
Regulation to Establish Procedure
for According Appropriate Confidentiality

Docket No. RM2008-1

**COMMENTS OF VALASSIS DIRECT MAIL, INC. ON
SECOND NOTICE OF PROPOSED RULEMAKING**

(April 27, 2009)

Valassis Direct Mail, Inc., a wholly owned subsidiary of Valassis Communications, Inc., hereby submits its comments concerning the Commission's second notice of proposed rulemaking in this docket, issued on March 20, 2009. Our comments relate to the proposal to provide a shortened three-day period for answers to motions for access to non-public materials that relate to third parties.

In proposed Sections 3007.40 (relating to Commission proceedings) and 3007.50 (relating to annual compliance reviews), the Commission has proposed alternative time limits for submission of answers to requests for access to non-public materials. Parties normally will be given seven days to respond. However, if the requestor has attached "an executed copy of the sample Commission protective conditions" to its motion, parties will be given only three days to respond.

In the case of requests that seek access to information related to third parties, we submit that this three-day answer period is too short *unless* the requesting party has also given *actual* notice to such third parties at the time of its filing. Normally, the posting of a motion on the Commission's website is considered constructive notice. However, unless a third party routinely checks the Commission's website on a daily basis, there is the very real possibility that it may not become aware of the pending

motion in sufficient time to respond within the three-day time limit, in which case it would forfeit its right to protect commercially sensitive information.

Providing actual notice to third parties in such circumstances would not be burdensome to moving parties. In most cases, the moving party will be aware of the identities of third parties that may have an interest in protecting the requested information. A phonecall or email to such parties or their representatives at the time of filing will suffice to give actual notice. In other cases, where the identity of potentially-affected third parties is unknown or where providing actual notice is impractical or impossible, the normal seven-day period for filing answers should apply.

Otherwise, the rules as proposed invite gamesmanship by requestors, encouraging them to attach protective conditions to their motions not so much to expedite access to the information as to cut off the opportunity for affected third parties to respond. While expedition may be important in the context of ongoing proceedings, particularly those with tight statutory or Commission-prescribed procedural schedules, that interest must be balanced against the legitimate interests of third parties to protect against disclosure of sensitive information.¹ Requiring actual notice of the motion as a precondition to the shortened three-day answer period is not only non-burdensome but essential.

¹ Outside the context of an ongoing Commission proceeding, however, we question the need for super-expedition on motions for disclosure. Under Section 3007.50, for example, such motions may be filed at any time whether or not an annual compliance determination proceeding is pending. If there is no pending proceeding (with an attendant tight procedural schedule), the value of obtaining access to non-public material a few days sooner becomes *de minimis* when weighed against the interests of third parties.

To accomplish this balancing of interests, we propose that paragraphs (b)(1) and (2) of proposed Sections 3007.40 and 3007.50 be modified as follows (new language in italics):

(1) If an executed copy for the sample Commission protective conditions is attached, *and if actual notice of the motion has been provided to third parties with a proprietary interest in the requested non-public materials*, answers are due within 3 days after such a motion is filed.

(2) If an executed copy of the sample Commission protective conditions is not attached *or if actual notice has not been provided*, answers are due within 7 days after such a motion is filed.

With these modifications, requesting parties that want the benefit of quicker access to protected materials will, appropriately, bear the onus of ensuring that affected third parties have actual notice of the request and fair opportunity to respond within the shortened three-day answer period.

Respectfully submitted,

/s/
John M. Burzio
Thomas W. McLaughlin
Burzio McLaughlin & Keegan
1054 31st Street, N.W., Suite 540
Washington, D. C. 20007-4403
(202) 965-4555; Fax (202) 965-4432
bmklaw@verizon.net

Counsel for Valassis Direct Mail, Inc.

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