

October 20, 1999

The Honorable William Henderson  
Postmaster General  
United States Postal Services  
475 L'Enfant Plaza, SW  
Washington, DC 20260-0001

Dear Postmaster Henderson:

On September 22, 1999, the Office of Advocacy participated in a meeting with the working group that is reviewing the Private Mailbox Rule (PMB). At the end of the meeting, the representatives from the United States Postal Service stated that they would make recommendations to you for changes to the rule. Although the Office of Advocacy and other members of the small business community clearly stated their opinions at the meeting, the representatives from USPS agreed to present to you only part of the recommendations. You need to know that what is being presented to you does not reflect the major concerns of the small business community.

### **Background of the PMB Rule**

On March 25, 1999, the United States Postal Services published a final rule on Delivery of Mail to Commercial Mail Receiving Agencies (CMRA) in the Federal Register, Vol. 64, No. 57, p. 14385. At the time that the rule was finalized, USPS asserted that “the sole postal purpose of the rule is to increase the safety and security of the mail.” Id. Among other things, the rule required CMRA users to use the term “PMB” in their addresses, provide two forms of identification when renting a mailbox, and to file a PS Form 1583 with USPS. USPS asserted that the rule was necessary to combat mail fraud. Although USPS received over 8,000 comments on the proposal, only 10 commenters were in favor of the rule.

### **The Proposal to be Forwarded By USPS's Representatives to the Postmaster**

The proposal that is being forwarded to you for your approval is not a consensus document. It primarily represents the opinion of USPS and the CMRA owners, not the opinion of members of the small business community.

The “compromise” proposal provides that:

- 1) A database of all CMRA addresses will be compiled and made available to allow members of the general public to be able to determine whether an address is a CMRA;
- 2) USPS will provide information about whether an address is a CMRA through its “800” information line;
- 3) USPS and CMRAs will work to educate the owners and employees on ways to detect and combat fraud; and

- 4) The “PMB” designation will not be required. CMRA users must use either “PMB” or the “#” sign; they may not use terms such as suite, apt., etc.

While the Office of Advocacy has no objections to the first three recommendations, Advocacy is vehemently opposed to the use of “PMB”, “#”, or any other type of address designation or change. Advocacy asserts that the address designation is an illusory requirement that serves no purpose in combating fraud. It merely presents a false sense of security to USPS, while making it more difficult for legitimate businesses to continue to operate in a dignified and cost efficient manner.

### **An Address Designation Is Unreasonable In That It Will Not Prevent Fraud**

Although 39 USC § 401(2) allows the USPS to “adopt, amend, and repeal such rules and regulations as it deems necessary to accomplish the objectives” of the Postal Reorganization Act, USPS is not under a statutory directive to develop a regulation that requires “PMB” or any other type of address designation for a CMRA. In reviewing whether USPS has exceeded its authority in promulgating the PMB requirement, a court would likely invoke a reasonableness standard.<sup>1</sup>

A regulation or administrative practice is ordinarily valid unless it is (a) unreasonable or inappropriate or (b) plainly inconsistent with the statute. The Rockville Reminder, Inc. v. USPS, 480 F.2d 4, 6 (2<sup>nd</sup> Cir., 1973). Under a reasonableness standard, a court does not have to uphold an agency’s action if it is merely plausible. The reasonableness standard allows courts wider latitude than the arbitrary and capricious standard by requiring that the link between the regulation and the legitimate purpose it is intended to advance demonstrate more than a minimum rationality. *See* Tovar v United States Postal Service , 3 F.3d 1271, 1276 (9<sup>th</sup> Cir., 1993).

USPS has not demonstrated that the legitimate purpose it purports to be advancing has a minimum rationality. There is no indication that the address designator will in anyway prevent fraud or that it has any “information communications” value. There are no studies that indicate that the incidences of fraud are any greater or more egregious, from a monetary standpoint, in CMRAs than at other addresses such as the post office, private homes, office buildings, warehouses, or executive suites. There are no “benchmarks” for USPS to evaluate the effectiveness of the regulation. All USPS has been able to produce

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<sup>1</sup> In Tovar v United States Postal Service , 3 F.3d 1271 (9<sup>th</sup> Cir., 1993), the United States Court of Appeals addressed the issue of whether USPS exceeded its authority in promulgating a regulation that prohibited employment of temporary resident aliens. The court stated that USPS’s actions should be reviewed under the standard found in Chevron v. NRDC, 467 U.S. 837. The court found that in that particular instance, the agency “regulation” was not the construction or interpretation of a statute, it was the exercise of authority pursuant to a statute. In such an instance, the court found that the proper standard of review is a “reasonableness” standard. Id., at 1276. Likewise, in the present situation, USPS is not implementing a statute-it is merely exercising its authority pursuant to a statute. As such, the courts would employ a “reasonableness” standard of review in reviewing the actions of USPS.

is anecdotal evidence of a few incidents of fraud.<sup>2</sup> In short, there is nothing to indicate that there is a legitimate purpose, let alone a minimum rationality for that purported purpose.

