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U.S. POSTAL SERVICE LAUNCHES NATIONAL ENFORCEMENT INITIATIVE AGAINST BUSINESS MAILERS

How to Navigate A Postal Service Investigation

The United States Postal Service, which appears headed for a multi-billion dollar loss this year, has quietly launched a major new initiative to collect more postage from mail that already has been paid for and delivered. The primary targets of the initiative are business mailers—the mailers that use large volumes of First-Class and Standard Mail for marketing, billing, account statements, and other customer communications and the mail service providers that help prepare these mailings. The Postal Service's strategy is to investigate recent mailings for violations of the complex and arcane mail preparation requirements for discounted postage rates. Evidence of violation can lead to demands for additional postage, or enforcement actions under the False Claims Act. The potential financial exposure for big national mailers can be seven or eight figures.

The USPS is Looking for Violations

The Postal Service seems to be looking for violations of Move Update (address updating) requirements, other addressing requirements, and other mail preparation and content requirements that could lead to large revenue deficiencies. In some cases, the investigators seek evidence that the mailer entered improper mailings knowingly or intentionally, states of mind that can support a claim under the False Claims Act. Violation of the False Claims Act can expose a mailer to double or treble damages—i.e., liability equal to two or three times the amount of the underlying revenue deficiency—as well as civil penalties of approximately \$11,000 per violation. The Postal Service typically rules that each mailing statement constitutes a separate violation; hence, total civil penalties sometimes can be ten or more times the underlying revenue deficiency. Criminal liability under the False Claims Act is also possible, but unlikely except in extreme cases.

Tips on Dealing with A Postal Service Investigation

If you've been targeted with a Postal Service investigation, here are some tips for how to react quickly:

(1) **Issue a document hold.** If the Postal Service has issued a subpoena or otherwise indicated that a serious investigation is under way, your company usually should issue a document hold to the employees who are likely to possess relevant information.

(2) **Uncover the facts.** You need to get to the bottom of the facts for yourself as soon as possible. A mailer cannot defend itself intelligently without knowing what it has (or has not) done. Depending on the focus of the investigation, you may need to be able to answer the following questions:

- Were the mailings at issue eligible for the rates claimed? Is the interpretation of the eligibility rules asserted by the investigators correct?
- How many pieces have been mailed at the rates at issue within the past year? If some pieces were in fact ineligible for the rates claimed, what volume of mail was affected, what were the lowest alternative rates for which the mailpieces were eligible, and what is the total revenue deficiency?
- What systems of records (electronic or hard copy) does your company maintain with the above information?
- What standards, policies and enforcement mechanisms has your company adopted to ensure compliance with the Postal Service's eligibility rules? If your company relies on its vendors for compliance, what standards, policies and enforcement mechanisms have the vendors implemented? If your company is a mail service provider, what steps have you taken to verify that your mail owner customers are in compliance?
- What communications has your company had with its employees, vendors and mail service providers—and Postal Service mail acceptance and classification personnel—about compliance with the Postal Service's eligibility rules?
- What do your company's employees, vendors or mail service providers know about any eligibility-related compliance issues? What documents exist in the files that might support (or refute) a claim that your employees, vendors or mail service providers were on notice about any eligibility-related compliance issues?

(3) **Cure any noncompliance.** If you discover any defects in your company's internal compliance mechanisms, remedy them as soon as possible.

(4) **Open lines of communication with the Postal Service.** If postal inspectors have been questioning your company's employees (or appear likely to do so), an attorney for your company should contact the inspectors to open lines of communications, underscore that your company intends to respond to the Postal Service's information requests in good faith, and make clear that requests for information from company personnel should be channeled through the company's lawyers. A letter should follow to confirm these points in writing.

(5) **Deal with subpoenas.** If your company has received a subpoena from the Postal Service, you and your legal counsel should quickly decide whether the questions are appropriate and manageable, and try to negotiate a narrowing of any data requests that are overly broad or burdensome.

(6) **Litigate or settle.** You need to decide whether the best strategy is to dispute the claim or admit it. If you have a strong case, vigorously challenging the deficiency claims may be the most effective course. If your company is clearly liable, the best way to avoid greater liability under the False Claims Act may be to move quickly to admit fault, establish procedural safeguards to prevent a recurrence, and offer to pay the deficiency.

Avoid Common Mistakes

Don't assume that your company will be able to derail an investigation or overturn a revenue deficiency assessment because the mailer is reputable and a big customer of the Postal Service. Postal inspectors report to the Office of Inspector General, which reports to the Postal Service's Governors, not the Postmaster General or any of his subordinates. Postal inspectors, unlike Postal Service marketing representatives, are not concerned with keeping big customers happy.

Nor should you assume that you are safe because you have obtained advance approval of a mailpiece or mailing practice from a local or district Postal Service official. Postal inspectors and headquarters officials commonly assert that local and district officials lack authority to grant exceptions from mail preparation requirements, and that mailers rely at their peril on advice from such officials.

Attempting to deal with the investigation without in-house or outside legal advice is a recipe for disaster.. Defending a mailer effectively in a postal investigation requires expertise in both postal eligibility law and the processes of law enforcement investigations. Mailers who try to handle these cases on their own can create problems in the record that will be difficult or impossible to cure later.

An appeal to the Postal Service from an initial revenue deficiency assessment should be supported by all of the good arguments and evidence that the mailer can offer. It is a mistake to assume that holes in the record can be filled at a later stage in the appeals process.

How Can We Help?

Venable LLP has one of the foremost postal law practices in the United States. The firm's individual and trade association clients represent every major class of mail, and the majority of the mail delivered by the U.S. Postal Service. Venable's postal lawyers also draw on the firm's expertise in tax law, advertising and marketing law, antitrust and trade regulation, legislative and regulatory affairs, administrative law, nonprofit organizations, the False Claims Act, and civil, criminal and appellate litigation.

If your company is the target of a Postal Service investigation, our lawyers can help you:

- conduct an internal investigation
- design the process changes needed to ensure compliance
- deal with Postal Service subpoenas

- negotiate a settlement
- litigate the case before the Postal Service and the federal courts.

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