

ORDER NO. 6451

UNITED STATES OF AMERICA
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Before Commissioners:

Michael Kubayanda, Chairman;
Mark Acton, Vice Chairman;
Ann C. Fisher;
Ashley E. Poling; and
Robert G. Taub

Amendments to Rules Regarding
Materials Provided to the Commission
in Connection with Activities Under
39 U.S.C. 407(b)(2)(A)

Docket No. RM2023-6

NOTICE OF PROPOSED RULEMAKING REGARDING MATERIALS
PROVIDED TO THE COMMISSION IN CONNECTION WITH
ACTIVITIES UNDER 39 U.S.C. 407(b)(2)(A)

(Issued March 3, 2023)

I. INTRODUCTION

In conducting the foreign policy of the United States with respect to international postal services and international delivery services, the Secretary of State must coordinate with applicable government agencies, including the Commission, under 39 U.S.C. 407(b)(2)(A). Such coordination about foreign affairs, a core constitutional function of the Executive Branch, requires the timely, free, and frank flow of information between government agencies. To set appropriate expectations about the status of such foreign-policy deliberations, the Commission initiates this rulemaking to consider proposed revisions to its rules pertaining to non-public materials, which are any documents or things provided to the Commission identified as containing non-public

information.¹ The Commission proposes to amend its rules in 39 CFR part 3011 to exempt non-public materials submitted to the Commission in connection with activities under 39 U.S.C. 407(b)(2)(A) from the rules in 39 CFR part 3011. In addition, the Commission also proposes to clarify certain rules pertaining to requests filed pursuant to the Freedom of Information Act (FOIA) in 39 CFR part 3006.

The proposed amended rules appear after the signature of this Order.

II. BACKGROUND

In pertinent part, 39 U.S.C. 407(b)(2)(A) provides:

[T]he Secretary of State shall exercise primary authority for the conduct of foreign policy with respect to international postal services and international delivery services, including the determination of United States positions and the conduct of United States participation in negotiations with foreign governments and international bodies. In exercising this authority, the Secretary...shall coordinate with other agencies as appropriate, and in particular, shall give full consideration to the authority vested by law or Executive order in the Postal Regulatory Commission, the Department of Commerce, the Department of Transportation, and the Office of the United States Trade Representative in this area[.]

39 U.S.C. 407(b)(2)(A). Flowing from this authority, the U.S. Department of State (DOS) coordinates continuous and frequent information sharing relating to international postal services and international delivery services between and among the relevant government agencies. As a routine part of this intragovernmental coordination, the agencies share materials with each other that may contain information that should be accorded non-public treatment. In other contexts, such exchange of non-public materials might implicate the Commission's existing regulations that govern procedures

¹ Throughout this Order and the Commission's rules, the term "information" refers to the substance, such as explanations, confirmations, factual descriptions, and data, whereas the term "materials" refers to tangible matter conveying information, such as hard copy/electronic documents or things. See 39 CFR 3011.100(b), 3011.101(a); see *also* Docket No. RM2018-3, Order Adopting Final Rules Relating to Non-Public Information, June 27, 2018, at 33, 54 (Order No. 4679).

when any natural person (individual) or legal person (entity) (collectively, submitter), provides non-public material to the Commission and seeks non-public treatment.²

Additionally, the Commission's existing FOIA regulations in 39 CFR part 3006 describe the procedure for requesting Commission records, which may include non-public materials shared among the agencies involved in the coordination activities under 39 U.S.C. 407(b)(2)(A).³ Nine categories of information are exempt from mandatory disclosure under the FOIA. 5 U.S.C. 552(b); 39 CFR 3006.11.

When providing materials to the Commission that are claimed to contain non-public information, submitters must ordinarily comply with the requirements in 39 CFR part 3011. See 39 CFR 3011.100(a)(1) and (2). For example, the submitter is required to concomitantly provide an application for non-public treatment,⁴ a redacted (public) version of the non-public materials,⁵ and an unredacted (sealed) version of the non-public materials.⁶ The submitter may seek non-public treatment of materials containing information that is proprietary to any person other than the Postal Service and would be protectable under Federal Rule of Civil Procedure 26(c) and/or information that would be exempt from FOIA disclosure pursuant to any of the nine exemptions appearing in 5 U.S.C. 552(b) and/or the six Postal Service-specific exemptions appearing in 5 U.S.C.

² See 39 CFR 3011.101(b); *see also* 39 CFR 3010.101(i) (defining "[p]erson" to refer to an individual, a partnership, corporation, limited liability company, trust, unincorporated association, public or private organization, or governmental entity).

³ See 39 CFR 3006.30(d), (e) (providing the Commission's procedures for handling FOIA requests for non-public materials submitted by the Postal Service or a person other than the Postal Service, respectively).

⁴ "If the material designated as non-public has been previously claimed to be non-public material by a prior application for non-public treatment, the submitter may incorporate by reference the prior application." 39 CFR 3011.201(c).

⁵ Generally, the submitter shall use the graphical redaction (blackout) method to redact only the non-public information; however, another redaction method may be used if the submitter justifies doing so based on the competitive harm or practical difficulty alleged to result from using the blackout method. See 39 CFR 3011.202.

⁶ 39 CFR 3011.200(a). "Each page or portion of the unredacted version of the materials for which non-public treatment is sought shall be marked in a manner reasonably calculated to alert custodians to the confidential nature of the materials." 39 CFR 3011.203(a).

