

# IRET Congressional Advisory

INSTITUTE FOR RESEARCH ON THE ECONOMICS OF TAXATION

*IRET is a non-profit 501(c)(3) economic policy research and educational organization devoted to informing the public about policies that will promote growth and efficient operation of the market economy.*

March 16, 2005

Advisory No. 184

## **SHOULD THE POSTAL SERVICE BE ABLE TO WITHHOLD SOME OF ITS FINANCIAL RESULTS FROM THE PUBLIC?**

### *Executive Summary*

The government-owned U.S. Postal Service often cites commercial sensitivity as a reason to withhold from the public various details about the costs and revenues of its products and how it estimates per-product costs. The federal entity compares itself to a private business when resisting disclosure, although it stresses its governmental status in many other contexts.

Should a government enterprise like the Postal Service be able to use claims of commercial sensitivity to conceal financial results from the public? This study finds that a government entity does not deserve as much financial confidentiality as individuals and private-sector businesses.

A government enterprise — which is ultimately owned by the people — has no legitimate right to privacy when asked to disclose its financial results to the people. In the case of the Postal Service, it should not be concealing financial results from the taxpayers and monopoly-market customers it puts at risk if it performs badly.

The Postal Service has provided no hard evidence that more financial openness would hurt it competitively. Further, with dual statutory monopolies on non-urgent letter delivery and mailbox access, the Postal Service is largely protected from direct competition in its massive core market.

Government entities need the financial discipline provided by a high level of disclosure more than private-sector businesses because government enterprises lack the financial discipline that skeptical lenders and profit-seeking shareholders impose on normal businesses. Greater financial transparency may help government enterprises by making it easier to spot and correct problems.

An amended rule by the Postal Rate Commission (PRC) to require the Postal Service to disclose more of its financial results is an excellent, pro-transparency step. As a matter of good public policy (and also current law) the Postal Service should obey the PRC's rule, instead of citing commercial sensitivity as an excuse to defy it.

Bills proposed in Congress last year and this year include provisions that would increase the Postal Service's power to withhold financial information from the public based on claims of commercial sensitivity. The Administration recognizes these provisions would reduce financial transparency, violating a basic principle of postal reform. The Administration has correctly called for pro-transparency changes in the legislative proposals.

## SHOULD THE POSTAL SERVICE BE ABLE TO WITHHOLD SOME OF ITS FINANCIAL RESULTS FROM THE PUBLIC?

Over the years customers, competitors, and government watchdogs have often complained about perceived inadequacies in the timeliness, detail, and accuracy of the financial information that the U.S. Postal Service releases. Consider three examples.

■ At a Congressional hearing in 2003, David Walker, the head of the U.S. Government Accountability Office (GAO), responded to a question about financial transparency at the Postal Service by noting that, before the hearing, even the GAO had been in the dark regarding a significant change in the Service's finances.<sup>1</sup> "You might note," Comptroller General Walker told Senator Susan Collins (R-ME), Chairman of the Senate Governmental Affairs Committee, "that there is a difference between the number that the Postal Service reported for their preliminary net income for this fiscal year (what's in their testimony) and ours. We said \$4.2 billion. They said \$3.9 [billion]. That changed within the last 24 hours, and we didn't find out about it until after we had sent our testimony up to the Hill." More generally, Mr. Walker testified, "I do not believe the current amount of financial transparency [at the Postal Service] is adequate." He recommended the Service begin following the "major [SEC] reporting requirements that apply to large public companies."

■ The Postal Rate Commission (PRC) is the independent federal agency that regulates the prices the Postal Service charges for most of its products. In 2002, the PRC's Office of the Consumer Advocate (OCA) filed a motion asking, in part, that the PRC require the Postal Service to provide "a full accounting ... of the costs and revenues of domestic 'nonpostal' services so as to insure that domestic postal services are not cross-subsidizing domestic 'nonpostal' services."<sup>2</sup> ("Nonpostal" services refer to various Postal Service products that have nothing to do with conventional mail delivery.) Sharing the concern that the Postal Service might be forcing users of its core products to subsidize the Service's

forays in other markets, a consumer advocacy group, Consumer Action, filed a similar petition several months later.<sup>3</sup> In its reply, the Postal Service revealed that it already prepares internally most of the requested information on per-product costs and revenues for "nonpostal" products — which means public disclosure would not entail much extra time and expense — but insisted that keeping such information under wraps is good business practice. "[A]ny disclosure of information ... must appropriately balance public disclosure with the Postal Service's interests and statutory prerogatives in protecting *sensitive commercial information and data*. [Emphasis added.]"<sup>4</sup> The consumer watchdogs achieved some success: they drew attention to the danger that inter-product subsidies may hide behind inadequate financial disclosure, and they may have prodded the Postal Service to discontinue some money-losing products. But they were not successful in compelling the Service routinely to release per-product data on costs and revenues.

■ The GAO found that, before 1994, the Postal Service had provided detailed information on how it projected international mail revenues and costs. However, after Federal Express, a competitor in that market, raised questions about whether the Service was underpricing international mail, the Service "ceased this practice and provided only aggregate volume, revenue, and cost figures."<sup>5</sup> The GAO wrote that the Service took the position "that the supporting, detailed information requested was irrelevant and outside the scope of the proceeding, was extremely burdensome to produce, and contained certain *confidential and commercially sensitive information*. [Emphasis added.]"<sup>6</sup> The GAO did not make any explicit accusation, but the chain of events it recounted suggests that the Postal Service's real motivation was to stonewall when faced with embarrassing questions. Although the Service still furnishes detailed information to the PRC on international mail costs and revenues, it insists the

data is commercially sensitive and attaches the condition that the PRC, in effect, stamp the information top secret and not release it to the public.<sup>7</sup>

When the Postal Service tries to prevent the public from viewing some of its financial data, it frequently claims that the numbers in question are commercially sensitive. The Service further insists that it has explicit statutory authority to limit access to numbers that it regards as commercially sensitive. This paper will evaluate those claims. The paper provides an overview of the Postal Service's authority under current law. It then examines whether allowing the Postal Service to limit financial disclosure on commercial sensitivity grounds would constitute good or bad public policy. The analysis turns on the fact that the U.S. Postal Service is part of the federal government; it is not a private-sector business.

