

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

In these Reply Comments, filed pursuant to Order No. 194, the Greeting Card Association (GCA) responds to arguments presented by Valpak Direct Marketing Systems, Inc., and Valpak Dealers' Association, Inc. (Valpak).¹ Valpak challenges the Commission's decision to establish a separate disclosure standard for information belonging to third parties but subject to potential disclosure because it is in the hands of the Postal Service. Pointing to the test for withholding or disclosing confidential information set out in 39 U.S.C. § 504(g)(3)(A)², Valpak says that the Commission is without authority to adopt an additional or different test based on Federal discovery rules. GCA believes the Commission does have such authority (and has appropriately exercised it in the proposed rules accompanying Order No. 194), and that adopting Valpak's view would lead to unreasonable results.

¹ Valpak Direct Marketing Systems, Inc., and Valpak Dealers' Association, Inc., Initial Comments Regarding Second Notice of Proposed Rulemaking to Establish a Procedure for According Appropriate Confidentiality ("Valpak Comments").

² This provision reads:

. . . 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.*

(Italics added.) For brevity, we will refer to the italicized portion as the "two-factor test."

A. *Interpretation of § 504(g)(3)(A)*. Valpak’s argument necessarily rests on an unarticulated premise: that the two-factor test is not only mandatory but is exclusive of any other consideration. Valpak, which simply assumes this premise without arguing for it, sometimes appears to treat the concepts of “mandatory” and “exclusive” as equivalent:

. . . the language of PAEA section 504(g)(3)(A) states that “the Commission **shall balance** [a] the nature and extent of the likely commercial injury to the Postal Service **against** [b] the financial transparency of a government establishment competing in commercial markets.” (Emphasis added.) These are words of obligation, not discretion. The Commission simply has no authority not to apply the statutory two-factor test because it believes that the “equities” of either the Postal Service or a third party’s proprietary interest warrant such treatment. In short, the Commission, like a court, has no choice but to “enforce [a statute] according to its terms,” not to change those terms to its own liking. . . .^{3]}

The text of § 504(g)(3)(A), however, does not require, or even support, this treatment. The sentence Valpak relies on in the passage just quoted begins: “*In determining* the appropriate degree of confidentiality to be accorded information identified by the Postal Service under paragraph (1), the Commission shall balance [etc.]” (Italics added.) This phrasing indicates that the two-factor test is a necessary part of the process of determining appropriate confidentiality, but not the whole of it.⁴ 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

³ Valpak Comments, pp. 7-8. The language expressing the second factor actually reads “the *public interest in maintaining the* financial transparency of a government establishment competing in commercial markets.” (Italics added.) It could easily make some difference, in a concrete case, whether the pro-disclosure position rested only on a private, commercial interest, or had a public-interest dimension as well.

It may also be worth observing, in connection with the last sentence of the quoted passage, that an agency engaged in statutorily authorized rulemaking is not in quite the same position as a court applying a statute to a litigated case.

⁴ GCA pointed this out, in a somewhat different context, in the first phase of this rulemaking. See Reply Comments of the Greeting Card Association (October 10, 2008), pp. 2-3, and Commission Order No. 194, p. 10.

public interest in . . . financial transparency”⁵ It required that the two specified factors be weighed against each other, as part of a possibly complex process, but it did not exclude others.

B. *Practical results of the Valpak interpretation.* That the broader (non-exclusive) reading of § 504(g)(3)(A) is the better one can also be seen by considering some of the implications of Valpak’s narrower interpretation. In a situation where third-party information is at issue – that is, where the test to which Valpak objects would be applied – the two-factor test *taken alone* is clearly a bad fit.

First, it is hard to see how disclosing confidential information belonging to XYZ Corporation, but provided to the Service in the course of XYZ’s discussions with it of an potential new postal product or a possible NSA, could further “the public interest in maintaining the financial transparency *of a government establishment* competing in commercial markets.” XYZ is not a government establishment, and its confidential data simply bear no relation to that public interest.

⁵ Congress has used the “shall determine . . . by . . .” formula when it wants a result to be generated *solely* by solving a specified equation or using a specified statistic. See, e.g., 39 U.S.C. § 2002(a) and (b), concerning the Postal Service’s capital:

. . . The value of assets and the amount of liabilities transferred to the Postal Service . . . *shall be determined* by the Postal Service subject to the approval of the Comptroller General, *in accordance with the following guidelines*:

(1) *Assets shall be valued on the basis of original cost less depreciation*

(2) All liabilities attributable to operations of the former Post Office Department shall remain liabilities of the Government of the United States, except that upon commencement of operations of the Postal Service, the unexpended balances of appropriations made to, held or used by, or available to the former Post Office Department and all liabilities chargeable thereto shall become assets and liabilities, respectively, of the Postal Service.

(b) The capital of the Postal Service at any time *shall consist* of its assets, including the balance in the Fund and the balance in the Competitive Products Fund, less its liabilities.

(Italics added.) In this case, however, Congress placed its specific directions, expressed as “shall balance,” within the larger framework which it denoted by the phrase “[i]n determining the appropriate degree of confidentiality[.]”

In cases like this, then, the second branch of the two-factor test would be essentially nugatory.

Second, Valpak itself adopts the argument that being forced to disclose third parties' information would be a "commercial injury" to the Service.⁶ GCA, of course, does not disagree with that proposition.⁷ Valpak, however, advances it in order to argue that third parties are sufficiently protected under the two-factor test it believes is the only one permissible. In reality, the two-factor test would not provide reasonable protection for third parties.