410(c). See 39 CFR 3011.101(a). Consistent with its long-standing practice, the Commission preliminarily treats such materials as non-public. See 39 CFR 3011.102(a); see *also* Order No. 4679 at 11.

Also consistent with its long-standing practice, the Commission does not accept the rationales for non-public treatment given in the application for non-public treatment unless the Commission makes a determination of non-public status, which may occur if an interested person files a motion for public disclosure (unsealing) of non-public materials pursuant to 39 CFR part 3011, subpart D or *sua sponte* by the Commission if it issues a preliminary determination *sua sponte*. Pending the Commission's resolution of the person's motion for disclosure or the Commission's notice of its preliminary determination, information designated as non-public continues to be accorded non-public treatment. 39 CFR 3011.103(b), (c), .400(e). Both procedures allow an opportunity to file a response (to either the person's motion for disclosure or the Commission's notice of its preliminary determination) and conclude with the issuance of a Commission order determining the non-public treatment to be accorded (if any) under the applicable standard.⁷

After submitters provide non-public materials to the Commission, other persons may seek access (subject to protective conditions) to such non-public materials for the express purposes of aiding participation in a pending Commission proceeding or aiding initiation of a proceeding before the Commission by filing a motion in accordance with the rules in 39 CFR part 3011, subpart C. 39 CFR 3011.300(c). The Commission

⁷ 39 CFR 3011.103(c); 39 CFR 3011.400(c); 39 CFR 3011.400 (f). The Commission adjudicates a motion for disclosure of non-public materials claimed by the Postal Service to contain non-public information by balancing 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. 39 CFR 3011.103(c); 39 CFR 3011.400(f); 39 CFR 3011.104(a). Consistent with its long-standing practice, the Commission does not interpret "likely commercial injury" so narrowly as to exclude harm associated with other interests, such as the deliberative process. See Order No. 4679 at 16. If the Commission determines any person other than the Postal Service has a proprietary interest, then the Commission adjudicates a motion for disclosure of non-public materials claimed by balancing the interests of the parties consistent with the analysis undertaken by a Federal court when applying the protective conditions appearing in Federal Rule of Civil Procedure 26(c). 39 CFR 3011.103(c); 39 CFR 3011.400(f); 39 CFR 3011.104(b).

adjudicates a motion for access to non-public materials by balancing the interests of the parties consistent with the analysis undertaken by a Federal court when applying the protective conditions appearing in Federal Rule of Civil Procedure 26(c). 39 CFR 3011.301(e). The Commission's access rules allow non-public materials to remain under seal and allow eligible persons granted access to view and use the non-public materials subject to protective conditions,⁸ if warranted by the Commission's balancing of the parties' interests.

The Commission's existing regulations provide the appropriate resolutions for requests for records depending on whether the requested record is submitted by the Postal Service or by a person other than the Postal Service, and also depending on whether the request is made pursuant to the FOIA (39 CFR part 3006) or via a motion filed pursuant to 39 CFR part 3011:

(1) A FOIA request seeking disclosure of any record submitted by the Postal Service shall be referred to the Postal Service. 39 CFR 3006.30(d)(1).

(2) A FOIA request for any record submitted by a person other than the Postal Service shall be considered by the Commission in light of all applicable FOIA exemptions. 39 CFR 3006.30(e)(1).

(3) A motion filed under 39 CFR part 3011 seeking access (subject to protective conditions) or disclosure of any materials designated as non-public shall be considered by the Commission under the applicable standards set forth in part 3011. 39 CFR 3006.30(d)(2) (designated by the Postal Service); 39 CFR 3006.30(e)(2) (designated by any person other than the Postal Service).

⁸ Access is restricted to eligible persons pursuant to 39 CFR 3011.300. "No person involved in competitive decision-making for any individual or entity that might gain competitive advantage from using non-public materials shall be granted access to non-public materials." 39 CFR 3011.300(b). All persons who obtain access are subject to protective conditions, which limit use and dissemination of the non-public materials (39 CFR 3011.302); they are also subject to sanctions under 39 CFR 3011.303(a) for violation of protective conditions; and 39 CFR 3011.303(b) reserves the right of any person, including the Postal Service, to pursue other remedies.

III. PROPOSED AMENDMENTS

A. Rationale for the Proposed Amendments

After experience with its rules, the Commission is concerned that the existing regulations on non-public materials might not set sufficiently clear expectations about those regulations' interaction with Executive Branch policy-making processes. Absent such clarity, Executive Branch stakeholders might be wary of engaging in the free flow of information between relevant parties during the DOS coordination activities under 39 U.S.C. 407(b)(2)(A) aimed at advising on U.S. foreign postal policy in a timely manner. As an example, existing 39 CFR 3011.200(a) requires submitters of non-public materials to the Commission to concomitantly provide an application for non-public treatment, a redacted version of the non-public materials, and an unredacted version of the non-public materials with each submission. The existing rules provide multiple pathways for persons to seek such materials (FOIA records requests under 39 CFR part 3006 and motions practice under 39 CFR part 3011). Some stakeholders have expressed concern that the rules, if interpreted strictly, could unduly expose intra-Executive Branch foreign-policy deliberations. This concern is not necessarily well-founded, in light of historical practice with the Commission's 39 CFR part 3011 rules and the absence of any motions under 39 CFR part 3011 relating to intragovernmental coordination under 39 U.S.C. 407(b)(2)(A) since the rules took effect on August 2, 2018. All the same, the Commission believes that the rules would benefit from increased clarity.

