

BEFORE THE  
POSTAL REGULATORY COMMISSION  
WASHINGTON, DC 20268-0001

Regulations to Establish Procedure )  
for According Appropriate Confidentiality )

Docket No. RM2008-1

**VALPAK DIRECT MARKETING SYSTEMS, INC. AND  
VALPAK DEALERS' ASSOCIATION, INC.  
COMMENTS REGARDING REGULATIONS TO ESTABLISH  
A PROCEDURE FOR ACCORDING APPROPRIATE CONFIDENTIALITY  
(September 25, 2008)**

On August 13, 2008, the Commission issued Order No. 96, Notice of Proposed Rulemaking to Establish a Procedure for According Appropriate Confidentiality. The rules are proposed pursuant to the Postal Accountability and Enhancement Act ("PAEA"), Pub. L. 109-435, section 602 (codified at 39 U.S.C. § 504(g)).<sup>1</sup> Commission Order No. 96 set September 25, 2008 as the deadline to file initial comments, and October 10, 2008 as the deadline to file reply comments. Valpak Direct Marketing Systems, Inc. and Valpak Dealers' Association, Inc. (hereafter "Valpak") submit these joint comments in response to Order No. 96.

**BACKGROUND**

The key PAEA section, 39 U.S.C. section 504(g), sets out a procedure for the Commission to establish specific rules to evaluate Postal Service determinations that certain information filed with the Commission pursuant to a subpoena or request should be treated as confidential:

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<sup>1</sup> Both section 504(g) and the Commission's proposed rules apply only to claims of confidentiality made by the Postal Service.

(g) (1) If the Postal Service **determines** that any document or other matter it provides to the Postal Regulatory Commission under a **subpoena** issued under subsection (f), or otherwise at the **request** of the Commission in connection with any proceeding or other purpose under this title, contains information which is described in section 410(c) of this title, or exempt from public disclosure under section 552(b) of title 5, 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).

(2) Except as provided in paragraph (3), no officer or employee of the Commission may, with respect to any information as to which the Commission has been notified under paragraph (1)--  
(A) use such information for purposes other than the purposes for which it is supplied; or  
(B) permit anyone who is not an officer or employee of the Commission to have access to any such information.

(3) (A) Paragraph (2) shall not prohibit the Commission from publicly **disclosing** relevant information in furtherance of its duties under this title, provided that the Commission has **adopted regulations** under section 553 of title 5, that establish a **procedure** for according appropriate confidentiality to information identified by the Postal Service under paragraph (1). In **determining** the appropriate degree of confidentiality to be accorded information identified by the Postal Service under paragraph (1), the Commission shall **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.

(B) Paragraph (2) shall not prevent the Commission from requiring production of information in the course of any discovery procedure established in connection with a proceeding under this title. The Commission shall, by **regulations** based on rule 26(c) of the Federal Rules of Civil Procedure, establish **procedures** for ensuring appropriate confidentiality for information furnished to any party. [Emphasis added.]

Regulations promulgated under this section will apply to materials from the Postal Service received by the Commission pursuant to both its new subpoena power and by request, as

section 504(g) provides. Moreover, under other PAEA provisions, such regulations will apply to: (i) material filed in connection with a **market test** of a competitive experimental product (39 U.S.C. § 3641(c)(2)); (ii) material filed in connection with **adding** a product to the **competitive product list** or **transferring** a product from the market dominant product list to the **competitive product list** (39 U.S.C. § 3642(d)(1)); (iii) certain material with respect to the additional **financial reporting** required under 39 U.S.C. section 3654 (39 U.S.C. § 3654(f)(2)); and, most importantly, (iv) certain material with respect to the Postal Service's **annual compliance report** (39 U.S.C. § 3652(f)(2)). (PAEA also contains a provision for confidentiality on international postal arrangements, 39 U.S.C. section 407(c)(2), which does not reference 39 U.S.C. section 504(g).)