To be clear, the Postal Service already provides much financial data regarding its operations. It objects to providing detailed cost and revenue data on some products. It also objects to explaining how it calculates products' costs (costing methodology), especially outside of formal rate cases. Without such detailed information, however, it is often difficult or impossible to know whether the Postal Service is assigning costs accurately to its various products and if the revenues of some products fully cover their costs. (For instance, is the Service lowballing its products' costs, and hiding losses on some products, when it claims that only about 60% of total costs are product-related while the remainder are for overhead?) Another concern is that claims of commercial sensitivity may sometimes be used to hide problems at the agency, reducing the pressure from customers and taxpayers to fix the difficulties promptly.

This paper touches a broader issue that is relevant for government activities ranging from taxation to spending programs to regulations to government enterprises. Citizen/voters need to be able to see what the government is doing in order to make informed decisions about whether its activities are consistent with a free society, have benefits that

exceed costs, and are carried out with reasonable efficiency. When a government enterprise refuses to release some of its financial data on grounds of commercial sensitivity, that conflicts with the transparency that helps citizen/voters hold the government accountable for its actions.

### **Importance of addressing the issue now**

While controversy over gaps in the Postal Service's financial disclosures is clearly not new, two factors give it extra urgency today.

First, the PRC has revised its rules regarding the financial data that the Postal Service must regularly report to the Commission. The new rules require the Service to include an explanation of how it estimates its products' costs. As has been its practice, the Commission allows the public to see most of the information it receives. The Postal Service, however, has expressed concern about public disclosure and told its rate regulator that it will not supply a significant portion of the data.

[O]ver the strenuous objections of the Postal Service, the [Postal Rate] Commission greatly increased the amount and type of [cost and revenue] information to be regularly produced by the Postal Service... [T]he Postal Service has declined to produce some of the additional new information...[T]he new rules threaten to nullify the statutory protections of *sensitive information* established by Congress in section 410 of Title 39. [Emphasis added.]<sup>8</sup>

Second, in 2004, bills were introduced in the House and Senate that would overhaul the laws governing the Postal Service (H.R. 4143 and S. 2468). Among the bills' many provisions, several would give the Postal Service's regulator greater authority to obtain information, but some would increase the Service's power to demand that the information be kept under wraps.<sup>9</sup> It appears that Congress will again consider these legislative proposals in 2005. In fact, the House bill has already been reintroduced with only minor changes (H.R. 22), and a bill is expected to be introduced in the Senate shortly. Giving the regulator greater

access to financial data would tend to increase transparency and accountability, but letting the Postal Service more easily withhold financial information from the general public cuts in the other direction. Is there a compelling reason for restricting what the public can know?

This paper's findings will help answer the questions of whether the Service should be refusing fully to comply with its rate regulator's order and whether legislation giving the Service significantly more power to deny the public access to its books would be pro-reform or anti-reform.

### **Current Law**

The right to obtain and disclose financial information about the Postal Service's operations depends on whether the information is being sought through a freedom of information (FOI) request or is based on the authority Congress has delegated to the Postal Service's rate regulator, the PRC. FOI filings with the Postal Service are covered in section 410 of USC 39. The Postal Service retains considerable discretion in deciding whether to release financial data sought through FOI requests. In contrast, there is a statutory presumption that a request made or permitted by the PRC and comporting with PRC rules and procedures is reasonable.

Congress has tried to open government agencies to greater public scrutiny through the use of FOI requests, but it often places limits on the information that may be obtained through those requests. That is true in the case of the Postal Service. The Postal Reorganization Act of 1970 gives firms and individuals the right to file FOI requests with the Postal Service, but the Act explicitly states that in responding to FOI filings the Service shall not have to provide "information of a commercial nature ... which under good business practice would not be publicly disclosed..."<sup>10</sup>

The Postal Service argues that the commercial-sensitivity exception to FOI requests also applies to the PRC outside of formal rate hearings, and, more generally, to what the PRC can make public. That is the Service's meaning in the earlier quote in

which it accuses the PRC of violating section 410 of title 39 of the U.S. Code.<sup>11</sup>

The PRC, however, derives its powers from other provisions of the Postal Reorganization Act that are unrelated to FOI filings. One key passage states:

The Postal Rate Commission shall promulgate rules and regulations and establish procedures ... and take any other action they deem necessary and proper to carry out their functions and obligations... *Such rules, regulations, procedures, and actions shall not be subject to any change or supervision by the Postal Service.* [Emphasis added.]<sup>12</sup>

Based on this language, the PRC would appear to be well within its statutory authority in establishing rules that order the Postal Service to furnish the financial information the PRC believes it needs. After all, the rate regulator must have accurate and detailed financial information on Postal Service operations if it is effectively to carry out the job that Congress gave it. Further, the explicit statutory language indicates that the PRC — not the Postal Service — is the judge of what financial information is needed.<sup>13</sup>

The Act also directs that in conducting hearings the PRC "may (*without limitation*) adopt rules which provide for ... discovery both from the Postal Service and the parties to the proceedings... [Emphasis added.]"<sup>14</sup> This gives the PRC clear statutory authority to establish rules permitting the PRC (and other participants, when the PRC thinks that appropriate) to seek information from the Postal Service at PRC hearings.

