

UNITED STATES OF AMERICA
POSTAL REGULATORY COMMISSION

Before Commissioners:

Dan G. Blair, Chairman;
Nanci E. Langley, Vice Chairman;
Mark Acton;
Ruth Y. Goldway; and
Tony L. Hammond

Regulations to Establish Procedure
for According Appropriate Confidentiality

Docket No. RM2008-1

SECOND NOTICE OF PROPOSED RULEMAKING TO ESTABLISH
A PROCEDURE FOR ACCORDING APPROPRIATE CONFIDENTIALITY



Washington, DC 20268-0001

March 20, 2009

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Appendix A to Part 3007—Statement of Compliance with Protective Conditions
Proposed Rules

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I. INTRODUCTION

The Postal Regulatory Commission (Commission) proposes to implement 39 U.S.C. 504(g) by adopting regulations applicable to confidentiality of materials submitted by the Postal Service to the Commission. A Notice of Proposed Rulemaking to Establish a Procedure for According Appropriate Confidentiality, issued August 13, 2008 (Order No. 96), requested public comments and reply comments. Based on comments received in this docket (RM2008-1) in response to the Commission's initial notice, the Commission issues this Second Notice of Proposed Rulemaking to Establish a Procedure for According Appropriate Confidentiality.

39 U.S.C. 504(g)(3)(A) recognizes the need to balance the Postal Service's, its business partners', or its customers' legitimate expectations to keep commercially

sensitive information confidential with the public's expectation for accountability and transparency of the business dealings of a governmental entity competing in commercial markets. The Postal Accountability and Enhancement Act (PAEA), Pub. L. 109-435, 120 Stat. 3218 (2006), relies on public transparency, in addition to regulation, to achieve its goal of Postal Service accountability. Therefore, as directed by the provisions of the PAEA and because the Commission considers it necessary and appropriate, the Commission proposes rules that could lead to public disclosure of materials that the Postal Service or a third party initially claims are non-public.

In developing proposed rules, the Commission takes very seriously its responsibility to achieve a fair balance between the commercial interests of the Postal Service and its partners or customers and the public interest in disclosure of information concerning a public entity that competes in commercial markets, as well as the need for discovery and access for any persons who wish to participate in Commission proceedings.

II. STATUTORY STANDARDS FOR ACCORDING CONFIDENTIALITY TO POSTAL SERVICE MATERIALS

The Postal Regulatory Commission is an independent establishment of the executive branch of the Government of the United States. See 39 U.S.C. 501. Therefore, the presumption is that its records are available for public review. 5 U.S.C. 552. However, 39 U.S.C. 504(g)(1) provides that the Postal Service may determine “that any document or other matter it provides to the Postal Regulatory Commission” is exempt from public disclosure under 39 U.S.C. 410(c) or 5 U.S.C. 552(b). The Postal Service must give reasons, in writing, for its claim. See 39 U.S.C. 504(g)(1).

Unless the Commission has established rules for determining the appropriate degree of protection of materials claimed to be non-public by the Postal Service, the Commission may not (1) “use such information for purposes other than the purposes for which it is supplied;” or (2) “permit anyone who is not an officer or employee of the Commission to have access to any such information.” See 39 U.S.C. 504(g)(2).

These proposed rules outline the procedure for the Commission’s treatment of non-public materials. Under these proposed rules, when materials are filed along with an application for non-public treatment, the Commission will initially treat those materials as non-public. However, the proposed rules allow persons to challenge non-public status or request access to the materials. The Commission, following such a motion or of its own accord, may balance the relevant interests to determine if disclosure or access is warranted.

Under 39 U.S.C. 410(c), the Postal Service may claim as exempt from public disclosure the name and address of postal customers; certain commercial information, for example, trade secrets, and other information which would not be disclosed under good business practice; certain information related to the negotiation of collective bargaining agreements; information prepared for proceedings before the Commission or the Federal courts concerning postal rates, classes and services; reports and memoranda prepared by outside sources unless their disclosure would have been required if the Postal Service had prepared the reports or memoranda itself; and

investigatory files compiled for law enforcement purposes, unless legally available to parties other than the Postal Service.

Under 5 U.S.C. 552(b), records that may be withheld from public disclosure include, but are not limited to, matters concerning only internal personnel matters of an agency; matters specifically exempted from public disclosure by statute; trade secrets and privileged or confidential commercial or financial information; non-public interagency or intra-agency memoranda or letters; privacy protected personnel, medical and other files; and certain law enforcement records or information. Section 552(b) provides that any portions of records subject to disclosure that can be segregated from records otherwise exempt from disclosure must be provided.

Upon adopting appropriate regulations under 5 U.S.C. 553 that “establish a procedure for according appropriate confidentiality[,]” the Commission may publicly disclose materials which the Postal Service asserts are exempt from disclosure under 39 U.S.C. 410(c) or 5 U.S.C. 552(b). 39 U.S.C. 504(g)(3)(A). In determining the appropriate degree of confidentiality for non-public materials, the Commission is directed to “balance the nature and extent of the likely commercial injury to the Postal Service against the public interest in maintaining the financial transparency of a government establishment competing in commercial markets.” *Id.*

During a proceeding, the Commission may authorize access to non-public materials that the Postal Service has claimed are exempt from disclosure under 39 U.S.C. 410(c) or 5 U.S.C. 552(b). 39 U.S.C. 504(g)(3)(B). However, before authorizing any person to access the non-public materials, the Commission “shall, by regulations based on rule 26(c) of the Federal Rules of Civil Procedure, establish procedures for ensuring appropriate confidentiality for the information....” Federal Rule of Civil Procedure 26(c) allows a court to issue a protective order for “good cause.”¹ Under rule 26(c) a protective order may range from a complete bar on disclosure to

¹ Rule 26(c), which is entitled “Protective Conditions,” authorizes the court, for good cause, to issue a variety of orders to protect parties or witnesses in the discovery process. See Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, *Federal Practice and Procedure* § 2035, *et seq.* (2d ed. 1994).

disclosure with conditions placed on time, manner, method, scope, or party allowed access.

The general parameters for disclosure and conversely protection of confidentiality of non-public materials during the discovery process under section 504(g)(3)(B) must be gleaned from the Federal case law pertaining to Federal Rule of Civil Procedure 26. Those parameters are a broader set than the specific parameters established by the balancing test laid out in section 504(g)(3)(A).² Case law surrounding Federal Rule of Civil Procedure 26 identifies several non-exclusive factors to be applied under the rule 26(c) “good cause balancing test.” See *Arnold* at 108. In the 2007 *Arnold* decision, the Third Circuit reaffirms the balancing test factors it developed in its 1994 *Pansy* decision:

- (1) [T]he interest in privacy of the party seeking protection;
- (2) whether the information is being sought for a legitimate purpose or an improper purpose;
- (3) the prevention of embarrassment, and whether that embarrassment would be particularly serious;
- (4) whether the information sought is important to public health and safety;
- (5) whether sharing of the information among litigants would promote fairness and efficiency;
- (6) whether the party benefitting from the order of confidentiality is a public entity or official; and
- (7) whether the case involves issues important to the public.

Id. (citing *Pansy*, 23 F.3d at 787-88). In this Order, the Commission refers to these factors as “evidentiary privileges.”

The general parameters for protection of confidentiality of materials under section 504(g)(3)(B) differ from the test under 504(g)(3)(A) which entails balancing the “nature and extent of the likely commercial injury to the Postal Service against the public interest in maintaining the financial transparency of a government establishment competing in commercial markets.” Access entails a specific request for materials

² See, e.g., *Arnold v. Penn. Dep’t of Transp.*, 477 F.3d 105 (3d Cir. 2007) at 109-110; *Pansy v. Borough of Stroudsburg*, 23 F.3d 772 (3d Cir. 1994) at 788; *Leucadia, Inc. v. Applied Extrusion Technologies*, 998 F.2d 157 (3d Cir. 1993) at 167. See generally Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 Harv. L. Rev. 427 (1991).

during a Commission proceeding which may or may not trigger a “public interest.”³ The procedure for ensuring confidentiality under section 504(g)(3)(B) must balance a private interest, the party’s need for the materials to participate effectively in a proceeding, as well as the public’s interest in transparent Commission proceedings, against the Postal Service’s or third party with a proprietary interest’s evidentiary privileges derived from the Federal Rule of Civil Procedure 26(c) “good cause balancing test.”