A routine part of intragovernmental coordination under 39 U.S.C. 407(b)(2)(A) requires the frequent and timely exchange of materials that may contain information that should be accorded non-public treatment under both sets of Commission regulations (39 CFR parts 3006 and 3011). By way of example, materials that contain "inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency" would be exempt from public disclosure pursuant to 39 CFR part 3006 and a basis to claim non-public treatment

pursuant to 39 CFR part 3011. 5 U.S.C. 552(b)(5); 39 CFR 3006.11(f); 39 CFR 3011.101(a) (citing 5 U.S.C. 552(b)). To assure the free flow of information and streamline the Commission regulations that may impact activities under the coordination of the DOS, the Commission proposes to explicitly exempt non-public materials submitted to the Commission in connection with the coordination activities under 39 U.S.C. 407(b)(2)(A) from its rules in 39 CFR part 3011. Relatedly, the Commission also proposes clarifying revisions to its rules in 39 CFR part 3006 regarding FOIA requests.

B. Statutory Authority for the Proposed Amendments

The proposed amendments aim to harmonize: (1) the Commission's specific authority relating to certain non-public materials, provided by 39 U.S.C. 504(g); (2) the Commission's general authority to take actions deemed to be necessary and proper to carry out its functions and obligations under Title 39 of the United States Code, provided by 39 U.S.C. 503; and (3) the Commission's role in advising DOS in connection with DOS coordination activities, described in 39 U.S.C. 407(b)(2)(A).

Section 504(g) of Title 39 of the United States Code sets forth both a mechanism for the Postal Service to seek non-public treatment of materials that it provides to the Commission and the legal standard for the Commission to evaluate the degree of appropriate confidentiality to be accorded to such materials (including specific authority to issue regulations). Section 504(g) is triggered:

[i]f the Postal Service determines that any document or other matter it provides to the Postal Regulatory Commission under a subpoena issued under [39 U.S.C. 504](f), or otherwise at the request of the Commission in connection with any proceeding or other purpose under ... [Title 39], contains information which is described in [39 U.S.C.] 410(c) ..., or exempt from public disclosure under [5 U.S.C. 552(b)], the Postal Service shall, at the time of providing such matter to the Commission, notify the Commission, in writing, of its determination (and the reasons therefor).

39 U.S.C. 504(g)(1).

After the Postal Service has identified its basis for seeking non-public treatment of the materials that it provides to the Commission pursuant to 39 U.S.C. 504(g)(1), 39 U.S.C. 504(g)(3) also establishes the Commission's specific authority regarding the public disclosure of⁹ or granting of access (subject to protective conditions)¹⁰ to such materials. Section 504(g) does not directly apply to non-public materials outside the threshold context contemplated by 39 U.S.C. 504(g)(1). The scope of 39 U.S.C. 504(g)(1) plainly does not apply to the Commission's receipt of non-public materials provided by other government agencies (other than the Postal Service) in connection with the coordination activities under 39 U.S.C. 407(b)(2)(A). Thus, exempting such materials from the Commission's rules in 39 CFR part 3011 is consistent with 39 U.S.C. 504(g).

To the extent that any materials in connection with the coordination activities under 39 U.S.C. 407(b)(2)(A) might be provided by the Postal Service to the Commission, those materials would be provided voluntarily or at the request of the coordinating authority (*i.e.*, the DOS) rather than pursuant to a Commission subpoena "or otherwise at the request of the Commission in connection with any proceeding or other purpose under ... [Title 39]" as contemplated by 39 U.S.C. 504(g)(1). Therefore, the proposal to exempt non-public materials submitted by the Postal Service to the Commission in connection with the coordination activities under 39 U.S.C. 407(b)(2)(A)

⁹ Section 504(g)(3)(A) states that the Commission is not prohibited from publicly disclosing such information as long as two conditions are met. First, the Commission must have engaged in a rulemaking to "establish a procedure for according appropriate confidentiality to information identified by the Postal Service [as non-public]." 39 U.S.C. 504(g)(3)(A). Second, in determining the appropriate degree of confidentiality to be given to information alleged to be non-public by the Postal Service, section 504(g)(3)(A) directs the Commission 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.*

¹⁰ Section 504(g)(3)(B) provides that, in the context of discovery, the Commission may disclose information obtained from the Postal Service if the disclosure is found to be appropriate and consistent with the kind of balancing of interest that is performed by Federal civil courts when asked to establish protective conditions under rule 26(c) of the Federal Rules of Civil Procedure. *Id.* Specifically, the statute requires the Commission to establish procedures by regulation based on rule 26(c) of the Federal Rules of Civil Procedure to ensure "appropriate confidentiality for information furnished to any party." *Id.*

from its rules in 39 CFR part 3011 is consistent with 39 U.S.C. 504(g), since such submission of non-public materials by the Postal Service occurs outside the context of a formal subpoena or Commission request.¹¹

The source of the Commission's statutory authority to regulate the non-public treatment of materials submitted by the Postal Service outside the context of 39 U.S.C. 504(g) and any materials submitted by any other person derives from 39 U.S.C. 503. This provision grants the Commission general authority to take actions, such as issuing rules and regulations, that are "necessary and proper" to carry out its "functions and obligations" under Title 39 of the United States Code. 39 U.S.C. 503. Thus, the Commission has broad discretion to determine the boundary of its regulations' applicability to materials outside the context of 39 U.S.C. 504(g)(1).