Based on the statutory language cited above, the PRC also appears to have the right to make financial information on the Postal Service's operations public when it believes that the resulting increase in transparency will improve the regulatory process. In cases where the PRC believes certain financial information should be kept confidential, it could do that instead, based on the broad rule-making discretion Congress has given it. Again, the PRC

does not derive its authority from section 410, and no language in the Act applies the section 410 limitation on FOI requests to the PRC's rules, procedures, and other actions.

### **The Postal Service is not a private-sector business**

When the Postal Service asserts that some of its financial information is financially sensitive and, therefore, should be kept under lock and key, it relies, in effect, on the following syllogism:

- (1) Private-sector businesses are allowed to keep much financial information out of the public domain. One reason the owners of a business may want some financial information to remain confidential is they believe it could be commercially sensitive.
- (2) The Postal Service is analogous to a private-sector business because Congress has tasked it with being self-supporting.
- (3) Therefore, the Postal Service deserves to be treated like a private-sector business. When the Postal Service claims some of its cost and revenue numbers are commercially sensitive, it should be permitted to withhold them from the public.

The flaw in this syllogism is that the Postal Service is very different from a private-sector business. It is not private at all, but, rather, it is part of the federal government. Technically, the Postal Service is "an independent establishment of the executive branch of the Government of the United States"<sup>15</sup> that "shall be operated as a basic and fundamental service provided to the people by the Government..."<sup>16</sup>

The Postal Service is fully aware of its governmental status when asserting its various government-based powers. For example, normal businesses must file income tax returns and pay income taxes if they have profits. The Postal Service is entirely exempt from income taxes and many other taxes, and has never volunteered to pay those taxes. (The legislative proposals mentioned above would require the Service to compute and pay an "assumed federal income tax" — to itself. Of

course, an "income tax" you pay to yourself is not a real income tax.) The Service is also exempt from many government fees and regulations, such as the state and local motor vehicle registration and licensing fees that private-sector firms and individuals must pay. Congress has assigned the Service the core mission of delivering hard-copy letters and periodicals to homes and businesses and, to help the agency carry out that mission, has given it statutory monopolies on the physical delivery of non-urgent letters and on the use of mailboxes. The Service vigorously enforces those dual monopolies, which emphasizes its status as a government entity rather than a private-sector business. In a case that went all the way to the U.S. Supreme Court, the Postal Service argued that it is totally exempt from the antitrust laws that apply to private-sector enterprises — because it is part of the federal government. The Supreme Court agreed. The Court found that "[t]he Postal Service has different goals, obligations, and powers from private corporations," and concluded that "in both form and function, [it] is ... part of the Government..."<sup>17</sup>

### **Giving private-sector businesses the benefit of the doubt with regard to financial confidentiality makes sense**

Unless there are compelling reasons to the contrary, the government should not force individuals and private-sector businesses to release financial information the individuals and firms would rather keep private. Governments should tread lightly in this area for several reasons.

First, individuals value privacy, that is, the right to be left alone. The desire for privacy includes financial privacy. Few individuals would be comfortable if the government forced them to disclose their finances to all who are curious. Individuals' concerns about financial privacy extend to businesses they own. The greatest concern may attach to small businesses that are closely linked to their owners' personal finances. Still, a respect for privacy suggests that, unless it has good cause, the government should not require even large private-sector businesses to disclose information they would rather keep confidential.

Second, private-sector businesses are private property, and one of the core functions of government is to protect property rights, not violate them. (There is some overlap between property rights and the respect for privacy.<sup>18</sup>) Secure property rights are an essential ingredient in creating and sustaining a free society because people will not feel very safe or very free if they must always fear their property will be taken from them. Similarly, secure property rights are needed in order to have a vibrant, growing economy because saving, investment, and entrepreneurship will all be stunted if people have no assurance they will be able to keep their property and the rewards derived from their property. Private property can be physical assets, or it can be knowledge — intellectual property.<sup>19</sup>

One aspect of the right to control private property is being able to decide whether or not information about the property, including financial information, will be made public. On occasion, the owners of a business may feel that detailed information on the business's costs and revenues might affect the business's competitiveness and, therefore, its profitability.<sup>20</sup> If so, the financial data is commercially sensitive, and that is a reason to keep it confidential. However, regardless of whether the information is commercially sensitive, the protection of private property rights implies that decisions about divulging the information should be left to the business's owners, unless there are strong public policy reasons for requiring disclosure.

Respect for private property has been a bedrock principle of U.S. law. The Fifth Amendment to the Constitution specifically mentions and protects property (the "takings" clause). The Fourth Amendment's prohibition against unreasonable searches and seizures also supports property rights. The Constitution gives Congress the power to issue patents (Article 1, sec. 8), which protect intellectual property rights for a limited period of time while providing for later public dissemination. When the Constitution's authors explained that patents are "to Promote the Progress of Science and the useful Arts," they displayed an understanding of incentives and appreciation for the economic benefits that flow from secure property rights.

In practice, though, the government often limits private property rights, usually for what it claims are valid public policy considerations. In the area of financial information, the government frequently requires businesses, especially publicly traded ones, to disclose a wide range of financial data. The government claims it needs to step in to protect investors. But that glosses over the financial discipline that market forces already impose and introduces a third reason why the government should hesitate before abridging private property rights.