The Commission may require the Postal Service to submit materials in furtherance of the Commission’s duties to determine compliance under title 39 chapter 36. The public must be provided an opportunity to participate effectively in the Annual Compliance Determination (ACD) proceeding.⁴ For the public to participate effectively and comment in an ongoing or upcoming annual determination of compliance, the Commission anticipates that persons may require access to non-public materials outside a Commission proceeding. To determine if access to these materials is appropriate, the Commission must determine that the materials are relevant to an ongoing or upcoming ACD, and balance the Postal Service’s (or third party with a proprietary interest) evidentiary privilege interest against the need of the requesting party to participate effectively. This process is akin to a request for access under section 504(g)(3)(B); therefore, it is appropriate for the Commission to utilize protective conditions when necessary to protect the interests of the Postal Service or third party with a proprietary interest in the materials.

³ For example, in a complaint filed by a mailer against the Postal Service, the mailer may ask for discovery of documents relevant to the complaint but which do not fall under the purview of the public’s interest in financial transparency. See, e.g., *Washington Post v. U.S. Dept. of Health and Human Services*, 690 F.2d 252 (D.C. App 1982); see also *Assoc. for Women in Science v. Califano*, 566 F.2d 339 (D.C. App. 1982). Both cases address the different applications of the Freedom of Information Act (FOIA) and the Federal Rules of Civil Procedure as they pertain to discoverability and privilege from discovery.

⁴ See, e.g., 39 U.S.C. 3653(a) (directing the Commission to “promptly provide an opportunity for comment” during the ACD proceeding).

III. ORDER NO. 96

In Order No. 96, the Commission proposed rules which would govern handling and access to materials submitted to the Commission, but deemed “exempt from disclosure” by the Postal Service. See Order No. 96. The Commission proposed rules 3007.10 to 3007.21, which would require the Postal Service to make an application for non-public treatment of all materials it submits and deems “exempt from disclosure” under 39 U.S.C. 504(g)(1). *Id.* at 17-19. The Commission also proposed rules 3007.24 through 3007.32, which govern the types of persons who can access the materials, the method by which a person can obtain access to materials, the restrictions on use of materials for persons signing protective conditions, and the procedure to remove the “non-public” status from the materials. *Id.* at 20-23.

The Commission proposed that one balancing test, governing the degree of confidentiality or assurance of appropriate confidentiality under 39 U.S.C. 504(g)(3)(A) and 39 U.S.C. 504(g)(3)(B), respectively, would be adequate and appropriate. *Id.* at 5. Consequently, the Commission proposed rule 3007.25, as a single standard for decision for requests made to access non-public Postal Service materials, and requests to remove protective conditions and publicly disclose those materials. *Id.* at 21. That standard for decision included two subparts:

(a) The Commission or its authorized representative shall balance the nature and extent of the likely commercial or other injury identified by the Postal Service against the public interest in maintaining the financial transparency of a government entity operating in commercial markets in determining whether to issue an order requiring disclosure of the information or materials filed under 39 U.S.C. 504(g)(1).

(b) The Commission or its authorized representative shall balance the nature and extent of the likelihood that [disclosure of] non-public materials would invade a specific evidentiary privilege that is recognized in federal civil courts, or would constitute an undue burden that the Postal Service has quantified to the best of its ability against the public interest that would be served by providing access to the non-

public materials in determining whether to issue an order requiring disclosure of non-public materials.

Id.

Order No. 96 summarizes ways the Postal Service and third-party non-public materials come before the Commission and the proposed treatment of such materials. Order No. 96 also proposed procedures to ensure confidentiality, or provide public dissemination, as may be appropriate.

IV. COMMENTS ON ORDER NO. 96

Multiple parties commented on Order No. 96. The Commission acknowledges the comments and appreciates the thoughtful discourse they provide concerning the proposed confidentiality rules. Several issues raised by the comments, and further discussions by the Commission, have led to modifications in the initially proposed regulations and necessitate this Order and a second opportunity for interested parties to comment.

The comments filed in response to Order No. 96 cover multiple issues. However, two issues were common to multiple commenters and provide the impetus for this Order.

Language and function of the balancing test to determine the appropriate degree of confidentiality. Valpak Direct Marketing Systems, Inc., and Valpak Dealers' Association, Inc. (Valpak); American Postal Workers Union, AFL-CIO (APWU); and the Newspaper Association of America (NAA) comment that the "evidentiary privileges" recognized by the Federal courts under Federal Rule of Civil Procedure 26(c) and the open-ended "other injury" term should not be imputed into the balancing test to determine the appropriate degree of confidentiality under 39 U.S.C. 504(g)(3)(A).⁵ The comments advise the Commission to use the balancing test articulated in 39 U.S.C. 504(g)(3)(A) to determine the appropriate degree of confidentiality under the rules, rather than considering "other injury" or evidentiary privileges. See Valpak Comments at 11; APWU Comments at 2; and NAA Reply Comments at 2-8.

Valpak specifically asserts:

[D]espite its regulations, the Commission's actual decision-making on confidentiality could be infected by inappropriate references to rule 26(c)'s 'good cause balancing test' in derogation of the 'commercial injury/financial transparency'

⁵ Valpak Direct Marketing Systems, Inc. and Valpak Dealers' Association, Inc. Comments Regarding Regulations to Establish a Procedure for According Appropriate Confidentiality, September 25, 2008 (Valpak Comments); Initial Comments of American Postal Workers Union, AFL-CIO, September 25, 2008 (APWU Comments); and Reply Comments of the Newspaper Association of America, October 10, 2008 (NAA Reply Comments).

test established by section 504(g)(3)(A). Indeed, the Commission has suggested that, under the influence of the rule 26(c) balancing test, it could ‘decid[e] whether the need for transparency outweighs the need for protecting the commercial **or other interests** of the Postal Service,’ whereas section 504(g)(3)(A) limits the balancing process to one Postal Service interest — ‘likely commercial injury’ — without reference to any ‘other interest,’ including [rule 26(c) factors]....Such factors may be relevant to judicially-crafted protective orders in private litigation, but which are wholly inapposite to such orders in the discharge of the executive and administrative functions of the Commission, especially in light of statutory requirements for transparency.

Valpak Comments at 11-12 (internal citations omitted, footnote omitted, emphasis in original). NAA agrees with Valpak:

Val-Pak correctly points out that the Rule 26(c) judge-created balancing test used in civil litigation is incompatible with the substantive balancing test adopted by Congress in Section 504(g)(3)(A).

NAA Reply Comments at 4.

These comments find conflict in the Commission’s single rule balancing test which encompasses “other injury” in addition to “likely commercial injury.”

Greeting Card Association (GCA), however, disagrees with limiting the test to the language of section 504(g)(3)(A).⁶ GCA argues that the Commission should take into account “other injury” because the statutory language does not limit the balancing test to only the factors set forth in the statute. *Id.* at 2. GCA comments that under 504(g)(3)(A), loss of volume resulting from potential disclosure of third-party sensitive information should also be included as “commercial injury.” *Id.* at 2-3.

⁶ See Reply Comments of the Greeting Card Association, October 10, 2008 (GCA Reply Comments).

The Postal Service is also opposed to the balancing test encompassing only “likely commercial injury.”⁷ It believes that interests it has in law enforcement, audit activities, collective bargaining, privacy, deliberative process, testing and examination of employees, and other interests are not implicated in such a test. *Id.* The Commission does not read “likely commercial injury” in such a narrow fashion as to exclude harm associated with the categories mentioned by the Postal Service in its comments. Most materials filed by the Postal Service with the Commission are commercial in nature, and for the Commission to demand information from the Postal Service, that information must be in furtherance of the Commission’s duties under title 39.

The Postal Service also comments that the Commission should not conduct “appellate review” of the Postal Service’s FOIA determinations under these proposed rules. *Id.* at 3. The operation of these rules, however, by clear mandate from 39 U.S.C. 504(g), allows the Commission either to publicly disclose, or to grant access subject to protective conditions, materials it collects from the Postal Service in furtherance of the its duties under title 39. 39 U.S.C. 504(g) does not operate to make the Commission an appellate body for FOIA; rather, without regard to FOIA, it operates to provide a mechanism for the Commission to create greater transparency (and hence less protection than FOIA provides), for matters relevant to the financial transparency and the regulatory responsibilities of the Postal Regulatory Commission.

