfalls or prevent projected shortfalls of those entities providing critical items by authorizing direct loans or loan guarantees “for the purpose of financing any contractor, subcontractor, ***provider of critical infrastructure***, or other person in support of . . . production and ***deliveries or services essential to the national defense***.” *Id.* (emphasis added). Although the DPA typically requires meeting certain conditions and for the President to make certain determinations before the incentives can be provided, if a national emergency is declared by Congress or the President such conditions and determinations do not apply. 50 U.S.C. §4531(2). In the case of the COVID-19 Pandemic, the President has formally declared a national emergency and therefore the conditions and determinations are not required. See <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/>. Regardless of a declaration of national emergency, Congress still must appropriate funds providing authority for such loan or loan guarantees. 50 U.S.C. §4531(3).

Congress has authorized the USPS, pursuant to 39 U.S.C. §2005, to borrow certain amounts of funds, but the total amount and net annual increase in obligations is subject to significant restrictions. However, the “CARES Act,” which has passed the Senate and is pending before the House of Representatives, includes an express appropriation of funds for direct loans to the USPS from the U.S. Treasury notwithstanding the limitations in 39 U.S.C. §2005. Specifically, Title VI, §6001(b) of the “CARES Act” currently includes language that allows the USPS to “borrow money from the Treasury in an amount not to exceed \$10,000,000,000,” in addition to any other existing borrowing authority, if the USPS determines that due to the COVID-19 Pandemic it “will not be able to fund operating expenses without borrowing money.” The direct loan(s) of up to \$10 Billion must be used for operating expenses and cannot be used for the payment of existing debt. *Id.* §6001(b)(1)(A)-(B). The loans under the CARES Act may be upon favorable terms, including any terms and conditions mutually agreed upon by the Secretary [of the Treasury] and the [USPS].” *Id.* §6001(b)(2).

Although the \$10 Billion of available borrowing authority under the CARES Act, if enacted, is an important tool for the USPS to weather the COVID-19 Pandemic, the USPS payroll is approximately \$4 Billion every two weeks and if additional borrowing becomes necessary Title III of the DPA can be invoked to provide additional funds so that USPS can continue to provide its critical infrastructure during this national emergency.

II. Title I of the DPA: *Priorities and Allocations Authority*

Title I of the DPA allows the President, or other portions of the Executive Branch through delegation, to require persons, businesses and other entities to (1) give ***priority*** to certain contracts, orders or other performance as necessary or appropriate to promote the national defense and (2) to ***allocate*** the distribution of supplies, materials, services or even facilities as deemed necessary or appropriate. 50 U.S.C. §4511(a).

The prioritization authority is the most commonly used aspect of the DPA, namely with regard to certain contracts or orders by the Department of Defense, including the B-2 Bomber, Air Force One and certain Mine Resistant Ambush Protected (MRAP) Vehicles. See www.bis.doc.gov/index.php/forms-documents/pdfs/1257-dx-dated-program-list/file. Although less common, other departments and agencies have used DPA prioritization such as the Department of Homeland Security requiring prioritization of manufacturing housing units, food and bottled water during the 2017 disaster season. See Department of Homeland Security, *The Defense Production Act Committee: Report to Congress*, Calendar Year 2017 Report, June 18, 2018, p. 10.

The allocation authority is rarely used. The best example of its use is the Civil Reserve Air Fleet (CRAF) whereby civilian aircraft are “allocated” for potential use by the Department of Defense in case needed in a nation defense crisis where the existing military air fleet is insufficient. See www.dot.gov/ost/oiser/craf.htm. However, the use of the allocation authority has recently been a topic of consideration during the COVID-19 Pandemic to potentially require private corporations to allocate resources towards the immediate production of test kits and other medical supplies.

Although providing powerful tools for the Executive Branch to invoke private assistance in national defense and national emergency efforts, the prioritization and allocation authorities of Title I are less likely to impact the USPS and more likely to affect private industry and manufacturing companies. That being said, Title VI, § 6001(c) of the “CARES Act,” which has passed the U.S. Senate and is pending before the House of Representatives, expressly instructs the USPS to “prioritize delivery of postal products for medical purposes” during the COVID-19 Pandemic and “establish temporary delivery points, in such form and manner as the [USPS] determines necessary, to protect employees . . . and individuals receiving deliveries...”

III. Title VII of the DPA: *General Provisions*

Title VII of the DPA includes various miscellaneous provisions that are generally not applicable to the USPS, including, *inter alia*, special preferences for small businesses, 50 U.S.C. §4551, ability to conduct investigations and obtain information regarding the domestic industrial base, 50 U.S.C. §4555, immunity from anti-trust laws where the DPA is used to encourage voluntary agreements between competing companies and interest, 50 U.S.C. §4558, the ability of the President to create a committee of industry executives, 50 U.S.C. §4560, and the creation of a committee on foreign investment, 50 U.S.C. §4565.

Conclusion

The DPA is an important and strong tool for the President and the Executive Branch to act in (or prepare for) wartime and times of crisis or emergency and the crucial function of the USPS makes it part of the “critical infrastructure” of the United States that is intended to be protected by the DPA.

Most applicable to the potential needs of the USPS in times of crisis such as the COVID-19 Pandemic is the authority to provide the USPS with significant direct loans or loan guarantees pursuant to Title III of the DPA. However, because the DPA requires express appropriation for such direct loans and loan guarantees and existing Federal Law caps USPS borrowing authority the USPS cannot rely exclusively on Executive authority under the DPA.

The USPS should:

- (1) engage Congress to assure passage of the CARES Act by the House without alteration to the section authorizing \$10 Billion in direct loans;
- (2) immediately upon passage of the CARES Act, work with the Treasury Department to secure favorable terms for funds made available; and
- (3) continue to engage with Congress to secure additional authority for loans or loan guarantees in excess of the \$10 Billion appropriated in the CARES Act if the current national emergency continues.



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all those activities and measures designed or undertaken to prepare for or minimize the effects of a hazard upon the civilian population, to deal with the immediate emergency conditions which would be created by the hazard, and to effectuate emergency repairs to, or the emergency restoration of, vital utilities and facilities destroyed or damaged by the hazard.

As a result the DPA extends well beyond military preparedness and support and is an important tool for the response and recovery from various types of national emergencies both foreign and domestic, including the current COVID-19 Pandemic. In fact, the essential services provided by the USPS, including the universal services mandate, during times where individuals are quarantined, and in many circumstances isolated from other services, is an important aspect of minimizing the effect of such a hazard upon the public.

I. Title III of the DPA: *Strengthening Domestic Capability*

Title III of the DPA allows the President, or other portions of the Executive Branch through delegation, to provide incentives and assistance, including loans and loan guarantees, to, *inter alia*, “assure that critical components, critical technology items, essential materials, and industrial resources are available from reliable sources when needed to meet defense requirements during peacetime, graduated mobilization, and national emergency.” U.S.C. §4517(b). As explained above, the USPS is likely considered part of the “critical infrastructure” of the United States, and the World, and Title III of the DPA allows for assistance and incentives to the USPS to assure that its critical function is provided in both peacetime and during a national emergency such as the COVID-19 Pandemic.

Pursuant to 50 U.S.C. §4531(a) the President has the authority under the DPA to reduce current shortfalls or prevent projected shortfalls of those entities providing critical items by authorizing direct loans or loan guarantees “for the purpose of financing any contractor, subcontractor, ***provider of critical infrastructure***, or other person in support of . . . production and ***deliveries or services essential to the national defense***.” *Id.* (emphasis added). Although the DPA typically requires meeting certain conditions and for the President to make certain determinations before the incentives can be provided, if a national emergency is declared by Congress or the President such conditions and determinations do not apply. 50 U.S.C. §4531(2). In the case of the COVID-19 Pandemic, the President has formally declared a national emergency and therefore the conditions and determinations are not required. See <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/>. Regardless of a declaration of national emergency, Congress still must appropriate funds providing authority for such loan or loan guarantees. 50 U.S.C. §4531(3).

Congress has authorized the USPS, pursuant to 39 U.S.C. §2005, to borrow certain amounts of funds, but the total amount and net annual increase in obligations is subject to significant restrictions. However, the “CARES Act,” which has passed the Senate and is pending before the House of Representatives, includes an express appropriation of funds for direct loans to the USPS from the U.S. Treasury notwithstanding the limitations in 39 U.S.C. §2005. Specifically, Title VI, §6001(b) of the “CARES Act” currently includes language that allows the USPS to “borrow money from the Treasury in an amount not to exceed \$10,000,000,000,” in addition to any other existing borrowing authority, if the USPS determines that due to the COVID-19 Pandemic it “will not be able to fund operating expenses without borrowing money.” The direct loan(s) of up to \$10 Billion must be used for operating expenses and cannot be used for the payment of existing debt. *Id.* §6001(b)(1)(A)-(B). The loans under the CARES Act may be upon favorable terms, including any terms and conditions mutually agreed upon by the Secretary [of the Treasury] and the [USPS].” *Id.* §6001(b)(2).

Although the \$10 Billion of available borrowing authority under the CARES Act, if enacted, is an important tool for the USPS to weather the COVID-19 Pandemic, the USPS payroll is approximately \$4 Billion every two weeks and if additional borrowing becomes necessary Title III of the DPA can be invoked to provide additional funds so that USPS can continue to provide its critical infrastructure during this national emergency.

II. Title I of the DPA: *Priorities and Allocations Authority*

Title I of the DPA allows the President, or other portions of the Executive Branch through delegation, to require persons, businesses and other entities to (1) give ***priority*** to certain contracts, orders or other performance as necessary or appropriate to promote the national defense and (2) to ***allocate*** the distribution of supplies, materials, services or even facilities as deemed necessary or appropriate. 50 U.S.C. §4511(a).

The prioritization authority is the most commonly used aspect of the DPA, namely with regard to certain contracts or orders by the Department of Defense, including the B-2 Bomber, Air Force One and certain Mine Resistant Ambush Protected (MRAP) Vehicles. See www.bis.doc.gov/index.php/forms-documents/pdfs/1257-dx-dated-program-list/file. Although less common, other departments and agencies have used DPA prioritization such as the Department of Homeland Security requiring prioritization of manufacturing housing units, food and bottled water during the 2017 disaster season. See Department of Homeland Security, *The Defense Production Act Committee: Report to Congress*, Calendar Year 2017 Report, June 18, 2018, p. 10.

The allocation authority is rarely used. The best example of its use is the Civil Reserve Air Fleet (CRAF) whereby civilian aircraft are “allocated” for potential use by the Department of Defense in case needed in a nation defense crisis where the existing military air fleet is insufficient. See www.dot.gov/ost/oiser/craf.htm. However, the use of the allocation authority has recently been a topic of consideration during the COVID-19 Pandemic to potentially require private corporations to allocate resources towards the immediate production of test kits and other medical supplies.

Although providing powerful tools for the Executive Branch to invoke private assistance in national defense and national emergency efforts, the prioritization and allocation authorities of Title I are less likely to impact the USPS and more likely to affect private industry and manufacturing companies. That being said, Title VI, § 6001(c) of the “CARES Act,” which has passed the U.S. Senate and is pending before the House of Representatives, expressly instructs the USPS to “prioritize delivery of postal products for medical purposes” during the COVID-19 Pandemic and “establish temporary delivery points, in such form and manner as the [USPS] determines necessary, to protect employees . . . and individuals receiving deliveries...”

III. Title VII of the DPA: *General Provisions*

Title VII of the DPA includes various miscellaneous provisions that are generally not applicable to the USPS, including, *inter alia*, special preferences for small businesses, 50 U.S.C. §4551, ability to conduct investigations and obtain information regarding the domestic industrial base, 50 U.S.C. §4555, immunity from anti-trust laws where the DPA is used to encourage voluntary agreements between competing companies and interest, 50 U.S.C. §4558, the ability of the President to create a committee of industry executives, 50 U.S.C. §4560, and the creation of a committee on foreign investment, 50 U.S.C. §4565.

Conclusion

The DPA is an important and strong tool for the President and the Executive Branch to act in (or prepare for) wartime and times of crisis or emergency and the crucial function of the USPS makes it part of the “critical infrastructure” of the United States that is intended to be protected by the DPA.

Most applicable to the potential needs of the USPS in times of crisis such as the COVID-19 Pandemic is the authority to provide the USPS with significant direct loans or loan guarantees pursuant to Title III of the DPA. However, because the DPA requires express appropriation for such direct loans and loan guarantees and existing Federal Law caps USPS borrowing authority the USPS cannot rely exclusively on Executive authority under the DPA.

The USPS should:

- (1) engage Congress to assure passage of the CARES Act by the House without alteration to the section authorizing \$10 Billion in direct loans;
- (2) immediately upon passage of the CARES Act, work with the Treasury Department to secure favorable terms for funds made available; and
- (3) continue to engage with Congress to secure additional authority for loans or loan guarantees in excess of the \$10 Billion appropriated in the CARES Act if the current national emergency continues.

Memorandum

VIA EMAIL

To: Tom Marshall, General Counsel, United States Postal Service
Keith Weidner, Deputy General Counsel, United States Postal Service

From: Stefan Passantino

CC: Joe Olson, Nicholas Boerke and Nathan Groth

Date: April 2, 2020

Subject Summary Analysis of Options Available to the USPS for Relief and Resources
:
During the COVID-19 Pandemic

Executive Summary

This memorandum provides a detailed summary analysis of various options available to the United States Postal Service (USPS) to obtain additional resources and relief during the current COVID-19 national emergency.

We have identified several different avenues for the USPS to achieve its goals, including (I) at least \$10 Billion of additional funding and the ability for the President to make purchases to assist the USPS using Defense Production Act (DPA) funding available in the recently enacted CARES Act; (II) other Executive authority and action using the DPA, National Emergencies Act of 1976, Public Health Service Act, the Stafford Disaster Relief and Emergency Assistance Act and other Executive orders, and (III) additional legislative or regulatory reforms.

Section I – The CARES Act

Section I of this memorandum provides an in depth overview of portions of the recently enacted CARES Act that the USPS could utilize for immediate additional assistance and resources.

First, §6001 of the CARES Act provides an express appropriation of \$10 Billion for the USPS to borrow money from the United States Treasury on any terms acceptable to the USPS and Secretary of the Treasury. This funding is in addition to the cap that otherwise exists on USPS loans pursuant to 39 U.S.C. §2005 and the USPS can use the funding to cover operating costs, but not pay existing debt. The additional \$10 Billion of funding can be obtained as soon as the USPS can agree on terms with the Treasury and may be obtained on favorable terms in much the same manner as other funds obtained by the USPS from the Treasury's Federal Financing Bank.