In addition, the Commission's role in the coordination activities as part of the foreign postal policy deliberative process under 39 U.S.C. 407(b)(2)(A) is subordinate to the DOS's leadership and decision-making authority. In this role, the Commission is one of multiple Executive Branch peers that exchange views and provide deliberative input to the DOS.¹² The Commission's receipt of non-public materials in this context is different from a Commission request for information in a regulatory proceeding over

¹¹ To the extent that 39 U.S.C. 504(g) could be construed to apply to any non-public materials submitted by the Postal Service to the Commission in connection with the coordination activities under 39 U.S.C. 407(b)(2)(A)—which as the Commission has explained above, it does not—the proposed amendments remain consistent with 39 U.S.C. 504(g). Notably, 39 U.S.C. 504(g) does not require the Commission to issue any regulations concerning the non-public treatment of any materials, unless the Commission intends to disclose or grant access (subject to protective conditions) to such materials. Rather, 39 U.S.C. 504(g)(3) permits the Commission to disclose or grant access (subject to protective conditions) if certain conditions are met. See *supra* nn.9-10. Further, the amendments proposed in this Order will continue to ensure non-dissemination, use, and care of such materials, consistent with 39 U.S.C. 504(g)(2), should that provision be construed to apply. If any non-public materials submitted to the Commission in connection with the coordination activities under 39 U.S.C. 407(b)(2)(A) are subsequently provided to the Commission in a manner that is within the scope of 39 U.S.C. 504(g)(1), the amendments proposed in this Order will continue to apply the rules appearing in 39 CFR part 3011.

¹² See 39 U.S.C. 407(b)(2)(A) (providing that the DOS shall coordinate with the Commission, "the Department of Commerce, the Department of Transportation, and the Office of the United States Trade Representative").

which the Commission presides.¹³ To facilitate the swift exchange of information among all agencies involved in the deliberative process and harmonize Commission application of the statute, the Commission deems it reasonable to explicitly provide that non-public materials submitted in this specific context are exempt from the requirements of 39 CFR part 3011.

C. Summary of the Proposed Amendments

For the reasons discussed above, the Commission proposes to explicitly exempt all materials (subject to the three exceptions discussed below) submitted to the Commission in connection with activities under 39 U.S.C. 407(b)(2)(A) from its rules in 39 CFR part 3011. To do so, the Commission proposes to add proposed 39 CFR 3011.100(c). As proposed, a person submitting non-public materials to the Commission in connection with activities under 39 U.S.C. 407(b)(2)(A) unambiguously would not need to comply with the procedures required by 39 CFR part 3011. The proposal would also clarify that a third party could not seek access or public disclosure of non-public materials submitted to the Commission in connection with activities under 39 U.S.C. 407(b)(2)(A) through the rules appearing in 39 CFR part 3011 subparts C and D. Under the proposal, any motion filed using the procedures set forth in 39 CFR part 3011 subparts C or D relating to materials submitted to the Commission in connection with activities under 39 U.S.C. 407(b)(2)(A) will be summarily dismissed with prejudice and the movant will be notified that the procedures to make a FOIA request appear in 39 CFR part 3006.

¹³ The Commission engages in a proceeding relating to international mail matters (International Mail docket or IM docket) only pursuant to 39 U.S.C. 407(c)(1), which requires the DOS to request the Commission to submit its views on a very limited subject, *i.e.*, whether any Market Dominant rates or classifications to be established in a treaty, convention, or amendment are consistent with the law. The Commission, the Chairman of the Commission, or a presiding officer (if applicable) reserves the opportunity to issue information requests in IM dockets, consistent with the discretion accorded under 39 CFR 3010.170 and proportionate to the purpose and scope of IM dockets described in 39 CFR 3025.102 and 3025.103.

Although this proposal generally exempts non-public materials submitted to the Commission in connection with activities under 39 U.S.C. 407(b)(2)(A) from the rules appearing in 39 CFR part 3011, there are three exceptions to this exemption. First, proposed § 3011.100(c)(1) provides that certain persons must adhere to the requirements of existing 39 CFR 3011.302 regarding the non-dissemination, use, and care of the non-public materials provided to the Commission in connection with activities under 39 U.S.C. 407(b)(2)(A). These persons include (1) members of the Commission; (2) Commission employees; and (3) non-employees who have executed appropriate non-disclosure agreements assisting the Commission in carrying out its duties. Second, proposed § 3011.100(c)(2) provides that any person that discovers that non-public materials provided to the Commission in connection with activities under 39 U.S.C. 407(b)(2)(A) have been inadvertently included within materials that are accessible to the public shall follow the procedures of 39 CFR 3011.205 regarding notification of the applicable Commission personnel to remove from the publicly available materials those materials for which non-public treatment are being requested and specify any special relief sought in connection with the version of the materials that are claimed to have been inadvertently submitted publicly. Third, proposed § 3011.100(c)(3) provides that non-public materials provided to the Commission in connection with activities under 39 U.S.C. 407(b)(2)(A) are construed to exclude each of the following: (1) non-public materials provided by the Postal Service to the Commission pursuant to a subpoena; (2) non-public materials filed in response to an information request issued pursuant to 39 CFR 3010.170; (3) non-public materials filed in compliance with any applicable Postal Service reporting required under 39 CFR part 3050 or part 3055; and (4) non-public materials filed in a Commission docket. In other words, if any non-public materials submitted to the Commission in connection with activities under 39 U.S.C. 407(b)(2)(A) are provided via these four methods, which are clearly contemplated as within the scope of 39 U.S.C. 504(g)(1), then that production responsive to a subpoena or filing would be subject to the requirements in 39 CFR part 3011, including the access and

disclosure rules in part 3011, subparts C and D, even if they were initially provided to the Commission in connection with activities under 39 U.S.C. 407(b)(2)(A).