Protection for non-public materials in which a third party has a proprietary interest. Parcel Shippers Association (PSA, et al.); the Association for Postal Commerce (PostCom); Direct Marketing Association, Inc. (DMA); Mail Order Association of America (MOAA); Time Warner, Inc. (Time Warner); National Postal Policy Council (NPPC); Magazine Publishers of America, Inc. (MPA); Alliance of Nonprofit Mailers (ANM); Pitney Bowes Inc.; GCA; and the Postal Service all reference the lack of protection for third-party materials held by the Postal Service but belonging

⁷ Initial Comments of the United States Postal Service, September 25, 2008, at 5-6 (Postal Service Comments).

to a third party.⁸ As articulated by Pitney Bowes, there should be an obligation to provide notice and an opportunity to be heard for parties whose commercially sensitive materials could be subject to disclosure in a Commission proceeding under these rules. See Pitney Bowes Comments at 6-7. This need is acute, according to Pitney Bowes, since the interests of the third party may not align perfectly with the Postal Service's reasons for claiming the materials exempt from disclosure. *Id.* at 5. The balancing test set out in section 504(g)(3)(A) must not be used for materials in which a third party has a proprietary interest because as PSA comments, "[i]t is manifest...that the same balancing requirements in the public interest are not implicated in the disclosure of the sensitive information of a third-party...." PSA Comments at 4.

NAA, however, does not believe any additional protection of non-public materials with a third party proprietary interest is necessary. See NAA Reply Comments at 8-10.

Specifically, NAA comments:

[A] third party that has provided documents to the Postal Service should [not] have an absolute right to prevent disclosure of that document. Disclosure of one's potentially sensitive documents, when in the possession of another entity, is always a risk in the business world. There is no reason why third parties dealing with the Postal Service should have any greater rights than in other business relationships.

Id. at 8-9.

The Public Representative's comments provide useful critique for the structure, wording, and application of the proposed rules.⁹ United Parcel Service (UPS) comments that the Commission should not apply protective conditions as a prophylactic

⁸ Initial Comments of Parcel Shippers Association, the Association for Postal Commerce, Direct Marketing Association, Inc., Mail Order Association of America, Time Warner Inc., National Postal Policy Council, Magazine Publishers of America, Inc., and Alliance of Nonprofit Mailers on Order No. 96, September 25, 2008 (PSA, et al. Comments); Comments of Pitney Bowes Inc., September 25, 2008, (Pitney Bowes Comments); and Initial Comments of the Greeting Card Association, September 25, 2008 (GCA Comments). See also Postal Service Comments.

⁹ Public Representative Comments on Proposed Regulations to Establish Procedure for According Appropriate Confidentiality, September 25, 2008 (Public Representative Comments).

remedy.¹⁰ UPS argues that protective conditions should not be used for “key Postal Service information that should be available to the public at-large.” *Id.* at 2-3.

The Postal Service requests that it be able to submit redacted, public versions of word processing documents in Adobe Portable Document Format (PDF) rather than in native format. Postal Service Comments at 15. The Postal Service also requests that persons seeking access under the rules identify relevant affiliations to accurately assess whether to object within an abbreviated timeframe. *Id.* at 12-13.

¹⁰ Comments of United Parcel Service on Notice of Proposed Rulemaking to Establish a Procedure for According Appropriate Confidentiality, September 25, 2008 (UPS Comments).

V. OTHER DEVELOPMENTS

In Docket No. ACR2008, the Public Representative raised an issue of “continuity of analysis,” which occurs when materials are accessed under protective conditions and are subject to the requirement that they be “returned or destroyed” when the Commission issues a final order in a case, or another event brings a matter before the Commission to a conclusion.¹¹ The Public Representative points out that this may effectively foreclose the opportunity to review trends in data over time, or compare data to determine anomalies. *Id.* Proposed rule 3007.50 will allow a person who has obtained access to non-public materials either during discovery in a Commission proceeding or in a previous rule 3007.50 request, to make a motion to continue access and protective conditions. If such a motion is granted, access subject to protective conditions will continue through the conclusion of the Commission’s next ACD proceeding.

Also in Docket No. ACR2008, Valpak asked the Commission to issue an information request.¹² Valpak “believes that participants should be permitted to request information directly from the Postal Service on the record....” *Id.* at 1. Since participants’ requests may be burdensome, duplicative, irrelevant, or involve objections or confidentiality concerns for the Postal Service, the Commission formalizes the process by which a person may request the Commission to issue an information request by changing proposed rule 3007.3. Under proposed rule 3007.3(b), any person may make a motion requesting that the Commission issue an information request to the Postal Service. Such a motion must include a detailed statement of support explaining how the materials sought will be relevant and material to the Commission’s duties under title 39.

¹¹ Docket No. ACR2008, Motion to Make Core Cost, Volume, and Revenue Materials Public, January 27, 2009, at 13.

¹² Docket No. ACR2008, Valpak Direct Marketing Systems, Inc. and Valpak Dealers’ Association, Inc. Motion for Issuance of Commission Information Request Concerning Core Costing Data on Detached Address Labels, January 13, 2009 (Valpak CIR Motion).

In Docket No. MC2009-11, the Public Representative stated that the Postal Service should redact using the “black box” method as it is preferable to using the “ellipses” (deletion) method since it allows the reader “to view the scope and extent of material that has been removed.”¹³ Subsequently, in Docket No. MC2009-13, the Postal Service justified use of the “ellipses” method by making a claim that the “black box” method provides “information or clues regarding the name of the customer, the length and breadth of price charts, the complexity of annual adjustment mechanisms, or other similar sensitive information.”¹⁴ Most recently, in Docket No. MC2009-15, the Public Representative suggested that the Commission may wish to address the appropriate method by which the Postal Service should redact non-public materials.¹⁵

¹³ Docket No. MC2009-11, Public Representative Comments in Response to Order No. 142, December 10, 2008, at 4.

¹⁴ Docket No. MC2009-13, Request of the United States Postal Service to Add Express Mail & Priority Mail Contract 3 to Competitive Product List and Notice of Establishment of Rates and Class Not of General Applicability, December 19, 2008, at 3.

¹⁵ Docket No. MC2009-15, Public Representative Comments in Response to United States Postal Service Request to Add Express Mail Contract 3 to Competitive Product List, January 15, 2009, at 3-4.

VI. REVIEW OF CHANGES TO PROPOSED RULES

The Commission adds several new proposed rules and modifies previously proposed rules to accurately identify and balance all relevant interests.

The Commission will obtain information, and must manage access to that information, in two basic contexts. In the first context, the Postal Service will file information pursuant to a specific statutory requirement or Commission rule. In these instances, with respect to some reports, the PAEA explicitly authorizes the Postal Service to designate portions as non-public annexes or to otherwise avail itself of the protections afforded Postal Service documents or other matters under the procedures of section 504(g). See 39 U.S.C. 3642(d), 3652(f), and 3654(f). Under proposed rule 3007.20, the Postal Service would notify any third party which the Postal Service has reason to believe may have a proprietary interest in the materials of the filing.

Under proposed rule 3007.20, the Postal Service must apply to the Commission, at the time that it files materials, for specifically identified portions of these materials to be non-public and to qualify for a degree of protection from public disclosure. Similarly, under proposed rule 3007.20, a third party with a proprietary interest in non-public materials may file an application for non-public treatment. Proposed rules 3007.21 and 3007.22 provide guidance on the content for an application for non-public treatment. Proposed rule 3007.21 specifically instructs the Postal Service to thoroughly justify its application with statutory authority.

In the second major context, the Commission may request information or materials from the Postal Service by way of a data or information request, or, if necessary, by issuance of a subpoena.¹⁶ The Commission may also receive information or materials from other parties during the exercise of its duties under title 39. When the Commission identifies information that it needs for the preparation of reports,

¹⁶ Information and materials required to be provided to the Commission in response to a subpoena that the Postal Service determines to be exempt are subject to the same rules under proposed part 3007 as information or materials provided in response to a data or information request. See 39 U.S.C. 504(f), (g).

for the conduct of “proceedings,” or other functions under the PAEA, the normal procedure contemplated for obtaining that information will be the issuance of data or information requests under proposed rule 3007.3. Data or information requests in the proposed rules are similar to requests that were issued in the former Postal Rate Commission’s international mail dockets as part of its preparation of its reports to Congress on international mail. The proposed rules contemplate that, where it perceives it to be necessary, the Postal Service or third party with a proprietary interest in the materials would file an application for non-public treatment under proposed rule 3007.20 with regard to data or information provided in response to a request issued by the Commission. In its application for non-public treatment, the Postal Service or third party with a proprietary interest in the materials would ask for a necessary degree of protection from public disclosure; for example, by requesting limiting the scope of the information to be produced, or restricting the dissemination of the information provided, as is commonly done in the application of rule 26(c) of the Federal Rules of Civil Procedure in Federal civil litigation.

