

Client Alert

Latham & Watkins
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The US Postal Service's Crackdown On Discounted Mail

The US Postal Service is cracking down on business mailers in an apparent attempt to raise much needed funds to offset its major financial shortfalls. Reflecting the maladies that have afflicted the rest of the economy, the Postal Service recently announced it lost \$384 million in the first quarter, and could lose a total of \$6 billion or more this fiscal year.¹ These losses are in addition to the \$2.8 billion lost last year, and the Postal Service is anxious to find ways to dig itself out of this financial hole.²

Among other things, the Postal Service is trying to raise revenue with aggressive new initiatives to enforce the regulations that govern the eligibility for discounted postal rates that many high volume business mailers depend upon. One requirement that has been the subject of particular emphasis is the Postal Service's "Move Update" standard, which prescribes the specific procedures high volume business mailers **must** use to update their mailing lists. Indeed, Move Update was recently highlighted by the Postmaster General's Mailers' Technical Advisory Committee as one of several "Historical Revenue Risk Areas."³ Likewise, one of the nation's leading providers of business mailing services recently warned its clients that the Postal Service is "re-engaging their efforts to enforce Move Update compliance."⁴

As part of this new enforcement initiative, the Postal Service is developing multiple new methods to detect and prosecute non-compliance with Move Update and has apparently already generated a lengthy list of suspected violators.⁵ This heightened scrutiny is not focused on a business mailer's prospective compliance—the Postal Service is aggressively searching for instances of non-compliance dating back multiple years. With the Department of Justice, the Postal Service is also exploring whether such non-compliance could constitute a violation of the False Claims Act, which carries a civil fine of \$11,000 per false statement plus treble damages.⁶ Indeed, we have seen a recent dramatic increase in Move Update enforcement by both the Postal Service and the Department of Justice, and are aware that Postal Inspectors have recently been trained to pursue these matters. Recent settlements of \$6.2 million and \$13 million for Move Update non-compliance may be a sign of things to come.⁷

Move Update Standard

The Postal Service offers substantial discounts to business mailers who follow certain procedures.⁸ For items that must be sent by first-class mail (*e.g.*, bills and statements of account or mail that contains personal information), the

"The bottom line is that any business mailer who takes advantage of discounted postal rates that are contingent upon compliance with Move Update should immediately review their compliance procedures."

Postal Service offers discounted first-class mail.⁹ For letters, the discounted rate can result in savings approaching 23 percent.¹⁰ For other items (*e.g.*, advertisements, circulars or newsletters), the Postal Service offers standard mail (also known as bulk mail), which offers additional savings at the expense of slower delivery.¹¹ For letters, the standard mail rate can result in savings approaching 50 percent.¹² To be eligible for either discount, mailers must, among other things, properly presort their mail¹³ (*i.e.*, bundling mail by ZIP Code so that all pieces going to the same destination are grouped together) and update their mailing lists in compliance with Move Update.¹⁴

In order to comply with Move Update, a mailer must have checked the accuracy of every address in a mailing, using one of several prescribed methods, within the previous 95 days.¹⁵ (Prior to November 2008, addresses had to be updated every 185 days.¹⁶) Thus, prior to making any mailing using any of the aforementioned discounted rates (either discounted first-class or standard), a mailer must use an approved method to verify the accuracy of the address list that will be used to generate the mailing. For both first-class and standard mail, the approved methods are: (1) using the Postal Service's Address Change Service, where the mailer receives updates from the Postal Service on address changes; (2) using the National Change of Address Linkage System, where the mailer uses an online Postal Service database of address changes; (3) using a FASTforward MLCOR process, which involves special machinery that automatically updates addresses against a Postal Service database; and (4) using an ancillary service endorsement, which tells the Postal Service how to handle undeliverable mail and can entail additional charges.¹⁷

In addition to the aforementioned, there are two additional methods to comply with Move Update for first-class mailers. For those first-class mailers who cannot use the previously stated methods because they are legally restrained from incorporating Postal Service change of address information into their mailing lists without consent (*e.g.*, insurance companies who may be constrained by state insurance law), there is the Legal Restraint method.¹⁸ This method essentially involves the mailer obtaining change of address information through one of the aforementioned methods, and contacting each person whose address has changed individually.¹⁹ Finally, for those first-class mailers who believe that their mailing lists are already accurate and updating through the approved methods would be a waste of time and resources, there is the Mailer Move Update Process Certification, which is also known as the 99 Percent Accurate Method.²⁰ This method essentially involves a validation of a mailer's address list by the Postal Service every four years to ensure that it is more than 99 percent accurate.²¹ Importantly, both of these methods require **pre-approval** from the Postal Service's National Customer Support Center.²²