In the private sector, normal market forces already supply much of the financial discipline that the government erroneously claims only it can provide. The explanation is that investors will not want to put money into a business unless they think the business is likely to earn an attractive risk-adjusted rate of return. In making their determinations, investors will seek a variety of information, including financial information. For instance, before making a loan, a bank may demand detailed data on the business's costs and revenues, its long-term business plan, its assets, other collateral, and the previous experience of its managers. Providing this information is voluntary, but if the business refuses, the bank may turn down the loan or else require a higher interest rate to compensate for higher perceived risk. At publicly traded companies, the market gives shareholders powerful tools for inducing management to release relevant financial information. If shareholders suspect they are not receiving adequate information, they will likely send management a strong signal by sharply bidding down the stock's price and will sometimes send an even louder signal by endorsing a takeover to install a new management team.<sup>21</sup> Hence, normal market forces already provide strong financial discipline and pressure businesses to release the financial information investors consider most important, without the need for government-mandated disclosure.

### **Little justification for keeping financial results confidential at a government enterprise**

Respect for the privacy of individuals and the businesses they own is justified by, and helps

support, individual freedom. In contrast, allowing the government similar discretion regarding what to disclose and what to keep secret would *reduce* individual freedom, for it would give the state a broad license to act without letting citizen/voters know and monitor what it is doing. For this reason, the government should not be able to hide behind a claim of privacy in its dealing with the general public.<sup>22</sup>

A government enterprise like the Postal Service has a stronger argument in terms of property rights. Government agencies can hold property in order to carry out their government-assigned missions. The Postal Service argues that product-specific knowledge of its costs and revenues is part of its property, that its future competitiveness (i.e., future costs and revenues) would be affected if others gained that knowledge, and, therefore, that the financial information should be withheld from the public. One weakness in this argument is that the general public also has some right to the financial information because it ultimately owns the government enterprise. Another weakness is the supposition that the Service would be at a significant competitive disadvantage if the public had better information on the costs and revenues of its products.

Some years ago then PRC Commissioner H. Edward Quick contrasted the Service's readiness to claim that information is commercially sensitive with the Service's inability to cite evidence to back up its claims. He said:

As for revealing "proprietary business information," and having a competitor "take our idea and run with it," ... I don't know of one service "idea" that has been stolen from USPS. On February 2 [1996], the project manager for the new products group in the USPS Marketing Department — the person responsible for the identification and pursuit of new business opportunities — could not cite any specific business opportunities that the Postal Service lost ... in the last two years.<sup>23</sup>

Although claiming that product ideas and strategies are commercially sensitive is somewhat different than claiming that estimates of costs and revenues and the underlying estimation procedures are commercially sensitive, the point in both cases is that evidence to back up the claims is lacking. Indeed, greater public disclosure of financial results might actually stimulate future competitiveness by increasing the organization's accountability.

The Postal Service's argument that it needs to hide some of its financial results from the public to guard its competitiveness is also suspect because Congress has given the government agency dual statutory monopolies that shield most of its output from direct competition. Even if private-sector businesses learned financial "secrets" about the Service's core products, federal law generally prevents anyone except the Postal Service from selling those products. Although the Service's monopoly products face indirect competition, such as e-mail substituting for first-class mail, production methods are typically so different that the Postal Service's financials are basically irrelevant to producers of indirect substitutes, such as Internet service providers that transmit e-mail.

The Postal Service has expanded beyond its basic government function and sells a range of products in competitive markets. Those products comprise a minority of the government agency's output. (A separate issue is whether the Postal Service should be in competitive markets at all. Other papers in this series have explored that topic.<sup>24</sup>) At first glance it might seem that the Postal Service would lose an edge in competitive markets if its rivals knew the government agency's product-by-product financial results in great detail. However, the innovative, profit-driven businesses that are the Service's competitive-market rivals have little to learn from a slow-moving government entity with a history of financial problems, high labor costs, and an admittedly inefficient national distribution network. Their main interest in the Service's financials would be to ascertain whether the agency is behaving in an anti-competitive manner

and violating its core mission by selling some competitive-market products at losses or unjustifiably low markups to pump up volume. If that is what the Postal Service is afraid will be discovered when it seeks confidentiality, full disclosure should be encouraged — not discouraged — as a matter of sound public policy.

Sometimes government organizations do generate commercially valuable information, such as the National Institutes of Health with medical knowledge and the Bureau of Economic Analysis with economic data. In those cases, however, the U.S. Government has usually embraced a policy opposite to that espoused by the Postal Service: the information is released publicly on the theory that the gain to society from the dissemination of knowledge will outweigh any benefits the government might reap by keeping the information out of public sight.

Because government enterprises are less dependent on market forces than private-sector businesses, they are also less subject to market discipline. For example, government enterprises often can borrow from the government at low interest rates, and if they are allowed to borrow in the marketplace, they can usually obtain funds at favorable rates with few questions asked because lenders assume the government stands behind them.<sup>25</sup> Government-owned enterprises do not have to worry about shareholders punishing poor financial behavior by driving down the value of the stock or supporting a takeover because government-owned enterprises do not have shareholders. In addition, government enterprises are sometimes partially shielded from normal market forces because the government has given them a protected market, such as the large sheltered market the Postal Service enjoys due to its dual statutory monopolies.

Consequently, government enterprises are not subject to the normal market forces that would persuade them voluntarily to reveal relevant financial information about their costs and revenues. Mandatory disclosure is one means of filling the gap so that the customers and taxpayers who are at risk can stay informed.