Secondly, §4003 of the CARES Act provides an additional \$17 Billion for loans or loan guarantees to U.S. businesses “critical to maintaining national security.” As explained in more detail below, because the USPS plays a highly important role in national security and continuity of government and is also considered essential to the critical infrastructure of the Nation, we believe that the USPS could also qualify for additional funding under this Section of the CARES Act. Section 4003 of the CARES Act does not expressly address the otherwise applicable cap on USPS borrowing in 39 U.S.C. §2005, but we believe a case can be made that the cap does not apply to this appropriation given the USPS’s integral role in maintaining national security and continuity during a national emergency. Additional guidelines and requirements for qualification for this funding is expected from the Treasury Department within the next several days at which time we plan to supplement this memorandum with specific instructions regarding how the USPS can apply for and obtain this additional funding, but we encourage the USPS to immediately engage Treasury in advance of Treasury issuing guidelines. The USPS could use this funding for operating expenses during the COVID-19 Pandemic or for other needs such as the purchase of Personal Protective Equipment or other supplies.

Lastly, §4017 of the CARES Act integrates the DPA and expressly encourages the President to use his powers under the DPA during the existing national emergency. This section of the CARES Act further appropriates an additional \$1 Billion for the President to use to make purchases under his DPA authority. The President could use portions of this funding to purchase Personal Protective Equipment or other resources for the USPS.

Section II – Executive Authority and Action

Section II of this memorandum identifies and addresses three major Acts that provide executive authority during times of national emergencies and that the USPS may benefit from, including the DPA, the National Emergencies Act of 1976, the Public Health Service Act, and the Robert T. Stafford Disaster Relief and Emergency Assistance Act.

General details on the DPA were included in the original memorandum to the USPS dated March 26, 2020 and further details are included below. The DPA extends well beyond military preparedness and support and is an important tool for the response and recovery from various types of national emergencies both foreign and domestic, including the current COVID-19 Pandemic. The essential services provided by the USPS, including the universal services mandate, during times where individuals are quarantined, and in many circumstances isolated from other services, is an important aspect of minimizing the effect of such a hazard upon the public. Because of the critical function of the USPS the President can use the DPA to assist the USPS in various ways, including providing direct loans or loan guarantees, directing prioritization of USPS needs for materials, equipment and supplies and the purchase or allocation of resources for the USPS.

The National Emergencies Act grants the President the authority to declare a national emergency and outlines the powers and authorities available to the President during national emergencies.

The Public Health Service Act authorizes the Secretary of Health and Human Services to access the Public Health Emergency Fund during public health emergencies. Pursuant to the Public Health Service Act, the Secretary of Health and Human Services has broad authority to utilize the Public Health Emergency Fund once the Secretary has determined a public health emergency exists which may provide the USPS an avenue to receive funding should the Secretary determine that such use of funds are appropriate. The Public Health Service Act authorizes the Secretary of Health and Human Services, in coordination with the Secretary of Homeland Security, to maintain the Strategic National Stockpile (SNS). The Secretary of Health and Human Services shall deploy the SNS as (i) required by the Secretary of Homeland Security to respond to an actual or potential emergency or (ii) deploy the SNS at their discretion to respond to an actual or potential public health emergency or other situation in which deployment is necessary to protect the public health or safety. Accordingly, the USPS may be able to acquire personal protective equipment for its employees and contractors from the Strategic National Stockpile through the discretion of the Secretary of Health and Human Services.

The Robert T. Stafford Disaster Relief and Emergency Assistance Act generally establishes the assistance provided by the federal government to state and local governments to alleviate the suffering and damages caused by disasters. Chapter 68 of the Stafford Act establishes that federal agencies, specifically including the USPS, may be reimbursed for services provided pursuant to the President's directive. Among other things, the President may direct federal agencies to support state and local emergency assistance efforts; coordinate disaster relief assistance; provide emergency assistance; and assist state and local governments in the distribution of medicine, food, and other supplies. The Stafford Act may provide the USPS the ability, through a designation made by the President, to provide additional assistance to emergency relief efforts and receive reimbursement for such assistance.

Section II of this memorandum also identifies and addresses the implications of the USPS's role in carrying out two Primary Mission Essential Functions as well as "postal, parcel, courier, last-mile delivery, and shipping and related workers, to include private companies" being designated essential critical infrastructure workers.

Presidential Policy Directive 40 directs the Secretary of Homeland Security through the Administrator of the Federal Emergency Agency to coordinate the implementation, execution, and assessment of continuity activities among executive departments and agencies. The USPS carries out two Primary Mission Essential Functions: (i) deliver postal services to the American public and (ii) provide essential response capabilities – specifically the delivery of emergency countermeasures to residences when requested by the Department of Health and Human Services.

Additionally, “postal, parcel, courier, last-mile delivery, and shipping and related workers, to include private companies” are considered essential critical infrastructure workers, as defined in guidance issued by the Department of Homeland Security’s Cybersecurity and Infrastructure Security Agency. As the USPS provides two Primary Mission Essential Functions and postal workers are considered critical infrastructure, opportunities under PPD-40 and Federal Continuity Directives 1 and 2 may be available to the USPS to both ensure liquidity of the USPS to continue performing its Primary Mission Essential Functions as well as obtain personal protective equipment (“PPE”) for USPS employees and contractors who are critical infrastructure.

In Executive Order 13909 (Prioritizing and Allocating Health and Medical Resources to Respond to the Spread of COVID-19), issued on March 18, 2020, President Trump delegated to the Secretary of Health and Human Services the prioritization and allocation under section 101 of the Defense Production Act with respect to health and medical resources needed to respond to the spread of COVID-19. Additionally, the Federal Emergency Management Agency established a National Resource Prioritization Cell to unify prioritization recommendations for the allocation of critical resources from the Strategic National Stockpile. The President’s executive order, and the establishment of the National Resource Prioritization Cell provide the USPS potential avenues to acquire personal protective equipment for its employees and contractors to safely continue executing its Primary Mission Essential Functions.

Section III – Legislative Action

Section III of this memorandum briefly addresses the fact that the President cannot act unilaterally by executive order to effectuate change to existing law, but addresses the potential to use additional stimulus legislation to obtain both additional financial aid and statutory changes that Michael Best could assist the USPS in achieving for long-term reform and sustainability.

Within a week of the President signing the CARES Act Members of Congress are already considering priorities for a potential “Phase 4” economic stimulus package to address the COVID-19 Pandemic. Because priorities are already being considered and various interested groups are already lobbying Congress for their share of the potential additional stimulus, it is important for the USPS needs to be part of the conversation. Members of the Michael Best & Friedrich Team, including Reince Priebus and Denise Bode, can provide invaluable assistance and guidance both with regard to the potential Phase 4 stimulus package and long-term statutory and regulatory reform to benefit the USPS.

Discussion

The United States Postal Service (USPS) has several options for obtaining additional funding and resources during and after the existing national emergency and COVID-19 Pandemic both as a result of the CARES Act and existing emergency powers of the President and the Executive Branch.

I. The CARES Act

The Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”) was signed into law by President Donald J. Trump on Friday March 27, 2020. The CARES Act is a third phase of economic stimulus legislation addressing the impacts caused by the Coronavirus 2019 (“COVID-19”) Pandemic and it includes over \$2 Trillion of economic aid, including, *inter alia*, direct payments to eligible individual taxpayers, expanded unemployment insurance, direct funding to state and local governments, loans and other incentives to eligible businesses and local governments, new small business loans and health equipment for hospitals fighting COVID-19.

We have identified several portions of the CARES Act that either directly benefit the USPS or provide a potential for the USPS to obtain additional financial aid and/or resources. The CARES Act (a) authorizes the United States Treasury to loan up to an additional \$10 Billion directly to the USPS to cover operating expenses during the COVID-19 Pandemic; (b) provides \$17 Billion for “businesses critical to maintaining national security” and (c) \$1 Billion for the President to make purchases under the Defense Production Act.

a. \$10 Billion Direct Lending Authority for USPS

Title VI, §6001(b) of the “Cares Act” Authorizes USPS to “borrow money from the Treasury in an amount not to exceed \$10,000,000,000,” in addition to any other existing borrowing authority, if the USPS determines that due to the COVID-19 Pandemic it “will not be able to fund operating expenses without borrowing money.” The direct loan(s) of up to \$10 Billion must be used for operating expenses and cannot be used for the payment of existing debt. *Id.* §6001(b)(1)(A)-(B). The loans under the CARES Act may be upon favorable terms, including any “terms and conditions mutually agreed upon by the Secretary [of the Treasury] and the [USPS].” *Id.* §6001(b)(2).

The CARES Act does not provide any guidance regarding the terms or procedures for the additional financing, but because the USPS has consistent borrowing authority from the Federal Financing Bank (FFB), which is under the supervision of the Secretary of the Treasury, the additional funding should be obtained in much the same manner as existing USPS loans from the FFB. However, because the CARES Act allows for any mutually agreed upon terms, given the

national emergency and the important role that USPS plays during such an emergency the USPS should obtain favorable terms rather than terms similar to existing FFB loans.

Section 6001 of the CARES Act further requires the USPS to “prioritize delivery of postal products for medical purposes” and allows the USPS to “establish temporary delivery points, in such form and manner as the [USPS] determines necessary, to protect employees of the [USPS] and individuals receiving deliveries from the [USPS].” *Id.* §6001(c)(1)-(2). Although this provision of the CARES Act places a burden on the USPS, requiring prioritization of medical supplies, it does allow the USPS to protect its workers (and other members of the public) when it determines necessary by temporarily suspending direct service to certain areas deemed to present a higher risk and instead provide temporary delivery points. *Id.* This may present some opportunities to reduced operating costs.

b. Economic Stabilization and Assistance to Severely Distressed Sectors of the United States Economy

Section 4003 of the CARES Act provides the largest single appropriation within the Act—\$500 Billion from the Treasury to provide liquidity to “eligible businesses” through loans, loan guarantees and other investments. *Id.* §4003(a). Eligible businesses are defined to include a business in the U.S. “that has not otherwise received **adequate** economic relief in the form of loans or loan guarantees provided under [the CARES Act].” *Id.* §4002(4)(B) (emphasis added). Although the USPS receives up to \$10 Billion in loans from §6001 of the CARES Act, this is likely not “**adequate**.”

Within the \$500 Billion available to “eligible businesses” Congress has specifically allocated \$17 Billion that shall be made available to “**businesses critical to maintaining national security**.” *Id.* §4003(b)(3). The USPS plays a highly important role in national security and continuity of government and is also considered essentially to the critical infrastructure of the Nation.

The current National Continuity Policy was issued on July 15, 2016 in Presidential Policy Directive 40 and remains classified, but in its predecessor Directive issued on May 4, 2007 the USPS played an important role in national continuity and national security. The prior directive established National Essential Functions (“NEF”), which are the subset of Government Functions¹ necessary to lead and sustain the country during a catastrophic emergency and therefore must be

¹ “Government Functions” means the collective functions of the heads of executive departments and agencies as defined by statute, regulation, presidential direction, or other legal authority, and the functions of the legislative and judicial branches. National Security Federal Directive 51(2)(g).

supported through Continuity of Operations² (“COOP”) and Continuity of Government³ (“COG”) capabilities.⁴ Executive departments and agencies were instructed to identify and submit a list of Primary Mission Essential Functions (“PMEF”), which are essential government functions that must be continuously performed in order to support or implement the uninterrupted performance of NEFs before, during, or in the aftermath of an emergency.⁵ The USPS carries out two PMEFs, (i) deliver postal services to the American public and (ii) provide essential response capabilities – specifically the delivery of emergency countermeasures to residences when requested by the Department of Health and Human Services (“HHS”).⁶

With over 500,000 employees and 187.8 Million items processed and delivered each day, 47% of the World’s mail, the USPS is unquestionably critical to a functioning U.S. and World economy.⁷ The Department of Homeland Security, Cybersecurity and Infrastructure Security Agency has further classified “postal and shipping workers” as part of the “Essential Critical Infrastructure Workforce” in light of the COVID-19 Pandemic by memorandum dated March 19, 2020.⁸

Furthermore, the USPS is designated as a supporting agency for 7 of the 15 Emergency Support Function annexes under the National Response Framework—specifically the USPS has roles in reporting infrastructure disruptions and damages and also has an important role in distributing medicine, pharmaceuticals and other medical information and supplies.⁹

Because the USPS likely qualifies as an eligible business under the CARES Act and is unquestionably critical to maintaining the Nation’s security and continuity, the USPS should apply for and seek additional assistance under §4003 of the CARES Act. Although a portion of the \$17 Billion is likely intended for other companies such as Boeing that play a role in national security,

² "Continuity of Operations," or "COOP," means an effort within individual executive departments and agencies to ensure that Primary Mission-Essential Functions continue to be performed during a wide range of emergencies, including localized acts of nature, accidents, and technological or attack-related emergencies. National Security Federal Directive 51(2)(d).

³ "Continuity of Government," or "COG," means a coordinated effort within the Federal Government's executive branch to ensure that National Essential Functions continue to be performed during a Catastrophic Emergency. National Security Federal Directive 51(2)(c).

⁴ National Security Federal Directive 51(1).

⁵ See U.S. Department of Homeland Security Federal Emergency Management Agency Federal Continuity Directive 1 at 3, available at: <https://www.gpo.gov/docs/default-source/accessibility-privacy-coop-files/January2017FCD1-2.pdf>.

⁶ See List of Validated PMEFs by Department/Agency, available at: https://www.dhs.gov/sites/default/files/publications/list_of_validated_pmefts_by_department_v2_fema.pdf.

⁷ See <https://facts.usps.com>.

⁸ See https://www.cisa.gov/sites/default/files/publications/CISA_Guidance_on_the_Essential_Critical_Infrastructure_Workforce_508C_0.pdf.

⁹ See David, *et al.*, The Role of the United States Postal Service in Public Safety and Security, RAND 2008, available at <https://about.usps.com/universal-postal-service/rand-report.pdf>.

the USPS should qualify and be able to share in these funds. One concern we do have with regard to additional loans under §4003 of the CARES Act is the general cap on USPS borrowing in 39 U.S.C. §2005, but we believe a strong case can be made that the cap does not apply to this appropriation given the USPS's integral role in maintaining national security and continuity during a national emergency. We encourage the USPS to immediately engage Treasury in advance of Treasury issuing guidelines in order to help ensure that such funds could be available to the USPS.

The framework for the terms and conditions associated with obtaining assistance under §4003 of the CARES Act is included in §§4003 (c) and (d), which further direct the Treasury Department to publish procedures for application and minimum requirements with 10 days of enactment. Under the terms and conditions in the CARES Act, the Treasury Secretary may make loans to businesses that can demonstrate: (1) they are an eligible business to which credit is not reasonably available at the time of the transaction; (2) the intended obligation is prudently incurred; and (3) the loan or guarantee is sufficiently secured or made at a rate that reflects the risk and, to the extent practicable, is not less than an interest rate based on market conditions for comparable obligations prior to the outbreak of COVID-19.

