

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, D.C. 20268-0001

REGULATIONS TO ESTABLISH PROCEDURE
FOR ACCORDING APPROPRIATE
CONFIDENTIALITY

Docket No. RM2008-1

**COMMENTS OF THE UNITED STATES POSTAL SERVICE
IN RESPONSE TO SECOND NOTICE OF PROPOSED RULEMAKING**
(April 27, 2009)

On March 20, 2009, the Postal Regulatory Commission issued Order No. 194, its Second Notice of Proposed Rulemaking to Establish a Procedure for According Appropriate Confidentiality. Order No. 194 solicits public comment regarding a second set of proposed rules designed to implement the Commission's authority under title 39, United States Code § 504(g) to regulate access to confidential information provided to it by the Postal Service. The Commission seeks to codify the rules in the form of regulations to be published in title 39, Code of Federal Regulations Part 3007. In response to the initial notice of proposed rulemaking, Order No. 96 (August 13, 2008), the United States Postal Service and various parties filed comments for the Commission's review. Order No. 194 reflects the Commission's consideration of those comments and its determination to refine the rules originally proposed in Order No. 96. The Postal Service hereby files these comments in response to the Second Notice of Proposed Rulemaking.

Third Party Assertions Of Proprietary Interests

Newly proposed rules 3007.20 and 3007.22 establish a process through which third parties with a proprietary interest in non-public information contained in postal records provided to the Commission may independently file pleadings supporting non-public treatment of such information. The establishment of the opportunity for third parties to address the Commission directly would enhance the Commission's ability to make fully-informed access/disclosure decisions and better protect the interests of all involved. Accordingly, the Postal Service views these new proposed rules as a welcome refinement.

The original proposal in Order No. 96 that, as a general rule, non-public postal materials lose their confidential status and become public after 10 years is reflected in newly proposed rule 3007.30, subject to exceptions that may be granted by the Commission. Proposed rule 3007.21(c)(6) permits the Postal Service, in applying for non-public status for certain materials, to request exceptional periods of non-public status by identifying "the length of time deemed necessary for the non-public material to be protected from public disclosure with justification thereof." Presumably, this provision would permit the Commission to approve Postal Service applications for more permanent protective conditions, as circumstances warrant, for materials that do not lose their commercially sensitivity after a decade, or for materials that involve the personal privacy of postal customers or employees.

However, there does not appear to be a subsection (c)(6) equivalent in proposed rule 3007.22, which governs third party applications for non-public

treatment of proprietary information of theirs that may be contained in materials submitted by the Postal Service to the Commission. Accordingly, the Postal Service encourages the adoption of appropriate wording as a part of proposed rule 3007.22

Applications For Access To Non-Public Data

Newly proposed rules 3007.40(a)(2) and 3007.50(a)(2) require persons applying for access to non-public materials to publicly file background information that permits the Postal Service and third-parties with proprietary interests in those materials to expeditiously investigate and determine whether a basis exists to oppose such applications. Without such background information, parties with an interest in the application of strict protective conditions would have a much less meaningful opportunity to protect their interests, and would be subject to much greater risk of irreparable harm resulting from any unwarranted access. Enhancement of the opportunity to protect non-public materials through informed judgments regarding each individual access application is essential. This is especially so, considering the very short deadlines proposed for the filing of any opposition, the irreparable harm that may result from unwarranted access to sensitive materials, and the likelihood that sanctions under proposed rule 3007.62(a) and remedies referenced therein may not effectively undo such harm in every case.

Motions Proposing Information Requests

Under newly proposed rule 3007.3(b), any person would be permitted to file a motion asking the Commission to issue a data or information request to the

Postal Service when that person believes the requested materials are likely (within the meaning of proposed rule 3007.2) to materially assist the Commission in its conduct of proceedings, in the preparation of reports, or in the performance of its functions under title 39. In an ideal world, motions submitted to the Commission for consideration under rule 3007.3(b) would be narrowly crafted and would focus on relevant and material information. Such motions would obviate or minimize the need for the Postal Service or others to file pleadings that oppose the proposed information requests or that seek to narrow their scope. It is the Postal Service's view that strict enforcement of the "materiality" standard in proposed rule 3007.2, in conjunction similar scrutiny of the statements of requesters provided under proposed rule 3007.3(b), will be vital to ensure that requests for postal information actually would advance the conduct of Commission proceedings or functions in some significant manner, as opposed to primarily serving other interests.

Continuing Access Between Dockets

It would be the Postal Service's preference that outside parties' access to compliance-related non-public postal materials be limited to the duration of the Commission's compliance review dockets. Nevertheless, the Commission has amended its proposed rules to permit parties continuing access to such data between compliance dockets. The Commission is of the view that the quality of future dockets would be enhanced if participants could continue to review non-public materials provided in previous dockets, because such access could help parties suggest ways for the Commission to improve its rules and the conduct of

future dockets. Accordingly, the Commission proposes procedures through which individuals could obtain continuing access to non-public materials between dockets, under terms and conditions similar to those applicable when such dockets are pending.

Notwithstanding the Postal Service's reservations regarding the prospect of continuing access to non-public data when no relevant compliance dockets are pending, the proposed rules seem reasonable, given the Commission's determination to permit such access.

Conclusion

The Postal Service considers that the refinements to the Commission's proposed rules, as a whole, reflect a rational plan for the exercise of the authority granted to it by section 504(g), and a thoughtful consideration of the concerns expressed by various parties in response to the Commission's initial solicitation of comments.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

By its attorneys:

Daniel J. Foucheaux, Jr.
Chief Counsel, Ratemaking

Michael T. Tidwell

475 L'Enfant Plaza West, S.W.
Washington, D.C. 20260-1137
(202) 268-2998; Fax -5402
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