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April 4, 2008

Manager, Mailing Standards
United States Postal Service
475 L'Enfant Plaza, S.W., Room 3436
Washington, DC 20260-3436

Re: 73 Fed. Reg. 12321: New Standards Prohibit the Mailing of Replica or Inert Munitions

Gentlemen:

Our firm represents Gun Owners of America, Inc. ("GOA"), and Gun Owners Foundation ("GOF"), and we are submitting these comments on their behalf, in response to the United States Postal Service's Notice of Proposed Rule to Prohibit the Mailing of Replica or Inert Munitions and its request for comments. *See 73 Fed. Reg. 12321 (March 7, 2008)*. GOA/GOF appreciates that the Postal Service has provided this opportunity to comment on its proposed rules.

The Postal Service proposes to declare nonmailable "[r]eplica or inert munitions that bear a realistic appearance, such as simulated grenades or other simulated explosive devices."

GOA/GOF understands that the Postal Service is proposing a rule that it believes will facilitate the safe, timely, and unimpeded delivery of mail. However, GOA/GOF believes that the proposed rule is unauthorized by law, vague, unduly restrictive, and unwise in practice, and that it, therefore, should not be implemented.

1. The Proposed Standard is Unauthorized by Law.

The U.S. Constitution gave Congress the power to "establish Postal Offices and post Roads" in Article II, Section 8. Pursuant to that power, Congress established the United States Postal Service in 1970 as an "independent establishment of the executive branch of the Government of the United States." 39 U.S.C. § 201.

Among the powers specifically granted to the Postal Service is the power "to adopt, amend, and repeal such rules and regulations, not inconsistent with this title...." 39 U.S.C.

§ 401(2). Furthermore, although not generally subject to the notice and comment rulemaking provisions of the Administrative Procedure Act (Title 5, Chapter 5 of the U.S. Code) (*see* 39 U.S.C. § 410(a)), no regulation promulgated by the Postal Service may be inconsistent with Title 39. *See generally Aid Association for Lutherans v. United States Postal Service*, 321 F.3d 1166, 1168 (D.C. Cir. 2003) (parties “may challenge actions by the Postal Service that are outside of the scope of its statutory authority”).

Congress never authorized the Postal Service to determine what type of matter is mailable and what is nonmailable. Instead, Congress has spelled out by statute specifically what it determined to be nonmailable material, and has added to that list from time to time. Up to now, it appears that all of the types of items listed by the Postal Service as nonmailable in the Domestic Mail Manual (“DMM”) implement Congressionally-enacted prohibitions, as the following chart demonstrates.

Nonmailable Matter

<u>DMM Section</u>	<u>Nonmailable Matter</u>	<u>Corresponding Statute</u>
508.8	Pandering Advertisements	39 U.S.C. § 3008
508.9	Sexually Oriented Advertisements	39 U.S.C. § 3010
601.10	Hazardous Materials	39 U.S.C. § 3018
601.11.1	Handguns	18 U.S.C. § 1715
601.11.5	Knives and Sharp Instruments	18 U.S.C. § 1716(g) and (I)
601.11.7	Intoxicating Liquor	18 U.S.C. § 1716(f)
601.11.10	Motor Vehicle Master Keys and Locksmithing Devices	39 U.S.C. §§ 3002, 3002a
601.11.11	Drugs	18 U.S.C. § 1716(d)
601.11.13	Household Substances	39 U.S.C. § 3001(f)
601.11.14	Pesticides	18 U.S.C. § 1716(a)
601.11.15	Fragrance Advertising Samples	39 U.S.C. § 3001(g)
601.11.18	Abortive/Contraceptive Devices	18 U.S.C. § 1461
601.11.20	Animal Fighting Accessories	7 U.S.C. § 2156
601.12.1	Solicitations in Guise of Bills, Invoices, or Statements of Accounts	39 U.S.C. §§ 3001(d), 3005
601.12.2	Solicitations Deceptively Implying Federal Connection, Approval, or Endorsement	39 U.S.C. §§ 3001(h), (i), 3005
601.12.3	Lottery Matter	18 U.S.C. § 1302
601.12.4	Advertising Matter of Nonmailable Matter	18 U.S.C. § 1716(h)
601.12.5.1	Fictitious Name in Conducting Illegal Scheme	18 U.S.C. § 1342
601.12.5.2-3	Foreign Origin or Destination	17 U.S.C. § 601-603

601.12.5.4	Lewd or Filthy Matter	18 U.S.C. §§ 1461, 1463
601.12.5.5	Matter Inciting Violence	18 U.S.C. §§ 1461, 1717
601.12.5.6	Other Unlawful Matter	Various items specifically prohibited in Title 18
601.12.5.7	Animal Fighting Matter	7 U.S.C. § 2156
601.12.5.8	Private ID Without Disclaimer	18 U.S.C. § 1738 (since repealed)
601.12.6	Sweepstakes Matter	39 U.S.C. § 3001(k)(3)(A)
601.12.7	Skills Contests	39 U.S.C. § 3001(k)(3)(B)
601.12.8	Facsimile Checks	39 U.S.C. § 3001(k)(3)(C)

Because Congress determines what types of matter is nonmailable, and since Congress has not granted to the Postal Service express authority to broaden the category of what is nonmailable, the Postal Service does not appear to have the authority to declare an entirely new category of items (such as replica and inert munitions) nonmailable.