In both instances, the non-public materials would initially be protected from disclosure until the Commission decides to disclose or grant access to the non-public materials, following a request for termination of non-public status, a request for access during a proceeding, or a request for access to materials relevant to compliance under proposed rules 3007.31, 3007.40, or 3007.50, respectively. Before acting on its own initiative, or in response to a request to require disclosure of or access to non-public materials, the Commission will give interested parties an opportunity to respond.

Valpak, APWU, and NAA’s comments about the appropriate balancing test for determining the degree of confidentiality to be afforded Postal Service non-public materials result in several changes to the proposed rules. While a single balancing test has simplicity, it is neither equitable nor consistent with section 504(g) to use a single balancing test to determine public disclosure, discoverability in a Commission proceeding, and access to materials outside a proceeding but relevant to compliance. The Commission, therefore, proposes separate balancing tests depending on the nature

of the request. The Commission also bifurcates the standard for decision for termination of non-public status in proposed rule 3007.33 to account for situations where only Postal Service non-public materials are at issue, and situations where non-public materials in which a third party has a proprietary interest are at issue. While more complex, the Commission believes these new proposed rules will allow the public to identify more easily the competing interests at issue in each determination, and to channel requests to the appropriate rule.

The Commission incorporates the statutory test from 39 U.S.C. 504(g)(3)(A) in proposed rule 3007.33(a), which sets forth the standard for decision when a person requests public disclosure and removal of non-public status. This proposed rule allows a person to challenge the Postal Service's classification of materials as non-public and exempt from disclosure under 39 U.S.C. 504(g)(1). This test balances the Postal Service's interest in avoiding commercial injury against the public's interest in financial transparency. If the likely commercial injury does outweigh the public interest, the Commission may deny the request to remove non-public status from the materials, or order the Postal Service to redact sensitive portions of the materials so that some portion may be released to the public.

In cases where non-public materials in which a third party has a proprietary interest are at stake, subsection (b) of this rule sets out the balancing of the parties' interests under Federal Rule of Civil Procedure 26(c) as the test for disclosure.

There are different rights at issue, interests to be balanced, and a stronger need for disclosure in the context of discovery, so the Commission creates a separate test applicable to access to materials during a Commission proceeding in proposed rule 3007.42. Under this proposed rule, the Commission would balance the need of the requesting party to access the non-public materials to participate effectively in a Commission proceeding against the Postal Service's or third party with a proprietary interest's evidentiary privileges under Federal Rule of Civil Procedure 26(c).

In discovery under the Commission's rules, see 39 CFR 3001.25 *et seq.*, there is a private right balanced against a private right, similar to the balancing routinely

undertaken by Federal courts in civil litigation during discovery. Due to the need for disclosure for efficient operation of discovery (both in civil litigation and in Commission proceedings), the scales are tipped in favor of disclosure.¹⁷ To offset the possible harm visited by this greater need for disclosure, the Commission may issue a protective order similar to those employed under Federal Rule of Civil Procedure 26(c) during Federal civil litigation.¹⁸ Under Federal Rule of Civil Procedure 26(c), a party or person may, during the discovery process, request a protective order. Federal Rule of Civil Procedure 26(c) lists several possible procedures to limit discovery and ensure confidentiality of information, including (1) completely forbidding the disclosure; (2) specifying terms for disclosure; for example, specifying the time and/or place of discovery; (3) ordering a specific method of discovery; (4) limiting the scope of discovery as it relates to certain matters; (5) limiting who may be present during discovery; (6) sealing a deposition; and (7) requiring that a trade secret or other confidential information be revealed only in a specific and limited manner.

Finally, there are different rights at issue and interests to be balanced in the context of the Commission's ACD proceeding under title 39 chapter 36. The Commission proposes another distinct test, applicable when there is not an active proceeding, for requests for access to non-public materials that are relevant to developing comments for use in a current or future ACD proceeding. This avenue will allow persons, outside of a Commission proceeding, to receive access to non-public materials relevant to an understanding or review of a past ACD proceeding or participation in an ongoing or upcoming ACD proceeding.

¹⁷ See, e.g., *Washington Post v. U.S. Dept. of Health and Human Services*, 690 F.2d 252 at 258 (discussing the difference between discoverability in litigation and disclosure under FOIA: "[i]t is well established that information that is exempt from disclosure to the general public under FOIA may nevertheless be subject to discovery.")

¹⁸ In application of the proposed disclosure rule, the decision-maker will also take into account relevant factors such as the procedural stage a matter is in (for example, discovery versus a formal hearing before the Commission) when deciding whether protection or non-disclosure of materials sought by the Postal Service is appropriate. Another factor to be considered is whether the information at issue relates to market dominant or competitive products.

Proposed rule 3007.52 announces the standard for decision for requests made for ACD relevant materials, outside of a Commission proceeding. This rule balances the Postal Service's or any third party with a proprietary interest in the materials' evidentiary privileges against the requesting party's need for the materials to participate effectively in a compliance determination or understand the intricacies of a completed ACD, and the public interest in transparency of Commission proceedings. Public participation in the ACD is directly called for by the PAEA. See 39 U.S.C. 3653(a). The Commission finds as a result of recent experience that a publicly published method to access materials relevant to compliance, outside of discovery in a proceeding, is necessary for effective public participation and transparency in the ACD process.

PSA, PostCom, DMA, MOAA, Time Warner, NPPC, MPA, ANM, Pitney Bowes, and GCA comment about the need for protection of third party non-public materials submitted to the Postal Service. These comments result in the change and reformatting of several proposed rules. Under the Commission's new proposed rules, the Postal Service would have a duty to notify a third party with a proprietary interest in materials filed with the Commission at the time of filing. The notice requirement should not unduly burden the Postal Service as it maintains a record of contacts for third parties with proprietary interests in materials it holds for FOIA purposes. See Postal Service Comments at 10-11. The third party with a proprietary interest in non-public materials would be afforded the same opportunity to respond to requests for access or early termination of non-public status as the Postal Service.

The Commission also adopted other additions, clarifications, and improvements based on public comments and other developments. The Commission adds proposed rule 3007.10(c) to clarify that the Postal Service should use the "black box" or "graphical" method of redaction as the preferred method of redaction. In an instance where the Postal Service can show likely competitive harm from the use of the "black box" method, it must indicate at the site of each redaction the amount of materials

redacted (in number of lines or pages).¹⁹ Proposed rule 3007.3(b) allows a person to request that the Commission issue a data or information request to the Postal Service. Proposed rule 3007.10(b) allows the Postal Service to submit redacted word processing documents in PDF format. Proposed rules 3007.40 and 3007.50 require submitters to identify relevant affiliations (such as employment, consultant, or contractual relationships).

Initial comments are due within 30 days of the publication of this Notice in the *Federal Register*. Reply comments are due within 45 days of the publication of this Notice in the *Federal Register*.

¹⁹ As a means of comparison, when processing FOIA requests, the Department of Defense utilizes the “black box” and other redaction methods which do not involve disguising the amount of material redacted. See “Sanitization Procedures” <http://www.dod.mil/pubs/foi/dfoipo/docs/NewRedactionPolicy.pdf>.

VII. ANALYSIS OF PROPOSED RULES

Below, the Commission provides a concise description of each rule, designed to assist commenters in understanding the scope and nature of the proposed rules and changes.

Rule 3007.1 Definitions. This provision sets forth definitions of terms used in part 3007. The term “non-public materials” is defined as any information, documents, and things filed by the Postal Service which, pursuant to 39 U.S.C. 504(g), it determines to be exempt from disclosure. The term is also used to describe materials submitted by the Postal Service in which a third party has a proprietary interest, *i.e.*, the third party believes is protectable under Federal Rule of Civil Procedure 26(c). As used in the rules, the phrase “materials claimed to be non-public” has the same meaning as non-public materials.

Rule 3007.2 Scope. This provision sets forth the scope of information, documents, and things that the Commission (or its authorized representative) may require the Postal Service to provide in connection with the Commission’s responsibilities under title 39. It is intended to encompass information, documents, and things in whatever form likely to materially assist the Commission in fulfilling its statutory responsibilities.

