

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.
INITIAL COMMENTS REGARDING SECOND NOTICE OF
PROPOSED RULEMAKING TO ESTABLISH A
PROCEDURE FOR ACCORDING APPROPRIATE CONFIDENTIALITY
(April 27, 2009)**

BACKGROUND

On August 13, 2008, the Commission issued Order No. 96, Notice of Proposed Rulemaking to Establish a Procedure for According Appropriate Confidentiality (also referred to herein as "First Notice"), which provided for the submission of initial comments and reply comments. The rules were proposed pursuant to the Postal Accountability and Enhancement Act ("PAEA"), Pub. L. 109-435, 39 U.S.C. section 504(g).

On March 20, 2009, the Commission issued Order No. 194, Second Notice of Proposed Rulemaking to Establish a Procedure for According Appropriate Confidentiality. Order No. 194 offered revisions to the original proposed confidentiality rules based on comments received in response to Order No. 96, as well as information gleaned from the recently-concluded Docket No. ACR2008. Order No. 194 set April 27, 2009 as the deadline to file initial comments, and May 11, 2009 as the deadline to file reply comments. Valpak Direct Marketing Systems, Inc. and Valpak Dealers' Association, Inc. (hereafter "Valpak") submit these joint initial comments in response to Order No. 194.

COMMENTS

I. In its First Notice of Proposed Rulemaking to Establish a Procedure for According Appropriate Confidentiality, the Commission Erroneously Replaced the Two-Factor Balancing Test Prescribed in PAEA Section 504(g)(3)(A) with the Multi-Factor Balancing Test Employed by Federal Courts under Rule 26(c) of the Federal Rules of Civil Procedure.

In its first Notice of Proposed Rulemaking to Establish a Procedure for According Appropriate Confidentiality, the Commission correctly acknowledged that, in determining the degree of protection “for according appropriate confidentiality,” section 504(g)(3)(A) “**directed**” the Commission to adopt a two-factor balancing test, weighing “[a] the nature and extent of the likely commercial injury to the Postal Service against [b] the public interest in maintaining the financial transparency of a government establishment competing in commercial markets.” *See* Order No. 96, pp. 2-3 (Aug. 13, 2008) (emphasis added). The Commission’s First Notice also correctly stated that section 504(g)(3)(B) “provides that in the **narrower context** of any ‘**discovery procedure**’ that is part of a Commission ‘**proceeding,**’ the Commission has the authority to require the Postal Service to produce information that the Postal Service has claimed as exempt from production.” *Id.*, p. 3 (emphasis added). To that specific end, the Commission noted — again correctly — that section 504(g)(3)(B) directed the Commission to “**establish procedures**” based upon Rule 26(c) of the Federal Rules of Civil Procedure (hereinafter “Rule 26(c)”) “for ensuring appropriate confidentiality for information furnished to any party.” *Id.* (emphasis added).

The Commission strayed, however, from this careful reading of PAEA section 504(g)(3) when it further stated that “Section 504(g)(3)(B) **appears** to be a specific application ... of the more 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 civil courts when asked to establish protective conditions under rule 26(c).**” *Id.*, p. 3 (emphasis added). In doing so, the Commission proposed that its “general” power to accord appropriate confidentiality to Postal Service nonpublic information would be “gleaned from the federal case law,” according to a seven-factor “good cause balancing test,” as well as from the two-factor balancing test specified in section 504(g)(3)(A). *Id.*, pp. 3-4 and 21 (proposed section 3007.25).

In support of this proposed **combined** standard governing appropriate confidentiality, the Commission asserted that “[**m**]ost of the seven specific factors” employed by the federal courts in the application of the Rule 26(c) balancing test according confidentiality “**appear[ed]** to be applicable to the general balancing test weighing the competing interests of the Postal Service against the public interest for transparency.” *Id.*, p. 4 (emphasis added). In a footnote, the Commission acknowledged, however, that two of the seven factors employed by the federal courts in administering Rule 26(c) “probably will be the least applicable in the majority of matters before the Commission” (*id.*, p. 4, n.5). But that realization did not dissuade the Commission from combining the Rule 26(c) balancing test with the one specifically prescribed in PAEA section 504(g)(3)(A).

In comments submitted by mailers, including Valpak, however, the Commission’s assumption that the two balancing tests were compatible was challenged. *See, e.g.*, Valpak Direct Marketing Systems and Valpak Dealers’ Association, Inc. Comments Regarding Regulations to Establish a Procedure for According Appropriate Confidentiality (“Valpak Initial Comments”) (Sept. 25, 2008), pp. 9-11.