Valpak's position would mean, for example, that if (i) XYZ Corporation provided to the Service the data hypothesized above, and (ii) the Service concluded that the proposed new product or NSA would not be worth its while to create, then (iii) the information – despite its confidentiality value to XYZ – seemingly would have to be disclosed. There would be *no* commercial injury to the Service, because no opportunity useful to it would have resulted from making use of XYZ's data; the "transparency" branch of the test would then govern.

Admittedly, it might be argued that because the information concerns only XYZ, and not the policies, finances, rates, or operations of the Postal Service, there is *also* no public transparency interest in disclosing it. On that reasoning, however, either the two-factor test becomes logically undecidable – there being no weight in either pan of the scale – or a "tiebreaker" principle must be applied (the most obvious candidate being the proposition – with which GCA also agrees – that *in general* the Service's inability to protect and, consequently, to obtain third-party data would in the long run injure it commercially). However, the notion of a "commercial injury" standard thus resting entirely, or even principally, on the Service's general, long-term interest in access to third parties' information raises questions of its own. If *any* disclosure of third-party information would injure the

⁶ Valpak Comments, pp. 12-13.

⁷ See Initial Comments of the Greeting Card Association, p. 2.

Service commercially by impairing such access, would the result be that *all* adequately supported confidentiality claims by third parties would have to be honored, without analysis of the injury (or lack of it) caused or likely in the particular case?

In practice, relying on commercial injury to the Postal Service as a standard for protecting confidential information belonging to others would be a convoluted, and most probably an ineffective, way of providing protection to mailers and other third parties. Valpak seems not to disagree that the protection is needed.⁸ If Valpak's position were adopted, however, private parties would have to predict, or guess, whether disclosure of the confidential information they are contemplating providing to the Postal Service would cause commercial injury to it as well as to themselves. They would probably conclude (reasonably enough, as a short-term decision⁹) that in many if not all cases it was safer not to share sensitive information with the Service. As a result, long-term commercial injury to

⁸ Valpak Comments, pp. 11, 12. At p. 13, Valpak states that

. . . Additionally, nothing in section 504(g) prevents the Commission from promulgating a rule that would allow third-party input concerning the importance of keeping particular proprietary information nonpublic, and giving weight to that input in assessing the extent and importance of the claimed "commercial injury," and Valpak would support such a rule.

Some such input would, we agree, be appropriate whenever third-party information is involved; but it remains true that under Valpak's suggestion the affected third party could still argue only the extent and importance of commercial injury to the Postal Service. Commercial injury to itself – however self-evident or easy to prove – would be legally irrelevant. Valpak later observes, "threats to a third-party proprietary interest is [sic] a subset of 'commercial injury to the Postal Service,' and thus a factor to be considered in according the appropriate degree of confidentiality" *Id.*, pp. 13-14. But where no, or no significant, commercial injury to the Service appears likely from a particular disclosure, the two-factor test seemingly would not permit the Commission to consider, separately, injury to the third party.

⁹ For example, suppose (i) that XYZ Corporation competes directly with ABC Corporation in some one line of business involving (identical) use of the mails, and (ii) that disclosure of XYZ's information to ABC would enable ABC to capture some of XYZ's traffic. Migration of volume from XYZ to ABC would cause no commercial injury to the Service, since it would still carry the same volumes at the same rates, albeit for a different customer. On Valpak's view, therefore, the information seemingly would have to be disclosed. The result would be commercial injury to XYZ with no offsetting benefit to the public interest in governmental transparency. It would be no more than good business practice, then, for XYZ to decide against furnishing the information in the first place.

the Service, which Valpak seems to agree would exist absent such information-sharing¹⁰, would be virtually guaranteed.

C. *The significance of 39 U.S.C. § 410(c) and the FOIA exemptions.* It is in order, finally, to inquire how Valpak’s proposal fits with the general structure of § 504(g), and particularly with the authority it gives the Postal Service to label information as nonpublic. The two-factor test on whose exclusivity Valpak insists applies to “information identified by the Postal Service under paragraph (1)” (i.e., § 504(g)(1)). That information, in turn, is defined as “information which is described in section 410(c) of this title, or exempt from public disclosure under section 552(b) of title 5[.]” Thus, for example, the Service is generally entitled to withhold from disclosure trade secrets and commercial or financial interests of parties other than the Postal Service, information on postal law enforcement activities, Postal Service OIG audit activity, collective bargaining information, and a number of other categories in which the probability of *commercial* injury to the Service is small or nonexistent.¹¹

Valpak’s argument, however, would require us to accept the notion that Congress first (in subsection (g)(1)) authorized the Postal Service to designate any of these types of information as confidential (nonpublic) and then (in subsection (g)(3)(A)) required the Commission, in deciding *how* confidential they were to be, to use – exclusively – a test guaranteeing that many of them would not be confidential at all since they did not implicate the Service’s *commercial* activities. This is a further indication that Valpak’s position clashes with the overall structure of § 504(g). In framing implementing rules, however, the Commission should seek to give a coherent sense to the entire provision. The rules proposed in Order No. 194 do so, and so should be retained.

¹⁰ Valpak says (Comments, p. 12): “. . . To operate properly, often the Postal Service must have access to third party (e.g., mailer) proprietary information.”

¹¹ For a list, see the Postal Service’s Initial Comments, at pp. 5-6.

Conclusion. The irrational results entailed by Valpak's argument can be avoided by adopting, as the Commission has done, a reading of § 504(g)(3)(A) which is both grammatically appropriate and properly adapted to the purposes for which the entire confidentiality provision was enacted. There is no question that commercial injury to the Service and the public interest in its financial transparency must be balanced in each case of disclosure. But these are not the only permissible factors, and an exclusive test limited to them would offer little or no effective protection to mailers and others who seek to cooperate with postal management by sharing commercially sensitive information. The Commission should adopt the rules it proposed for this purpose in Order No. 194.

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Respectfully submitted,

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