Finally, the Postal Service requires its customers retain address-correction records for up to two years in the event the Postal Service requests documentation showing compliance with Move Update.²³

Consequences of Non-compliance with Move Update

Revenue Deficiency Assessment

The consequences of a violation of Move Update can be significant. At the very least, such a violation could lead the Postal Service to determine that, for the duration of the violation, no discounted

postal rates could be claimed since compliance with Move Update is an express prerequisite for these rates.²⁴ Such a determination would likely lead the Postal Service to levy an assessment for underpayment of postage equal to the difference between the appropriate first-class postage rate and the rate actually paid, which could run into the millions of dollars depending upon the volume of mail implicated. Indeed, the Postal Service recently revealed that it successfully obtained settlements in the amount of \$6.2 million and \$13 million against two different companies for Move Update non-compliance.²⁵

Under the applicable regulations, a revenue deficiency for underpaid postage is likely to be first issued by the postmaster or manager for Business Mail Entry.²⁶ This assessment may be appealed, within 30 days, by submitting a written appeal to the postmaster or manager for Business Mail Entry, who then forwards the appeal to the Postal Service's Pricing Classification Service Center (PCSC).²⁷ The PCSC will then issue the final agency decision.²⁸ If, however, the revenue deficiency was first issued by the PCSC, then the appeal would be made, also within 30 days, to Mailing Standards, who would then issue the final agency decision.²⁹

The authority to use such procedures derives, at least in part, from the Postage Statement that accompanies each mailing. These statements contain, among other things, a certification that the "mailer's signature certifies acceptance of liability for and agreement to pay any revenue deficiencies assessed on this mailing, subject to appeal."³⁰ And at least one court has approved of the Postal Service's efforts to enforce such liabilities for revenue deficiencies through the Federal Debt Collection Procedure Act and under a common law theory of unjust enrichment.³¹

False Claims Act Liability

In addition, a violation of Move Update could lead the Postal Service to refer the matter to the Department of Justice to bring a claim under the False Claims Act (FCA). Under the FCA, any person who "knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government" is liable for a civil penalty of up to \$11,000 per false statement plus treble damages.³² Such a claim "requires proof: (1) that the defendant made, used, or caused to be used a record or statement to conceal, avoid, or decrease an obligation to the United States; (2) that the statement or record was false; (3) that the defendant knew that the statement or record was false; and (4) that the United States suffered damages as a result."³³

The basis for a false statement in the case of a failure to comply with Move Update derives, at least in part, from the Postage Statement that accompanies each mailing. In that statement, among other things, is a certification that "the mailing qualifies for the prices and fees claimed."³⁴ If this statement is false (because the mailing does not qualify for the claimed discounted rate as Move Update was not followed), then an FCA violation may be found to have occurred. While there is no case law directly on point, at least one court has found that falsely claiming eligibility for a non-profit discounted postage rate can constitute an FCA violation.³⁵

Conclusion

It is important to note that there remains considerable ambiguity on the precise consequences of failing to comply with the requirements of Move Update. This is due, in no small part, to the absence of any reported cases dealing specifically with Move Update. Nonetheless, as indicated in this *Alert*, there is some case law dealing with the availability of the non-profit discount

postal rate that lends some support any Move Update enforcement action the Postal Service might undertake.³⁶ There is also, however, some case law that suggests several possible defenses a mailer who violated Move Update might raise in response to any enforcement action by the Postal Service. Such defenses might include arguing that enforcement of Move Update was not permitted by the statute³⁷ or arguing that the Postal Service's enforcement should be estopped.³⁸

Despite this ambiguity, or perhaps because of it, *the bottom line is that any business mailer who takes advantage of discounted postal rates that are contingent upon compliance with Move Update should immediately review their compliance procedures.* While neither the precise scope of the authority possessed by the Postal Service to enforce Move Update nor the availability of defenses to such an enforcement action have been conclusively determined, it is clear that the Postal Service is placing a particular emphasis on enforcing Move Update and business mailers should be ready to respond.

Endnotes

¹ Russell Adams, *Mail Delivery Could be Cut Back, Postmaster General Says*, WALL ST. J., January 28, 2009.

² *Id.* For example, the Postal Service recently asked Congress for permission to eliminate mail delivery on Saturdays, and recently announced it would be raising several postal rates, including raising the cost of mailing first class letters by two cents to 44 cents. Randolph Schmid, *Stamp Prices to Go Up 2 Cents in May*, WASHINGTON POST, February 10, 2009.

³ Revenue Protection Program, Mailers' Technical Advisory Committee, November 19, 2008, at 7, available at <http://ribbs.usps.gov/files/mtac/MTAC1108/MTACISPresentation.ppt>.