Additional terms require an applicant to: (1) show, to the extent practicable, the duration of the loan or guarantee will not exceed 5 years; (2) forego buying back stock or paying dividends for common stock (except if contractually obligated to do so) for 12 months after the obligation is no longer outstanding; (3) maintain employment levels as of March 24, 2020, to the extent practicable, until September 30, 2020, and not "in any case" reduce those employment levels by more than 10 percent; (4) certify that the business is "created or organized in the United States or under the laws of the United States and has significant operations in and a majority of its employees based in the United States; and (5) demonstrate that it incurred losses such "that the continued operations of the business are jeopardized."

Although the USPS is not a typical U.S. business, it is an independent federal entity that is self-supporting and operates much like any other business, but is subject to significant federal law and regulations. *See, e.g., 39 U.S.C. § 101, et seq.* Because the USPS receives no tax dollars for its operations and relies on the sale of postage, products and services to fund its operations it likely qualifies under §4003 of the CARES Act as an eligible business and can meet the above criteria.

When the Treasury Department publishes additional guidance on CARES Act funds under Section 4003 we will provide an updated version of the Memorandum with additional information.

c. Defense Production Act Purchases and Funding

Section 4017 of the CARES Act seeks to increase access to materials and supplies necessary for both national security and recovery from the COVID-19 Pandemic. To accomplish this the CARES expressly utilizes the Defense Production Act of 1950 ("DPA") by lifting certain

limits and requirements within the DPA (namely with regard to the President's ability to order the purchase of resources or items of need for government use or resale) and providing \$1 Billion of funding¹⁰ for the President to make such purchases.

As explained generally in Michael Best's original memorandum to the USPS dated March 26, 2020 and again in Section II(a) below, the DPA confers significant powers on to the Executive Branch to impact, direct, prioritize and incentivize industries as is necessary in the "national defense." The DPA provides the President, or other Executive Branch departments or agencies through delegation, with significant authority to act in the interest of national security and during emergencies, including the ability to require persons, businesses and other entities to allocate the distribution of supplies, materials, services or even facilities as deemed necessary or appropriate. 50 U.S.C. §4511(a). In conjunction with this authority, the DPA allows the President great discretion to make purchases or commitments to purchase important items for its use or resale. 50 U.S.C. §4533(a). The President's purchases under the DPA are typically limited to an existing Defense Production Act Fund, but the CARES Act expands on this funding with the additional \$1 Billion. *Id.*, §4534.

By removing conditions and requirements that the President would otherwise have to meet in order to act under the DPA, §4017 of the CARES Act encourages the use of this power by the President. As a result the President has great discretion to order certain companies to manufacture health supplies, including personal protective equipment such as and sanitizer, masks and gloves and use the funds existing in the Defense Production Act Fund and provided by the CARES Act to purchase these items for the USPS.

This directive can be ordered by the President at any time now that the CARES Act is effective and the USPS should therefore immediately engage the Administration for action on this item.

II. Executive Authority and Action

The CARES Act is not the only resource available to the USPS for both short-term assistance during the COVID-19 Pandemic and long-term solutions for sustainability. The Defense Production Act can be utilized by the President and or his Administration to assist the USPS independently of the CARES Act along with other significant statutory authority, executive orders and regulatory reform.

¹⁰ The \$1 Billion appropriated for purchases under the DPA is not included in Section 4070 of the CARES Act, but is included in an un-numbered section later in the CARES Act.

a. Defense Production Act

The Defense Production Act of 1950 (“DPA”) confers significant powers on to the Executive Branch to impact, direct, prioritize and incentivize industries as is necessary in the “national defense.” The main sections of the DPA were presented in memorandum to the USPS dated March 26, 2020 and are again summarized for your convenience, including (I) Title III: Strengthening Domestic Capability; (II) Title I: Priorities and Allocations; and (III) Title VII: General Provisions.

The DPA expressly provides the Executive Branch with an “array of authorities to shape ***national defense*** preparedness programs and to take appropriate steps to maintain and enhance the domestic industrial base.” 50 U.S.C. §4502(a)(4) (emphasis added). The term “national defense” is defined very broadly in the DPA, including many of the functions provided by the USPS; national defense is defined as

programs for military and energy production or construction, military or critical infrastructure assistance to any foreign nation, homeland security, stockpiling, space, and any directly related activity. Such term includes emergency preparedness activities conducted pursuant to title VI of The Robert T. Stafford Disaster Relief and Emergency Assistance Act [42 U.S.C. §§5195 et seq.] and critical infrastructure protection and restoration.

50 U.S.C. §4552(14).

“Critical infrastructure” is further broadly defined in the DPA to include “any systems and assets, whether physical or cyber-based, so vital to the United States that the degradation or destruction of such systems and assets would have a debilitating impact on national security, including, but not limited to, national economic security and national public health and safety.” 50 U.S.C. §4552(2). With over 500,000 employees and 187.8 Million items processed and delivered each day, 47% of the World’s mail, the USPS is unquestionably critical to a functioning U.S. and World economy.¹¹ The Department of Homeland Security, Cybersecurity and Infrastructure Security Agency has further classified “postal and shipping workers” as part of the “Essential Critical Infrastructure Workforce” in light of the COVID-19 Pandemic by memorandum dated March 19, 2020.¹² Moreover, the DPA references 42 U.S.C. §5195(a)(3) for the definition of “emergency preparedness” activities, which includes

all those activities and measures designed or undertaken to prepare for or minimize the effects of a hazard upon the civilian population, to deal with the immediate emergency conditions which would be created by the hazard, and to effectuate emergency repairs to, or the emergency restoration of, vital utilities and facilities destroyed or damaged by the hazard.

¹¹ See <https://facts.usps.com>.

¹² See *supra* n. 8.

As a result the DPA extends well beyond military preparedness and support and is an important tool for the response and recovery from various types of national emergencies both foreign and domestic, including the current COVID-19 Pandemic. In fact, the essential services provided by the USPS, including the universal services mandate, during times where individuals are quarantined, and in many circumstances isolated from other services, is an important aspect of minimizing the effect of such a hazard upon the public.

i. Title III of the DPA

Title III of the DPA allows the President, or other portions of the Executive Branch through delegation, to provide incentives and assistance, including loans and loan guarantees, to, *inter alia*, “assure that critical components, critical technology items, essential materials, and industrial resources are available from reliable sources when needed to meet defense requirements during peacetime, graduated mobilization, and national emergency.” U.S.C. §4517(b). As explained above, the USPS is part of the “critical infrastructure” of the United States, and the World, and Title III of the DPA allows for assistance and incentives to the USPS to assure that its critical function is provided in both peacetime and during a national emergency such as the COVID-19 Pandemic.

Pursuant to 50 U.S.C. §4531(a) the President has the authority under the DPA to reduce current shortfalls or prevent projected shortfalls of those entities providing critical items by authorizing direct loans or loan guarantees “for the purpose of financing any contractor, subcontractor, ***provider of critical infrastructure***, or other person in support of . . . production and ***deliveries or services essential to the national defense***.” *Id.* (emphasis added). Although the DPA typically requires meeting certain conditions and for the President to make certain determinations before the incentives can be provided, if a national emergency is declared by Congress or the President such conditions and determinations do not apply. 50 U.S.C. §4531(2). In the case of the COVID-19 Pandemic, the President has formally declared a national emergency and therefore the conditions and determinations are not required.¹³ Regardless of a declaration of national emergency, Congress still must appropriate funds providing authority for such loan or loan guarantees. 50 U.S.C. §4531(3).

Although Congress has limited the borrowing authority of the USPS pursuant to 39 U.S.C. §2005 as explained in Section I of this memorandum the CARES Act includes both an express appropriation of funds for direct loans to the USPS from the U.S. Treasury and other relief for which we believe the USPS could qualify.

¹³ See <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/>.

ii. Title I of the DPA

Title I of the DPA allows the President, or other portions of the Executive Branch through delegation, to require persons, businesses and other entities to (1) give **priority** to certain contracts, orders or other performance as necessary or appropriate to promote the national defense and (2) to **allocate** the distribution of supplies, materials, services or even facilities as deemed necessary or appropriate. 50 U.S.C. §4511(a).

The prioritization authority is the most commonly used aspect of the DPA, namely with regard to certain contracts or orders by the Department of Defense, including the B-2 Bomber, Air Force One and certain Mine Resistant Ambush Protected (MRAP) Vehicles.¹⁴ Although less common, other departments and agencies have used DPA prioritization such as the Department of Homeland Security requiring prioritization of manufacturing housing units, food and bottled water during the 2017 disaster season.¹⁵

The allocation authority is rarely used. The best example of its use is the Civil Reserve Air Fleet (CRAF) whereby civilian aircraft are “allocated” for potential use by the Department of Defense in case needed in a nation defense crisis where the existing military air fleet is insufficient. See www.dot.gov/ost/oiser/craf.htm.

In these extraordinary times the use of the DPA during the COVID-19 Pandemic to potentially require private corporations to both prioritize and allocate resources towards the immediate production of test kits and other medical supplies is at the forefront of public discussion. In fact, on March 27, 2020 President Trump issued an order under the DPA directing the Secretary of Health and Human Services to “use any and all authority available under the [DPA] to require General Motors Company to accept, perform, and prioritize contracts or orders for the number of ventilators that the Secretary determines to be appropriate.”¹⁶ As explained in Section I (c) above, the President can use the DPA, including the additional funding provided by the CARS Act for the DPA Fund to make purchases of PPE or other materials and equipment for the USPS.

iii. Title VII of the DPA

Title VII of the DPA includes various miscellaneous provisions that are generally not applicable to the USPS, including, *inter alia*, special preferences for small businesses, 50 U.S.C. §4551, ability to conduct investigations and obtain information regarding the domestic industrial base, 50 U.S.C. §4555, immunity from anti-trust laws where the DPA is used to encourage

¹⁴ See www.bis.doc.gov/index.php/forms-documents/pdfs/1257-dx-dated-program-list/file.

¹⁵ See Department of Homeland Security, *The Defense Production Act Committee: Report to Congress*, Calendar Year 2017 Report, June 18, 2018, p. 10.

¹⁶ See <https://www.whitehouse.gov/presidential-actions/memorandum-order-defense-production-act-regarding-general-motors-company/>

voluntary agreements between competing companies and interest, 50 U.S.C. §4558, the ability of the President to create a committee of industry executives, 50 U.S.C. §4560, and the creation of a committee on foreign investment, 50 U.S.C. §4565.

b. Other Existing Statutory Authority

There are three major Acts that provide executive authority during times of national emergencies: (i) the National Emergencies Act of 1976; (ii) the Public Health Service Act; and (iii) The Robert T. Stafford Disaster Relief and Emergency Assistance Act. This section contains an overview of each Act and identifies potential executive actions under such legislation that could benefit the USPS.

i. National Emergencies Act of 1976

The National Emergencies Act of 1976 (the “National Emergencies Act”) authorizes the President to declare a national emergency. 50 U.S.C. § 1621(a). When the President declares a national emergency, as President Trump has for the COVID-19 Pandemic,¹⁷ various laws conferring executive powers during such an emergency become effective and remain in effect during such emergency. 50 U.S.C. § 1621(b). While the National Emergencies Act does not provide authority for specific executive actions applicable to the USPS, the National Emergencies Act does provide general authority for when, and how long, a national emergency may be declared and allows the President to take certain actions that may benefit the USPS under other law as discussed below.

ii. Public Health Service Act

The Public Health Service Act authorizes the Secretary of Health and Human Services (“HHS”) to determine that (i) a disease or disorder presents a public health emergency; or (ii) that a public health emergency, including significant outbreaks of infectious disease or bioterrorist attacks, exists. 42 U.S.C. § 247d(a). If the Secretary of HHS declares a public health emergency, as Secretary Azar has in the case of COVID-19,¹⁸ the Secretary may access the Public Health Emergency Fund (the “Health Fund”), without fiscal year limitations. 42 U.S.C. § 247d(b)(1). Secretary Azar may use the Health Fund to, *inter alia*, (a) facilitate coordination between and among Federal, State, local, Tribal, and territorial entities and public and private health care entities that the Secretary determines may be affected by COVID-19; (b) make grants, provide for

¹⁷ Proclamation 9994, Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak (March 13, 2020), available at: <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/>.

¹⁸ See <https://www.hhs.gov/about/news/2020/01/31/secretary-azar-declares-public-health-emergency-us-2019-novel-coronavirus.html>.

awards, enter into contracts, and conduct supportive investigations pertaining to COVID-19; and (c) carry out other activities, as the Secretary determines applicable and appropriate. 42 U.S.C. § 247d(2). The Secretary must report on expenditures made out of the Health Fund not later than 90 days after the end of the fiscal year to certain committees of the House of Representatives and Senate. 42 U.S.C. § 247d(3). As a result of the COVID-19 Pandemic and the declared emergencies the Secretary of HHS has broad authority to utilize the Health Fund to assist the USPS as the Secretary deems appropriate, including providing resources, equipment and other resources.

Additionally, the Public Health Service Act authorizes the Secretary of HHS, in coordination with the Secretary of Homeland Security, to maintain the Strategic National Stockpile (“SNS”). *See* 42 U.S.C. § 247d-6b. The SNS is a national repository of large quantities of medical supplies, including Personal Protective Equipment stored in strategic locations around the nation. The SNS is designed to supplement state and local public health departments in the event of a large-scale public health emergency that causes local supplies to run out. Pursuant to the Public Health Service Act, the Secretary of HHS may deploy the SNS to respond to the COVID-19 Pandemic. 42 U.S.C. § 247d-6b(a)(3)(f)-(g). The USPS may be able to access the SNS to obtain Personal Protective Equipment or other stockpiled equipment and resources for its operations during the COVID-19 Pandemic.

iii. Robert T. Stafford Disaster Relief and Emergency Assistance Act

The Robert T. Stafford Disaster Relief and Emergency Assistance Act (the “Stafford Act”) establishes certain assistance provided by the federal government to state and local governments to alleviate the suffering and damages caused by disasters. Pursuant to the Stafford Act, federal agencies are reimbursed for services or supplies furnished during disasters and emergencies such as the current COVID-19 Pandemic. 42 U.S.C. § 5147. For purposes of the Stafford Act a “federal agency” includes any department, independent establishment, Government corporation, or other agency of the executive branch of the Federal Government, *including the United States Postal Service . . .*” 42 U.S.C. § 5122(9) (emphasis added). In any emergency under the Stafford Act, “the President may:

- (i) direct any Federal agency, with or without reimbursement, to utilize its authorities and the resources granted to it under federal law (including personnel, equipment, supplies, facilities, and managerial, technical and advisory services) in support of state and local emergency assistance efforts to save lives, protect property and public health and safety, and lessen or avert the threat of a catastrophe, including precautionary evacuations;
- (ii) coordinate all disaster relief assistance (including voluntary assistance) provided by federal agencies, private organizations, and state and local governments; . . .