The lack of a rational basis is particularly disturbing given the potential economic consequences of the address designator. The potential economic damage will exceed the cost of reprinting stationary and catalogues. As stated in Advocacy's earlier correspondence, many small businesses use CMRAs because of the services that they provide, safety concerns, and general business matters. Requiring an address designator may unfairly taint the legitimate small business as illegitimate and interfere with its customer base. The potential loss of business cannot be quantified or traced. The potential harm may, therefore, be irreparable.

### **The Address Designation Violates 39 USC §403(c)**

The Office of Advocacy further asserts that the address designation violates 39 USC § 403(c). It states that:

“In providing services and in establishing classifications, rates, and fees under this title, the Postal Service shall not, except as specifically authorized in this title, make any undue or unreasonable discrimination among users of the mails, nor shall it grant any undue or unreasonable preferences to any such user.”

If USPS provides different services to different users, it must have a rational basis. Egger v. USPS, 436 F. Supp. 138 (W.D. Va., 1977).

At the meeting, the representatives from USPS stated that delivery of mail to a CMRA is made by bulk mail. This means that the CMRA is responsible for sorting and distributing the mail among the box users, not USPS. USPS provides similar bulk mail delivery to

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2. At the September 22<sup>nd</sup> meeting, a representative from the CMRA industry stated that there are 1.5 million private mailboxes in the US. Another member of the working group cited a statistic found in the Office of Inspector General, USPS, November 1998 *Semiannual Report to Congress* which stated that there were 1,533 incidences of mail fraud in the US in fiscal year 1998. The incidences were not categorized according to the type of address, such as CMRA, USPS post office boxes, private homes, office buildings, warehouses, or executive suites. Assuming that all of the fraud did not occur at CMRAs, the statistics indicate that USPS is enacting a regulation that will punish over 99.9% of the boxes for the actions of less than .1% of the boxes. Even if all of the mail fraud occurred at CMRAs, USPS would be punishing approximately 99.9% of the boxes for offenses that occurred in approximately .1% of the boxes.

While Advocacy recognizes that the issue may extend beyond the number of “bad actors” to the amount of money involved in the schemes, Advocacy asserts that the such a broad sweeping rule is unnecessarily punitive for the 99.9+% of CMRAs that are law-abiding citizens. Given the fact that the number of bad actors is relatively small, it may be more constructive to concentrate enforcement efforts on locating those few bad actors rather than expending funds on policing whether an envelope says “PMB”, “#”, or “suite”.

facilities such as schools, hotels, large companies, government facilities, some apartment buildings/complexes, executive suites, etc. Id. Like the CMRA, the facility, not USPS, is responsible for sorting and distributing the mail. However, the addressees for those facilities are not required to use an address designator.

By requiring only CMRA users to use an address designator, USPS is discriminating against CMRA users without a reasonable basis. As stated previously, there has been no showing that mail fraud is more egregious at a CMRA than at other addresses. Likewise, there is no indication that the designator will prevent fraud. If it would be in any way effective (which we doubt), the designator will only encourage perpetrators of fraud to seek out other venues for their activities—venues that do not require designators. Indeed, the movement of a criminal to another venue may, in fact, thwart USPS's attempts to apprehend a particular suspect. The difference in requirements for CMRA versus other bulk mail facilities, therefore, is not rationally related to achieving USPS's purported goal of preventing fraud. Fraud will still occur; it will simply occur someplace else.

### **Conclusion**

Requiring an address designator for CMRA users is discriminatory and unduly prejudicial to those users, and creates a preference for other bulk mail sorters. Public policy and the law mandate a legitimate basis and minimal rationality for the implementation of a regulation by USPS. It is unreasonable to implement a regulation that does not remedy the harm that it is supposed to address. An address designator of "PMB" or "#" will not prevent fraud—it will only harm small businesses. To implement and enforce such a regulation is not only bad public policy, it may also violate the law.

If you have any questions, please feel free to contact me at (202) 205-6533.

Sincerely,

Sincerely,

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Cc: Members of Working Group