

BEFORE THE  
POSTAL REGULATORY COMMISSION  
WASHINGTON, D.C. 20268-0001

Regulations Establishing Procedures for )  
Obtaining Information from the Postal Service )

Docket No. RM2009-12

**VALPAK DIRECT MARKETING SYSTEMS, INC. AND  
VALPAK DEALERS' ASSOCIATION, INC.  
INITIAL COMMENTS ON PROPOSED RULEMAKING CONCERNING  
OBTAINING INFORMATION FROM THE POSTAL SERVICE  
(November 9, 2009)**

**INTRODUCTION**

On September 2, 2009, the Commission issued Order No. 293, Notice and Order of Proposed Rulemaking Concerning Obtaining Information from the Postal Service, commencing Docket No. RM2009-12. The deadline for initial comments is November 9, 2009, and the deadline for reply comments is November 23, 2009. *See* Order No. 293, 74 *Fed. Reg.* 51,815 (Oct. 8, 2009).

Valpak Direct Marketing Systems, Inc. and Valpak Dealers' Association, Inc. (hereafter "Valpak") submit these joint initial comments in response to Order No. 293.

**PROCEDURAL BACKGROUND**

The Postal Accountability and Enhancement Act (Pub. L. 109-435) ("PAEA") empowered the Chairman of the Commission (or a designated Commissioner or an appointed administrative law judge) with the authority to issue subpoenas to "an officer, employee, agent, or contractor of the Postal Service" (39 U.S.C. § 504(f)(4)):

The Chairman ... may, with respect to **any proceeding** conducted by the Commission under this title **or** to obtain information to be used to prepare **a report under this title** --

(A) **issue subpoenas** requiring the attendance and presentation of testimony by, or the production of documentary or other evidence in the possession of, any covered person; and

(B) **order** the taking of **depositions** and responses to **written interrogatories** by a covered person.

The written concurrence of a majority of the Commissioners then holding office shall, with respect to each subpoena under subparagraph (A), be required in advance of its issuance. [39 U.S.C. § 504(f)(2) (emphasis added).]

The Commission may apply to a district court of the United States with respect to subpoenas issued under subparagraph (A) which are not obeyed, and failure to obey a court order is punishable as contempt. 39 U.S.C. § 504(f)(3).

## COMMENTS

The proposed regulations in Order No. 293 generally appear to conform to the statutory authorization. They provide special rules where needed (*e.g.*, different requirements for subpoenas requested by third parties in different types of dockets), yet do not add unnecessary or complicated requirements.

### 1. Commission Identification of Statutory Authority

PAEA permits a subpoena to be issued only with “respect to [i] any **proceeding** conducted by the Commission **under this title** or [ii] to obtain information for preparation of a **report under said title 39.**” 39 U.S.C. § 504(f)(2). Order No. 293 suggests that the Congressional purpose underlying the grant of the subpoena power is that the Commission have access to information “needed to [e]nsure financial transparency and to make informed decisions” to implement a “modern system of regulation.” Order No. 293, p. 6. Of course, “transparency” is an important objective of PAEA, and the Commission is charged with the establishment of a “modern system for regulating rates and classes” with respect to “market

dominant products.” *See* 39 U.S.C. § 3622(b)(6) and (a). However, general statements of inferred Congressional policy must yield to the precise words of the statute, and in this case, the Commission’s subpoena power can only be employed for the two express purposes identified by Congress.

To ensure that the subpoena power be properly employed, it is important that the Commission in each case specifically identify the basis for its assertion of that power. The Commission’s proposed rules contain a form of subpoena as an appendix. *See* Appendix A to Part 3005 (pp. 30-31). This form has placeholders for “[Case Name – If Applicable]” and “Docket No. – If Applicable.” Both of these placeholders would appear to correlate to issuing a subpoena with respect to “any **proceeding** conducted by the Commission **under this title.**” 39 U.S.C. § 504(f) (emphasis added). However, in situations where a subpoena is being issued “to obtain information for preparation of a **report under said title 39**” there is no corresponding placeholder for the subpoena to specify the report being prepared, which would be the Commission’s jurisdictional authority. *Id.* (emphasis added). Revising the form of subpoena to add a line for “[Report Name – If Applicable]” would ensure that the jurisdictional basis for each subpoena would be clarified at the outset.

Such a requirement would be fully consistent with the Commission’s approach in proposed rule 3005.13 applicable to subpoenas issued in response to a third-party request. In that circumstance, the Commission requires that third parties must specify either the “proceeding” or “report” under which the subpoena is requested. *See* § 3005.13(c)(1).

## **2. Commission Protection of Third Party Mailer Interests**

Valpak appreciates the Commission's consideration and protection of third-party interests in the proposed rules in two respects.

First, in its Order, the Commission begins by recognizing the current right of mailers to make requests that the Commission issue Information Requests to the Postal Service. Order No. 293, p. 12 n.12. Then, the Commission incorporates into its proposed regulations procedures applicable to mailer requests for issuance of a subpoena to enforce an information request. *See* rule 3005.13 ("Subpoena issued in response to a third-party request"). The proposed procedures applicable to such third-party requests appear to be reasonable.

Second, the proposed rules address subpoenas that might involve third-party confidential information. Proposed rule 3005.12(d) provides "other interested persons" the opportunity to file a motion to quash, limit the scope of, or condition a subpoena. Proposed rules 3005.13(a)(3) and (b)(2) provide for other parties to file answers in response to a third-party request for issuance of a subpoena. These provisions should allow for adequate consideration of any request for protection of third-party confidential information.

### **CONCLUSION**

Valpak believes the proposed rules should be adopted, with the change proposed above.

Respectfully submitted,

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