Rule 3007.3 Data or information requests. This proposed rule provides that the Commission, or its authorized representative, may issue data or information requests to the Postal Service concerning materials covered by proposed rule 3007.2. The rule has changed since Order No. 96 in that it also allows persons to request that the Commission issue a data or information request. These proposed rules only allow for persons to request access to materials or disclosure of materials after the materials have been filed with the Commission. This rule provides a mechanism for relevant materials to be filed with the Commission concurrent or prior to a request for access (under proposed rules 3007.40 or 50) or early termination of non-public status (under proposed rule 3007.31). In justifying a request made pursuant to this rule, the movant

should indicate whether it expects a request under proposed rule 3007.31, 3007.40, or 3007.50 will be made and a detailed statement of support explaining how the materials sought will be relevant and material to the Commission's duties under title 39.

Rule 3007.10 Submission of non-public materials under seal. This proposed rule sets forth the manner in which non-public materials are to be filed with the Commission. More specifically, it provides that non-public materials are not to be filed electronically pursuant to rule 3001.9, but are to be filed in sealed envelopes clearly marked as confidential. The proposed rule requires non-public materials to be filed in hard copy as well as electronic form (compact discs), with the latter subject to certain conditions to ensure their utility. In addition, the proposed rule requires that a redacted copy of the non-public materials be filed electronically pursuant to rule 3001.9. Changes to the rule since Order No. 96 require that when the Postal Service files redacted copies of non-public materials in electronic form, they must be in a searchable format (such as searchable Adobe PDF format), but spreadsheets, data files, or programs must be in native format. The method of redaction for hard copy submissions under this rule shall be the "black box" or "graphical" redaction method unless the Postal Service identifies particular, likely commercial injury which may result from the use of such a method. If any other method is used, the Postal Service must indicate, at the site of each redaction, in lines or pages, the amount of material removed.

Rule 3007.20 Application for non-public treatment. This provision directs the Postal Service to file an application for non-public treatment whenever it files non-public materials. It also instructs the Postal Service to contact any third party which may have a proprietary interest in the information being filed with the Commission to give that party an opportunity to file an application for non-public treatment, and address its confidentiality concerns directly with the Commission.

Rule 3007.21 Content of the Postal Service application for non-public treatment. This proposed rule requires the Postal Service to identify the materials it asserts are non-public and to provide a detailed statement in support thereof, addressing, among other things, the rationale for the claim, including the statutory authority, the nature and

extent of any commercial harm, a hypothetical example of such harm, the extent of public protection from public disclosure deemed necessary, and any other factors relevant to the application for non-public treatment.

Rule 3007.22 Content of third party applications for non-public treatment. This proposed rule gives guidance to a third party with a proprietary interest in non-public materials on the content of an application for non-public treatment. The proposed rule directs the third party to provide justification for non-public treatment of materials it believes should not be publicly disclosed or accessed.

Rule 3007.23 Treatment of non-public materials. This proposed rule provides that the Commission will not disclose non-public materials except as pursuant to the rules in part 3007.

Rule 3007.24 Commission access to non-public materials. This proposed rule permits Commissioners, Commission employees, including the public representative, other persons assisting the Commission in carrying out its statutory duties, and reviewing court personnel access to non-public materials subject to the limitations in 39 U.S.C. 504(g)(2)(A) and (B). Access to non-public materials for all persons not covered by this rule is by motion under proposed rules 3007.40 and 3007.50.

Rule 3007.25 Use of non-public materials. This proposed rule states that persons with access to non-public materials under proposed rule 3007.24, except as pursuant to this part, may not use non-public materials for purposes other than for which they were supplied or allow any other person to have access to the non-public materials.

Rule 3007.30 Termination of non-public status. This proposed rule states that non-public status shall expire 10 years after filing, unless otherwise provided by the Commission or its authorized representative.

In the context of FOIA requests under rule 3004.8, the Commission provides that information submitted to the Commission and claimed to be exempt from disclosure under 5 U.S.C. 552(b) (namely, trade secrets or commercially or financially sensitive materials) will lose any such exemption 10 years after its submission. The Commission

believes that a 10-year sunset provision in this instance will also serve administrative convenience and sound records management practices while adequately protecting the commercial interest of the Postal Service.

Rule 3007.31 Request for early termination of non-public status. This proposed rule states that any person may request that the Commission remove non-public status from materials filed by the Postal Service. This proposed rule gives details of the form and procedure of such a request. The request for early termination of non-public status must specifically address the Postal Service claims in its application for non-public treatment.

If a request for early termination of non-public status is made, the Postal Service or any third party with a proprietary interest may submit an answer within 7 days (or such longer period as specified in the notice). Given the expedited timetables under which the Commission ordinarily operates, this proposed rule does not allow any filings after the initial answers. Thus, requests and answers should address all issues relevant to whether the non-public materials should be publicly disclosed. Following the receipt of the answers, if any, the Commission will issue an order concerning the appropriate status of the non-public materials.

Rule 3007.32 Preliminary determination of non-public status. This proposed rule recognizes that as a matter of course, the Commission will review Postal Service materials designated as non-public for substance, and in the course of such review may have cause to question the claim that part or all of the materials should not be disclosed. Thus, the proposed rule provides that the Commission may issue a notice of preliminary determination concerning the appropriate degree of protection, if any, to be accorded non-public materials filed by the Postal Service.²⁰

If a preliminary determination of non-public status is made, the Postal Service or any third party with a proprietary interest may submit an answer within 7 days (or such

²⁰ This aspect of the rule is designed to enable the Commission to address claims of confidentiality by the Postal Service or a third party on its own initiative. It is not intended to imply that the Commission will necessarily make a preliminary determination with respect to each filing by the Postal Service of non-public materials.

longer period as specified in the notice). Given the expedited timetables under which the Commission ordinarily operates, this proposed rule does not allow any filings after the initial answers. Thus, those answers should address all issues relevant to whether the non-public materials should be publicly disclosed. Following the receipt of the answers, if any, the Commission will issue an order concerning the appropriate status of the non-public materials.

Rule 3007.33 Standard for decision for early termination of non-public status.

Subsection (a) of this proposed rule sets out the balancing test prescribed in 39 U.S.C. 504(g)(3)(A) for determining the appropriate degree of confidentiality to be accorded Postal Service non-public materials for which a request for early termination of non-public status or a preliminary determination of non-public status has been made.

Subsection (b) of this proposed rule sets out the balancing test, adapted from 39 U.S.C. 504(g)(3)(A), applicable to a request for early termination of non-public status for materials in which the Commission determines that a third party has proprietary interest.

Rule 3007.40 Request for access to non-public materials. Any person, during a Commission proceeding and pursuant to the Commission's rules of practice, may make a motion to request access to non-public materials filed by the Postal Service under 39 U.S.C. 504(g)(1). Any person requesting access must file a motion, which must include a detailed statement in support of granting access. The person requesting access must identify all relevant affiliations, including employer, organization, agency or contractual relationships, and ties to the delivery services, communications, or mailing industry.²¹

Given the expedited timetables under which the Commission generally operates, the proposed rules contemplate procedures that will expedite the process. Thus, the proposed rule provides that the person submitting the motion may agree in advance to

²¹ Industry affiliations of the party requesting access to materials designated as protected by the Postal Service are disclosed to enable the Postal Service to determine whether to object in the context of an expedited matter.

execute and attach sample Commission protective conditions. In that event, answers to the motion are due within 3 days.²²

Recognizing that protective conditions may vary based on the nature of the non-public materials at issue, the Commission encourages any person attaching protective conditions to tailor the conditions to fit that situation, *e.g.*, limiting access to competitive information to certain individuals. Persons attaching protective conditions should describe those conditions, particularly alterations to the standard form. If an executed copy of the sample Commission protective conditions is not attached, answers to the motion are due in 7 days. Following the filing of the answer, the Commission will issue an order concerning access to the non-public materials, or, if protective conditions are approved by the Postal Service or third party with a proprietary interest, the Commission or its authorized representative will grant access subject to the agreed protective conditions.

Rule 3007.41 Termination of access to non-public materials. This proposed rule states that access terminates for all persons with access under proposed rule 3007.40 when the proceeding during which the materials were requested ends (by Commission order or report) or the person otherwise withdraws or ceases to be involved in the proceeding. This proposed rule also allows a person who has access under proposed rule 3007.40 to maintain access, subject to any applicable protective conditions, while that person waits for the Commission or its authorized representative to rule on a motion to continue access made under proposed rule 3007.50.