In the insightful report it issued in 2003, the bipartisan President's Commission on the U.S. Postal Service emphasized the desirability of disclosure when it concluded that the "Service has a responsibility to the public to be transparent in its financial reporting"<sup>26</sup> both as part of its obligation to the people and to help the agency perform better. The Commission said:

Given its important public mission and central role in the nation's economy, changes in Postal Service economic health should not come as a surprise to those responsible for or impacted by its performance. By engaging in more businesslike financial reporting and more aggressively allocating costs by product and service, the Postal Service will gain essential insight into all aspects of its operations.<sup>27</sup>

### **The rate regulator's enhanced reporting requirements and the Postal Service's refusal to comply**

The PRC believes it can be a more effective rate regulator if the Commission and the public are able to view the Postal Service's financial results on a regular basis, rather than having access only when rate and other cases come before the Commission. Accordingly, the PRC requires the Service to file periodic reports. One of the most important is the Cost and Revenue Analysis report (CRA). In the CRA, the Service reports aggregate data on its costs, revenues, and volume, and it provides per-product data for most of its products. For two reasons, the PRC, the Treasury, and many outside observers are concerned about the reliability of the CRA data, particularly how costs are attributed to specific products. The first reason for this concern is that the Postal Service controls the collection of the raw data. The second is that the Postal Service uses estimation techniques that it does not disclose in its periodic reports to convert the raw data into per-product estimates. To find out about the Service's estimation procedures, the PRC and the public have traditionally had to wait until cases come before the PRC and then use the discovery process within the hearings. The PRC charges that because of the lack of documentation regarding estimating techniques:



Neither the Commission nor the interested public can competently interpret the results presented in the Postal Service's routine financial reports, because they have no way to distinguish between what appear to be changes in cost, volume, and revenue behavior, from changes in the methods that the Postal Service uses to measure that behavior.<sup>28</sup>

In response, the PRC issued a rule in November 2003 requiring the Postal Service to include in future periodic reports more information regarding the underlying data and the Service's estimation procedures.<sup>29</sup> The PRC reasons that more complete information about how the Service derives its estimates will have several benefits.<sup>30</sup> It will assist the PRC in deciding rate cases by giving the Commission a better understanding of the Service's cost estimates. Also, the PRC believes the enhanced reporting will speed up rate cases because the Commission will already be familiar with the Service's data and estimation procedures when the cases begin. Further, the PRC thinks the enhanced reporting will aid it in fulfilling its regulatory function between rate cases by helping it spot problems that might warrant initiating classification cases. The PRC notes that "interested members of the public," as well as the Postal Service, "have the right to present a case in support of the rates that they advocate, and the right to challenge the cases presented by others."<sup>31</sup> The PRC believes that interested members of the public can better exercise that right if they are able to stay abreast of how the Postal Service estimates per-product costs. That consideration leads the PRC to favor public release of the periodic reports it receives from the Postal Service.

As mentioned earlier, the Postal Service objects to the rule and is refusing to comply. Faced with the Service's protests, the PRC is considering now whether to modify its order.<sup>32</sup> The Service contends that the rule is unnecessary, overly burdensome, and exceeds the PRC's statutory authority. The Service's primary objection, though, seems to be that the PRC would let the public see more data on its finances. The Service revealed its priorities when it informed the PRC that a

reconciliation might be possible if the regulator were to "abandon its intention to routinely make such information public."<sup>33</sup> Instead, the Service insists that it should have something close to veto power:

[T]he Postal Service should be permitted to identify, via a descriptive index or otherwise, materials which it considers to be sensitive, and that determination ... should create an automatic and binding presumption against unfettered public disclosure that can be overcome only under exceptional, specified and limited circumstances.<sup>34</sup>

The PRC, in turn, accuses the Postal Service of using claims of commercial sensitivity as a "red herring" when its real objective is to restrict the flow of information to others in order to preserve a "tactical advantage" in rate cases.<sup>35</sup> The PRC says it is ready to accommodate claims of commercial sensitivity when it thinks they are valid, and has often done so in the past, but it finds the Service's current claims to be extraordinarily broad.

In terms of the law, the statutory language described earlier appears to support the PRC. The Commission has related the financial data it seeks to its regulatory mission, and its analysis is plausible. Further, the PRC has explained how public release of the data would advance its regulatory function. Hence, the Commission's actions seem to be a reasonable exercise of the regulatory authority that Congress has given it.

In terms of public policy, obtaining better information from the Postal Service on the agency's finances and letting the public see the information is an excellent step. As explained above, attempts by government entities to hide their finances behind a veil of commercial sensitivity should be treated warily, especially because the financial discipline resulting from a high level of financial disclosure may be very beneficial. The analysis suggests that if the PRC revises its reporting rules in the future, it should, if anything, demand more financial performance information from the Postal Service, not less.

An important additional consideration, of course, is regulatory compliance costs. A regulation that might otherwise be warranted may not be desirable if its costs would be very high. The compliance costs of the PRC's revised rule should be modest, however, because the Service already produces most of the required information internally. Moreover, a benefit in terms of regulatory costs is that, as already noted, the PRC may be able to handle rate requests from the Postal Service more quickly if it is already familiar with the Service's costing methodology. The Service often complains that current rate regulation is time-consuming and cumbersome, and for that reason should be scaled back. However, the Service has been slow to work with the PRC in making use of options allowed under current law that would speed up and increase the flexibility of the rate-setting process, such as phased-in rate increases and negotiated service agreements (although there have been improvements under the current Postmaster General, John Potter.)<sup>36</sup> In this case of the revised PRC rule, the Postal Service seems to be repeating that pattern of complaining of a problem and then denying the remedy.