Related to the proposed amendments discussed above, the Commission also proposes to amend 39 CFR 3011.103 by adding a sentence to paragraph (a). The inadvertent failure of a submitter to concomitantly provide all documents required by existing 39 CFR 3011.200(a) (e.g., omission of an application for non-public treatment and/or a redacted (public) version of the non-public material) does not prevent the Commission from according appropriate confidentiality to non-public information contained with any materials provided to the Commission. Consistent with the remainder of the existing paragraph (a), the Commission may direct a submitter to provide an application and/or redacted (public) version of the non-public material if it was omitted in the initial submission. This proposed addition conforms with the Commission's long-standing practice and is intended to provide increased transparency and assurances to persons less familiar with the Commission's motions practices and its treatment of non-public information contained in materials that may not have been identified as non-public at the time of their submission. This proposed addition does not relieve the obligations to provide all documents required by existing 39 CFR 3011.200(a). As the Commission observed when codifying the requirement appearing in existing 39 CFR 3011.200(a), the concomitant submission of an application for non-public treatment and a redacted (public) version of the non-public material are aimed at better ensuring that confidential treatment is properly accorded to the unredacted version of the non-public material, providing the Commission with sufficient information to determine the non-public treatment (if any) that should be accorded, and facilitating the resolution of any applicable motions practice.¹⁴ There is no intent to change the meaning or operation of the rules currently in place.

¹⁴ See Order No. 4679 at 57-58. The burden of persuasion that must be carried by an application for non-public treatment, the specific content requirements of such application, and the specific procedures to streamline applications via incorporation by reference further serve these goals; the proposed change is not intended to allow for evasion of any requirements imposed by existing 39 CFR 3011.201.

Although the proposal would clearly bar a person from seeking access or public disclosure of non-public materials submitted to the Commission in connection with activities under 39 U.S.C. 407(b)(2)(A) using the processes appearing in 39 CFR part 3011 (subject to the exceptions appearing in proposed § 3011.100(c)(3)), the proposal would continue to allow a person to seek disclosure of such non-public materials through a FOIA request in accordance with 39 CFR part 3006 (subject to the FOIA procedures and exemptions). Existing 39 CFR 3006.30(d) and 3006.70(a) refer to the procedures in 39 CFR part 3011 to be followed by the Postal Service and a person other than the Postal Service, respectively, when they submit non-public materials to the Commission. In conformity with the proposed exemption of non-public materials submitted to the Commission in connection with activities under 39 U.S.C. 407(b)(2)(A) from the application of 39 CFR part 3011, the Commission also proposes to exempt such non-public materials from the language regarding 39 CFR part 3011 in 39 CFR 3006.30(d) and 3006.70(a).

In addition, existing 39 CFR 3006.30(e)(1) provides that “[a] request made pursuant to FOIA for records designated as non-public by a person other than the Postal Service shall be considered in light of all applicable exemptions[.]” Upon consideration, this would only apply to a person other than the Postal Service *who is not subject to the FOIA*, and not to a person other than the Postal Service *who is subject to the FOIA* (such as the DOS, the Department of Commerce, the Department of Transportation, and the Office of the United States Trade Representative).¹⁵ Therefore, the Commission proposes to revise 39 CFR 3006.30(e)(1) to state that a FOIA request for records submitted by a person other than the Postal Service shall be handled in accordance with the applicable procedures for consultation, referral, or coordination set forth in newly proposed § 3006.35, and if it is not referred to another Federal agency

¹⁵ Most agencies within the Executive Branch of the Federal government and some components within the Executive Office of the President are subject to the FOIA. 5 U.S.C. 552(f)(1). Although the Postal Service and the Commission are not typically subject to 5 U.S.C. chapter 5, see 39 U.S.C. 410(a), 504(e), they are nonetheless subject to the FOIA. 39 U.S.C. 410(b)(1).

pursuant to proposed § 3006.35(b), then the Commission shall consider such a FOIA request in light of all applicable exemptions,¹⁶ after notifying the person of the FOIA request and providing the person with an opportunity to respond.

In connection with the proposed revision to 39 CFR 3006.30(e)(1), the Commission proposes to add proposed § 3006.35, which is modeled upon the U.S. Department of Justice, Office of Information Policy's Template for Agency FOIA Regulations, IV. Responsibility for Responding to Requests.¹⁷ This new proposed rule would provide transparency detailing how the Commission responds to a FOIA request when another agency or entity subject to the FOIA has an interest via one of three processes: consultation, referral, or coordination.¹⁸ First, proposed § 3006.35(a) states that if the FOIA request is for records that originated with the Commission but contain within them information of significance to another Federal agency or office, then the Commission will typically consult with that other entity prior to making a release determination.¹⁹ Second, proposed § 3006.35(b) states that if the Commission believes that a different Federal agency is best able to determine whether to disclose the record, the Commission will typically refer the FOIA request to that agency. Typically, the agency that originated the record is presumed to be the best agency to make the disclosure determination.²⁰ This is in addition to the Commission's referring all FOIA

¹⁶ See, e.g., 5 U.S.C. 552(b)(4) ("trade secrets and commercial or financial information obtained from a person and privileged or confidential").