- (iv) provide emergency assistance through Federal agencies; ...
- (vii) assist state and local governments in the distribution of medicine, food, and other consumable supplies, and emergency assistance; and
- (viii) provide accelerated federal assistance and Federal support where necessary to save lives, prevent human suffering, or mitigate severe damage, which may be provided in the absence of a specific request and in which case the President—
 - a. shall, to the fullest extent practicable, promptly notify and coordinate with a State in which such assistance or support is provided; and
 - b. shall not, in notifying and coordinating with a state, delay or impede the rapid deployment, use, and distribution of critical resources to victims of an emergency.”
42 U.S.C. § 5192(a).

Although the Stafford Act contains various requirements for emergency declarations at the federal and state level, this is not a concern given the existing national emergency and various emergencies and disasters declared in virtually every state throughout the nation as a result of COVID-19. The Stafford Act is primarily designed to provide direct federal assistance to state and local governments, but it also includes mechanisms for the President to direct and/or coordinate federal agencies, including the USPS, to provide services in an emergency or disaster. Due to the unique ability of the USPS to reach every residence in the United States, the USPS may be the sole federal agency, as defined under the Stafford Act, to provide emergency assistance to every citizen during the COVID-19 Pandemic. As such, the President may instruct the USPS to provide certain services and take certain actions, including the use of special equipment and protections, which could be directly funded or reimbursed under the Stafford Act by executive order.

c. Executive Orders

i. Federal Continuity Directives and Critical Infrastructure Designation

As identified in Mr. Marshall’s letter to Ms. Bonner “Re: Essential Public Service Provided by the Postal Service as a Part of the Nation’s Critical Infrastructure,” dated March 23, 2020, the United States Postal Services (“USPS”) carries out an essential function of the federal government and provides critical government services as part of the National Continuity Policy. National Security Presidential Directive 51 (“Directive 51”), issued May 4, 2007, established a comprehensive national policy on the continuity of federal government structures and operations.¹⁹ Directive 51 also established National Essential Functions (“NEF”), which are the subset of

¹⁹ National Security Presidential Directive 51, available at: <https://fas.org/irp/offdocs/nspd/nspd-51.htm>.

Government Functions²⁰ necessary to lead and sustain the country during a catastrophic emergency and therefore must be supported through Continuity of Operations²¹ (“COOP”) and Continuity of Government²² (“COG”) capabilities.²³ Executive departments and agencies were instructed to identify and submit a list of Primary Mission Essential Functions (“PMEF”), which are essential government functions that must be continuously performed in order to support or implement the uninterrupted performance of NEFs before, during, or in the aftermath of an emergency.²⁴ The USPS carries out two PMEFs: delivery of (i) postal services to the American public and (ii) emergency countermeasures to residences when requested by the Department of Health and Human Services (“HHS”).²⁵

Presidential Policy Directive 40 (“PPD-40”), *National Continuity Policy*, issued on July 15, 2016, replaced Directive 51. PPD-40 remains classified, however certain information has been made available through Federal Continuity Directives 1 and 2.²⁶ PPD-40 directs the Secretary of Homeland Security through the Administrator of the Federal Emergency Management Agency (“FEMA”) to coordinate the implementation, execution, and assessment of continuity activities among executive departments and agencies.²⁷ Specifically, the Administrator of FEMA is directed to develop and promulgate Federal Continuity Directives to establish continuity program and planning requirements for executive departments and agencies.²⁸ PPD-40 requires departments and agencies to appoint a Continuity Coordinator at the Assistant Secretary level or higher.²⁹

Additionally, “postal, parcel, courier, last-mile delivery, and shipping and related workers, to include private companies” are considered essential critical infrastructure workers, as defined

²⁰ “Government Functions” means the collective functions of the heads of executive departments and agencies as defined by statute, regulation, presidential direction, or other legal authority, and the functions of the legislative and judicial branches. National Security Federal Directive 51(2)(g).

²¹ “Continuity of Operations,” or “COOP,” means an effort within individual executive departments and agencies to ensure that Primary Mission-Essential Functions continue to be performed during a wide range of emergencies, including localized acts of nature, accidents, and technological or attack-related emergencies. National Security Federal Directive 51(2)(d).

²² “Continuity of Government,” or “COG,” means a coordinated effort within the Federal Government's executive branch to ensure that National Essential Functions continue to be performed during a Catastrophic Emergency. National Security Federal Directive 51(2)(c).

²³ National Security Federal Directive 51(1).

²⁴ See U.S. Department of Homeland Security Federal Emergency Management Agency Federal Continuity Directive 1 at 3, available at: <https://www.gpo.gov/docs/default-source/accessibility-privacy-coop-files/January2017FCD1-2.pdf>.

²⁵ See List of Validated PMEFs by Department/Agency, available at: https://www.dhs.gov/sites/default/files/publications/list_of_validated_pmefts_by_department_v2_fema.pdf.

²⁶ See generally Federal Continuity Directive 1 and Federal Continuity Directive 2, available at: <https://www.fema.gov/media-library-data/1499702987348-c8eb5e5746bfc5a7a3cb954039df7fc2/FCD-2June132017.pdf>.

²⁷ Federal Continuity Directive 1, Section I (pg. 3).

²⁸ *Id.*

²⁹ *Id.* at Section V (pg. 5).

in guidance issued by the Department of Homeland Security's Cybersecurity and Infrastructure Security Agency ("CISA").³⁰ The term critical infrastructure is used to describe "systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems and assets would have a debilitating impact on security, national economic security, national public health or safety, or any combination of those matters."³¹

Because the USPS provides PMEFs, and postal workers are considered critical infrastructure, the USPS may be able to use PPD-40 and Federal Continuity Directives 1 and 2 to both ensure liquidity as well as obtain personal protective equipment ("PPE") for USPS employees and contractors. The USPS should coordinate with the President, the Secretary of Homeland Security, and the Administrator of FEMA in order to seek possible emergency funds to ensure the USPS remains financially able to continue providing its important services and to obtain the equipment and resources necessary to do so.

ii. Strategic National Stockpile ("SNS")

As discussed above in Section II(b), the Secretary of HHS, in coordination with the Secretary of Homeland Security, maintains the SNS. The President has declared a national emergency as a result of the COVID-19 Pandemic³² and issued Executive Order 13909 directing the Secretary of HHS to use the prioritization and allocation authorities under section 101 of the DPA with respect to health and medical resources needed to respond to the spread of COVID-19.³³ Additionally, FEMA established the Supply Chain Stabilization Task Force to address limited supply of critical Personal Protective Equipment. The Supply Chain Stabilization Task Force is utilizing a four-prong approach, one prong focuses on the allocation of critical resources. To effectively allocate resources, the FEMA Supply Chain Stabilization Task Force established a National Resource Prioritization Cell to unify prioritization recommendations.³⁴ The USPS should work with the Secretary of HHS, the Secretary of Homeland Security, and the National Resource Prioritization Cell of the FEMA Supply Chain Stabilization Task Force to obtain equipment and resources through the SNS.

³⁰ See Department of Homeland Security Cybersecurity and Infrastructure Security Agency, Guidance on the Essential Critical Infrastructure Workforce, available at: <https://www.cisa.gov/publication/guidance-essential-critical-infrastructure-workforce>.

³¹ Presidential Policy Directive (PPD) 21, Critical Infrastructure Security and Resilience, February 12, 2013, p. 12; USA Patriot Act of 2001, Section 1016(e), (42 U.S.C) 5195c(e)).

³² Proclamation 9994, Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak (March 13, 2020), available at: <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/>.

³³ Executive Order 13909, Prioritizing and Allocating Health and Medical Resources to Respond to the Spread of COVID-19 (March 18, 2020), available at: <https://www.federalregister.gov/documents/2020/03/23/2020-06161/prioritizing-and-allocating-health-and-medical-resources-to-respond-to-the-spread-of-covid-19>.

³⁴ FEMA Coronavirus (COVID) 19 Pandemic: Supply Chain Stabilization Task Force (March 30, 2020), available at: <https://www.fema.gov/news-release/2020/03/30/coronavirus-covid-19-pandemic-supply-chain-stabilization-task-force>.

III. Legislative Action

Although significant authority is already vested in the President to take actions described above to protect national security, continuity and address national emergencies such as the COVID-19 Pandemic, the President's executive authority has significant limits generally *and* during national emergencies. We do not believe that the President can take executive action during the COVID-19 Pandemic to effectuate any change to existing law sought by the USPS.

The United States Supreme Court has consistently held that the "President's power, if any, to issue [executive orders] must stem from an act of Congress or from the Constitution itself." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952). In the landmark case of *Youngstown* President Truman issued an executive order directing the Secretary of Commerce to seize and operate steel mills, which were integral to national security during the Korean War, and avert a strike. *Id.* at 582-83. Despite the undisputed national security need for the steel mills to continue operations, the Supreme Court held that the order was unconstitutional because it did not stem from any act of Congress or the Constitution itself. *Id.* at 585. In fact, the Court expressly rejected arguments that general executive authority and/or general military authority vested in the President by the Constitution supported the executive order. *Id.* at 586-87. The decision in *Youngstown* remains applicable law today. See *Sierra Club v. Trump*, 929 F.3d 670, 694 (9th Cir. 2019).

Additionally, because the changes desired by the USPS mostly involve express changes to existing statutory authority, the President's power to effectuate change is virtually non-existent. The President cannot take action that is incompatible with the express or implied will of Congress unless the President has an independent power to do so under the Constitution, *Zivotofsky v. Kerry*, 571 U.S. 1, 15 (2015) (citing *Youngstown*, 343 U.S. at 637), which we do not believe exists here.

a. Additional "Phase 4" COVID-19 Stimulus

Less than a week after the enactment of the CARES Act, Members of Congress have signaled a desire for yet another "Phase 4" stimulus package. Part of the additional items being suggested by Speaker Nancy Pelosi includes additional investment in infrastructure, the health care system and digital economy.³⁵

Even if a fourth round of stimulus is still only a possibility, it is important to make sure that additional assistance and/or reform for the USPS is part of the conversation and under consideration early in the process. In addition to further loans, funding and other resources that

³⁵ See <https://www.cnn.com/2020/04/01/coronavirus-stimulus-package-white-house-is-not-planning-4th-bill.html>.

could be included in Phase 4, the package could also be a source for long-term legislative reform benefiting the USPS. With adequate time to influence Members of Congress and the President a Phase 4 package could be significantly more beneficial to the USPS than the CARES Act.

b. Long-term Legislative Action

Federal legislation specifically reforming the law governing the USPS is the best long-term solution to liquidity issues faced by the USPS. The USPS has already identified several statutory changes that would greatly improve the ability of the USPS to efficiently operate and obtain more revenue. Namely legislation could be enacted to: (1) eliminate the cap on prices charged by the USPS and allow the Postal Regulatory Commission to engage in an oversight role monitoring the market prices set by the USPS Board of Governors; (2) provide flexibility for the USPS to enter into Negotiated Service Agreements; (3) eliminate Postal Regulatory Commission review of rate changes prior to effective date of the change; (4) provide flexibility for the USPS to offer non-postal services and government services; and (5) eliminate Postal Regulatory Commission review of new postal products and the elimination of existing postal products.

The USPS has already provided draft language for proposed amendments to Title 39 of the U.S. Code to accomplish these changes, which are attached hereto as Exhibit A.

Members of the Michael Best & Friedrich Team, including Reince Priebus and Denise Bode, can provide invaluable assistance and guidance both with regard to the potential Phase 4 stimulus package and long-term statutory and regulatory reform to benefit the USPS. In addition to taking immediate action on the above-identified items related to the CARES Act and existing Executive Action, we would like to discuss more specifically how Michael Best can assist the USPS in achieving both its short-term and long-term goals.

Memorandum

VIA EMAIL

To: Tom Marshall, General Counsel, United States Postal Service
Keith Weidner, Deputy General Counsel, United States Postal Service

From: Stefan Passantino

CC: Joe Olson, Nicholas Boerke and Nathan Groth

Date: April 3, 2020

Subject: Summary Analysis of Options Available to the USPS for Relief and Resources During the COVID-19 Pandemic

Executive Summary

This memorandum provides a detailed summary analysis of various options available to the United States Postal Service (USPS) to obtain additional resources and relief during the current COVID-19 national emergency.

We have identified several different avenues for the USPS to achieve its goals, including (I) at least \$10 Billion of additional funding and the ability for the President to make purchases to assist the USPS using Defense Production Act (DPA) funding available in the recently enacted CARES Act; (II) other Executive authority and action using the DPA, National Emergencies Act of 1976, Public Health Service Act, the Stafford Disaster Relief and Emergency Assistance Act and other Executive action, and (III) additional legislative or regulatory reforms.

Section I – The CARES Act

Section I of this memorandum provides an in depth overview of portions of the recently enacted CARES Act that the USPS could utilize for immediate additional assistance and resources.

First, §6001 of the CARES Act provides an express appropriation of \$10 Billion for the USPS to borrow money from the United States Treasury on any terms acceptable to the USPS and Secretary of the Treasury. This funding is in addition to the cap that otherwise exists on USPS loans pursuant to 39 U.S.C. §2005 and the USPS can use the funding to cover operating costs, but not pay existing debt. The additional \$10 Billion of funding can be obtained as soon as the USPS can agree on terms with the Treasury and may be obtained on favorable terms in much the same manner as other funds obtained by the USPS from the Treasury's Federal Financing Bank.

Secondly, §4003 of the CARES Act provides an additional \$17 Billion for loans or loan guarantees to U.S. businesses “critical to maintaining national security.” As explained in more detail below, because the USPS plays a highly important role in national security and continuity of government and is also considered essential to the critical infrastructure of the Nation, we believe that the USPS could also qualify for additional funding under this Section of the CARES Act. Section 4003 of the CARES Act does not expressly address the otherwise applicable cap on USPS borrowing in 39 U.S.C. §2005, but we believe a case can be made that the cap does not apply to this appropriation given the USPS’s integral role in maintaining national security and continuity during a national emergency. The Treasury Department has released “preliminary” guidelines for this funding, which mostly restates the terms in the CARES Act and is further explained in the discussion section below. Additional guidelines and requirements, including an application, for qualification for this funding is expected from the Treasury Department at which time we plan to supplement this memorandum, but we encourage the USPS to immediately engage Treasury in advance of final guidelines. The USPS could use this funding for operating expenses during the COVID-19 Pandemic or for other needs such as the purchase of Personal Protective Equipment or other supplies.