### **Legislative "reform" proposals that would let the Postal Service more easily block public disclosure.**

House bill H.R. 4341 (the "Postal Accountability and Enhancement Act") was introduced in 2004. Among its many provisions, H.R. 4341 would have prohibited the PRC<sup>37</sup> from releasing material that the Postal Service provided in compliance with PRC reporting requirements, if the Service designated the material as being commercially sensitive. The authority to label documents or portions of documents as commercially sensitive, and therefore unavailable to the public, would have rested solely with the Postal Service. In addition, for material submitted as part of the discovery process in rate cases and other proceedings, the bill would have required the regulator to tighten "procedures for ensuring appropriate confidentiality".<sup>38</sup> The House bill, almost unchanged, has been reintroduced this year as H.R. 22.

A slightly different bill, S. 2468 (also called the "Postal Accountability and Enhancement Act"), was

introduced in the Senate in 2004. For material that the Postal Service designated as commercially sensitive and submitted under PRC reporting requirements, S. 2468 would have allowed the regulator to "balance the nature and extent of the likely commercial injury to the Postal Service against the public interest in maintaining the financial transparency of a government establishment competing in commercial markets."<sup>39</sup> However, it would be harder to override the Postal Service's preference than it is at present because of the procedure the bill would require the regulator to follow in making this determination. Like the House bill, S. 2468 would have required the regulator to adopt tighter confidentiality procedures for information the Postal Service submitted as part of the discovery process in rate cases and other proceedings. The authors of S. 2468 are expected very shortly to introduce a bill in the Senate this year.

The House bills would essentially treat Postal Service claims of commercial sensitivity with rules that would be appropriate if the government agency were a private-sector business. The Senate bill sees the importance of making government entities disclose their finances but tries to balance that against the confidentiality normally accorded to private-sector businesses. Both approaches would be bad public policy because they fail to recognize that government enterprises do not have an inherent claim to privacy, do not merit the same property rights with regard to claims of commercial sensitivity as individuals and non-government businesses, and are in greater need of mandatory disclosure to help discipline their financial operations.

The Administration has noted that H.R. 4341 and S. 2468 include some provisions that would increase the federal deficit by billions of dollars and expressed the view that the bills contain too little real reform to justify the cost. The Administration has offered a number of specific reform suggestions, and recommended that the bills be modified to include them. Several of the Administration's ideas relate to the topic of this paper, and they make good sense. Those recommendations are requiring the Postal Service to provide "SEC-like financial

disclosure", requiring the Service to furnish "product-by-product financial statements", and directing the regulator — not the Postal Service — to "determine whether materials submitted by the Postal Service are to be deemed confidential and exempt from public disclosure."<sup>40</sup> The Administration had previously identified greater transparency as a basic principle of postal reform,<sup>41</sup> implicitly recognizing that government enterprises should not be able to cloak their finances in claims of commercial sensitivity. The Administration accurately concluded that as currently written and in the absence of such improvements, "the bills lack meaningful reforms" with regard to transparency.<sup>42</sup> In fact, in their current form the bills would *reduce* transparency, which would undercut reform.

## Conclusion

When the Postal Service enforces its dual mail monopolies, declines to pay numerous federal, state, and local taxes, invokes its power of eminent

domain, treats local zoning laws as voluntary, or goes to the Supreme Court to thwart an effort to hold it accountable under the antitrust laws, it vigorously exercises its powers as part of the federal government. Yet, the same government entity seeks to be treated like private firms and individuals when it claims some of its financial results are commercially sensitive and should be kept confidential.

This paper has explained why a government entity like the Postal Service does not merit and should not receive the confidentiality regarding its finances that would be appropriate if it were a private-sector firm or individual. Allowing the Postal Service to declare some of its financials off limits is unjustified and bad policy. Instead, to the maximum extent feasible, the Service should be required to let the public see its financial results.

Michael Schuyler  
Senior Economist

*This is another of a continuing series of IRET papers examining the U.S. Postal Service. IRET began its work in this area in the mid 1990s. Norman Ture, the organization's founder, believed that growth and prosperity are advanced by restricting government to a limited set of core functions. From this perspective he was concerned about the activities of government owned and sponsored businesses. The Postal Service stands out among government businesses because of its size — it employs nearly one third of the federal government workforce — and its efforts over the years to expand.*

## Endnotes

1. David M. Walker, Comptroller General, U.S. General Accounting Office, Testimony, U.S. Senate Committee on Governmental Affairs, Hearing, "The Report of the Presidential Commission on the U.S. Postal Service: Preserving Access and Affordability," November 5, 2003, archived Webcast, accessed at <http://hsgac.senate.gov/index.cfm?Fuseaction=Hearings.Detail&HearingID=125>. (Since the hearing, GAO's name has been changed to the Government Accountability Office, and the Senate committee's name has become Homeland Security and Governmental Affairs.)
2. Office of the Consumer Advocate, Postal Rate Commission, "Motion to Request That the Commission Institute A Proceeding to Consider the Postal/Nonpostal Character of Specified Services and the Establishment Of Rules to Require a Full Accounting of the Costs and Revenues of Nonpostal Services," Docket No. R2001-1, March 20, 2002, p. 1, accessed on the Internet at <http://www.prc.gov/docs/33/33557/mo-proceeding-oca.pdf>.

