

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Regulations to Establish Procedure)
for According Appropriate Confidentiality)

Docket No. RM2008-1

**VALPAK DIRECT MARKETING SYSTEMS, INC. AND
VALPAK DEALERS' ASSOCIATION, INC.
REPLY COMMENTS REGARDING REGULATIONS TO ESTABLISH
A PROCEDURE FOR ACCORDING APPROPRIATE CONFIDENTIALITY
(October 10, 2008)**

On August 13, 2008, the Commission issued Order No. 96, Notice of Proposed Rulemaking to Establish a Procedure for According Appropriate Confidentiality, opening this docket and setting September 25, 2008 as the deadline to file initial comments, and October 10, 2008 as the deadline to file reply comments. Valpak Direct Marketing Systems, Inc. and Valpak Dealers' Association, Inc. (hereafter "Valpak") submit these joint reply comments in response to Order No. 96.

**I. PAEA Requires Postal Service Transparency with the Public, Not Just
Transparency with the Postal Regulatory Commission.**

In its initial comments, the United States Postal Service offers the following as a summary of the meaning and purpose of "transparency," as reflected in the Postal Regulatory Commission's proposed 39 C.F.R. Part 3007:

Proposed 39 C.F.R. Part 3007 **equates transparency** with Commission oversight and regulation, supplemented **either** by *in camera* inspection of confidential postal documents, restricted access to such matter by participants in Commission proceedings under appropriate protective conditions, **or** public disclosure of confidential postal information. [Initial Comments of the United States Postal Service (September 25, 2008), p. 2 (emphasis added).]

To the contrary, Order No. 96 emphatically states that “PAEA relies on **public transparency**, in addition to regulation, to achieve its goal of Postal Service **accountability**.” Order No. 96, p. 5 (emphasis added). The difference between the Postal Service’s characterization of proposed 39 C.F.R. Part 3007 and the Commission’s language in Order No. 96 is more than semantic; it goes to the heart of the purpose for the proposed rules.

According to the Postal Service, “Section 504(g) affirms the Commission’s authority ... to determine whether the discharge of its duties requires that any such information be **publicly** disclosed.” Postal Service Comments, p. 4 (emphasis added). The Postal Service has argued, however, that its determination that certain information, documents, and materials be nonpublic should create a presumption that nondisclosure would be required to protect the Postal Service from “likely commercial injury” — a presumption that could be overcome only by a showing that the disclosure to the public was necessary to maintain the financial transparency of the Postal Service. *See id.*, pp. 3-4.

But no such presumption can be inferred from the statutory language. Moreover, according to Order No. 96, the very purpose of its proposed regulations is to comply with 39 U.S.C. section 504(g)(3)(A), which empowers the Commission to make public information that the Postal Service has determined to be confidential in those instances where the “public interest in maintaining the financial transparency of a government establishment competing in commercial markets” outweighs “the likely commercial injury to the Postal Service.” In short, by its taking action to promulgate 39 C.F.R. Part 3007, the Commission has decided that it is “necessary and appropriate ... [to] propose[] rules that could lead to public disclosure of information initially claimed by the Postal Service as non-public,” in light of its

“responsibility to achieve a fair balance between the commercial interests of the Postal Service and the public interest in disclosure....” Order No. 96, p. 5.

As a consequence of this exercise of discretionary power, the Commission has indicated that the Postal Service’s determination that a matter should be kept confidential does not create any presumption in favor of such determination. Rather, as the Commission has explained, “the non-public information would initially be protected from disclosure until such time as the Commission decides what actual degree of protection, if any, from public disclosure should be afforded such non-public information.” Order No. 96, p. 7. *See also* Proposed Rules 3007.25 and 3007.30. That determination should be based on a balancing of the relevant factors, but not on any presumption.

Respectfully submitted,

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