¹⁷ Available at <https://www.justice.gov/oip/template-agency-foia-regulations#Responsibility%20for%20Responding%20to%20Requests> (last visited February 21, 2023).

¹⁸ See U.S. Department of Justice, Office of Information Policy, Referrals, Consultations, and Coordination: Procedures for Processing Records When Another Agency or Entity Has an Interest in Them, available at <https://www.justice.gov/oip/blog/referrals-consultations-and-coordination-procedures-processing-records-when-another-agency> (last visited February 21, 2023).

¹⁹ See 5 U.S.C. 552(a)(6)(B)(iii)(III) (describing that one of three statutory circumstances where agencies can extend time to respond to a FOIA request concerns "the need for consultation...with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein").

²⁰ See *Elec. Priv. Info. Ctr. v. Nat'l Sec. Agency*, 795 F. Supp. 2d 85, 92 (D.D.C. 2011) ("It is true that agencies that receive FOIA requests and discover responsive documents that were created by

requests for Postal Service records to the Postal Service as specified by § 3006.30(d)(1), which is also supported by the same rationale: the Postal Service is in the best position to make the disclosure determination for FOIA requests for Postal Service records submitted to the Commission. Third, proposed § 3006.35(c) describes coordination, which is used when the standard referral procedure is not appropriate because disclosure of the identity of the originating agency could harm an interest protected by an applicable FOIA exemption, such as the exemptions that protect personal privacy or national security interests. Under such circumstances, the Commission will coordinate with the originating agency to seek its views on disclosure of the record. Relatedly, proposed § 3006.35(d) states that if the Commission determines that a FOIA request involves a record containing information that has been classified (or derivatively classified) or may be appropriate for classification by another agency, the Commission must refer the FOIA request to the agency that classified the information or should consider the information for classification. Proposed § 3006.35(e) specifies that all consultations and referrals received by the Commission will be handled based on the date that the first agency received the perfected FOIA request. Proposed § 3006.35(f) states that the Commission may establish agreements with other agencies to eliminate the need for consultations or referrals with respect to particular types of records.

IV. SECTION-BY-SECTION ANALYSIS

Proposed § 3006.30(d). Proposed § 3006.30(d) is revised to exempt non-public materials submitted by the Postal Service to the Commission in connection with activities under 39 U.S.C. 407(b)(2)(A) from the applicability of the rules in 39 CFR part 3011.

another agency [subject to the FOIA] may forward, or 'refer,' those requests to the agency that 'originated' the document.").

Proposed § 3006.30(e)(1). Proposed § 3006.30(e)(1) is revised to state that if the Commission receives a FOIA request for records submitted by a person other than the Postal Service, the Commission shall adhere to the applicable procedures of the proposed § 3006.35, and if the Commission does not refer such a FOIA request to another Federal agency pursuant to proposed § 3006.35(b), the Commission shall consider the FOIA request in light of all applicable exemptions, after notifying the submitter of the FOIA request and providing the submitter with an opportunity to respond.

Proposed § 3006.35. Proposed § 3006.35 is added to detail the procedures that the Commission should follow for consultation, referral, and coordination with other Federal agencies with regard to certain FOIA requests, and for FOIA requests that involve classified information. It also provides for the timing of responses to FOIA consultations and referrals received by the Commission, and the Commission's ability to establish agreements with other agencies to eliminate the need for consultations or referrals for particular types of records.

Proposed § 3006.70(a). Proposed § 3006.70(a) is revised to exempt a person other than the Postal Service from following the procedures described in subpart B of 39 CFR part 3011 when the person submits non-public materials to the Commission in connection with activities under 39 U.S.C. 407(b)(2)(A).

Proposed § 3011.100(c). Proposed § 3011.100(c) is added to exempt non-public materials submitted by any person to the Commission in connection with activities under 39 U.S.C. 407(b)(2)(A) from the applicability of the rules in 39 CFR part 3011, with three exceptions. First, certain persons shall adhere to the requirements of § 3011.302 regarding the non-dissemination, use, and care of the non-public materials provided to the Commission in connection with activities under 39 U.S.C. 407(b)(2)(A). Second, any person that discovers that non-public materials provided to the Commission in connection with activities under 39 U.S.C. 407(b)(2)(A) have been inadvertently included within materials that are accessible to the public shall follow the procedures of § 3011.205. Third, non-public materials provided to the Commission in connection with

activities under 39 U.S.C. 407(b)(2)(A) are construed to exclude each of the following: (i) non-public materials provided by the Postal Service to the Commission pursuant to a subpoena; (ii) non-public materials filed in response to an information request; (iii) non-public materials filed in compliance with any applicable Postal Service reporting required under 39 CFR part 3050 or part 3055; and (iv) non-public materials filed in a Commission docket.