These proposed confidentiality rules fit into a statutory framework which the Commission described as having the goal of:

increased **accountability** and **transparency** of the Postal Service to the public it serves. *See* 39 U.S.C. 3622(b)(6) (“increase the **transparency** of the ratemaking process”); 39 U.S.C. 3691 (**transparency** of service standards); 39 U.S.C. 3622(b)(3) (“maintain high quality service standards”); 39 U.S.C. 504(g)(3)(A) (“public interest in maintaining the financial **transparency** of a government establishment ...”). [Docket No. RM2008-3, Commission Order No. 101, p. 4 (emphasis added).]

## COMMENTS

### I. Confidentiality of the Postal Service’s Annual Compliance Report Applies to Two Limited Categories of Information

PAEA requires the Postal Service to file its annual compliance report (“ACR”), with the Commission within 90 days of the end of the Postal Service’s fiscal year. 39 U.S.C.

§ 3652. Section 3652 has specific rules for confidentiality with respect to only two portions of that report:

#### (f) Confidential Information —

(1) In General — If the Postal Service determines that any document or portion of a document, or other matter, which it provides to the Postal Regulatory Commission in a **nonpublic annex under this section or under subsection (d)**<sup>2]</sup> contains information which is described in section 410(c) of this title, or exempt from public disclosure under section 552(b) of title 5, the Postal Service shall, at a time of providing such matter to the Commission, notify the Commission of its determination, in writing, and describe with particularity the documents (or portions of documents) or other matter for which confidentiality is sought and the reasons therefor.

(2) Treatment — Any information or other matter described in paragraph (1) to which the Commission gains access under this section shall be subject to **paragraphs (2) and (3) of section 504(g)** in the same way as if the Commission had received notification with respect to such matter under **section 504(g)(1)**. [39 U.S.C. § 3652(f), emphasis added.]

Therefore, for the ACR’s (i) nonpublic annex and (ii) working papers and supporting materials under subsection (d), section 3652(f)(2) explicitly anticipates this rulemaking. The reverse is also true, since all ACR matter other than that information in the two specific categories of

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<sup>2</sup> Subsection 3652(d) provides that the Commission shall have access, “in accordance with such regulations as the Commission shall prescribe, to the **working papers and any other supporting matter** of the Postal Service and the Inspector General in connection with” the ACR. 39 U.S.C. § 3652(d) (emphasis added).

information identified in section 3652(f)(1) — the nonpublic annex and subsection (d)'s working papers and supporting matter — is public information, with respect to which confidentiality cannot be claimed.

By another PAEA section, the Commission is required to “prescribe the content and form” of the ACR as well as “any nonpublic annex and support matter relating to the report.” 39 U.S.C. § 3652(e)(1). The rules relating to the ACR are beyond the scope of this proceeding. Indeed, the Commission has begun the process of tackling this important issue in Docket No. RM2008-4 — where the rules initially proposed for review do not appear to provide yet for, or specify the contents of, a nonpublic annex.<sup>3</sup> (Valpak intends, however, to address this issue in comments to be filed in that rulemaking docket.) In light of the PAEA goals of increased transparency and accountability, *supra*, and the Commission’s description of the ACR as one of “the most important tools provided by the PAEA for achieving the transparency on which the new statutory scheme relies” (Order No. 104, p. 2), the Commission rules have the opportunity to clarify that there can be no claim of confidential treatment relating to the ACR except for that which is part of (i) the nonpublic annex or (ii) working papers and supporting matter.

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<sup>3</sup> In Docket No. ACR2007, without the benefit of Commission rules implementing section 3652, the Postal Service filed a nonpublic annex, apparently consisting primarily of information relating to competitive products.

## **II. Terms of Market Dominant Negotiated Service Agreements Should Continue to Be Made Available to the Public.**

Heretofore, all market dominant negotiated service agreements (“NSAs”) were filed under the Postal Reorganization Act of 1970, or the PAEA transition rule.<sup>4</sup> And heretofore, all market dominant NSAs and related information have been both filed with the Commission and made publicly available. The consideration of a market dominant NSA under PAEA is yet to occur.