3. Consumer Action, "Petition of Consumer Action Requesting That the Commission Institute Proceedings to (1) Review the Jurisdictional Status of Fourteen Specified Services and (2) Establish Rules to Require a Full Accounting of the Costs and Revenues of Non-Jurisdictional Domestic Services," filed with the Postal Rate Commission, October 15, 2002, accessed on the Internet at <http://www.prc.gov/docs/35/35357/oca-petition.pdf>.
4. Nicholas F. Barranca, Vice President, Product Development, U.S. Postal Service, "Report on Nonpostal Initiatives," submitted to Postal Rate Commission, report prepared in response to Petition by Consumer Action, March 7, 2003, p. 11, accessed on the Internet at [http://www.prc.gov/docs/37/37405/Notice\\_Report.3.10.03.pdf](http://www.prc.gov/docs/37/37405/Notice_Report.3.10.03.pdf).
5. U.S. General Accounting Office, "U.S. Postal Service: Unresolved Issues In The International Mail Market," GAO/GGD-96-51, March 1996, p. 20, accessed on the Internet at <http://www.gao.gov/archive/1996/gg96051.pdf>.
6. *Ibid.*
7. For instance, the Postal Service cautioned the PRC in 2003: "In general, the Postal Service maintains its position that most of the records submitted in connection with the [Postal Rate] Commission's annual Report to Congress [on international mail] are internal [Postal Service] documents of a *commercially sensitive nature* that under good business practices should not be disclosed publicly. Accordingly, the Postal Service requests that the Commission withhold all of these materials from public disclosure...[Emphasis added.]" (U.S. Postal Service, "Letter Transmitting Materials Responsive to Commission Rule 103 in Connection with Commission's Annual International Mail Report to Congress," submitted to Postal Rate Commission, Docket No. IM2003-1, March 17, 2003, accessed on the Internet at <http://www.prc.gov/docs/37/37466/Letter.pdf>.)
8. U.S. Postal Service, "Initial Comments Of The United States Postal Service," submitted to Postal Rate Commission, Docket No. RM2005-1, December 6, 2004, accessed on the Internet at [http://www.prc.gov/docs/42/42472/Postal\\_Service\\_Initial\\_Comments.fnl.pdf](http://www.prc.gov/docs/42/42472/Postal_Service_Initial_Comments.fnl.pdf)
9. Three earlier papers in this series commented on other aspects of the bills. See Michael Schuyler, "Would Proposed Postal Service Legislation Help Bring Down Costs?," *IRET Congressional Advisory*, No. 175, June 8, 2004, available at <ftp://ftp.iret.org/pub/ADVS-175.PDF>; Michael Schuyler, "Legislative Proposals Would Modestly Trim Some Hidden Government Subsidies To Postal Service," *IRET Congressional Advisory*, No. 176, July 15, 2004, at <ftp://ftp.iret.org/pub/ADVS-176.PDF>; and Michael Schuyler, "Limiting The Postal Service's Interest Rate Subsidy; A Lesson From Fannie Mae And Freddie Mac On What Would Work And What Would Not," *IRET Congressional Advisory*, No. 178, August 10, 2004, at <ftp://ftp.iret.org/pub/ADVS-178.PDF>.
10. Postal Reorganization Act of 1970 (P.L. 91-375), sec. 410(b) and 410(c), codified as 39 USC, sec. 410(b) and 410(c). The quote is from sec. 410(c)(2).
11. U.S. Postal Service, "Initial Comments Of The United States Postal Service," *op. cit.*
12. Postal Reorganization Act of 1970 (P.L. 91-375), sec. 3603, codified as 39 USC, sec. 3603.
13. The Postal Service disagrees. See Mary Anne Gibbons, Senior Vice President, General Counsel, U.S. Postal Service, "Letter to Steven W. Williams, Secretary, Postal Rate Commission," September 8, 2004, accessed on the Internet at <http://www.prc.gov/docs/41/41777/letter.pdf>. Ms. Gibbons claims, in the context of information sought by the PRC, "[T]he PRA [Postal Reorganization Act of 1970] embodied, as a bedrock principle, the expectation that the Postal Service would have the authority to perform its important functions with the freedom and flexibility normally enjoyed by a modern business ... [including the] freedom not to have to publish commercial information that would not be disclosed under good business practice..." (*Ibid.*, p. 2.) This would be a reasonable interpretation — if the PRC derived its authority and was controlled by sec. 410. However, as noted in the text, Congress specified in other sections of the Act what the Postal Service's rate regulator can and cannot do. To make its case, the Postal Service would have to convince a court that the PRC is bound by the restriction on FOI requests, even though nothing in the statute says that restriction applies to the rate regulator's rules, procedures, and actions.
14. Postal Reorganization Act of 1970 (P.L. 91-375), sec. 3624, codified as 39 USC, sec. 3624.
15. Postal Reorganization Act of 1970, sec. 202.
16. Postal Reorganization Act of 1970, sec. 101.