Rule 3007.42 Standard for decision for request for access to non-public materials. This proposed rule creates a balancing test to establish procedures to accord appropriate confidentiality as authorized by 39 U.S.C. 504(g)(3)(B). This test directs the Commission to balance the interests of the parties, similar to balancing done in Federal civil litigation under Federal Rule of Civil Procedure 26(c). The standard balances the need of the requesting party to have access to participate effectively in a

²² Consistent with the Commission's rules, any prescribed time period of 5 days or less excludes Saturdays, Sundays, and legal holidays. See rule 3001.15.

Commission proceeding against the Postal Service's or third party with a proprietary interest in the materials' rights derived from rule 26 of the Federal Rules of Civil Procedure.

Rule 3007.50 Request for access to non-public materials relevant to compliance.

This proposed rule provides procedures for any interested person to request access to non-public materials, relevant to the ACD, when outside an ongoing Commission proceeding. This proposed rule also allows a person who has access subject to protective conditions (under proposed rules 3007.40 or 3007.50) to file a motion to continue access if the materials are relevant to compliance under 39 U.S.C. 3653. Any person requesting access must file a motion, which includes a statement justifying why access should be granted, and stating how the requested materials are relevant to the Commission's annual determination of compliance under 39 U.S.C. 3653. As with proposed rule 3007.40, the person requesting access must identify all relevant affiliations to assist the Postal Service in determining whether to object to access.

Given the expedited timetables under which the Commission generally operates, the proposed rules contemplate procedures that will expedite the process. Thus, the proposed rule provides that the person submitting the motion may execute and attach to the motion the sample Commission protective conditions. In that event, answers to the motion are due within 3 days. Recognizing that protective conditions may vary based on the nature of the non-public materials at issue, the Commission encourages any person attaching protective conditions to tailor the conditions to fit that situation, *e.g.*, limiting access to competitive information to certain individuals. Persons attaching protective conditions should describe those conditions, particularly alterations to the standard form. If a copy of the sample Commission protective conditions is not attached, answers to the motion are due in 7 days. Following the filing of any answers, the Commission will issue an order concerning access to the non-public materials, or, if protective conditions are approved by the Postal Service or third party with a proprietary interest, the Commission or its authorized representative will grant access subject to the agreed protective conditions.

Under this proposed rule, a person previously granted access to materials under this proposed rule could make renewed requests for access to non-public materials.

Rule 3007.51 Termination of access to non-public materials relevant to compliance. This proposed rule states that access terminates for all persons with access under proposed rule 3007.50 when the Commission issues its next ACD or the person otherwise withdraws or ceases to be involved. This proposed rule also allows a person who has access under proposed rule 3007.50 to maintain access, subject to any applicable protective conditions, while that person waits for the Commission to rule on a motion to continue access made under proposed rule 3007.50.

Rule 3007.52 Standard for decision for request for access to non-public materials relevant to compliance. This proposed rule creates a balancing test to establish the procedures to accord appropriate confidentiality when determining restrictions on the amount or conditions of access to materials requested by a person which are relevant to the ACD. The standard instructs the Commission to balance the parties' interests, similar to balancing done by the Federal courts under Federal Rule of Civil Procedure 26(c). Such balancing may weigh the requesting party's need to access the materials to participate effectively in determining compliance against the Postal Service's interests derived from Federal Rule of Civil Procedure 26(c).

Rule 3007.60 Limitations on access to non-public materials. This proposed rule identifies various limitations on access to non-public materials that may be ordered by the Commission pursuant to 39 U.S.C. 504(g)(3)(B). These limitations, which are generally similar to relief provided by Federal civil courts in discovery disputes under rule 26(c) of the Federal Rules of Civil Procedure include, *inter alia*, not requiring the public disclosure of the materials, specifying the terms for public disclosure, ordering a specific method of disclosure, restricting to whom the information may be disclosed, specifying a time when access terminates, and such other relief as the Commission deems appropriate.

Rule 3007.61 Continued effectiveness of protective conditions. This proposed rule specifies procedures to be followed if a court or other administrative agency

subpoenas (or otherwise orders production of) non-public materials which a person has obtained pursuant to a protective order issued by the Commission. This proposed rule requires that any person seeking to disclose non-public materials to a reviewing court make a good faith effort to obtain protective conditions in accord with those prescribed by the Commission. The proposed rule also provides that unless overridden by the reviewing court, the protective conditions of the Commission (or its authorized representative) remain in effect. The procedures require notice to the Postal Service.

Rule 3007.62 Sanctions for violations of protective conditions. This proposed rule reiterates the protective conditions, barring the dissemination of non-public materials by every person granted access to such materials to any person not authorized to access such materials. The sanctions include dismissing the proceeding in whole or part, issuing a default judgment against the violator of the protective conditions, and such other relief as the Commission (or its authorized representative) deems appropriate. In addition, the rule provides that the Postal Service may pursue whatever remedies may be available to it under law against the violator as well as the entity on whose behalf that person was acting.

VIII. PUBLIC REPRESENTATIVE

Pursuant to 39 U.S.C. 505, Kenneth E. Richardson remains the officer of the Commission (Public Representative) to represent the interests of the general public in the captioned docket.

IX. ORDERING PARAGRAPHS

It is Ordered:

1. Interested persons may submit initial comments no later than 30 days from the date of publication of this Notice in the *Federal Register*.
2. Reply comments may be filed no later than 45 days from the date of publication of this Notice in the *Federal Register*.
3. The Secretary shall arrange for publication of this Notice in the *Federal Register*.

By the Commission.

Steven W. Williams
Secretary

For the reasons discussed above, the Commission proposes to amend title 39 of the Code of Federal Regulations to add part 3007 to read as follows:

PART 3007—TREATMENT OF NON-PUBLIC MATERIALS PROVIDED BY THE POSTAL SERVICE

§ 3007.1 Definitions.

For purposes of this part:

(a) *Authorized representative* means any Commissioner designated by the Chairman, any administrative law judge appointed by the Commission under 5 U.S.C. 3105, and any employee of the Commission designated by the Commission. The authorized representative may administer oaths, examine witnesses, take depositions, and receive evidence with respect to any proceeding before the Commission under title 39 or obtain information to assist the Commission in the preparation of a report or performance of a function under title 39.

(b) *Non-public materials* means any information, documents, and things filed with the Commission which are claimed to be exempt from disclosure by the Postal Service pursuant to 39 U.S.C. §§ 504(g) , 3652(f) or 3654(f), or claimed to be protectable under Federal Rule of Civil Procedure 26(c) by a third party with a proprietary interest in the materials.

§ 3007.2 Scope.

The Commission or its authorized representative may require the Postal Service to provide any information, documents, and things in its possession or control, or any information, documents, and things that it can obtain through reasonable effort and expense, that are likely to materially assist the Commission in its conduct of proceedings, in its preparation of reports, or in performance of its functions under title 39. Information, documents, and things the Postal Service may be required to provide, include, but are not limited to, paper hard copy and electronically stored data and materials—including writings, notes, e-mails, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations—stored in any medium

from which information can be obtained either directly or, if necessary, after translation into a reasonably usable form; or any tangible things.

§ 3007.3 Data or information requests.

(a) The Commission or its authorized representative may issue data or information requests to the Postal Service seeking information, documents, and things covered by section 3007.2. A data or information request shall describe the documents, information, and things sought, briefly explain the reason for the request, and specify a timeframe for receiving the requested information and materials.

(b) Any person may request that the Commission issue a data or information request for documents, information, and things covered by rule 3007.2 by filing a motion with the Commission, pursuant to rule 3001.21 of the Commission's rules of practice and procedure, which describes the documents, information, and things sought, explains the reasons the Commission should make the request, and includes a statement of how the materials sought are relevant and material to the Commission's duties under title 39.

§ 3007.10 Submission of non-public materials under seal.

(a) Non-public materials shall not be filed electronically pursuant to Commission rule 3001.9, but shall be filed in sealed envelopes clearly marked "Confidential. Do Not Post on Web." The person filing the non-public materials shall submit two copies consisting, where practicable, of two paper hard copies as well as two copies in easily usable electronic form such as compact discs (CDs) or digital video discs (DVDs) of the non-public materials which shall also be clearly marked "Confidential. Do Not Post on Web." Spreadsheets submitted in electronic form shall display the formulas used, their links to related spreadsheets, and shall not be password protected. All workpapers or data shall be submitted in a form, and be accompanied by sufficient explanation and documentation to allow them to be replicated using a publicly available PC application. Each page of any paper hard copy non-public materials submitted shall be clearly marked as non-public.