Parties to NSAs have consistently sought to avoid making at least some information publicly available, and the Commission has wisely limited secrecy in this area. Indeed, part of the Commission’s *Opinion and Recommended Decision* in Docket No. MC2007-1 was initially filed under seal (with a redacted version being made publicly available), although the protective conditions eventually were lifted at the Postal Service’s request. Valpak appreciates the great care the Commission took in Docket Nos. MC2007-4 (Bradford Group NSA) and MC2007-5 (Life Line Screening NSA) in analyzing the joint motions of the Postal Service and the parties for protective conditions to responses to interrogatories. *See* Commission Order Nos. 38, 39, and 44. The Commission is appropriately “concerned about having to rely extensively on non-public information in its opinions ... particularly ... to a request for a special discount for a single mailer.” Order No. 38, p. 3. Furthermore, the Commission should continue its long-held position that “nominal support in the form of generalized assertions for the claim that the information sought is highly confidential and commercially

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<sup>4</sup> Those market dominant NSAs filed with Commission after the enactment of PAEA (December 20, 2006) were filed under the transition rule in 39 U.S.C. section 3622(f).

sensitive is not sufficient for the granting of protective conditions.” *Id.*, p. 4. These matters were not changed by PAEA, and properly are left unchanged by the Commission’s proposed rules.

The only NSAs filed under PAEA and Commission rules issued thereunder have been for competitive products, and all were filed under seal, with even the identities of the parties and all terms of the agreements being withheld. Of course, competitive products by definition face a highly competitive environment and thus have a much different need for confidentiality than market dominant products. It should be made clear that blanket confidential treatment of information relating to competitive product NSAs does not extend in any way to market dominant product NSAs.

### **III. The Commission’s Confidentiality Rules Should Import Procedural, Not Substantive, Guidance from Rule 26(c), Federal Rules of Civil Procedure.**

Section 504(g)(2)(B) states that “[t]he Commission shall, by regulations, based on Rule 26 of the Federal Rule of Civil Procedure, establish procedures for ensuring appropriate confidentiality for information furnished to any party.” According to Commission Order No. 96, this statutory mandate authorizes the Commission to supplement its “general authority granted in 504(g)(3)(A) to disclose information obtained from the Postal Service if disclosure is found appropriate and consistent with the kind of balancing of interests that is performed by federal courts when asked to establish protective conditions under rule 26(c) of the Federal Rules of Civil Procedure.” Order No. 96, p. 3. Hence, the Order concludes that “[t]he general parameters for disclosure, and conversely protection of confidentiality, under section

504(g)(3)(B) must be gleaned from the federal case law pertaining to Federal Rule of Civil Procedure 26, and those parameters are, as stated above, a more specific application of the parameters established by the balancing test laid out in section 504(g)(3)(A).” *Id.*

As demonstrated below, the proposed rules do not accurately apply the language of section 504(g)(3)(B), in that they fail to examine the language in that section in relation to the language of section 504(g)(3)(A), and they appear to adopt a view of the language of the two sections that is incompatible with the Commission’s executive and administrative oversight of the Postal Service.

**A. The Reference to Rule 26(c) in Section 504(g)(3)(B) Applies to the Establishment of Procedures for Ensuring Confidentiality, Not Modifying the Balancing Test Required by Section 504(g)(3)(A).**

To ascertain the meaning of section 504(g)(3)(B), “the starting point ... is the existing statutory text.” *See Lamie v. United States*, 540 U.S. 526, 534 (2004). In examining that text, one must first make “reference to the language itself.” *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997).

By its plain language, section 504(g)(2)(B) mandates that the Commission, “by regulations based on [rule 26(c)] establish **procedures** for ensuring **appropriate confidentiality** for information furnished to any party.” (Emphasis added.) It does **not**, as is assumed in Order No. 96, mean that the Commission should “base” its **substantive** standards governing whether a confidentiality claim is “**appropriate** and consistent with the kind of balancing of interests ... performed by federal civil courts **under** rule 26(c).” *See* Order No. 96, p. 3 (emphasis added).