Lastly, §4017 of the CARES Act integrates the DPA and expressly encourages the President to use his powers under the DPA during the existing national emergency. This section of the CARES Act further appropriates an additional \$1 Billion for the President to use to make purchases under his DPA authority. The President could use portions of this funding to purchase Personal Protective Equipment or other resources for the USPS.

Section II – Executive Authority and Action

Section II of this memorandum identifies and addresses three major Acts that provide executive authority during times of national emergencies and that the USPS may benefit from, including the DPA, the National Emergencies Act of 1976, the Public Health Service Act, and the Robert T. Stafford Disaster Relief and Emergency Assistance Act.

General details on the DPA were included in the original memorandum to the USPS dated March 26, 2020 and further details are included below. The DPA extends well beyond military preparedness and support and is an important tool for the response and recovery from various types of national emergencies both foreign and domestic, including the current COVID-19 Pandemic. The essential services provided by the USPS, including the universal service mandate, during times where individuals are quarantined, and in many circumstances isolated from other services, is an important aspect of minimizing the effect of such a hazard upon the public. Because of the critical function of the USPS the President can use the DPA to assist the USPS in various ways, including providing direct loans or loan guarantees, directing prioritization of USPS needs for materials, equipment and supplies and the purchase or allocation of resources for the USPS.

The National Emergencies Act grants the President the authority to declare a national emergency and outlines the powers and authorities available to the President during national emergencies.

The Public Health Service Act authorizes the Secretary of Health and Human Services to access the Public Health Emergency Fund during public health emergencies. Pursuant to the Public Health Service Act, the Secretary of Health and Human Services has broad authority to utilize the Public Health Emergency Fund once the Secretary has determined a public health emergency exists which may provide the USPS an avenue to receive funding should the Secretary determine that such use of funds are appropriate. The Public Health Service Act authorizes the Secretary of Health and Human Services, in coordination with the Secretary of Homeland Security, to maintain the Strategic National Stockpile (SNS). The Secretary of Health and Human Services shall deploy the SNS as (i) required by the Secretary of Homeland Security to respond to an actual or potential emergency or (ii) deploy the SNS at their discretion to respond to an actual or potential public health emergency or other situation in which deployment is necessary to protect the public health or safety. Accordingly, the USPS may be able to acquire personal protective equipment for its employees and contractors from the Strategic National Stockpile through the discretion of the Secretary of Health and Human Services.

The Robert T. Stafford Disaster Relief and Emergency Assistance Act generally establishes the assistance provided by the federal government to state and local governments to alleviate the suffering and damages caused by disasters. Chapter 68 of the Stafford Act establishes that federal agencies, specifically including the USPS, may be reimbursed for services provided pursuant to the President's directive. Among other things, the President may direct federal agencies to support state and local emergency assistance efforts; coordinate disaster relief assistance; provide emergency assistance; and assist state and local governments in the distribution of medicine, food, and other supplies. The Stafford Act may provide the USPS the ability, through a designation made by the President, to provide additional assistance to emergency relief efforts and receive reimbursement for such assistance.

Section II of this memorandum also identifies and addresses the implications of the USPS's role in carrying out a "Primary Mission Essential Function" as well as "postal, parcel, courier, last-mile delivery, and shipping and related workers, to include private companies" being designated essential critical infrastructure workers.

Presidential Policy Directive 40 directs the Secretary of Homeland Security through the Administrator of the Federal Emergency Agency to coordinate the implementation, execution, and assessment of continuity activities among executive departments and agencies. Delivery of postal services to the American public by the USPS is considered a "Primary Mission Essential Function." Additionally, "postal, parcel, courier, last-mile delivery, and shipping and related workers, to include private companies" are considered essential critical infrastructure workers, as

defined in guidance issued by the Department of Homeland Security's Cybersecurity and Infrastructure Security Agency. As the USPS provides two Primary Mission Essential Functions and postal workers are considered critical infrastructure, opportunities under PPD-40 and Federal Continuity Directives 1 and 2 may be available to the USPS to both ensure liquidity of the USPS to continue performing its Primary Mission Essential Functions as well as obtain personal protective equipment ("PPE") for USPS employees and contractors who are critical infrastructure.

In Executive Order 13909 (Prioritizing and Allocating Health and Medical Resources to Respond to the Spread of COVID-19), issued on March 18, 2020, President Trump delegated to the Secretary of Health and Human Services the prioritization and allocation under section 101 of the Defense Production Act with respect to health and medical resources needed to respond to the spread of COVID-19. Additionally, the Federal Emergency Management Agency established a National Resource Prioritization Cell to unify prioritization recommendations for the allocation of critical resources from the Strategic National Stockpile. The President's executive order, and the establishment of the National Resource Prioritization Cell provide the USPS potential avenues to acquire personal protective equipment for its employees and contractors to safely continue executing its Primary Mission Essential Functions.

Section III – Legislative Action

Section III of this memorandum addresses the potential to use additional stimulus legislation to obtain both additional financial aid and statutory changes that Michael Best could assist the USPS in achieving for long-term reform and sustainability.

Within a week of the President signing the CARES Act Members of Congress are already considering priorities for a potential "Phase 4" economic stimulus package to address the COVID-19 Pandemic. Because priorities are already being considered and various interested groups are already lobbying Congress for their share of the potential additional stimulus, it is important for the USPS needs to be part of the conversation. Members of the Michael Best & Friedrich Team, including Reince Priebus and Denise Bode, can provide invaluable assistance and guidance both with regard to the potential Phase 4 stimulus package and long-term statutory and regulatory reform to benefit the USPS.

Discussion

The United States Postal Service ("USPS") has several options for obtaining additional funding and resources during and after the existing national emergency and COVID-19 Pandemic both as a result of the CARES Act and existing emergency powers of the President and the Executive Branch.

I. The CARES Act

The Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”) was signed into law by President Donald J. Trump on Friday March 27, 2020. The CARES Act is a third phase of economic stimulus legislation addressing the impacts caused by the Coronavirus 2019 (“COVID-19”) Pandemic and it includes over \$2 Trillion of economic aid, including, *inter alia*, direct payments to eligible individual taxpayers, expanded unemployment insurance, direct funding to state and local governments, loans and other incentives to eligible businesses and local governments, new small business loans and health equipment for hospitals fighting COVID-19.

We have identified several portions of the CARES Act that either directly benefit the USPS or provide a potential for the USPS to obtain additional financial aid and/or resources. The CARES Act (a) authorizes the United States Treasury to loan up to an additional \$10 Billion directly to the USPS to cover operating expenses during the COVID-19 Pandemic; (b) provides \$17 Billion for “businesses critical to maintaining national security” and (c) \$1 Billion for the President to make purchases under the Defense Production Act.

a. \$10 Billion Direct Lending Authority for USPS

Title VI, §6001(b) of the “Cares Act” Authorizes USPS to “borrow money from the Treasury in an amount not to exceed \$10,000,000,000,” in addition to any other existing borrowing authority, if the USPS determines that due to the COVID-19 Pandemic it “will not be able to fund operating expenses without borrowing money.” The direct loan(s) of up to \$10 Billion must be used for operating expenses and cannot be used for the payment of existing debt. *Id.* §6001(b)(1)(A)-(B). The loans under the CARES Act may be upon favorable terms, including any “terms and conditions mutually agreed upon by the Secretary [of the Treasury] and the [USPS].” *Id.* §6001(b)(2).

The CARES Act does not provide any guidance regarding the terms or procedures for the additional financing, but because the USPS has consistent borrowing authority from the Federal Financing Bank (FFB), which is under the supervision of the Secretary of the Treasury, the additional funding should be obtained in much the same manner as existing USPS loans from the FFB. However, because the CARES Act allows for any mutually agreed upon terms, given the national emergency and the important role that USPS plays during such an emergency the USPS should obtain favorable terms rather than terms similar to existing FFB loans.

Section 6001 of the CARES Act further requires the USPS to “prioritize delivery of postal products for medical purposes” and allows the USPS to “establish temporary delivery points, in such form and manner as the [USPS] determines necessary, to protect employees of the [USPS] and individuals receiving deliveries from the [USPS].” *Id.* §6001(c)(1)-(2). Although this provision of the CARES Act places a burden on the USPS, requiring prioritization of medical

supplies, it does allow the USPS to protect its workers (and other members of the public) when it determines necessary by temporarily suspending direct service to certain areas deemed to present a higher risk and instead provide temporary delivery points. *Id.* This may present some opportunities to reduce operating costs.

b. Economic Stabilization and Assistance to Severely Distressed Sectors of the United States Economy

Section 4003 of the CARES Act provides the largest single appropriation within the Act—\$500 Billion from the Treasury to provide liquidity to “eligible businesses” through loans, loan guarantees and other investments. *Id.* §4003(a). Eligible businesses are defined to include a business in the U.S. “that has not otherwise received **adequate** economic relief in the form of loans or loan guarantees provided under [the CARES Act].” *Id.* §4002(4)(B) (emphasis added). Although the USPS receives up to \$10 Billion in loans from §6001 of the CARES Act, this is likely not “**adequate**.”

Within the \$500 Billion available to “eligible businesses” Congress has specifically allocated \$17 Billion that shall be made available to “**businesses critical to maintaining national security**.” *Id.* §4003(b)(3). The USPS plays a highly important role in national security and continuity of government and is also considered essential to the critical infrastructure of the Nation.

The current National Continuity Policy was issued on July 15, 2016 in Presidential Policy Directive 40 and remains classified, but in its predecessor Directive issued on May 4, 2007 the USPS played an important role in national continuity and national security. The prior directive established National Essential Functions (“NEF”), which are the subset of Government Functions¹ necessary to lead and sustain the country during a catastrophic emergency and therefore must be supported through Continuity of Operations² (“COOP”) and Continuity of Government³ (“COG”) capabilities.⁴ Executive departments and agencies were instructed to identify and submit a list of Primary Mission Essential Functions (“PMEF”), which are essential government functions that must be continuously performed in order to support or implement the uninterrupted performance

¹ “Government Functions” means the collective functions of the heads of executive departments and agencies as defined by statute, regulation, presidential direction, or other legal authority, and the functions of the legislative and judicial branches. National Security Federal Directive 51(2)(g).

² “Continuity of Operations,” or “COOP,” means an effort within individual executive departments and agencies to ensure that Primary Mission-Essential Functions continue to be performed during a wide range of emergencies, including localized acts of nature, accidents, and technological or attack-related emergencies. National Security Federal Directive 51(2)(d).

³ “Continuity of Government,” or “COG,” means a coordinated effort within the Federal Government's executive branch to ensure that National Essential Functions continue to be performed during a Catastrophic Emergency. National Security Federal Directive 51(2)(c).

⁴ National Security Federal Directive 51(1).

of NEFs before, during, or in the aftermath of an emergency.⁵ The delivery of postal services to the American public by the USPS is considered a PMEF.⁶

With over 500,000 employees and 187.8 Million items processed and delivered each day, 47% of the World's mail, the USPS is unquestionably critical to a functioning U.S. and World economy.⁷ The Department of Homeland Security, Cybersecurity and Infrastructure Security Agency has further classified “postal and shipping workers” as part of the “Essential Critical Infrastructure Workforce” in light of the COVID-19 Pandemic by memorandum dated March 19, 2020.⁸

Furthermore, the USPS is designated as a supporting agency for 8 of the 15 Emergency Support Function annexes and is a cooperating agency for one essential support area under the National Response Framework—specifically the USPS has roles in reporting infrastructure disruptions and damages and also has an important role in distributing medicine, pharmaceuticals and other medical information and supplies.⁹

Because the USPS likely qualifies as an eligible business under the CARES Act, as explained in more detail below, and is unquestionably critical to maintaining the nation's security and continuity, the USPS should apply for and seek additional assistance under §4003 of the CARES Act. Although a portion of the \$17 Billion is likely intended for other companies such as Boeing that play a role in national security, the USPS should qualify and be able to share in these funds. One concern we do have with regard to additional loans under §4003 of the CARES Act is the general cap on USPS borrowing in 39 U.S.C. §2005, but we believe a strong case can be made that the cap does not apply to this appropriation given the USPS's integral role in maintaining national security and continuity during a national emergency. Generally where there is an apparent conflict between two statutes, like there may be in this case with the general cap in 39 U.S.C. §2005 and the funds available under §4003 of the CARES Act, courts will attempt to read the two statutes “to give effect to each if [it] can do so while preserving their sense and purpose.” *Watt v. Alaska*, 451 U.S. 259, 267 (1981), see also *Morton v. Mancari*, 417 U.S. 535, 551 (1974). The general cap and §4003 of the CARES Act can be read to co-exist as the CARES Act is an emergency measure intended to provide for additional funding during the specific COVID-19 Pandemic,

⁵ See U.S. Department of Homeland Security Federal Emergency Management Agency Federal Continuity Directive 1 at 3, available at: <https://www.gpo.gov/docs/default-source/accessibility-privacy-coop-files/January2017FCD1-2.pdf>.

⁶ See List of Validated PMEFs by Department/Agency, available at: https://www.dhs.gov/sites/default/files/publications/list_of_validated_pmefts_by_department_v2_fema.pdf.

⁷ See <https://facts.usps.com>.

⁸ See https://www.cisa.gov/sites/default/files/publications/CISA_Guidance_on_the_Essential_Critical_Infrastructure_Workforce_508C_0.pdf.

⁹ See David, *et al.*, The Role of the United States Postal Service in Public Safety and Security, RAND 2008, available at <https://about.usps.com/universal-postal-service/rand-report.pdf>.

whereas the general cap applied prior to, and will again apply after, the existing national emergency. Moreover, when there is a conflict between two statutes, the statute enacted more recently (the CARES Act in this case) will generally control while preserving all non-conflicting aspects whenever possible. *Smith v. Robinson*, 468 U.S. 992, 1024 (U.S. 1984). We encourage the USPS to immediately engage Treasury in advance of Treasury issuing final guidelines in order to help ensure that such funds could be available to the USPS and to better understand if Treasury will take the position that the general cap still applies to the CARES Act funds.

The framework for the terms and conditions associated with obtaining assistance under §4003 of the CARES Act is included in §§4003 (c) and (d), which includes requirements that businesses demonstrate: (1) they are an eligible business to which credit is not reasonably available at the time of the transaction; (2) the intended obligation is prudently incurred; and (3) the loan or guarantee is sufficiently secured or made at a rate that reflects the risk and, to the extent practicable, is not less than an interest rate based on market conditions for comparable obligations prior to the outbreak of COVID-19.

