DoD 5400.11–R,[1] and procedures outlined in this part amplified by 32 CFR part 286.

§ 285.4 Responsibilities.

(a) The Assistant Secretary of Defense for Public Affairs shall:

(1) Direct and administer the DoD FOIA Program to ensure compliance with policies and procedures that govern the administration of the program.

(2) Issue a DoD FOIA regulation and other discretionary instructions and guidance to ensure timely and reasonably uniform implementation of the FOIA in the Department of Defense.

(3) Internally administer the FOIA Program for OSD, the Chairman of the Joint Chiefs of Staff and, as an exception to DoD Directive 5100.3,[2] the Combatant Commands.

(4) As the designee of the Secretary of Defense, serve as the sole appellate authority for appeals to decisions of respective Initial Denial Authorities within OSD, the Chairman of the Joint Chiefs of Staff, the Combatant Commands, and the DoD Field Activities.

(b) The General Counsel of the Department of Defense shall provide uniformity in the legal interpretation of this part.

(c) The Heads of the DoD Components shall:

(1) Publish in the **Federal Register** any instructions necessary for the internal administration of this part within a DoD Component that are not prescribed by this Directive or by other issuances of the Assistant Secretary of Defense (Public Affairs). For the guidance of the public, the information specified in 5 U.S.C. 552(a)(1) shall be published in accordance with DoD Directive 5400.9.[3]

(2) Conduct training on the provisions of this part, 5 U.S.C. 552, and 32 CFR part 286 for officials and employees who implement the FOIA.

(3) Submit the report prescribed in subpart G of 32 CFR part 286.

(4) Make available for public inspection and copying in an appropriate facility or facilities, in accordance with rules published in the **Federal Register,** the records specified in 10 U.S.C. 552(a)(2), unless such records are published and copies are offered for sale. These records shall be made available to the public in hard copy, by computer telecommunications, or other electronic means.

(5) Maintain and make available for public inspection and copying current indices of all (a)(2) records as required by 10 U.S.C. 552(a)(2).

§ 285.5 Information requirements.

The reporting requirements in subpart G of 32 CFR part 286 have been assigned Report Control Symbol DD–PA(A) 1365.

Dated: November 5, 1997.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 97–29659 Filed 11–13–97; 8:45 am]

BILLING CODE 5000–04–M

[1] Copies may be obtained, at cost, from the National Technical Information Service, 5285 Port Royal Road, Springfield, VA 22161.

[2] See footnote 1.

[3] See footnote 1.

POSTAL SERVICE

39 CFR Part 111

Eligibility Requirements for Certain Nonprofit Standard Mail Rate Matter

AGENCY: Postal Service.

ACTION: Final rule.

SUMMARY: This notice adopts a proposed rule which was published in the **Federal Register** on September 8, 1997 (62 FR 47178–47179). It amends the regulations of the Postal Service governing the eligibility requirements for mail to be sent at the Nonprofit Standard Mail rates of postage. For the most part, this final rule adopts the proposal as it was published with changes suggested in comments received from interested parties.

EFFECTIVE DATE: November 14, 1997.

FOR FURTHER INFORMATION CONTACT: Jerome M. Lease, 202–268–5188.

SUPPLEMENTARY INFORMATION: The proposed rule discussed in detail the common practice of nonprofit organizations to offer premium items, such as tote bags, umbrellas, t-shirts, and coffee mugs when seeking contributions or membership dues payments from new members. As explained in the proposed rule, by statute, material that advertises, promotes, offers, or, for a fee or consideration, recommends, describes, or announces the availability of any product or service, other than separately restricted travel, insurance, and financial instruments such as credit cards, is ineligible for the nonprofit rates of postage unless the sale of the product or the provision of such service is substantially related to the exercise or performance by the organization of one or more of the purposes used by the organization to qualify for mailing at the Nonprofit Standard Mail rates or other prescribed exceptions are met. 39 U.S.C. 3626(j)(1)(D).

The Postal Service promulgated standards implementing the statute effective October 1, 1995. Since that time, the Postal Service has consistently held that ''backend premiums'' such as those described above are to be considered advertising for the product offered as a premium. In addition, the Postal Service has generally concluded that ''utilitarian'' items such as coffee mugs, t-shirts, tote bags, umbrellas, and similar items are not normally related to an organization's qualifying purposes, thus disqualifying such advertisements from being mailed at the Nonprofit Standard Mail rates.

The proposed rule offered standards by which, if met, the Postal Service would not consider the announcement of the backend premium as an ''advertisement.'' Specifically, the Postal Service proposed two tests. First, the requested contribution must be at least five (5) times the cost of the premium to exempt the announcement from being considered as an advertisement for the premium. The cost of the premium is its actual cost to the nonprofit organization. Second, the requested contribution must be at least three (3) times the represented value in the mailpiece, if any, of the premium. *Each* test must be met or the offer will be considered an advertisement.

The Postal Service received a total of 12 comments on the proposed rule. In one fashion or another, all of the commenters expressed their support for a test or threshold by which announcements of backend premiums would not be considered as advertisements, thereby eliminating the need for consideration of the substantially related test. Accordingly, after full consideration of the comments received, the Postal Service believes it is appropriate to adopt, with revision of the ratios, the proposed changes in eligibility requirements at this time.

