

Before the
POSTAL REGULATORY COMMISSION
Washington, DC 20268-0001

Regulations to Establish Procedure :
for According Appropriate Confidentiality : Docket No. RM2008-1

REPLY COMMENTS OF THE GREETING CARD ASSOCIATION

The Greeting Card Association (GCA) submits these Reply Comments pursuant to Order No. 96 (August 13, 2008). GCA finds much to agree with in most of the initial comments submitted on September 25. Our present submission focuses on a position advanced by American Postal Workers Union (APWU).

I

At pp. 1-2 of its Initial Comments¹, APWU makes two arguments to the effect that the Commission's proposed rule affords more latitude for protection of nonpublic information than the statute permits. Both rely on a literal reading of the balancing test described in 39 U.S.C. § 504(g)(3)(A). Both are subject to substantial criticism (see Part II, below), but perhaps more significant is the fact that APWU makes them apparently without having considered their potential effect on the interests of third parties whose confidential information happens to be in the possession of the Postal Service.

Numerous parties filing initial comments² raised the issue of adequate protection for third-party commercial information, a subject seemingly not ad-

¹ Initial Comments of American Postal Workers Union, AFL-CIO, pp. 1-2.

² See 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, pp. 3-6; Comments of Pitney Bowes Inc., pp. 3-7; Initial Comments of the United States Postal Service, pp. 9-12; Initial Comments of the Greeting Card Association, pp. 2-4, 6.

dressed in the proposed rules published with Order No. 96. GCA continues to consider this lack of protection a highly significant issue. If the Commission were to agree with all or part of APWU's arguments in favor of more restricted protection for nonpublic information in general, the problem for third parties which have entrusted confidential information to the Postal Service for their mutual benefit would become still more acute.

GCA does not believe that either of the APWU arguments discussed below would require a change in the proposed rule. However, if the Commission should decide to follow any of APWU's suggestions in the interest of more disclosure, we strongly urge it to do so only after making adequate provision for protection of third-party information.

II

A. APWU's "other injury" argument. APWU notes that proposed Rule 3007.25(a) calls for balancing

. . . 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. . . .

APWU objects to the phrase "or other" on the ground that the statute speaks only of "likely commercial injury." Thus, it argues, the proposed rule could permit nondisclosure where the injury is not commercial but is nonetheless thought to outweigh the public interest in transparency.

Section 504(g)(3)(A) states, in relevant part, that

. . . 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 main-

taining the financial transparency of a government establishment competing in commercial markets.

It is far from clear that in making this determination the Commission may consider *only* likely commercial injury to the Service, on the one hand, and *only* the public interest in financial transparency, on the other. Congress did not, for example, direct that the Commission “*shall* determine the appropriate degree of confidentiality . . . *by* balancing the nature and extent of the likely commercial injury to the Postal Service against the public interest [in financial transparency].” The balancing test expressed in the statute seems, instead, to be one mandatory (and specially emphasized) step in the process of determining the appropriate degree of confidentiality. It is not identical with, and does not exhaust, that process. There are certainly other, non-commercial, interests protected by the underlying confidentiality provisions.³ The Postal Service provides a list of them⁴; they include such concerns as the undermining of law enforcement and the disclosure of information prepared for use in collective bargaining and consultation between the Service and its unions and management associations. The Commission’s proposed language suitably allows for consideration of these concerns and does not unduly expand the scope of confidential information.

B. “Operating” vs. “competing”. APWU also objects to the Commission’s phrase “financial transparency of a government entity *operating* in commercial markets[.]” It points out that the statutory phrase is “*competing* in commercial markets,” (italics added in both cases), and argues that

. . . The balancing test was designed to protect the Postal Service’s commercial interests vis a vis its competitors. Yet the rule as proposed would permit the Postal Service to claim as non-public information relevant to its market dominant products, without requiring the Postal Service to specify why information withheld relates to its competitive position.

³ The Freedom of Information Act exemptions [5 U.S.C. § 552(b)] and 39 U.S.C. § 410(c), referenced in 39 U.S.C. § 504(g)(1) and thus governing here.

⁴ See Initial Comments of the United States Postal Service, pp. 5-6.

APWU urges the Commission, therefore, to change the rule to “reflect the actual requirements” of § 504(g)(3)(A).

The disputed phrase, however, occurs in the second branch of the balancing test, referring to the degree of *transparency* appropriately expected of a government entity. In this connection, we should first make clear that the information relevant to this problem is Postal Service information in the strict sense – not third-party information which the Service happens to possess, as to which there would appear to be no particular “transparency” interest. If APWU’s suggested revision were adopted, it seems likely that the outcome would be less public information concerning Postal Service costs and operations, not more. It would be argued, perhaps successfully, that with respect to, e.g., single-piece First Class Letters the Postal Service does not “compet[e] in commercial markets” (in view of the Private Express Statutes); and, that being so, information about that category simply does not implicate the public interest in transparency. The Commission’s language, indeed, may be thought to broaden rather than restrict the area in which the public interest in transparency can counteract, and may override, the prospect of injury to the Postal Service. This is appropriate, since (i) the statute does not make “competing” coterminous with the list of competitive products in § 3631(a), and (ii) there clearly are “commercial markets” in which even the most archetypal market dominant products must compete with electronic or other substitutes. The Commission’s use of “operating” should forestall academic disputation over the meaning of “competing” and allow for a more useful focus on whether, with respect to the information at issue, there is a competitive situation (of whatever kind) and what, if any, competitive injury will result from disclosure.

Consequently, GCA (i) reiterates its recommendation that the confidentiality rules be revised to make appropriate provision for protection of third-party information in the possession of the Postal Service, and (ii) suggests that the language of Rule 3007.25(a) is lawful and appropriate as proposed.

Respectfully submitted,

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