Additional terms require an applicant to: (1) show, to the extent practicable, the duration of the loan or guarantee will not exceed 5 years; (2) forego buying back stock or paying dividends for common stock (except if contractually obligated to do so) for 12 months after the obligation is no longer outstanding; (3) maintain employment levels as of March 24, 2020, to the extent practicable, until September 30, 2020, and not "in any case" reduce those employment levels by more than 10 percent; (4) certify that the business is "created or organized in the United States or under the laws of the United States and has significant operations in and a majority of its employees based in the United States; and (5) demonstrate that it incurred losses such "that the continued operations of the business are jeopardized."

The Treasury Department has already issued "preliminary" guidance for obtaining funds under §4003 of the CARES Act, which mostly reiterate what was already included in the Act itself. However, the Treasury guidelines define a "Borrower" to include any U.S. Business, including those "critical to maintaining national security" that apply for or receive a loan under §4003 of the CARES Act. The guidance further states that "Borrowers will be able to apply for a loan directly from the Treasury Department, which will disburse the loan directly to borrowers whose applications are approved by the Treasury Department." The guidance does not expand on the definition of an eligible business, simply stating that "eligible borrowers" include "businesses critical to maintaining national security."

Although the USPS is not a typical U.S. business, it is an independent federal entity that is self-supporting and operates much like any other business, but is subject to significant federal law and regulations. *See, e.g., 39 U.S.C. § 101, et seq.* Because the USPS receives no tax dollars for its operations and relies on the sale of postage, products and services to fund its operations it likely qualifies under §4003 of the CARES Act as an eligible business and can meet the above criteria.

Moreover, Treasury guidance recently published for §4003 of the CARES Act explains that being a “U.S. Business” requires a certification that the borrower “is created or organized in the United States or under the laws of the United States and has significant operations in and a majority of its employees based in the United States.” The USPS easily meets all of these criteria.

When the Treasury Department publishes additional guidance on regarding funds under §4003 of the CARES Act, including the application, we will provide that to the USPS along with our analysis.

c. Defense Production Act Purchases and Funding

Section 4017 of the CARES Act seeks to increase access to materials and supplies necessary for both national security and recovery from the COVID-19 Pandemic. To accomplish this the CARES expressly utilizes the Defense Production Act of 1950 (“DPA”) by lifting certain limits and requirements within the DPA (namely with regard to the President’s ability to order the purchase of resources or items of need for government use or resale) and providing \$1 Billion of funding¹⁰ for the President to make such purchases.

As explained generally in Michael Best’s original memorandum to the USPS dated March 26, 2020 and again in Section II(a) below, the DPA confers significant powers on to the Executive Branch to impact, direct, prioritize and incentivize industries as is necessary in the “national defense.” The DPA provides the President, or other Executive Branch departments or agencies through delegation, with significant authority to act in the interest of national security and during emergencies, including the ability to require persons, businesses and other entities to allocate the distribution of supplies, materials, services or even facilities as deemed necessary or appropriate. 50 U.S.C. §4511(a). In conjunction with this authority, the DPA allows the President great discretion to make purchases or commitments to purchase important items for its use or resale. 50 U.S.C. §4533(a). The President’s purchases under the DPA are typically limited to an existing Defense Production Act Fund, but the CARES Act expands on this funding with the additional \$1 Billion. *Id.*, §4534.

By removing conditions and requirements that the President would otherwise have to meet in order to act under the DPA, §4017 of the CARES Act encourages the use of this power by the President. As a result the President has great discretion to order certain companies to manufacture health supplies, including personal protective equipment such as hand sanitizer, masks and gloves and use the funds existing in the Defense Production Act Fund and provided by the CARES Act to purchase these items for the USPS.

¹⁰ The \$1 Billion appropriated for purchases under the DPA is not included in Section 4070 of the CARES Act, but is included in an un-numbered section later in the CARES Act.

This directive can be ordered by the President at any time now that the CARES Act is effective and the USPS should therefore immediately engage the Administration for action on this item.

II. Executive Authority and Action

The CARES Act is not the only resource available to the USPS for both short-term assistance during the COVID-19 Pandemic and long-term solutions for sustainability. The Defense Production Act can be utilized by the President and or his Administration to assist the USPS independently of the CARES Act along with other significant statutory authority. While certain regulatory changes are a possibility under the USPS's rulemaking authority, and executive action through executive orders is limited and subject to the statutory scheme establishing the USPS.

a. Defense Production Act

The Defense Production Act of 1950 ("DPA") confers significant powers on to the Executive Branch to impact, direct, prioritize and incentivize industries as is necessary in the "national defense." The main sections of the DPA were presented in memorandum to the USPS dated March 26, 2020 and are again summarized for your convenience, including (I) Title III: Strengthening Domestic Capability; (II) Title I: Priorities and Allocations; and (III) Title VII: General Provisions.

The DPA expressly provides the Executive Branch with an "array of authorities to shape *national defense* preparedness programs and to take appropriate steps to maintain and enhance the domestic industrial base." 50 U.S.C. §4502(a)(4) (emphasis added). The term "national defense" is defined very broadly in the DPA, including many of the functions provided by the USPS; national defense is defined as

programs for military and energy production or construction, military or critical infrastructure assistance to any foreign nation, homeland security, stockpiling, space, and any directly related activity. Such term includes emergency preparedness activities conducted pursuant to title VI of The Robert T. Stafford Disaster Relief and Emergency Assistance Act [42 U.S.C. §§5195 et seq.] and critical infrastructure protection and restoration.

50 U.S.C. §4552(14).

"Critical infrastructure" is further broadly defined in the DPA to include "any systems and assets, whether physical or cyber-based, so vital to the United States that the degradation or destruction of such systems and assets would have a debilitating impact on national security, including, but not limited to, national economic security and national public health and safety." 50

U.S.C. §4552(2). With over 500,000 employees and 187.8 Million items processed and delivered each day, 47% of the World’s mail, the USPS is unquestionably critical to a functioning U.S. and World economy.¹¹ The Department of Homeland Security, Cybersecurity and Infrastructure Security Agency has further classified “postal and shipping workers” as part of the “Essential Critical Infrastructure Workforce” in light of the COVID-19 Pandemic by memorandum dated March 19, 2020.¹² Moreover, the DPA references 42 U.S.C. §5195(a)(3) for the definition of “emergency preparedness” activities, which includes

all those activities and measures designed or undertaken to prepare for or minimize the effects of a hazard upon the civilian population, to deal with the immediate emergency conditions which would be created by the hazard, and to effectuate emergency repairs to, or the emergency restoration of, vital utilities and facilities destroyed or damaged by the hazard.

As a result the DPA extends well beyond military preparedness and support and is an important tool for the response and recovery from various types of national emergencies both foreign and domestic, including the current COVID-19 Pandemic. In fact, the essential services provided by the USPS, including the universal service mandate, during times where individuals are quarantined, and in many circumstances isolated from other services, is an important aspect of minimizing the effect of such a hazard upon the public.

i. Title III of the DPA

Title III of the DPA allows the President, or other portions of the Executive Branch through delegation, to provide incentives and assistance, including loans and loan guarantees, to, *inter alia*, “assure that critical components, critical technology items, essential materials, and industrial resources are available from reliable sources when needed to meet defense requirements during peacetime, graduated mobilization, and national emergency.” U.S.C. §4517(b). As explained above, the USPS is part of the “critical infrastructure” of the United States, and the World, and Title III of the DPA allows for assistance and incentives to the USPS to assure that its critical function is provided in both peacetime and during a national emergency such as the COVID-19 Pandemic.

Pursuant to 50 U.S.C. §4531(a) the President has the authority under the DPA to reduce current shortfalls or prevent projected shortfalls of those entities providing critical items by authorizing direct loans or loan guarantees “for the purpose of financing any contractor, subcontractor, **provider of critical infrastructure**, or other person in support of . . . production and **deliveries or services essential to the national defense**.” *Id.* (emphasis added). Although the DPA typically requires meeting certain conditions and for the President to make certain determinations before the incentives can be provided, if a national emergency is declared by Congress or the

¹¹ See <https://facts.usps.com>.

¹² See *supra* n. 8.

President such conditions and determinations do not apply. 50 U.S.C. §4531(2). In the case of the COVID-19 Pandemic, the President has formally declared a national emergency and therefore the conditions and determinations are not required.¹³ Regardless of a declaration of national emergency, Congress still must appropriate funds providing authority for such loans or loan guarantees. 50 U.S.C. §4531(3).

Although Congress has limited the borrowing authority of the USPS pursuant to 39 U.S.C. §2005 as explained in Section I of this memorandum the CARES Act includes both an express appropriation of funds for direct loans to the USPS from the U.S. Treasury and other relief for which we believe the USPS could qualify.

ii. Title I of the DPA

Title I of the DPA allows the President, or other portions of the Executive Branch through delegation, to require persons, businesses and other entities to (1) give **priority** to certain contracts, orders or other performance as necessary or appropriate to promote the national defense and (2) to **allocate** the distribution of supplies, materials, services or even facilities as deemed necessary or appropriate. 50 U.S.C. §4511(a).

The prioritization authority is the most commonly used aspect of the DPA, namely with regard to certain contracts or orders by the Department of Defense, including the B-2 Bomber, Air Force One and certain Mine Resistant Ambush Protected (MRAP) Vehicles.¹⁴ Although less common, other departments and agencies have used DPA prioritization such as the Department of Homeland Security requiring prioritization of manufacturing housing units, food and bottled water during the 2017 disaster season.¹⁵

The allocation authority is rarely used. The best example of its use is the Civil Reserve Air Fleet (CRAF) whereby civilian aircraft are “allocated” for potential use by the Department of Defense in case needed in a national defense crisis where the existing military air fleet is insufficient. See www.dot.gov/ost/oiser/craf.htm.

In these extraordinary times the use of the DPA during the COVID-19 Pandemic to potentially require private corporations to both prioritize and allocate resources towards the immediate production of test kits and other medical supplies is at the forefront of public discussion. In fact, on March 27, 2020 President Trump issued an order under the DPA directing the Secretary of Health and Human Services to “use any and all authority available under the [DPA] to require

¹³ See <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/>.

¹⁴ See www.bis.doc.gov/index.php/forms-documents/pdfs/1257-dx-dated-program-list/file.

¹⁵ See Department of Homeland Security, *The Defense Production Act Committee: Report to Congress*, Calendar Year 2017 Report, June 18, 2018, p. 10.

General Motors Company to accept, perform, and prioritize contracts or orders for the number of ventilators that the Secretary determines to be appropriate.”¹⁶ As explained in Section I (c) above, the President can use the DPA, including the additional funding provided by the CARS Act for the DPA Fund to make purchases of PPE or other materials and equipment for the USPS.

iii. Title VII of the DPA

Title VII of the DPA includes various miscellaneous provisions that are generally not applicable to the USPS, including, *inter alia*, special preferences for small businesses, 50 U.S.C. §4551, ability to conduct investigations and obtain information regarding the domestic industrial base, 50 U.S.C. §4555, immunity from anti-trust laws where the DPA is used to encourage voluntary agreements between competing companies and interest, 50 U.S.C. §4558, the ability of the President to create a committee of industry executives, 50 U.S.C. §4560, and the creation of a committee on foreign investment, 50 U.S.C. §4565.

b. Other Existing Statutory Authority

There are three major Acts that provide executive authority during times of national emergencies: (i) the National Emergencies Act of 1976; (ii) the Public Health Service Act; and (iii) The Robert T. Stafford Disaster Relief and Emergency Assistance Act. This section contains an overview of each Act and identifies potential executive actions under such legislation that could benefit the USPS.

i. National Emergencies Act of 1976

The National Emergencies Act of 1976 (the “National Emergencies Act”) authorizes the President to declare a national emergency. 50 U.S.C. § 1621(a). When the President declares a national emergency, as President Trump has for the COVID-19 Pandemic,¹⁷ various laws conferring executive powers during such an emergency become effective and remain in effect during such emergency. 50 U.S.C. § 1621(b). While the National Emergencies Act does not provide authority for specific executive actions applicable to the USPS, the National Emergencies Act does provide general authority for when, and how long, a national emergency may be declared and allows the President to take certain actions that may benefit the USPS under other law as discussed below.

¹⁶ See <https://www.whitehouse.gov/presidential-actions/memorandum-order-defense-production-act-regarding-general-motors-company/>

¹⁷ Proclamation 9994, Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak (March 13, 2020), available at: <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/>.

ii. Public Health Service Act

The Public Health Service Act authorizes the Secretary of Health and Human Services (“HHS”) to determine that (i) a disease or disorder presents a public health emergency; or (ii) that a public health emergency, including significant outbreaks of infectious disease or bioterrorist attacks, exists. 42 U.S.C. § 247d(a). If the Secretary of HHS declares a public health emergency, as Secretary Azar has in the case of COVID-19,¹⁸ the Secretary may access the Public Health Emergency Fund (the “Health Fund”), without fiscal year limitations. 42 U.S.C. § 247d(b)(1). Secretary Azar may use the Health Fund to, *inter alia*, (a) facilitate coordination between and among Federal, State, local, Tribal, and territorial entities and public and private health care entities that the Secretary determines may be affected by COVID-19; (b) make grants, provide for awards, enter into contracts, and conduct supportive investigations pertaining to COVID-19; and (c) carry out other activities, as the Secretary determines applicable and appropriate. 42 U.S.C. § 247d(2). The Secretary must report on expenditures made out of the Health Fund not later than 90 days after the end of the fiscal year to certain committees of the House of Representatives and Senate. 42 U.S.C. § 247d(3). As a result of the COVID-19 Pandemic and the declared emergencies the Secretary of HHS has broad authority to utilize the Health Fund to assist the USPS as the Secretary deems appropriate, including providing resources, equipment and other resources.

Additionally, the Public Health Service Act authorizes the Secretary of HHS, in coordination with the Secretary of Homeland Security, to maintain the Strategic National Stockpile (“SNS”). *See* 42 U.S.C. § 247d-6b. The SNS is a national repository of large quantities of medical supplies, including Personal Protective Equipment stored in strategic locations around the nation. The SNS is designed to supplement state and local public health departments in the event of a large-scale public health emergency that causes local supplies to run out. Pursuant to the Public Health Service Act, the Secretary of HHS may deploy the SNS to respond to the COVID-19 Pandemic. 42 U.S.C. § 247d-6b(a)(3)(f)-(g). The USPS may be able to access the SNS to obtain Personal Protective Equipment or other stockpiled equipment and resources for its operations during the COVID-19 Pandemic.

iii. Robert T. Stafford Disaster Relief and Emergency Assistance Act

The Robert T. Stafford Disaster Relief and Emergency Assistance Act (the “Stafford Act”) establishes certain assistance provided by the federal government to state and local governments to alleviate the suffering and damages caused by disasters. Pursuant to the Stafford Act, federal agencies are reimbursed for services or supplies furnished during disasters and emergencies such as the current COVID-19 Pandemic. 42 U.S.C. § 5147. For purposes of the Stafford Act a “federal agency” includes any department, independent establishment, Government corporation, or other agency of the executive branch of the Federal Government, *including the United States Postal*

¹⁸ *See* <https://www.hhs.gov/about/news/2020/01/31/secretary-azar-declares-public-health-emergency-us-2019-novel-coronavirus.html>.

