

Before the  
POSTAL REGULATORY COMMISSION  
WASHINGTON, DC 20268-0001

Regulations to Establish Procedure  
For According Appropriate Confidentiality

Docket No. RM2008-1

PUBLIC REPRESENTATIVE COMMENTS  
ON PROPOSED REGULATIONS TO ESTABLISH PROCEDURE  
FOR ACCORDING APPROPRIATE CONFIDENTIALITY  
(September 25, 2008)

The Public Representative hereby comments on the Commission's Notice of proposed rulemaking to implement section 504(g) of the Postal Accountability and Enhancement Act, 39 U.S.C. 504(g), regarding the confidentiality of documents and materials submitted to the Commission by the Postal Service.<sup>1</sup>

These comments discuss the following areas:

- 1) Clarification of the definition of non-public materials;
- 2) Clarification of the inter-relationship of proposed section 3007.24 (Request for access to non-public materials) and section 3007.31 (Notice of access to material subject to protective order);
- 3) Clarification of proposed section 3007.24;
- 4) Elimination of the need to obtain review of protected material prior to moving for its public disclosure;
- 5) Correction to proposed section 3007.25(b);
- 6) Elimination of potential conflict with section 3004.5 as to FOIA appeals;
- 7) Additional Form for the proposed Statement of Compliance with Protective Conditions.

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<sup>1</sup> Notice of Proposed Rulemaking to Establish a Procedure for According Appropriate Confidentiality, August 13, 2008. Reply comments are due October 10, 2008.

## **Comments**

### **1) Section 3007.1(b)**

The definition of “Non-public materials” in section 3007.1(b) is filings “claimed to be exempt from disclosure by the Postal Service pursuant to 39 U.S.C. 504(g).” As proposed, the definition assumes that once a claim of exemption is made by the Postal Service, the information is thereafter styled as “Non-public materials” regardless of whether the Commission subsequently determines the materials must be disclosed and are thereafter public material. It is suggested that the following clause should be added at the end of the definition: “unless public disclosure has been ordered pursuant to this Part.”

### **2) Interrelationship of Sections 2007.24 and 3007.31**

The interrelationship of proposed sections 3007.24 and 3007.31 is not specified in the rules and may be confusing to persons seeking non-public materials. It appears that section 3007.24 applies simply upon the claim of the Postal Service for non-public treatment whereas section 3007.31 is intended to apply only after the Commission or its delegate has issued a protective order providing for protective conditions with respect to “non-public materials,” *i.e.* those materials for which the Postal Service has claimed to be exempt from disclosure.

However, the language of section 3007.31 is not so clear, and without knowledge or close review of section 3007.24, a person might attempt to rely solely on section 3007.31 and believe access to protected material could be gained simply by following section 3007.31. For instance, when would section 3007.31 be applicable? The

heading of the rule is styled “Notice of access to material subject to protective order” but the body of the rule does not use the term “protective order.” Therefore, adding the words “subject to protective order” after the introductory words in section 3007.31(a), “Non-public materials” is suggested.

Also, section 3007.31(b) applies to “each person seeking access to non-public materials subject to protective conditions.” This is vague. All non-public materials, as defined, are subject to protective conditions upon filing by the Postal Service and a claim of confidentiality by operation of sections 3007.21 through-3007.23 and section 504(g) of the PAEA, even before a Commission order imposing further protective conditions is issued. More precise language in section 3007.31(b), consistent with the section heading, might state “...each person seeking access to non-public material subject to protective *order* [conditions] must file a notice....” (Delete bracketed word, add italicized word).

It appears that operation of section 3007.24 could lead to issuance of more than one protective order for specific materials—for instance, one order might be a standard protective order and another tailored to a specific person. If so, then, as drafted, proposed section 3007.31 is not specific as to which protective conditions would apply if the material is to be released automatically to the person filing a notice under section 3007.31. If only one protective order issued with respect to specific non-public materials, then clearly the extant protective order would apply. If there is more than one protective order for the same materials, there could be confusion as to which protective order applies to an automatic provision of access to materials. This could occur if no objection is filed to a notice for access and, after two days without objection, the

material may be released immediately subject to one (but which one) of the protective orders.

Further, section 3007.31(b) states access will not be granted for 2 days subject to objection. If no objection is filed, it appears access is automatically granted to the person seeking access, but the rule does not say so, nor does it indicate when or how quickly material will become available. Also, although implicit, the rule does not specifically indicate that access would be provided subject to the protective conditions of the protective order of the Commission.

Finally, the rule does not indicate the manner by which non-public material will be provided to a party who does not pick-up the material at the Commission. The timeliness of the service may be a factor and the choice of Priority Mail, Express Mail, or First-Class Mail may be important. Also, in the past, some material has been mailed by registered mail. The method of releasing and shipping the materials under protective conditions is not prescribed in the rule.

### **3) Section 3007.24**

The procedures outlined in section 3007.24 are not entirely explicit as to their applicability and may engender confusion. If one person has filed a motion requesting access to material and agrees to protective conditions and an order issues from the Commission determining the appropriate degree of access, does rule 3007.31 thereafter become the applicable procedure to follow for subsequent requests by any person seeking access to the same materials covered by the Commission order? If so, then rule 3007.24(a) might be clarified to state, "Any person may file a motion requesting access to the materials claimed to be non-public by the Postal Service. *If,*

*with respect to the non-public materials, an applicable protective order of the Commission or its authorized representative has issued, section 3007.31(b) applies.”*

Alternatively, or in addition, for clarity, the heading of section 3007.24 could be modified to read “Request for access to non-public material *not subject to protective order*”

#### **4) Section 3007.32**

This section provides that a person may file a motion requesting an order to remove protective conditions on non-public materials. The section provides for a motion, “After reviewing non-public materials subject to protective conditions.” Thus, persons who wish to object to a non-public classification and seek public disclosure of non-public materials must first move for access to non-public materials pursuant to section 3007.24, wait for objections to the request, and only if there are no objections, obtain the materials for review. Otherwise, if there is objection, a Commission protective order must first issue before material may be obtained for review. Only then may a motion be filed for public disclosure.