(b) The person submitting the non-public materials shall also file an electronic public (redacted) copy of the non-public materials pursuant to Commission rule 3001.9. The electronic public (redacted) copy of the materials which are not spreadsheets, data files, or programs must be submitted in a searchable electronic format, but need not be submitted in its native format. As part of its publicly available electronic filing, the Postal Service must appropriately redact materials that contain both public and non-public information. For example, the Postal Service may not identify a whole page or a whole table as non-public materials if the page or table contains both public and non-public information, but must redact only the information it claims to be non-public. If practicable, the Postal Service shall sequentially number each page of the materials identified as non-public.

(c) The Postal Service shall use the graphical redaction (blackout) method for all redacted materials. Should the Postal Service wish to use any other method, it must state with particularity the competitive harm associated with use of the graphical redaction method to justify the use of any other method, and indicate the number of lines or pages removed at each redaction.

(d) The Postal Service shall mark each page, item, and thing, or portion thereof, that it seeks to protect from disclosure in a manner reasonably calculated to alert custodians to the confidential nature of the information or materials.

§ 3007.20 Application for non-public treatment.

(a) Whenever the Postal Service files non-public materials with the Commission, it shall at the same time file an application for non-public treatment under rule 3007.21.

(b) Before the Postal Service files non-public materials with the Commission which the Postal Service has reason to believe may implicate a third party proprietary interest, the Postal Service shall inform each such third party:

(1) Of the nature and scope of the filing with the Commission, including the pertinent docket, and

(2) That it may address its confidentiality concerns directly with the Commission.

(c) A third party with a proprietary interest in the materials may, if it deems necessary, independently seek non-public treatment under rule 3007.22.

§ 3007.21 Content of the Postal Service application for non-public treatment.

(a) Whenever the Postal Service files non-public materials with the Commission, it must submit an application for non-public treatment that clearly identifies all non-public materials and describes the circumstances causing them to be submitted to the Commission.

(b) An application for non-public treatment is to fulfill the burden of persuasion that the non-public materials should be withheld from the public.

(c) The application for non-public treatment must include a specific and detailed statement setting forth:

(1) The rationale for claiming that the materials are non-public, including the specific statutory basis for the claim, and a statement justifying application of the provision(s);

(2) A description of the materials claimed to be non-public in a manner that, without revealing the materials at issue, would allow a person to thoroughly evaluate the basis for the claim that they are non-public;

(3) Particular identification of the nature and extent of commercial harm alleged and the likelihood of such harm;

(4) At least one specific hypothetical, illustrative example of each alleged harm;

(5) The extent of protection from public disclosure deemed to be necessary;

(6) The length of time deemed necessary for the non-public materials to be protected from public disclosure with justification thereof; and

(7) Any other factors or reasons relevant to support the application.

§ 3007.22 Content of third party application for non-public treatment.

(a) The application for relief from public disclosure submitted by a party other than the Postal Service must clearly identify all materials believed to be protected from disclosure.

(b) The application for non-public treatment must include a specific and detailed statement setting forth:

(1) A description of the materials claimed to be non-public in a manner that, without revealing the materials at issue, would allow a person to thoroughly evaluate the basis for the claim that they are non-public;

(2) Particular identification of the nature and extent of the harm alleged and the likelihood of such harm; and

(3) Any other factors or reasons relevant to support the application.

§ 3007.23 Treatment of non-public materials.

The Commission or its authorized representative will not publicly disclose or grant access to non-public materials except as provided in the rules of this part.

§ 3007.24 Commission access to non-public materials.

(a) Non-public materials may be disclosed to the following persons:

(1) Members of the Commission;

(2) Commission employees including a public representative carrying out their appropriate responsibilities;

(3) Contractors, attorneys, or other subject matter experts assisting the Commission in carrying out its statutory duties;

(4) Reviewing courts and their staffs; or

(5) Court reporters, stenographers, or persons operating audio or video recording equipment for such court reporters or stenographers at hearings or depositions.

(b) Access to non-public materials for all persons not covered by this rule is pursuant to rules 3007.40 and 3007.50.

§ 3007.25 Use of non-public materials.

Except as pursuant to this part, persons with access to non-public materials under rule 3007.24 may not:

(a) Use such materials for purposes other than the purposes for which they are supplied.

(b) Permit anyone who is not allowed access under rule 3007.24 to have access to any such materials.

§ 3007.30 Termination of non-public status.

Ten years after the date of filing with the Commission, non-public materials shall lose non-public status unless the Commission or its authorized representative enters an order extending the duration of that status.

§ 3007.31 Request for early termination of non-public status.

(a) Any person may make a request to the Commission that non-public materials be publicly disclosed. Each such request shall provide a specific and detailed statement justifying why the non-public materials should be made public giving specific recognition to any pertinent rationale(s) provided in the application for relief submitted pursuant to rules 3007.21 or 3007.22. The request, however, shall not publicly disclose any of the non-public materials. If it is necessary to use the non-public materials to formulate the argument in favor of public disclosure, the argument utilizing the non-public materials shall be filed under seal.

(b) Any interested person, including the Postal Service, may file a response to the request within 7 days after such a request is filed, unless a longer period is specified by the Commission.

(c) Unless the Commission otherwise provides, no reply to a response filed pursuant to subsection (a) shall be filed.

(d) Following the filing of responses, if any, the Commission will issue an order determining the appropriate degree of protection, if any, to be accorded to the materials claimed to be non-public by the Postal Service or third party with a proprietary interest in the materials.

§ 3007.32 Preliminary determination of non-public status.

(a) Whenever the Postal Service files non-public materials, the Commission may issue a notice of preliminary determination concerning the appropriate degree of protection, if any, to be accorded to such materials.

(b) Any interested person, including the Postal Service, may file a response to the Commission's notice of preliminary determination within 7 days after such a notice is filed, unless a longer period is specified.

(c) Unless the Commission otherwise provides, no reply to a response filed pursuant to subsection (b) shall be filed.

(d) Following the filing of responses, if any, the Commission will issue an order determining the appropriate degree of protection, if any, to be accorded to the materials claimed to be non-public by the Postal Service or third party with a proprietary interest in the materials.

§ 3007.33 Standard for decision for early termination of non-public status.

(a) In determining whether to publicly disclose non-public materials filed by the Postal Service, the Commission shall balance the nature and extent of the likely commercial injury identified by the Postal Service against the public interest in maintaining the financial transparency of a government entity competing in commercial markets.

(b) In determining whether to publicly disclose non-public materials in which the Commission determines a third party has a proprietary interest, the Commission shall balance the interests of the parties based on Federal Rule of Civil Procedure 26(c).

§ 3007.40 Request for access to non-public materials.

(a) During a Commission proceeding, any person may file a motion pursuant to rule 3001.21 requesting access to non-public materials. The motion shall include:

- (1) A detailed statement providing justification for access; and
- (2) A list of relevant affiliations, including employment or other relationship (including agent, consultant or contractor) with the party requesting access,

and whether that party is affiliated with the delivery services, communications or mailing industries.

(b) To expedite the process, each person seeking access to non-public materials may attach to the motion an executed copy of the sample Commission protective conditions as provided in Appendix A to Part 3007.

(1) If an executed copy of the sample Commission protective conditions is attached, 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, answers are due within 7 days after such a motion is filed.

(c) Unless the Commission otherwise provides, no reply to an answer filed pursuant to subsection (b)(1) or (b)(2) shall be filed.

(d) Following the filing of answers, if any:

(1) The Commission will issue an order allowing or denying access and setting forth the appropriate protective conditions, if any, to be accorded non-public materials, or

(2) If the Postal Service or third party with a proprietary interest does not contest a person's access subject to agreed protective conditions, the Commission or its authorized representative may issue an order allowing access subject to the agreed protective conditions.

§ 3007.41 Termination of access to non-public materials.

(a) Except as provided in subsection (b), access to non-public materials obtained under rule 3007.40 terminates either when the Commission issues a final order or report in the relevant proceeding or the person withdraws or is otherwise no longer involved in the proceeding, whichever occurs first. For purposes of this rule, an order or report is not considered final until after the possibility of judicial review expires.

(b) Access to non-public materials shall continue for persons seeking continued access under rule 3007.50.

(c) Upon termination of access under subsection (a), all non-public materials in a person's possession must be destroyed, and the form attached to the protective conditions certifying destruction must be executed and filed with the Commission.

§ 3007.42 Standard for decision for request for access to non-public materials.