17. United States Postal Service v. Flamingo Industries (USA) Ltd. et al., Supreme Court of the United States, Case No. 02-1290, decided February 25, 2004, accessed on the Internet at <http://supremecourtus.gov/opinions/03pdf/02-1290.pdf>. An earlier paper in this series discussed the Service's antitrust immunity and explained why it is bad economic policy. See Michael Schuyler, "Postal Service's Immunity From Antitrust Laws Should Be Restricted," *IRET Congressional Advisory*, No. 172, April 21, 2004, available on the Internet at <ftp://ftp.iret.org/pub/ADVS-172.PDF>.
18. Economists tend to think of a respect for privacy in terms of property rights, but for an early and influential legal analysis that legal protections for privacy do not derive solely from property rights, see Samuel Warren and Louis D. Brandeis, "The Right To Privacy," originally published in 4 *Harvard Law Review*, 193 (1890), accessed on the Internet at <http://www.louisville.edu/library/law/brandeis/privacy.html>.
19. Although physical property is very important, so is intellectual property. The modern world has been shaped by intellectual property, with a few illustrations being knowledge of how to make internal combustion engines, airplanes, computers, and lifesaving pharmaceuticals. Much intellectual property has passed into the public domain, but a considerable amount remains private property.
20. A business's detailed cost and revenue data do not necessarily have great market value. If public knowledge of the numbers routinely had a major impact on a business's competitiveness, one should expect diversified companies to do better than companies that concentrate on one product line because diversified companies can more easily conceal product-specific financial information in the financial statements they are required to release. There is no evidence, however, that diversified companies normally do better than specialized companies and no evidence that the desire to conceal product-specific financial data is a driving force behind mergers of companies in different product lines.
21. This is not to say markets are perfect. Managers have more information about a company than shareholders and can sometimes fool shareholders. However, if managers hide problems and the problems persist, shareholders will eventually see there is trouble and at that point react all the more forcefully in driving down the share price and considering whether to replace management. Further, because shareholders are very concerned about future performance (a stock's price depends on expected future returns), managers feel market pressure not only to release current financial results but also to keep shareholders informed, often in great detail, about the company's plans and its future prospects. In discussing the future, managers know accuracy is important because expectations that are not met will likely lead to large and sudden declines in share value. Although governments often talk about how they are trying to protect shareholders, many governments have done the opposite by passing laws that discourage hostile takeovers. Those laws make it harder for shareholders to remove unsatisfactory management teams, which lessens shareholder power and weakens normal market discipline.
22. Government agencies often have access to information on individuals and their businesses (e.g., the Postal Service can see from whom people receive mail). Government agencies should generally keep such information confidential, but that confidentiality is based on protection of individual privacy and property rights; it has nothing to do with any government right to privacy.
23. H. Edward Quick, Jr., "Trilogy Of Woes Demands A Reality Check," Commissioner, Postal Rate Commission, Testimony Before the Subcommittee On Postal Service, House Committee On Government Reform And Oversight, March 13, 1996, accessed on the Internet at <http://www.prc.gov/docs/33/33400/Quick.pdf>.
24. See, for example, Michael Schuyler, "Empire Building At The Postal Service," *IRET Policy Bulletin*, No. 87, May 19, 2003, available on the Internet at <ftp://ftp.iret.org/pub/BLTN-87.PDF>.
25. Even if an enterprise is not government owned, it can often sidestep normal market discipline if lenders believe it has an implicit government credit guarantee. This danger is often mentioned in connection with Fannie Mae and Freddie Mac, two huge enterprises that are privately owned but government sponsored. An earlier paper in this series discussed why turning the government-owned Postal Service loose in the private credit market would invite similar trouble, even if Postal Service debt issues were to state that they carry no government guarantee. (See Michael Schuyler, "Limiting The Postal Service's Interest Rate Subsidy; A Lesson From Fannie Mae And Freddie Mac On What Would Work And What Would Not," *op. cit.*) Unfortunately, a provision that would let the Postal Service borrow in the private credit market was contained in last year's H.R. 4341 and S. 2468, and it is retained in this year's H.R. 22. (This year's Senate bill has not yet been released to check if the provision is there too.)

26. President's Commission on the United States Postal Service, *Embracing The Future; Making The Tough Choices To Preserve Universal Mail Service*, July 31, 2003, p. 66, accessed on the Internet at <http://www.treas.gov/offices/domestic-finance/usps/pdf/report.pdf>.
27. *Ibid.* The bipartisan Commission praised the Service's level of disclosure relative to other federal agencies, but found it deficient relative to private-sector companies. "While the Postal Service does, in many respects, conduct financial reporting over and above what is required today of Federal agencies, it remains behind the level of disclosure offered by its corporate peers." (*Ibid.*)
28. Postal Rate Commission, "Final Rule On Periodic Reporting Requirements," Order No. 1386, Docket No. RM2003-3, November 3, 2003, pp. 6-7, accessed on the Internet at <http://www.prc.gov/docs/39/39414/RM2003-3.pdf>.
29. *Ibid.* The rule was issued only after the PRC had proposed it and then allowed a period for comments.
30. For the PRC's own explanation of its thinking, see *ibid.*
31. *Ibid.*, p. 1.
32. See Postal Rate Commission, "Advance Notice Of Proposed Rulemaking," Order No. 1423, Docket No. RM2005-1, November 8, 2004, accessed on the Internet at <http://www.prc.gov/docs/42/42296/Order1423.pdf>.
33. *Ibid.*
34. U.S. Postal Service, "Initial Comments Of The United States Postal Service," *op. cit.*, p. 8.
35. PRC, Order No. 1386," *op. cit.*, pp. 69, 77.
36. The asymmetry between the Postal Service's complaints and its reluctance to seek relief permitted under current law is discussed in an earlier paper. See Michael Schuyler, "Is The Postal Rate-Setting Process Broken?" *IRET Congressional Advisory*, No. 182, December 8, 2004, available on the Internet at <ftp://ftp.iret.org/pub/ADVS-182.PDF>.
37. The regulator would have the same initials as presently, but it would be given added responsibilities and renamed the Postal Regulatory Commission.
38. H.R. 4341, 108th Congress, Second Session, sec. 204, amending sec. 3652(f) of 39 USC, and sec. 502, amending sec. 504(g) of 39 USC.
39. S. 2468, 108th Congress, Second Session, sec. 602, amending sec. 504(g) of 39 USC. Also relevant is S. 2468, sec. 204, amending sec. 3652(f) of 39 USC.
40. See Administration document titled "Postal Reform," given to members of Congress working on Postal Service legislation, posted by Postcom on Nov. 18, 2004, accessed on the Internet at <http://www.postcom.org/public/reform/WH.PDF>.
41. See U.S. Department of the Treasury, "Bush Administration Announces Principles for Postal Reform," Press Release, JS-1044, December 8, 2003, accessed on the Internet at <http://www.treas.gov/press/releases/js1044.htm>.
42. Administration, "Postal Reform" letter, *op. cit.*