⁴ Are You Complying with the Move Update Requirement?, Pitney Bowes Industry Update, 2008, available at <http://www.g1.com/PDF/WhitePaper/MoveUpdateCompliance.pdf>.

⁵ *Id.*

⁶ 31 U.S.C. § 3729(a).

⁷ Revenue Protection Program, *supra* Note 3, at 8.

⁸ The regulations governing these discounts (as well as domestic mail generally), are codified in the Domestic Mail Manual or DMM, which is incorporated into official regulations by 39 C.F.R. § 111.1 (2005). The current version of the DMM can be found online at http://pe.usps.gov/text/dmm300/dmm300_landing.htm.

The DMM has separate regulations for letters and flats. Generally speaking, a flat is simply an oversized letter. The regulations for letters and flats are, as to the issues addressed in this *Alert*, essentially identical.

⁹ DMM § 233 (governing letters and cards); DMM § 333 (governing flats).

¹⁰ DMM § 233.

¹¹ DMM § 243 (governing letters and cards); DMM § 343 (governing flats).

¹² DMM § 243.

¹³ DMM § 235 (governing presorting for first-class mail); DMM § 335 (governing presorting for first-class flats); DMM § 245 (governing presorting for standard mail); DMM § 345 (governing presorting for standard flats).

¹⁴ DMM § 233.3.5 (requiring Move Update compliance for first-class mail); DMM § 333.3.5 (requiring Move Update Compliance for first-class flats); DMM § 243.3.9 (requiring Move Update compliance for standard mail); DMM § 343.3.9 (requiring Move Update compliance for standard flats).

¹⁵ *Id.*

¹⁶ New Move Update Standards for First-Class Mail and Standard Mail, 72 Fed. Reg. 55,055 (Sept. 28, 2007) (to be codified at 39 C.F.R. Part 111).

¹⁷ DMM § 233.3.5 (requiring Move Update compliance for first-class mail); DMM § 333.3.5 (requiring Move Update Compliance for first-class flats); DMM § 243.3.9 (requiring Move Update compliance for standard mail); DMM § 343.3.9 (requiring Move Update compliance for standard flats).

¹⁸ DMM § 233.3.5.2(d).

¹⁹ Updating Address Lists is a Smart Move, United States Postal Service Publication 363 at 7, January 2007.

²⁰ DMM § 233.3.5.2(d).

²¹ Updating Address Lists is a Smart Move, *supra* Note 19, at 8-9.

²² DMM § 233.3.5.2(d).

²³ Updating Address Lists is a Smart Move, *supra* Note 19, at 4.

²⁴ DMM § 233.3.3(f) (governing first-class letters); DMM § 333.3.3(f) (governing first-class flats); DMM § 243.3.9(d) (governing standard letters); DMM § 343.3.9(d) (governing standard flats).

²⁵ Revenue Protection Program, *supra* Note 3, at 8.

²⁶ DMM § 604.10.1.

²⁷ DMM § 604.10.1.2.

²⁸ *Id.*

²⁹ *Id.*

³⁰ See, e.g., Postage Statement—First-Class Mail, United States Postal Service Form 3600-R1, January 2009, available at http://www.usps.com/forms/_pdf/ps3600r.pdf; Postage Statement—Standard Mail, United States Postal Service Form 3602-R1, May 2008, available at http://www.usps.com/forms/_pdf/ps3602r.pdf.

³¹ See, e.g., *United States v. Raymond & Whitcomb Co.*, 53 F. Supp. 2d 436, 443-45 (S.D.N.Y. 1999) (discussing such theories in a claim against a mailer who improperly used

the non-profit postal rate).

³² 31 U.S.C. § 3729(a).

³³ *Raymond & Whitcomb Co.*, 53 F. Supp. 2d at 444-45.

³⁴ See, e.g., Postage Statement—First-Class Mail, United States Postal Service Form 3600-R1, *supra* Note 30, Postage Statement—Standard Mail, United States Postal Service Form 3602-R1, *supra* Note 30.

³⁵ *Raymond & Whitcomb Co.*, 53 F. Supp. 2d at 444-45.

³⁶ *Id.*; *United States Postal Service v. University Publishing Corporation*, 835 F. Supp. 489, 492 (S.D. Ind. 1993) (upholding the Post Office's assessment for deficient postage for improperly using the nonprofit bulk mailing rate).

³⁷ *Aid Association for Lutherans v. United States*, 321 F.3d 1166, 1178 (D.C. Cir. 2003) (finding that the Postal Service lacked authority to prohibit non-profits from using the non-profit rate for certain insurance-related purposes).

³⁸ *University Publishing*, 835 F. Supp. at 491-92.

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