In determining whether to grant a request for access to non-public materials, the Commission shall balance the interests of the parties based on Federal Rule of Civil Procedure 26(c).

§ 3007.50 Request for access to non-public materials relevant to compliance.

(a) Any person may file a motion pursuant to rule 3001.21 requesting access to, or continued access to, non-public materials relevant to compliance under 39 U.S.C. 3653. The motion shall include:

(1) A detailed statement providing justification for access, including reference to the materials' relevance to compliance under title 39 chapter 36; and

(2) A list of relevant affiliations, including employment or other relationship (including agent, consultant or contractor) with the party requesting access, and whether that party is affiliated with the delivery services, communications or mailing industries.

(b) To expedite the process, each person seeking access to non-public materials may attach to the motion an executed copy of the sample Commission protective conditions as provided in Appendix A to Part 3007.

(1) If an executed copy for the sample Commission protective conditions is attached, 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, answers are due within 7 days after such a motion is filed.

(c) Unless the Commission otherwise provides, no reply to an answer filed pursuant to subsection (b)(1) or (b)(2) shall be filed.

(d) Following the filing of answers, if any:

(1) The Commission will issue an order allowing or denying access and setting forth the appropriate protective conditions, if any, to be accorded the non-public materials, or

(2) If the Postal Service or third party with a proprietary interest does not contest a person's access subject to agreed protective conditions, the Commission or its authorized representative may issue an order allowing access subject to the agreed protective conditions.

§ 3007.51 Termination of access to non-public materials relevant to compliance.

(a) Access to non-public materials obtained under rule 3007.50 terminates either when the Commission issues its next Annual Compliance Determination (ACD) or the person withdraws or is otherwise no longer involved in the relevant proceeding, whichever occurs first.

(b) Access to non-public materials shall continue for persons seeking continued access under rule 3007.50.

(c) Upon termination of access under subsection (a), all non-public materials in a person's possession must be destroyed, and the form attached to the protective conditions certifying destruction must be executed and filed with the Commission.

§ 3007.52 Standard for decision for request for access to non-public materials relevant to compliance.

In determining whether to grant a request for access to non-public materials relevant to compliance, the Commission shall balance the interests of the parties based on Federal Rule of Civil Procedure 26(c).

§ 3007.60 Limitations on access to non-public materials.

To afford appropriate confidentiality to non-public materials during any stage of a proceeding before the Commission, or in connection with any other purpose under title 39, the Commission may, based on Federal Rule of Civil Procedure 26(c):

- (a) Prohibit the public disclosure of the non-public materials;
- (b) Specify terms for public disclosure of the non-public materials;

- (c) Order a specific method for disclosing the non-public materials;
- (d) Restrict the scope of the disclosure of the non-public materials as they relate to certain matters;
- (e) Restrict who may have access to non-public materials;
- (f) Require that a trade secret be revealed only in a specific and limited manner or to limited or specified persons; and
- (g) Order other relief as appropriate including, but not limited to, sealing a deposition or part of a proceeding.

§ 3007.61 Continued effectiveness of protective conditions.

(a) If a court or other administrative agency subpoenas or orders production of non-public materials which a person has obtained under protective conditions ordered by the Commission, the target of the subpoena or order shall, within 2 days of receipt of the subpoena or order for production, notify the Postal Service of the pendency of the subpoena or order to allow the Postal Service time to object to the production or to seek a protective order or seek such other relief as it deems appropriate.

(b) Any person seeking to disclose non-public materials to a reviewing court shall make a good faith effort to obtain protective conditions at least as effective as those set forth in the Commission order establishing the protective conditions.

(c) Protective conditions ordered by the Commission or its authorized representative shall remain in effect throughout any subsequent review unless overridden by the action of the reviewing court.

§ 3007.62 Sanctions for violations of protective conditions.

(a) No person who has been granted access to materials subject to protective conditions shall disseminate the materials in whole or in part to any person not authorized to obtain access under the protective conditions imposed by the Commission. If a person who has been granted access to such non-public materials under a protective order violates the terms of such order, the Commission or its authorized representative shall impose sanctions on the person who violated the

protective order or the individuals or entities on whose behalf the person was acting, or both. The sanctions may include:

(1) Dismissing the proceeding in whole or in part;

(2) Ruling by default against the person who violated the protective order; and

(3) Such other sanctions as the Commission or its authorized representative deems appropriate.

(b) The Postal Service, in its discretion, may pursue any remedies available to it under the law against the individual who violated the protective order, or the individuals or entities on whose behalf the person was acting, or both.

STATEMENT OF COMPLIANCE WITH PROTECTIVE CONDITIONS

The Postal Service (or a third party) has filed non-public materials identified as _____ in Commission Docket No. (if any) _____. The Postal Service (or a third party) requests confidential treatment of the materials (hereinafter “these materials”).

The following protective conditions limit access to these materials identified as _____ by the Postal Service (or third party). Each person seeking to obtain access to these materials must agree to comply with these conditions, complete the attached certifications, and provide the completed certifications to the Commission and counsel for the Postal Service.

1. Access to these materials is limited to a person as defined in rule 5(f), 39 CFR 3001.5(f), or an individual employed by such person, or acting as agent, consultant, contractor, affiliated person, or other representative of such person for purposes related to the matter identified as _____. However, no person involved in competitive decision-making for any entity that might gain competitive advantage from use of this information shall be granted access to these materials. “Involved in competitive decision-making” includes consulting on marketing or advertising strategies, pricing, product research and development, product design, or the competitive structuring and composition of bids, offers or proposals. It does not include rendering legal advice or performing other services that are not directly in furtherance of activities in competition with a person or entity having a proprietary interest in the protected material.
2. No person granted access to these materials is permitted to disseminate them in whole or in part to any person not authorized to obtain access under these conditions.
3. Immediately after access has terminated under rule 39 CFR 3007.41 or 3007.51, a person (and any individual working on behalf of that person) who has obtained a copy of these materials shall certify to the Commission:
 - (a) That the copy was maintained in accordance with these conditions (or others established by the Commission); and
 - (b) That the copy (and any duplicates) either have been destroyed or returned to the Commission.

4. The duties of each person obtaining access to these materials shall apply to material disclosed or duplicated in writing, orally, electronically, or otherwise, by any means, format, or medium. These duties shall apply to the disclosure of excerpts from or parts of the document, as well as to the entire document.
5. All persons who obtain access to these materials are required to protect the document by using the same degree of care, but no less than a reasonable degree of care, to prevent the unauthorized disclosure of the document as those persons, in the ordinary course of business, would be expected to use to protect their own proprietary material or trade secrets and other internal, confidential, commercially sensitive, and privileged information.
6. These conditions shall apply to any revised, amended, or supplemental versions of these materials provided in the matter identified as _____.
7. The duty of nondisclosure of each person obtaining access to these materials is continuing, terminable only by specific order of the Commission, or as specified in paragraphs 9 and 10, below.
8. Each person granted access to these materials consents to these or such other conditions as the Commission may approve.
9. Any written materials that quote or contain materials protected under these protective conditions are also covered by the same protective conditions and certification requirements, and shall be filed with the Commission only under seal. Documents submitted to the Commission as confidential shall remain sealed while in the Secretary's office or such other place as the Commission may designate so long as they retain their status as stamped confidential documents.
10. If a court or other administrative agency subpoenas or orders production of confidential information which a person has obtained under the terms of this protective order, the target of the subpoena or order shall promptly (within 2 business days) notify the Postal Service of the pendency of the subpoena or order to allow it time to object to that production or seek a protective order.

CERTIFICATION

The undersigned represents that:

Access to these materials provided in the matter identified as _____ by the Postal Service has been authorized by the Commission. The cover or label of the copy obtained is marked with my name. I agree to use the information only for purposes of analyzing matters at issue in the matter identified as _____. I certify that I have read and understand the above protective conditions and am eligible to receive access to materials under paragraph 1 of the protective conditions. I further agree to comply with all protective conditions and will maintain these materials in strict confidence in accordance with all of the protective conditions set out above.

Name _____

Firm _____

Title _____

Representing _____

Signature _____

Date _____

CERTIFICATION

The undersigned represents that:

Access to these materials provided in the matter identified as _____ by the Postal Service has been terminated.

I certify that I have destroyed or returned to the Commission, all materials subject to protective conditions, relevant to the above matter. I also certify that these materials were maintained in accordance with the established protective conditions.

Name _____

Firm _____

Title _____

Representing _____

Signature _____

Date _____