Evaluation of Comments Received

Written comments were received from 12 organizations and associations representing nonprofit organizations. Of primary concern to 11 of the 12 commenters is the Postal Service's proposed test of requiring a contribution or dues payment to be at least five times the cost and three times the represented value of the premium to activate the exception from material being considered as an advertisement. Four commenters supported the proposal in its entirety including the five times cost and three times represented value criteria. On the other hand, two commenters requested a test of three times the cost and eliminating the represented value test. Other

suggestions included a test of three times cost and 1½ times represented value; three times cost and two times represented value; four times cost and two times represented value; and a single test that would be based on the lower of cost or market value of the premium.

The most common reason for requesting lower numbers be used, particularly with respect to the test related to the ''represented value'' of the premium, is a disclosure requirement of the Internal Revenue Service which requires that the ''fair market value'' of a premium be disclosed. (The donor may not take a charitable deduction for that part of his or her payment). Along those same lines, one commenter was concerned about using a cost figure when merchandise which is ''obsolete'' and without current market value is offered as a premium. Others simply cited lower numbers as a more reasonable way to fairly assess whether the offer of a premium should be considered advertising.

We have considered the comments, and determined to adopt both of the proposed tests, albeit with modifications in the original ratios. Up to this time, the Postal Service viewed these solicitations as two distinct transactions (i.e., part donation and part sale). Even though the amount of the donation generally exceeded the amount of the sale, the premium offer was considered to be an advertisement for that item. The rulemaking looks to the premise, supported by a recent ruling of another agency, that the solicitation is a single transaction (rather than part solicitation and part sale); it then looks to whether the solicitation or sale is the predominant part of the transaction. That is, it looks to whether the amount of the sale is greater than the amount of the donation.

One means to make this judgment would be to compare the fair market value of the premium(s) with the ''donation'' (i.e., the difference between the amount solicited and the fair market value). However, the fair market value of the premium may not always be clear or readily ascertained. Accordingly, the Postal Service proposal looked to the represented value, if any, of the premium(s), since this would be the perceived value of the premium(s), as well as the cost to the nonprofit, since there is generally a relationship (i.e., markup) between cost and market value.

We continue to believe that both of these standards are appropriate, but will adjust the ratios. With respect to represented value, the solicitation will not be considered to be an advertisement if the requested donation is *more* than two times the represented value of the premium(s). (For example, if the request is for $100.00, the represented value of the premium(s) could be no more than $49.99). With respect to cost to the nonprofit, the solicitation will not be considered an advertisement if the requested donation is *more* than four times the represented value of the premium(s). (For example, if the request is for $100.00, the cost of the premium(s) may be no more than $24.99). In adopting this test, we considered that a usual ''markup'' over costs is two to one, which was suggested in some comments (although other comments suggest the ratio may be higher).

The comment concerning application of the test to ''obsolete'' merchandise raises an interesting concern. Even if we would be inclined to consider this concern, it is not clear to us how a standard could easily be administered (e.g., how can we determine what is ''obsolete?''). While we do not believe it appropriate to delay this rulemaking to give further consideration to this concern, we will consider further proposals regarding it.

Two commenters were concerned that the proposed rule does not make clear that only premium offers which are not substantially related to a nonprofit organization's qualifying purposes must meet the test incorporated in the final rule to be eligible for mailing at Nonprofit Standard Mail rates. We believe that adoption of these suggestions is not needed, and would unnecessarily complicate the regulations. The rule is intended to define the solicitations which will not be considered advertising. If solicitations are advertising, they may still be eligible for nonprofit rates if the premiums are substantially related to the organization's purposes or contained in material meeting the content requirements of a periodical.

One commenter also suggested that future adjustments be made possible, such as adjustments for inflation. We will remain open to future suggestions to change the standards adopted here.

Another commenter requested that the Postal Service include a provision for ''one written warning'' if a premium offer for a product or service is determined to be ineligible for mailing at the nonprofit rates; and, to create a statute of limitations to limit a nonprofit organization's liability for making improper mailings. This same commenter requested ''retroactive'' application of the policy adopted in the final rule, although no justification for this request was offered in the comment provided. These requests are beyond the scope of this rulemaking. Nevertheless, the Postal Service has an ongoing dialogue with the nonprofit community and concerns such as those expressed here have been considered.

Finally, one commenter offered views concerning the application of the ''substantially related'' standard. These comments were beyond the scope of the rulemaking.

List of Subjects in 39 CFR Part 111

Postal Service.

For the reasons discussed above, the Postal Service hereby adopts the following amendments to the Domestic Mail Manual, which is incorporated by reference in the Code of Federal Regulations (see 39 CFR part 111).

PART 111—[AMENDED]

1. The authority citation for 39 CFR part 111 continues to read as follows:

Authority: 5 U.S.C. 552(a); 39 U.S.C. 101, 401, 403, 404, 3001–3011, 3201–3219, 3403–3406, 3621, 3626, 5001.

2. In the Domestic Mail Manual, redesignate 5.9, 5.10, 5.11, and 5.12 as 5.10, 5.11, 5.12, and 5.13, respectively; add new 5.9 to read as follows:

5.0 ELIGIBLE AND INELIGIBLE MATTER

* * * * *

5.9 Contribution and Membership Premiums

Announcements for premiums received as a result of a contribution or payment of membership dues are not considered advertisements if the requested contribution or membership dues is more than 4 times the cost of the premium item(s) offered and more than 2 times the represented value in the mailpiece, if any, of the premium item(s) offered.

* * * * *

A transmittal letter making these changes in the pages of the Domestic Mail Manual will be published and will be transmitted to subscribers automatically. Notice of issuance will be published in the **Federal Register** as provided by 39 CFR 111.3.

Stanley F. Mires,

Chief Counsel, Legislative.

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