Service . . .” 42 U.S.C. § 5122(9) (emphasis added). In any emergency under the Stafford Act, “the President may:

- (i) direct any Federal agency, with or without reimbursement, to utilize its authorities and the resources granted to it under federal law (including personnel, equipment, supplies, facilities, and managerial, technical and advisory services) in support of state and local emergency assistance efforts to save lives, protect property and public health and safety, and lessen or avert the threat of a catastrophe, including precautionary evacuations;
- (ii) coordinate all disaster relief assistance (including voluntary assistance) provided by federal agencies, private organizations, and state and local governments; ...
- (iv) provide emergency assistance through Federal agencies; ...
- (vii) assist state and local governments in the distribution of medicine, food, and other consumable supplies, and emergency assistance; and
- (viii) provide accelerated federal assistance and Federal support where necessary to save lives, prevent human suffering, or mitigate severe damage, which may be provided in the absence of a specific request and in which case the President—
 - a. shall, to the fullest extent practicable, promptly notify and coordinate with a State in which such assistance or support is provided; and
 - b. shall not, in notifying and coordinating with a state, delay or impede the rapid deployment, use, and distribution of critical resources to victims of an emergency.” 42 U.S.C. § 5192(a).

Although the Stafford Act contains various requirements for emergency declarations at the federal and state level, this is not a concern given the existing national emergency and various emergencies and disasters declared in virtually every state throughout the nation as a result of COVID-19. The Stafford Act is primarily designed to provide direct federal assistance to state and local governments, but it also includes mechanisms for the President to direct and/or coordinate federal agencies, including the USPS, to provide services in an emergency or disaster. Due to the unique ability of the USPS to reach every residence in the United States, the USPS may be the sole federal agency, as defined under the Stafford Act, to provide emergency assistance to every citizen during the COVID-19 Pandemic. As such, the President may instruct the USPS to provide certain services and take certain actions, including the use of special equipment and protections, which could be directly funded or reimbursed under the Stafford Act by executive order.

c. Direct Executive Action

i. Federal Continuity Directives and Critical Infrastructure Designation

As identified in Mr. Marshall's letter to Ms. Bonner "Re: Essential Public Service Provided by the Postal Service as a Part of the Nation's Critical Infrastructure," dated March 23, 2020, the USPS carries out an essential function of the federal government and provides critical government services as part of the National Continuity Policy. National Security Presidential Directive 51 ("Directive 51"), issued May 4, 2007, established a comprehensive national policy on the continuity of federal government structures and operations.¹⁹ Directive 51 also established National Essential Functions ("NEF"), which are the subset of Government Functions²⁰ necessary to lead and sustain the country during a catastrophic emergency and therefore must be supported through Continuity of Operations²¹ ("COOP") and Continuity of Government²² ("COG") capabilities.²³ Executive departments and agencies were instructed to identify and submit a list of Primary Mission Essential Functions ("PMEF"), which are essential government functions that must be continuously performed in order to support or implement the uninterrupted performance of NEFs before, during, or in the aftermath of an emergency.²⁴ The delivery of postal services to the American public by the USPS is considered a PMEF.²⁵

Presidential Policy Directive 40 ("PPD-40"), *National Continuity Policy*, issued on July 15, 2016, replaced Directive 51. PPD-40 remains classified, however certain information has been

¹⁹ National Security Presidential Directive 51, available at: <https://fas.org/irp/offdocs/nspd/nspd-51.htm>.

²⁰ "Government Functions" means the collective functions of the heads of executive departments and agencies as defined by statute, regulation, presidential direction, or other legal authority, and the functions of the legislative and judicial branches. National Security Federal Directive 51(2)(g).

²¹ "Continuity of Operations," or "COOP," means an effort within individual executive departments and agencies to ensure that Primary Mission-Essential Functions continue to be performed during a wide range of emergencies, including localized acts of nature, accidents, and technological or attack-related emergencies. National Security Federal Directive 51(2)(d).

²² "Continuity of Government," or "COG," means a coordinated effort within the Federal Government's executive branch to ensure that National Essential Functions continue to be performed during a Catastrophic Emergency. National Security Federal Directive 51(2)(c).

²³ National Security Federal Directive 51(1).

²⁴ See U.S. Department of Homeland Security Federal Emergency Management Agency Federal Continuity Directive 1 at 3, available at: <https://www.gpo.gov/docs/default-source/accessibility-privacy-coop-files/January2017FCD1-2.pdf>.

²⁵ See List of Validated PMEFs by Department/Agency, available at: https://www.dhs.gov/sites/default/files/publications/list_of_validated_pmefts_by_department_v2_fe_ma.pdf.

made available through Federal Continuity Directives 1 and 2.²⁶ PPD-40 directs the Secretary of Homeland Security through the Administrator of the Federal Emergency Management Agency (“FEMA”) to coordinate the implementation, execution, and assessment of continuity activities among executive departments and agencies.²⁷ Specifically, the Administrator of FEMA is directed to develop and promulgate Federal Continuity Directives to establish continuity program and planning requirements for executive departments and agencies.²⁸ PPD-40 requires departments and agencies to appoint a Continuity Coordinator at the Assistant Secretary level or higher.²⁹

Additionally, “postal, parcel, courier, last-mile delivery, and shipping and related workers, to include private companies” are considered essential critical infrastructure workers, as defined in guidance issued by the Department of Homeland Security’s Cybersecurity and Infrastructure Security Agency (“CISA”).³⁰ The term critical infrastructure is used to describe “systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems and assets would have a debilitating impact on security, national economic security, national public health or safety, or any combination of those matters.”³¹

Although the specific aspects of PPD-40 remain classified, because the USPS provides PMEFs, and postal workers are considered critical infrastructure, the USPS may be able to use PPD-40 and Federal Continuity Directives 1 and 2 to both ensure liquidity as well as obtain personal protective equipment (“PPE”) for USPS employees and contractors. The USPS should coordinate with the President, the Secretary of Homeland Security, and the Administrator of FEMA in order to seek possible emergency funds to ensure the USPS remains financially able to continue providing its important services and to obtain the equipment and resources necessary to do so.

ii. Strategic National Stockpile (“SNS”)

As discussed above in Section II(b), the Secretary of HHS, in coordination with the Secretary of Homeland Security, maintains the SNS. The President has declared a national

²⁶ See generally Federal Continuity Directive 1 and Federal Continuity Directive 2, available at: <https://www.fema.gov/media-library-data/1499702987348-c8eb5e5746bfc5a7a3cb954039df7fc2/FCD-2June132017.pdf>.

²⁷ Federal Continuity Directive 1, Section I (pg. 3).

²⁸ *Id.*

²⁹ *Id.* at Section V (pg. 5).

³⁰ See Department of Homeland Security Cybersecurity and Infrastructure Security Agency, Guidance on the Essential Critical Infrastructure Workforce, available at: <https://www.cisa.gov/publication/guidance-essential-critical-infrastructure-workforce>.

³¹ Presidential Policy Directive (PPD) 21, Critical Infrastructure Security and Resilience, February 12, 2013, p. 12; USA Patriot Act of 2001, Section 1016(e), (42 U.S.C) 5195c(e)).

emergency as a result of the COVID-19 Pandemic³² and issued Executive Order 13909 directing the Secretary of HHS to use the prioritization and allocation authorities under section 101 of the DPA with respect to health and medical resources needed to respond to the spread of COVID-19.³³ Additionally, FEMA established the Supply Chain Stabilization Task Force to address limited supply of critical Personal Protective Equipment. The Supply Chain Stabilization Task Force is utilizing a four-prong approach, one prong focuses on the allocation of critical resources. To effectively allocate resources, the FEMA Supply Chain Stabilization Task Force established a National Resource Prioritization Cell to unify prioritization recommendations.³⁴ The USPS should work with the Secretary of HHS, the Secretary of Homeland Security, and the National Resource Prioritization Cell of the FEMA Supply Chain Stabilization Task Force to obtain equipment and resources through the SNS.

iii. Executive Orders

Executive orders are an extraordinary law making authority vested in the President only under very narrow circumstances and where the legislative and executive branch – through power vested in them by Article I and Article II of the Constitution – have not already spoken. Although significant authority is already vested in the President to take actions described above to protect national security, his constitutional authority does not extend to issue the executive orders sought by the USPS.

The United States Supreme Court has consistently held that the “President’s power, if any, to issue [executive orders] must stem from an act of Congress or from the Constitution itself.” *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952). In the landmark case of *Youngstown* President Truman issued an executive order directing the Secretary of Commerce to seize and operate steel mills, which were integral to national security during the Korean War, and avert a strike. *Id.* at 582-83. Despite the undisputed national security need for the steel mills to continue operations, the Supreme Court held that the order was unconstitutional because it did not stem from any act of Congress or the Constitution itself. *Id.* at 585. In fact, the Court expressly rejected arguments that general executive authority and/or general military authority vested in the President by the Constitution supported the executive order. *Id.* at 586-87. The decision in

³² Proclamation 9994, Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak (March 13, 2020), available at: <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/>.

³³ Executive Order 13909, Prioritizing and Allocating Health and Medical Resources to Respond to the Spread of COVID-19 (March 18, 2020), available at: <https://www.federalregister.gov/documents/2020/03/23/2020-06161/prioritizing-and-allocating-health-and-medical-resources-to-respond-to-the-spread-of-covid-19>.

³⁴ FEMA Coronavirus (COVID) 19 Pandemic: Supply Chain Stabilization Task Force (March 30, 2020), available at: <https://www.fema.gov/news-release/2020/03/30/coronavirus-covid-19-pandemic-supply-chain-stabilization-task-force>.

Youngstown remains applicable law today. See *Sierra Club v. Trump*, 929 F.3d 670, 694 (9th Cir. 2019).

Here, what the USPS seeks not only isn't granted by statutory or constitutional authority but is expressly addressed in statute. Any such orders issued by the President would be counter to the law and thus ineffectual. The President cannot take action that is incompatible with the express or implied will of Congress unless the President has an independent power to do so under the Constitution, *Zivotofsky v. Kerry*, 571 U.S. 1, 15 (2015) (citing *Youngstown*, 343 U.S. at 637). The authority to make the changes the USPS seeks by executive order simply does not exist.

III. Legislative Action

a. Additional "Phase 4" COVID-19 Stimulus

Less than a week after the enactment of the CARES Act, Members of Congress have signaled a desire for yet another "Phase 4" stimulus package. Part of the additional items being suggested by Speaker Nancy Pelosi includes additional investment in infrastructure, the health care system and digital economy.³⁵

Even if a fourth round of stimulus is still only a possibility, it is important to make sure that additional assistance and/or reform for the USPS is part of the conversation and under consideration early in the process. In addition to further loans, funding and other resources that could be included in Phase 4, the package could also be a source for long-term legislative reform benefiting the USPS. With adequate time to influence Members of Congress and the President a Phase 4 package could be significantly more beneficial to the USPS than the CARES Act.

b. Long-term Legislative Action

Federal legislation specifically reforming the law governing the USPS is the best long-term solution to liquidity issues faced by the USPS. The USPS has already identified several statutory changes that would greatly improve the ability of the USPS to efficiently operate and obtain more revenue. Namely legislation could be enacted to: (1) eliminate the cap on prices charged by the USPS and allow the Postal Regulatory Commission to engage in an oversight role monitoring the market prices set by the USPS Board of Governors; (2) provide flexibility for the USPS to enter into Negotiated Service Agreements; (3) eliminate Postal Regulatory Commission review of rate changes prior to effective date of the change; (4) provide flexibility for the USPS to offer non-postal services and government services; and (5) eliminate Postal Regulatory Commission review of new postal products and the elimination of existing postal products.

³⁵ See <https://www.cnbc.com/2020/04/01/coronavirus-stimulus-package-white-house-is-not-planning-4th-bill.html>.



The USPS has already provided draft language for proposed amendments to Title 39 of the U.S. Code to accomplish these changes, which are attached hereto as Exhibit A.

Members of the Michael Best & Friedrich Team, including Reince Priebus and Denise Bode, can provide invaluable assistance and guidance both with regard to the potential Phase 4 stimulus package and long-term statutory and regulatory reform to benefit the USPS. In addition to taking immediate action on the above-identified items related to the CARES Act and existing Executive Action, we would like to discuss more specifically how Michael Best can assist the USPS in achieving both its short-term and long-term goals.

USPS

Pricing/Cost Analysis of

Contracts with Amazon & Other Major Customers

Scope of Assignment by Independent Firm

- Analyze the economic terms of the contracts between USPS and its 10 largest package customers for the fiscal years 2017, 2018 and 2019.
- Determine the profitability of the contracts considering fixed and variable costs to determine a) their marginal profitability, and b) their profitability after fully allocating all costs.
- Given its legally and regulatorily mandated service, pricing and cost and other obligations, and the competitive environment, determine whether the USPS is pricing these contracts in a fashion designed to optimize both their profitability and the overall profitability of the USPS.
- Provide any additional observations on the costs or profitability of its major package contracts.

April 14, 2020

USPS

Pricing/Cost Analysis of

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- Provide any additional observations on the costs or profitability of its major package contracts.

April 14, 2020

From: [Marshall, Thomas J - Washington, DC](#)
To: [Brennan, Megan J - Washington, DC](#); [Stroman, Ronald A - Washington, DC](#)
Subject: FW: Response to Senator Charles Schumer's Request
Date: Thursday, April 16, 2020 7:43:52 PM

Fyi. I had my monthly meeting with the OIG leadership yesterday via ZOOM.