This extended process prevents those who may believe a broad designation of materials as non-public is generally inappropriate or incorrect and not in the public interest and do not need to review the materials under protective order to argue their position and who wish to obtain a more timely resolution of the issue during Commission proceedings. It is suggested the Commission provide an opportunity in the rules for a person to seek, by motion, public disclosure without the need to first obtain the non-public materials for review as proposed section 3007.32 would require.

**5) Section 3007.25(b)**

To correct an apparent inadvertent omission in proposed section 3007.25(b), the words “disclosure of” before “non-public materials” should be added so that the sentence will read, “...the likelihood that disclosure of non-public materials would invade a specific evidentiary privilege ....” This is needed because it is “disclosure” that would invade a specific evidentiary privilege, not the “non-public materials” that would invade an evidentiary privilege.

**6) Possible conflict with current rule in section 3004.5**

In addition to establishing procedures for confidential treatment of section 410(c) material, the proposed rules would establish procedures for affording confidentiality to information the Postal Service asserts is exempt from disclosure under 5 U.S.C. 552(b). (Notice at 2). This is because, as the notice correctly points out, section 504(g)(1) provides that the Postal Service shall notify the Commission of any document, or other material filed with the Commission, exempt from public disclosure under section 552(b) of title 5, as well as section 410(c) of the PAEA. Thus, the Postal Service may claim material covered by the exemptions in section 552(b) are non-public. The procedures for disclosure proposed in Part 3007 would then apply. Section 3007.22 states that non-public material will be disclosed only as provided by Part 3007.

However, neither the discussion in the notice nor the proposed rules indicate the interrelationship of the new rules to the current Commission rules for handling Freedom of Information Act requests for access to information in the Commission’s files subject to section 552(b). Persons may file an FOIA request for information pursuant to Part 3004

of the Commission's rules, not realizing the Postal Service has claimed the material is non-public pursuant to 504(g) and Part 3007. Consequently, any such FOIA request for materials would likely be denied. The current rule in section 3004.5 provides for a procedure for *appeals* from denials of FOIA requests for information that is different from the procedure in the proposed rules.

These are different processes pursuant to different statutes. The PAEA provides an avenue for interested persons to obtain non-public information with conditions. Under the FOIA, access is either granted or, if the information is confidential, denied entirely without the opportunity to obtain the information upon protective conditions. However, the proposed rules may, in effect, conflict with the current FOIA rules for appeals of denials for access to 552(b) material. A cross-reference in Part 3004 of the rules as to the potential availability of the 552(b) materials pursuant to protective conditions under Part 3007 would be appropriate to clarify the availability of the procedures in part 3007.

### **7) Add Form to Statement of Compliance with Protective Conditions**

The proposed Statement of Compliance with Protective Conditions (Statement) included in the Secretary's Notice<sup>2</sup> is similar to the Statement included in an order in another Commission proceeding,<sup>3</sup> but differs in minor respects from protective conditions included in other orders issued by the Commission.<sup>4</sup> Although it does not

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<sup>2</sup> Notice of Filing Illustrative Protective Conditions, September 18, 2008.

<sup>3</sup> Order Establishing Protective Conditions, *Notice of Price Adjustment*, Docket No. R2008-1, February 21, 2008.

<sup>4</sup> See, for instance, Order Granting Motion of the Bradford Group for Protective Order..., Docket No. MC2007-4, September 10, 2007.

appear that there have been any problems raised with respect to the interpretation of protective conditions implemented in recent cases, a careful review of the protective conditions would be useful to insure that they are enforceable in the event of controversy or apparent violation of the conditions and that, if necessary, sanctions may be justifiably and legally applied.

The proposed Statement includes a “Certification” on page 5 of 5. In addition to the Certification, there should be added another blank form for use upon return or disposal of protected materials. Such a blank form was omitted from the Secretary’s Notice in this proceeding, but a similar blank form entitled, “Certification upon Return of Protected Materials” has been included in other cases.<sup>5</sup> For clarity, the title of the form should be changed to “Certification upon Return *or Disposal* of Protected Materials.” Also, the form should be referenced within paragraph 4 of the Statement requiring persons who have obtained a copy of protected materials to “file a completed Certification upon Return or Disposal of Protected Materials.”

A Certification upon Return or Disposal of Protected Materials should be specifically included in the order for several reasons. It would assist the Commission in tracking and recovering protected materials or ensuring that the materials have been destroyed. The return form would provide persons with access to protected materials a ready means of closing out the process and would be a reminder of the need to do so. A blank return form would be particularly useful to persons working on a contract basis who are not familiar with Commission procedures. A ready-to-complete return form will provide a convenient form to affirm compliance with protective conditions.

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<sup>5</sup> See, Order Establishing Protective Conditions, *Notice of Price Adjustment Proceeding*, Docket No. R2008-1.

**Conclusion**

The Public Representative respectfully submits the foregoing Comments for the Commission's consideration.

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