Further, as the Postal Service states, “[t]he basic premise of the postal mailability statutes is that anything ‘which may kill or injure another, or injure the mails or other property...’ is nonmailable.” DMM 601.8.2. According to the rationale advanced by Postal Service in its proposal, this basic premise is not applicable to “replica or inert munitions.” While the Postal Service claims that its proposed rules are designed “to increase the safety of the mail and provide a safe working environment,” it acknowledges that its concern is based not on any actual risk, but only on the unsupported theory that “continued exposure to replicated munitions, over time, lead to desensitized reactions.”¹

Moreover, if the Postal Service is operating on the theory that “replica munitions” are “hazardous,” its actions are clearly *ultra vires*. The Postal Service cannot declare whatever it wants to be “hazardous material,” as the Postal Accountability and Enhancement Act vests the authority to make that decision in the United States Secretary of Transportation. *See* 39 U.S.C. § 3001(n)(2).

2. The Postal Service’s Universal Service Obligation would be Violated if the Proposed Regulation were Adopted.

Under the Universal Service Obligation (“USO”), the Postal Service has a duty to “provide prompt, reliable, and efficient services to patrons in all areas and shall render postal services to all communities.” 39 U.S.C. § 101(a). This is not just a duty to deliver what it

¹ The Postal Service asserts that numerous incidents have occurred involving the discovery of inert munitions. It is understood that only First-Class Mail is sealed against postal inspection, but it is not clear how this many incidents could have occurred unless the Postal Service, either routinely or on a targeted basis, opens thousands of packages being sent without public awareness of this practice.

wants to deliver based on arbitrary Postal Service preferences; the Postal Service is obligated to deliver what mailers want to mail. Congress has modified the USO to declare some items nonmailable. The Postal Service can no more add to that list than it can decide not to deliver mail to certain homes or businesses.

3. The Proposed Rule is Vague in Describing What Items it Seeks to Prohibit in that it does not Adequately Define the Term “Replica or Inert Munitions.”

The proposed rule would amend section 601 of the DMM to include prohibitions against “[r]eplica or inert munitions that bear a realistic appearance, such as simulated by grenades or other simulated explosive devices...” (73 Fed. Reg. 12321).

Although the apparent intention of the proposed language suggests that the Postal Service will limit its restrictions to imitation explosive devices like “grenades,” the ordinary definition of “munitions” would include “materials used in war, esp[ecially] weapons and ammunition.”² Thus, all sorts of other items potentially could fall under the proposed restriction. Using the ordinary definition of “munitions,” such things as a blue rubber training knife, or a box of spent cartridge brass would be prohibited, even though such items, by any reasonable standard, would not be considered dangerous or even resembling a dangerous device. Adding to the confusion is the Notice’s opening sentence, stating that the Postal Service regulations “do not prohibit look-alike weapons.” If that language were adopted, even non-“live” ammunition components such as cartridge brass and bullets could fall into the proposed rule’s definition of a prohibited “munition.”

Unlike other Postal Service prohibitions, such as the one banning the mailing of a handgun, which defines the term so that a reasonable person can identify prohibited items with great certainty, the terms “replica or inert munitions” are not recognized by an ordinary person. Rather, these are terms of art that very well could lead to confusion as well as arbitrary and inconsistent application. Clearly, then, without a more precise definition of its key terms, the proposed regulation is flawed.

4. The Proposed Rule May be Motivated by an Unstated Purpose, to Rationalize Regulations across North America, Similar to a Recently-Adopted Canadian Restriction Which has Met with Limited Success.

Effective October 4, 2006, Canada Post announced amendments to its “Non-Mailable Matter Regulations,” prohibiting the mailing of inert or replica munitions “into Canada, out of

² Webster’s Encyclopedic Unabridged Dictionary of the English Language, 1989.

Canada, or within Canada.”³ The prohibition was virtually identical to the one USPS now proposes, as were the reasons given for the restriction.

Because of shipments coming from other countries, Canada approached the U.K., Germany, and the United States, to request international mail standards which prohibit replica or inert munition shipments to Canada.⁴ Effective December 21, 2006, the Postal Service added similar restrictions to its International Mail Manual.⁵

Therefore, the question is whether the motivation for the proposed regulation really stems from any real problem in the United States, or rather stems from a desire to make the DMM “compatible” with the International Mail Manual based on a Canadian request to stop inert munitions shipments to Canada. It may even point to a trend towards the standardization of federal rules among North American countries, which is not something the Postal Service should attempt on its own initiative.

Finally, the proposed regulations may be just as ineffective in the United States as they appear to have been in Canada. Nearly a year after the Canadian regulations were put into effect, the CTV Television Network reported that replica or inert munitions were “still popping up at Canada’s mail-processing centres, months after they were banned....”⁶ The ineffectiveness factor, of course, may be a direct consequence of other debilities in the proposed regulations mentioned above, such as confusing language and the overreaching nature of the proposal.

³ “Mailing of inert or replica munitions now illegal in Canada,” Canada Post, October 23, 2006, <http://www.canadapost.ca/personal/corporate/about/newsroom/pr/default-e.asp?prid=1192>.

⁴ “Canada Post still receiving grenades, munitions,” CTV Television Network, June 11, 2007, http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20070611/mailed_munitions_070611/20070611?hub=Canada.

⁵ Postal Bulletin 22196 (12-21-06), p. 59.

⁶ The drop in the number of “incidents” due to newly-prohibited munitions was said to be “small.” In fact, Canada Post has instituted new “procedures deal with ... suspicious packages,” including treating all replica or inert munitions as live munitions, even when they are clearly marked as inert. Overall, Canada’s Border Services Agency has determined that “[a]s far as we’re concerned, it’s still too soon to determine the effectiveness of the regulations [against inert munitions].” CTV Television Network, *supra*.

For the foregoing reasons, the proposed regulations should not be adopted or implemented.

Sincerely yours,

William J. Olson

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