Had the reference to rule 26(c) appeared in section 504(g)(3)(A), instead of a separate subsection, the Commission’s assumption might be plausible. But no such reference exists. Rather, section 504(g)(3)(A) establishes a two-factor balancing test: “[i]n determining the **appropriate degree of confidentiality** to be accorded information identified by the Postal Service ..., the Commission **shall balance** [1] the nature and extent of the likely **commercial injury** to the Postal Service against [2] the **public interest** in maintaining the financial transparency of a government establishment competing in commercial markets.” *Id.* (emphasis added).

Had Congress intended the Commission to adopt rules which augment section 504(g)(3)(A)’s “financial transparency” balancing test with “rule 26(c)’s good cause balancing test,” it would have stated that the Commission “base” its regulations implementing its transparency balancing formula upon rule 26(c). But it did not. And it is not for the Commission to “rewrit[e] rules that Congress has affirmatively and specifically enacted.” *See Mobile Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978).

**B. Rule 26(c)’s Balancing Test Governing Confidentiality Is Incompatible with the Balancing Test in Section 504(g)(3)(A).**

Further, the proposed adoption of rule 26(c) standards ignores the standard rule to examine the “specific context in which [the] language is used.” *See Robinson v. Shell Oil Co.*, 519 U.S. at p. 341. This standard requires that section 504(g)(3)(B)’s reference to rule 26(c) be read in light of the closely related language “determining the appropriate degree of confidentiality” found in section 504(g)(3)(A).

According to Order No. 96, section 504(g)(3)(B)'s reference to rule 26(c) mandates that the Commission "glean[] from the federal case law pertaining to [that rule] ... a more **specific** application of the **parameters** established by the balancing test laid out in section 504(g)(3)(A)," with special emphasis upon "the Third Circuit[']s] ... balancing test factors," including "the prevention of **embarrassment**, and whether that embarrassment would be particularly serious." Order No. 96, pp. 3-4 (emphasis added). In a footnote, however, the Commission questions whether the "balancing test factor" of "embarrassment" dictated by rule 26(c) should be given the same weight in assessing a confidentiality matter before the Commission, as it would under the rule 26(c) "good cause balancing test." *See id.*, p. 4 n.5. Indeed, the Commission further suggests that the "embarrassment" factor in the rule 26(c) balancing test "probably will be the least applicable in the majority of matters before the Commission." *Id.*

Therefore, Order No. 96 leaves open the possibility, for example, that under the rule 26(c) balancing test the Commission could be persuaded to find "good cause" to keep confidential financial information about a negotiated service agreement that lost money because it would be an "embarrassment" to the Postal Service. However, a correct application of section 504(g)(3)(B)'s reference to rule 26(c) to this hypothetical results in Postal Service "embarrassment" being **totally inapplicable** in **all** cases under the two-factor balancing test of section 504(g)(3)(A), rather than **possibly applicable** under the seven-factor formula of rule 26(c).<sup>5</sup>

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<sup>5</sup> Further, the Commission's suggestion that "embarrassment" would be the "least applicable" of rule 26(c)'s balancing factors would run counter to the "commonplace [rule] of

Although the Commission has not expressly incorporated the seven-factor “good cause” balancing test in its proposed regulations governing Postal Service confidentiality claims,<sup>6</sup> the Commission’s interpretative commentary raises serious concerns that the “general parameters for disclosure and conversely protection of information ... [may very well] be gleaned from the federal case law pertaining to [Rule 26(c)].” *See* Order No. 96, p. 3. Such commentary suggests that, despite 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” test established by section 504(g)(3)(A). *See* Order No. 96, p. 4. 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,”<sup>7</sup> 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

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statutory construction that the specific governs the general.” *See Morales v. Trans-World Airlines, Inc.*, 504 U.S. 374, 384-85 (1992). *See also Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987). After all, according to the Commission’s view, section 504(g)(3)(B)’s reference to rule 26(c) is a “**specific** application ... of the **more general** authority granted in 504(g)(3)(A)” and “the federal case law pertaining to [rule 26(c)] [is] a more **specific** application of the parameters established by the balancing test laid out in section 504(g)(3)(A).” *See* Order No. 96, p. 3 (emphasis added). According to the governing rule of statutory construction, the more specific “rule 26(c) ‘good cause balancing test,’” as set forth in the Third Circuit’s *Pansy* decision, would trump the more general balancing test set forth in section 504(g)(3)(A), especially in light of the fact that, according to the Commission’s view, the two tests “are interrelated and closely positioned.” *See HCSC-Laundry v. United States*, 450 U.S. 1, 6 (1981).