Proposed § 3011.103(a). Proposed § 3011.103(a) is revised to add one sentence that would codify the Commission's current practice. The inadvertent failure of a submitter to concomitantly provide all documents required by existing § 3011.200(a) (e.g., omission of an application for non-public treatment and/or a redacted (public) version of the non-public material) does not prevent the Commission from according appropriate confidentiality to non-public information contained with any materials provided to the Commission. Consistent with the remainder of the existing paragraph (a), the Commission may direct a submitter to provide an application and/or redacted (public) version of the non-public material if it was omitted in the initial submission. This proposed additional sentence does not relieve the obligations to provide all documents required by existing § 3011.200(a). There is no intent to change the meaning or operation of the rules currently in place.

V. ADMINISTRATIVE ACTIONS

The Regulatory Flexibility Act requires Federal agencies, in promulgating rules, to consider the impact of those rules on small entities. See 5 U.S.C. 601, *et seq.* If the proposed or final rules will not, if promulgated, have a significant economic impact on a substantial number of small entities, the head of the agency may certify that the initial and final regulatory flexibility analysis requirements of 5 U.S.C. 603 and 604 do not apply. See 5 U.S.C. 605(b).

In the context of this rulemaking, the Commission's primary responsibility is to revise its regulations pertaining to non-public materials, so that non-public materials submitted to the Commission in connection with the coordination activities with the DOS under 39 U.S.C. 407(b)(2)(A) are clearly exempt from its rules in 39 CFR part 3011. In connection with the proposed amendments to 39 CFR part 3011, the Commission also proposes to clarify certain rules in 39 CFR part 3006 pertaining to FOIA requests. The rules that are the subject of this rulemaking have a regulatory impact on the Commission, the DOS, the Postal Service, and other government agencies and entities involved in the coordination activities under 39 U.S.C. 407(b)(2)(A), but do not impose any regulatory obligation upon any other entity. The rules that are the subject of this rulemaking have an impact on participation in Commission proceedings (such as clarifying IM dockets and motions practice) but impose no further financial obligation upon any entity. For entities other than the United States Postal Service, participation is strictly voluntary. Based on these findings, the Chairman of the Commission certifies that the rules that are the subject of this rulemaking will not have a significant economic impact on a substantial number of small entities. Therefore, pursuant to 5 U.S.C. 605(b), this rulemaking is exempt from the initial and final regulatory flexibility analysis requirements of 5 U.S.C. 603 and 604.

Interested persons are invited to provide written comments concerning the proposed amendments. Comments are due April 6, 2023. All comments received will be available for review on the Commission's website, <http://www.prc.gov>.

Pursuant to 39 U.S.C. 505, Anne J. Siarnacki is appointed to serve as an officer of the Commission (Public Representative) to represent the interests of the general public in this docket.

VI. ORDERING PARAGRAPHS

It is ordered:

1. Docket No. RM2023-6 is established for the purpose of receiving comments on the proposed amendments to 39 CFR 3006.30, 3006.70, 3011.100, and 3011.103 and the proposed addition of 39 CFR 3006.35, as discussed in this Order.
2. Interested persons may submit comments no later than April 6, 2023.
3. Pursuant to 39 U.S.C. 505, Anne J. Siarnacki is appointed to serve as Public Representative in this proceeding.
4. The Secretary shall arrange for publication of the proposed rules and general statement as to the basis and purpose of the proposed rules in the *Federal Register*.

By the Commission.

Mallory Richards
Federal Register Liaison

List of Subjects

39 CFR Part 3006

Administrative practice and procedure, Freedom of information, Reporting and recordkeeping requirements.

39 CFR Part 3011

Administrative practice and procedure, Confidential business information.

For the reasons stated in the preamble, the Commission proposes to amend chapter III of title 39 of the Code of the Federal Regulations as follows:

PART 3006—PUBLIC RECORDS AND FREEDOM OF INFORMATION ACT

1. The authority citation for part 3000 is revised to read as follows:

Authority: 5 U.S.C. 552; 39 U.S.C. 407, 503, 504.

2. Amend § 3006.30 by revising paragraphs (d) and (e) to read as follows:

§ 3006.30 Relationship among the Freedom of Information Act, the Privacy Act, and the Commission's procedures for according appropriate confidentiality.

* * * * *

(d) *Requesting a Postal Service record.* The Commission maintains custody of records that are both Commission and Postal Service records. Except when the Postal Service submits materials to the Commission in connection with activities under

39 U.S.C. 407(b)(2)(A), in all other instances that the Postal Service submits materials to the Commission that the Postal Service reasonably believes to be exempt from public disclosure, the Postal Service shall follow the procedures described in part 3011, subpart B of this chapter.

(1) A request made pursuant to FOIA for Postal Service records shall be referred to the Postal Service; and

(2) A request made pursuant to part 3011 of this chapter for records designated as non-public by the Postal Service shall be considered under the applicable standards set forth in that part.

(e) *Requesting a record submitted under seal by a person other than the Postal Service.* The Commission maintains records of a confidential nature submitted by persons other than the Postal Service as non-public materials.

(1) A request made pursuant to FOIA for records submitted by a person other than the Postal Service shall adhere to the applicable procedures of § 3006.35 and if not referred to a different Federal agency pursuant to § 3006.35(b), shall be considered in light of all applicable exemptions, after notifying the person of the FOIA request and providing the person with an opportunity to respond; and

(2) A request made pursuant to part 3011 of this chapter for records designated as non-public by a person other than the Postal Service shall be considered under the applicable standards set forth in that part.

3. Add § 3006.35 to read as follows:

§ 3006.35 Consultation, referral, and coordination.