Thomas J. Marshall
General Counsel and Executive Vice President
United States Postal Service

From: Marshall, Thomas J - Washington, DC
Sent: Thursday, April 16, 2020 7:43 PM
To: 'Martin, Lisa' (b)(3), 410(c)(2), (b)(6)
Subject: RE: Response to Senator Charles Schumer's Request

Lisa, as I mentioned yesterday, we believe the direct short-term impacts of the pandemic will increase our net losses over the next 18 months by (b)(5), (b)(3), (b)(6) and over the longer term by (b)(5), (b)(3), (b)(6). As such, (b)(5), (b)(3), (b)(6). Those asks are as follows:

(b)(5), (b)(3), 410(c)(2)

Finally, because the focus of our ask right now is related to the direct impacts of the COVID-19 pandemic, you are correct that (b)(5), (b)(3), 410(c)(2). However, we have made it clear that (b)(5), (b)(3), 410(c)(2)

We have also emphasized that without both our request related to the direct impacts of the COVID-19 pandemic, and the additional reforms which we need but which we are not seeking now, (b)(5), (b)(3), 410(c)(2)

From: Martin, Lisa (b)(3), 410(c)(2), (b)(6)
Sent: Thursday, April 16, 2020 3:59 PM
To: Marshall, Thomas J - Washington, DC (b)(3), 410(c)(2), (b)(6)
Subject: [EXTERNAL] RE: Response to Senator Charles Schumer's Request

CAUTION: This email originated from outside USPS. STOP and CONSIDER before responding, clicking on links, or opening attachments.

We're trying to summarize your description of the USPS ask on the Hill, but want to be sure we're accurate. Is this correct?

1. \$25B in appropriated funds to cover COVID related expenses and losses
2. \$25B grant for shovel ready infrastructure improvements, not necessarily attributable to COVID issues

3. Loan consolidation and forgiveness (forgiving \$11B outstanding debt, and combining existing \$15B Title 39 and \$10B CARES Act borrowing authority and administration)
4. Does not include elimination of outstanding prefunding obligations.

From: Marshall, Thomas J - Washington, DC (b)(3), 410(c)(2), (b)(6)

Sent: Thursday, April 16, 2020 3:52 PM

To: Martin, Lisa (b)(3), 410(c)(2), (b)(6) >

Subject: RE: Response to Senator Charles Schumer's Request

No worries, and sorry for my tardiness.

Thomas J. Marshall
General Counsel and Executive Vice President
United States Postal Service

From: Martin, Lisa [(b)(3), 410(c)(2), (b)(6)]

Sent: Thursday, April 16, 2020 3:19 PM

To: Marshall, Thomas J - Washington, DC (b)(3), 410(c)(2), (b)(6) >

Subject: [EXTERNAL] RE: Response to Senator Charles Schumer's Request

CAUTION: This email originated from outside USPS. STOP and CONSIDER before responding, clicking on links, or opening attachments.

Thanks, Tom

From: Pangilinan, Regina K - Washington, DC

(b)(3), 410(c)(2), (b)(6)

> On Behalf Of Marshall, Thomas J -

Washington, DC

Sent: Thursday, April 16, 2020 2:39 PM

To: Joshua (b)(6)

Cc: (b)(6)

Marshall, Thomas J -

Washington, DC (b)(3), 410(c)(2), (b)(6)

; Whitcomb, Tammy L.

(b)(3), 410(c)(2), (b)(6)

; Martin, Lisa

(b)(3), 410(c)(2), (b)(6)

>; Calamoneri, Kevin A - Washington, DC

(b)(3), 410(c)(2), (b)(6)

; Donahue, Ray E - Washington, DC

(b)(3), 410(c)(2), (b)(6)

Subject: Response to Senator Charles Schumer's Request

Importance: High

Good Afternoon,

Please see the attached letter from Thomas J. Marshall, General Counsel for the United States Postal Service. This is in response to Senator Schumer's request that was sent to the Inspector General Tammy Whitcomb on February 10, 2020. Please note, the original letter is being mailed via First Class Mail also.

If you have any questions regarding this letter please contact Ray Donahue via email at

(b)(3), 410(c)(2), (b)(6)

or (202) 268-3076.

Thank you.

Regina K. Pangilinan
Office of the General Counsel
and Executive Vice President
United States Postal Service

475 L'Enfant Plaza, SW, Rm 6100
Washington, DC 20260-1100
202-268-2951
(b)(3), 410(c)(2), (b)(6)



Headquarters COVID Town Hall

April 28th, 2020



AMERICAN
OVERSIGHT

COVID
CORONAVIRUS
DISEASE 19

USPS-20-1215-000723



Opening Remarks

Megan J. Brennan

Postmaster General and Chief Executive Officer

General Election outreach to States

- Expected surge in absentee ballots
- Contact all 50 states, prioritizing 19 states with excuse required to vote with absentee ballot
- Educate states on absentee ballot envelope design and mailing requirements
- Election Mail Teams will be comprised of HQ, Area, and District staff with election mail expertise
- Efforts in progress to support increased use of absentee ballots for primaries



Legal Landscape

(b)(5)



Employee Response

Continue to support our employees as the nation ramps back up for business

- Employee health, safety and wellness
- Partnership with Unions and Management Associations
- Targeted fast track hiring
- Telework approach



Operational Continuity

Continue to deliver vital goods and services as we help the country transition

- Economic Impact Payment
- Medications
- Package platform utilization
- Manage to workload and employee availability



Continue to leverage technology to enable the Postal Service to achieve its mission

- (b)(3), 410(c)(2)



Business Continuity

Continue to ensure health of critical business processes to drive Postal operations

(b)(3), 410(c)(2)



Customer Continuity

Continue to meet our customers where they are to provide creative, meaningful and effective mailing & shipping solutions

• (b)(3), 410(c)(2)



Continue to communicate with our employees, customers and stakeholders

- COVID-19 Blue and LiteBlue sites
- HERO Messaging
- Field Positive Feedback
- Social Media
- Media Stories



THANK **YOU** FOR THE **THANK-YOU's**

Continue to support and coordinate all of Postal response to COVID-19

- Integrated transition plan
- Coordinated & prioritized solutions
- Speed & thoroughness in decision making
- Removal of barriers & allocation of resources
- Navigating the new normal



Thank You





EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

April 27, 2020

M-20-24

MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

FROM: Russell T. Vought 
Acting Director

SUBJECT: Implementing the Presidential Transition Act

This Memorandum provides guidance to all Executive departments and agencies (“agencies”) on assisting the Presidential transition activities required by the Presidential Transition Act of 1963, as amended (3 U.S.C. § 102 note).

Background

The Presidential Transition Act promotes the orderly transfer of Executive powers in connection with the expiration of the term of office of a President and the inauguration of a new President. The activities required by the Act are also helpful to prepare for leadership transitions that occur between the first and second terms of Administrations.

The Act requires the establishment of a White House Transition Coordinating Council, an Agency Transition Directors Council, and designation of a General Services Administration (GSA) Federal Transition Coordinator. The Act sets up a timetable for agencies to name points of contact to assist with transition efforts and develop succession plans and establishes responsibilities for the Agency Transition Directors Council.

Timetable of Required Agency Actions

1. By May 1, 2020, each agency identified in Enclosure 1 shall name its Agency Transition Director. The Agency Transition Director should be a senior career representative whose responsibilities include leading Presidential transition efforts within the agency. Agencies shall provide the name, title, email address, and telephone number for their Agency Transition Directors to GSA’s Federal Transition Coordinator at PresidentialTransition2020@gsa.gov. These individuals will serve on the Agency Transition Directors Council, co-chaired by the Federal Transition Coordinator and the Deputy Director for Management of the Office of Management and Budget (OMB).

2. By May 1, 2020, each agency identified in Enclosure 2 shall identify a point of contact for communication purposes related to Presidential transition efforts. Agencies shall provide the name, title, email address, and telephone number for their communication coordination to GSA's Federal Transition Coordinator at PresidentialTransition2020@gsa.gov.
3. Not later than September 15, 2020, and in accordance with subchapter III of chapter 33 of title 5, United States Code, the head of each agency¹ shall ensure that a succession plan² is in place for each senior non-career position in the agency.

Responsibilities

The Agency Transition Directors Council shall:

- i. Ensure the Federal Government has an integrated strategy for addressing interagency challenges and responsibilities around Presidential transitions and turnover of non-career appointees;
- ii. Coordinate transition activities among the Executive Office of the President, agencies, and the transition team of eligible candidates and the President-elect and vice-President-elect;
- iii. Draw on guidance provided by the White House Transition Coordinating Council and lessons learned from previous Presidential transitions in carrying out its duties;
- iv. Assist the Federal Transition Coordinator in identifying and carrying out the responsibilities of the Federal Transition Coordinator relating to a Presidential transition;
- v. Provide guidance to agencies in gathering briefing materials and information relating to the Presidential transition that may be requested by eligible candidates;
- vi. Ensure materials and information described in subparagraph (v) above are prepared not later than November 1 of the year during which a Presidential election is held;
- vii. Ensure agencies adequately prepare career employees who are designated to fill non-career positions during a Presidential transition; and
- viii. Consult with the President's Management Council, or any successor thereto, in carrying out its duties.

OMB and GSA intend to hold an Agency Transition Directors Council meeting on May 27, 2020. Calendar invitations will be distributed to the Agency Transition Directors in advance of the meeting.

¹ As used in this memorandum, the term 'agency' means an Executive agency, as defined in section 105 of title 5, United States Code.

² Required pursuant to the Presidential Transition Enhancements Act of 2019 (Pub. L. 116-121).

If you have any questions regarding this Memorandum, please contact Mary Gibert, Federal Transition Coordinator at GSA (mary.gibert@gsa.gov).

Enclosures:

1. List of Agencies to Provide Agency Transition Director
2. List of Agencies to Provide Presidential Transition Communication Point of Contact Information
3. Text of Presidential Transition Act of 1963, as amended (3 U.S.C. 102 note)



PARCEL SHIPPERS ASSOCIATION

320 South West Street
Suite 110
Alexandria, Virginia 22314

(703) 989-0789
jim@parcelshippers.org

The Honorable Steven T. Mnuchin
Secretary
U.S. Department of the Treasury
1500 Pennsylvania Ave
Washington, D.C. 20220

Dear Secretary Mnuchin:

During this national emergency, the U.S. Postal Service (USPS) continues to deliver critical goods to every address, including those in hard-hit urban cities as well as difficult to reach rural areas. The services being provided by the Postal Service include the delivery of prescription drugs, household goods, election materials, census material, Coronavirus-related information, testing kits, medical equipment, and eventually vaccines. However, without immediate financial assistance, these services will not continue.

We understand House and Senate negotiators agreed to a \$13 billion appropriation during consideration of the CARES Act. We further understand this appropriation was dropped when it was opposed by the Administration. It is now obvious that much more is needed.

Yesterday the USPS Board of Governors (appointed by President Trump), notified Congress that, due to the Coronavirus emergency, it will run out of cash before September 30, the end of this fiscal year (see attached release). The bipartisan Board of Governors requested the following:

- \$25 billion emergency appropriation to offset coronavirus-related losses.
- \$25 billion grant to fund “shovel-ready” projects to modernize the Postal Service.
- Access to \$25 billion in unrestricted borrowing authority from the Treasury.

We write in support of the USPS Board of Governors’ request. In addition, Treasury should never seek to impose operational changes and policy conditions on any of the Postal Service’s new or existing borrowing authorities—changes and policies that by law are set by the USPS Board of Governors and Congress.

The over 600,000 men and women of the Postal Service, who have been on the front lines each and every day, represent the only workforce servicing every single household and open business across the nation. Unfortunately, given the lack of emergency funding, it appears they have been abandoned by the Administration. The Postal Service and the corporate members of the Parcel Shippers Association stand-out with their commitment and execution in support of the administrations efforts to keep the economy moving as it struggles throughout this pandemic.

There is a mistaken impression promoted by at least one competitor that the Postal Service undercharges for its package delivery services. This claim has been widely debunked by independent commissions, experts, and virtually everyone who has looked at it (see attached Bibliography). Unfortunately, the postal task force that you chaired accepted this view, choosing to ignore the information provided by USPS and the Postal Regulatory Commission, and proposed the costing methodology changes advocated by that competitor in its final report.

Now is NOT the time to demand structural changes in the way the Postal Service operates or prices its products as a condition to access funds vital for it to continue the extraordinary service they provide the American people. Now is the time to help the Postal Service do what they have done for over 240 years—to Bind the Nation, Enable Commerce, and most importantly, support the Administration in the economic recovery of this nation.

Sincerely,



Jim Cochrane
Chief Executive Officer
Parcel Shippers Association

Attachments:

Members and Senators letter
Senate Testimony
Related articles, testimony, court and PRC decisions

Congress of the United States
Washington, DC 20510

From: [Marshall, Thomas J - Washington, DC](#)
To: [Kennedy, Dale E - Washington, DC](#); [Ellis, David B - Washington, DC](#); [Weidner, Keith E - Washington, DC](#)
Cc: [Monteith, Steven W - Washington, DC](#); [Foti, Thomas J - Washington, DC](#); [Krage Strako, Jakki - Washington, DC](#)
Subject: RE: [EXTERNAL] MSP's Being Forced to Shut Down
Date: Friday, March 20, 2020 3:18:26 PM
Attachments: [image001.jpg](#)

(b)(5) We will keep you posted.

Thomas J. Marshall
General Counsel and Executive Vice President
United States Postal Service

From: Kennedy, Dale E - Washington, DC
Sent: Friday, March 20, 2020 2:19 PM
To: Marshall, Thomas J - Washington, DC (b)(6), (b)(3), 410(c)(2); Ellis, David B - Washington, DC (b)(6), (b)(3), 410(c)(2); Weidner, Keith E - Washington, DC (b)(6), (b)(3), 410(c)(2)
Cc: Monteith, Steven W - Washington, DC (b)(6), (b)(3), 410(c)(2); Foti, Thomas J - Washington, DC (b)(6), (b)(3), 410(c)(2); Krage Strako, Jakki - Washington, DC (b)(6), (b)(3), 410(c)(2)
Subject: FW: [EXTERNAL] MSP's Being Forced to Shut Down

Tom, David and Keith,

(b)(5)
(b)(5)

Thanks,

Dale Kennedy
O: 202-268-6592
C: (b)(6), (b)(3), 410(c)(2)

From: (b)(6)
Sent: Friday, March 20, 2020 2:15 PM
To: Monteith, Steven W - Washington, DC <(b)(6), (b)(3), 410(c)(2)>; Kennedy, Dale E - Washington, DC (b)(6), (b)(3), 410(c)(2); Foti, Thomas J - Washington, DC (b)(6), (b)(3), 410(c)(2) >>
Subject: [EXTERNAL] MSP's Being Forced to Shut Down

Steve, Tom, Dale,

(b)(5)

Best, Steve

Stephen Kearney
executive director
Alliance of Nonprofit Mailers
1211 Connecticut Ave, NW, Suite 610
Washington, DC 20036

Tel: 202-462-5132

[cid:image001.jpg@01D5FECA.CBDA2DE0]

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| in Connect<<https://www.linkedin.com/company/alliance-of-nonprofit-mailers/?viewAsMember=true>>



Alliance *of* Nonprofit Mailers