<sup>6</sup> *See* Order No. 96, p. 12 and proposed 39 C.F.R. § 3007.25.

<sup>7</sup> Order No. 96, p. 4 n.5 (emphasis added).

“embarrassment,” “annoyance,” and “undue burden” 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.

**C. Rule 26(c)’s Substantive Standard Governing Confidentiality Is Not Designed to Apply to the Commission’s Executive and Administrative Responsibilities and Functions.**

As noted above, statutory language should be construed not only according to the meaning of the words and the specific context in which those words are used, but also according to operation of the statutory scheme as a whole. *See Robinson v. Shell Oil Co.*, 519 U.S. at 341. Rule 26(c)’s “good cause balancing test” is designed to guide an impartial judge in an adversarial proceeding where two opposing parties have been unable in good faith to agree to a discovery process that is adequate to protect a range of interests of both parties. In contrast, section 504(g)(3)(A)’s substantive standard is designed to guide a commission with executive and administrative functions to oversee “a government establishment competing in commercial markets” to ensure “the public interest in maintaining the financial transparency” of that establishment, while protecting its legitimate “commercial” interests. 39 U.S.C. § 504(g)(3)(A). To that end, claims of confidentiality are initiated unilaterally by the Postal Service, not after the give-and-take of an adversarial process, but as part of a regular reporting process, or by an information-gathering proceeding initiated by the Commission itself. *See Order No. 96*, pp. 5-6. Indeed, even when an intervenor seeks certain “confidential” information about the Postal Service’s operations, it generally does so **after** the Postal Service has already designated such information to be “nonpublic.” *Id.*, p. 7.

At issue in the PAEA context, then, are confidentiality matters that fit one or more of the categories set forth in 39 U.S.C. section 410(c) and 5 U.S.C. section 552(b), some of which are peculiar to the special interests of the Postal Service's operating in a commercial market. Thus, the focus of a confidentiality inquiry that would come before the Commission would not be to administer "justice" in an adversary proceeding between two private parties, as contemplated by rule 26(c)'s substantive standard, but to ascertain the proper balance between the legitimate commercial interests of the Postal Service and the countervailing legitimate public interest in "maintaining" the Postal Service's "financial transparency." A noncommercial injury claim of "embarrassment" or "annoyance" or "undue burden" — each of which would be a legitimate consideration under rule 26(c) — actually could interfere, if improperly applied to the Postal Service, with the Commission's duty under section 504(g)(2)(A) to ensure "the public interest in maintaining the financial transparency" of the Postal Service.

In contrast, rule 26(c)'s **procedural** rules could very well be adapted to the legitimate commercial confidential concerns of the Postal Service. Indeed, the Commission has adopted almost **verbatim** rule 26(c)'s eight alternative **procedures** whereby "appropriate confidentiality for information" may be "ensur[ed]," as mandated by section 504(g)(3)(B). *See* Order No. 96, p. 12 and proposed 39 C.F.R. § 3007.30.

**D. The Distinction Between Procedural Rules and Substantive Standards Must Be Preserved.**

Although the Postal Service makes the initial determination of confidentiality, it is for the Commission to make the final determination. To evaluate a Postal Service initial

determination, the Commission needs to clarify the standard and rules it will apply. According to well-established rules of statutory construction, section 504(g)(3)(B)'s reference to rule 26(c) of the Federal Rules of Civil Procedure should be limited to serve as the basis for crafting **procedures** by which legitimate claims of confidentiality may be ensured, but not as the basis for modification of section 504(g)(3)(A)'s **substantive standard** governing the legitimacy of such claims. The Commission's rules should create no non-statutory basis for withholding a document from the public.

### CONCLUSION

Valpak urges that the proposed rules be revised in accordance with the principles discussed herein.

Respectfully submitted,

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