(a) *Consultation.* If records originated with the Commission but contain within them information of significance to another Federal agency or office, the Commission will typically consult with that other entity prior to making a release determination.

(b) *Referral.* In addition to referring all requests made pursuant to FOIA for Postal Service records to the Postal Service as specified by § 3006.30(d)(1), if the Commission believes that a different Federal agency is best able to determine whether to disclose the record, the Commission will typically refer responsibility for responding to the request regarding that record to that agency. Ordinarily, the agency that originated the record is presumed to be the best agency to make the disclosure determination. Whenever the Commission refers any part of the responsibility for responding to a request to another agency, the Commission will notify the requester of the referral, including the name of the agency and that agency's FOIA contact information.

(c) *Coordination.* The standard referral procedure is not appropriate where disclosure of the identity of the Federal agency to which the referral would be made could harm an interest protected by an applicable exemption, such as the exemptions that protect personal privacy or national security interests. For example, if a non-law enforcement agency responding to a request for records on a living third party locates within its files records originating with a law enforcement agency, and if the existence of that law enforcement interest in the third party was not publicly known, then to disclose that law enforcement interest could cause an unwarranted invasion of the personal privacy of the third party. Similarly, if the Commission locates within its files material originating with an Intelligence Community agency, and the involvement of that agency

in the matter is classified and not publicly acknowledged, then to disclose or give attribution to the involvement of that Intelligence Community agency could cause national security harms. In such instances, in order to avoid harm to an interest protected by an applicable exemption, the Commission will coordinate with the originating agency to seek its views on disclosure of the record. The Commission then will notify the requester of the release determination for the record that is the subject of the coordination.

(d) *Classified information.* On receipt of any request involving classified information, the Commission will determine whether the information is currently and properly classified in accordance with applicable classification rules. Whenever a request involves a record containing information that has been classified or may be appropriate for classification by another agency under any applicable executive order concerning the classification of records, the Commission must refer the responsibility for responding to the request regarding that information to the agency that classified the information, or that should consider the information for classification. Whenever an agency's record contains information that has been derivatively classified (for example, when it contains information classified by another agency), the Commission must refer the responsibility for responding to that portion of the request to the agency that classified the underlying information.

(e) *Timing of responses to consultations and referrals.* All consultations and referrals received by the Commission will be handled according to the date that the first agency received the perfected FOIA request.

(f) *Agreements regarding consultations and referrals.* The Commission may establish agreements with other agencies to eliminate the need for consultations or referrals with respect to particular types of records.

4. Amend § 3006.70 by revising paragraph (a) to read as follows:

§ 3006.70 Submission of non-public materials by a person other than the Postal Service.

(a) *Overlap with treatment of non-public materials.* Any person who submits materials to the Commission (submitter) that the submitter reasonably believes to be exempt from public disclosure shall follow the procedures described in part 3011, subpart B of this chapter, except when the submitter submits materials to the Commission in connection with activities under 39 U.S.C. 407(b)(2)(A).

* * * * *

Part 3011—NON-PUBLIC MATERIALS PROVIDED TO THE COMMISSION

5. The authority citation for part 3011 is revised to read as follows:

Authority: 39 U.S.C. 407, 503, 504.

6. Amend § 3011.100 by adding paragraph (c) to read as follows:

§ 3011.100 Applicability and scope.

* * * * *

(c) *Exemption.* Except for the circumstances described in paragraphs (c)(1) through (c)(3) of this section, the rules in this part do not apply to any non-public

materials (and the non-public information contained therein) provided to the Commission by any person in connection with activities under 39 U.S.C. 407(b)(2)(A).

(1) The following persons shall adhere to the requirements of § 3011.302 regarding the non-dissemination, use, and care of the non-public materials (and the non-public information contained therein) provided to the Commission in connection with activities under 39 U.S.C. 407(b)(2)(A).

- (i) Members of the Commission;
- (ii) Commission employees; and
- (iii) Non-employees who have executed appropriate non-disclosure agreements (such as contractors, attorneys, or subject matter experts) assisting the Commission in carrying out its duties.

(2) Any person that discovers that non-public materials provided to the Commission in connection with activities under 39 U.S.C. 407(b)(2)(A) have been inadvertently included within materials that are accessible to the public shall follow the procedures of § 3011.205.

(3) Non-public materials provided to the Commission in connection with activities under 39 U.S.C. 407(b)(2)(A) are construed to exclude each of the following:

- (i) Non-public materials provided by the Postal Service to the Commission pursuant to a subpoena issued in accordance with part 3013 of this chapter;
- (ii) Non-public materials filed in response to an information request issued in accordance with § 3010.170 of this chapter;

- (iii) Non-public materials filed in compliance with any applicable Postal Service reporting required under part 3050 or part 3055 of this chapter; and
- (iv) Non-public materials filed in a Commission docket.

7. Amend § 3011.103 by revising paragraph (a) to read as follows:

§ 3011.103 Commission action to determine non-public treatment.

(a) The inadvertent failure of a submitter to concomitantly provide all documents required by § 3011.200(a) does not prevent the Commission from according appropriate confidentiality to non-public information contained with any materials provided to the Commission. Information requests as described in § 3010.170 of this chapter, preliminary notices, or interim orders may be issued to help the Commission determine the non-public treatment, if any, to be accorded to the materials claimed by any person to be non-public.

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