

address the status of confidential information of a third party in the Postal Service's possession that would be submitted to the Commission. Comments were filed in the fall by the Postal Service and a number of parties highlighting this flaw and urging the Commission to rectify this problem and specifically address it in revised regulations .

The Commission heeded the industry comments and released a Second Notice on March 20, 2009 that addresses the issue of third party confidentiality and proposes using the same standard that the federal courts use to handle confidential information of third parties—that of Federal Rule of Civil Procedure 26(C).

Commission's Second Notice

DFS would like to commend the Commission for appropriately responding to the comments of the industry. DFS generally finds that the proposed rules should adequately protect the interests of a third party, such as DFS when its confidential business information is given to the Postal Service, and when the Commission has asked for that information. Among the proposed regulations is a provision for actual notice and an opportunity for a company to be heard directly by the Commission on the preliminary question of whether the information is confidential and should be treated as such. Thus, under this provision, the Commission would hear not only from the Postal Service but also directly from the company.

This is important, for the arguments made by the Postal Service and the position it takes *vis a vis* the information might not reflect the arguments and position the company would take. Presumably, when the Commission would make its decision, it would pay very close attention to the positions put before it by the company.

Once the information is deemed confidential, there are provisions for a party to subsequently seek limited access under protective conditions that are outlined in the rules, or for a party to seek to open up the data. Should someone ask for access, the proposed rules provide that the owner of the information can file in opposition to the motion, and the Commission would consider the request and opposition under the standards of Federal Rule of Civil procedure 26 (C).

Although that seems reasonable on its fact, DFS sees two problems and urges the Commission to correct them.

First, there is *no* provision for giving a company actual notice that someone is seeking access to their confidential information. If the owner of the information is a party to whatever proceeding in which the issue has arisen, this structure probably does not pose much of a problem. However, if the owner of the information is *not* a party to the proceeding, then it seems that there is a significant problem, for unless that company is daily monitoring each and every filing in each and every docket, the odds are fairly good that the owner might not hear of the request for access until the allotted time period to respond *has passed*.

Second, the time period to respond is only three or seven days. Again, if an owner of information is a party to the relevant proceeding, this structure probably does not pose a problem, although the three day time period is rather short. If a owner is not a party to the proceeding, then the three day period is not sufficient, for the owner need not only receive notice, but must also familiarize itself with the context in which the motion is being made.

Consequently, DFS urges the Commission to amend its rules when it promulgates its final rules and provide that 1) actual notice be given by the Commission to the owner of the confidential information before the Commission if someone seeks access to that confidential information, or seeks to make it public, and 2) the company have 7 days *after receipt* of the notice to respond.

Thank you for considering our views.

Respectfully submitted,

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