In its Initial Comments, Valpak not only demonstrated that the two balancing tests were not compatible, but explained that the seven-factor test applied by federal courts in Rule 26(c) cases would actually undermine the two-factor test prescribed by PAEA section 504(g)(3)(A) and, in doing so, would undermine the Commission's executive and administrative oversight of the Postal Service. *Id.*, pp. 10-13. Furthermore, applying well-established rules of statutory construction, Valpak showed that PAEA section 504(g)(3)(B) could not be read in such a way that it authorized the Commission to apply the seven-factor balancing test to accord appropriate confidentiality; rather, that section reasonably could be read only to apply Rule 26(c) "procedural protections" securing appropriate confidentiality as exclusively determined under PAEA section 504(g)(3)(A)'s substantive two-factor balancing test. *Id.*, pp. 7-9. Indeed, Valpak pointed out that the Commission had already "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 id.*, p. 13 (emphasis original).

In Order No. 194, the Commission has acknowledged that mailer comments (including Valpak's) on the incompatibility of the two balancing tests (among other comments) which prompted the Commission to modify "the initially proposed regulations" and to provide "a second opportunity for interested parties to comment." *See* Second Notice, pp. 9-10, 17.

Valpak greatly appreciates the Commission's careful review of all comments filed in this docket, and its conclusion that its previously-proposed regulations were "not consistent with section 504(g)." While the Commission's second proposed regulations reflect important improvements, Valpak believes that certain of the Commission's proposed regulations in Order

No. 194 still unlawfully displace the statutorily-required two-factor formula with the Rule 26(c) seven-factor one, contrary to the mandates of PAEA, requiring further modification.

II. In Order No. 194, the Commission Still Has in Three Types of Instances Erroneously Displaced the Two-Factor Balancing Test Prescribed in Section 504(g)(3)(A) with the Multi-Factor Balancing Test Employed by Federal Courts under Rule 26(c) of the Rules of Civil Procedure.

According to section 504(g)(3)(A), the Commission is authorized to adopt regulations establishing “a procedure for according appropriate confidentiality to information identified by the Postal Service” as qualified nonpublic information. To that end, section 504(g)(3)(A) requires that:

[i]n determining the **appropriate degree** of confidentiality to be accorded information [so] identified by the Postal Service ... the Commission **shall** balance [a] the nature and extent of the likely commercial injury to the Postal Service against [b] the public interest in maintaining the financial transparency of a government establishment competing in commercial markets. [Emphasis added.]

Under its second proposed rules, the Commission correctly employs the PAEA-commanded substantive balancing test to “a request” to the Commission for “early termination” of the information’s “nonpublic status” in what is anticipated herein to be the normal situation, where there is no third-party interest involved. However, the Commission errs in providing, if that termination request implicates a “third party ... propriety interest,” that request would be assessed **not** under the PAEA-prescribed test, but according to the “balance of interests of the parties based on Federal Rule of Civil Procedure 26(c).” *See* proposed section 3007.33(b). And the Commission’s second proposed rules also ignore the

PAEA-mandated test and applies the Rule 26(c) balancing test as the **exclusive** balancing test, regardless of whether those materials implicate a third party proprietary interest, in:

(1) “a Commission proceeding, [in which] any person ... file[s] a motion pursuant to rule 3001.21 requesting access to non-public materials” (*see* proposed sections 3007.40 and 3007.42); and

(2) “a motion pursuant to rule 3001.21 requesting access to, or continued access to, non-public materials relevant to compliance under 39 U.S.C. 3653” (*see* proposed sections 3007.50 and 3007.52).

In explanation of these latter proposed rules, the Commission concludes:

While [the] single balancing test [of 39 U.S.C. Section 504(g)(3)(A)] has simplicity, it is **neither equitable nor consistent** with section 504(g) to use a single balancing test to determine [i] public disclosure, [ii] discoverability in a Commission proceeding, and [iii] access to materials outside a proceeding but relevant to compliance. [Order No. 194, p. 17 (emphasis added).]

A. The Commission’s Proposal Conflicts with the Statutory Text.

The Commission makes no attempt to demonstrate why — in light of the specific statutory two-factor balancing test spelled out in section 504(g)(3)(A) — the Commission has authority to dispense with that statutory test, and supplant it with the multi-factor Rule 26(c) test in proposed section 3007.33(b), 3007.42, and 3007.52. Yet, the Commission would substitute its judgment for that of Congress based on its policy view that it would “neither [be] equitable nor consistent with section 504(g) to use a single balancing test to determine public disclosure, discoverability in a Commission proceeding, and access to materials outside a proceeding but relevant to compliance.”

First, the Commission overlooks the fact that — if it would be inequitable or inconsistent with section 504(b) to use “**a single balancing test**” — it would be equally “inequitable and inconsistent” to use the Rule 26(c) multi-factor test. Nor has the Commission made any attempt whatsoever to explain why it chose the Rule 26(c) multi-factor balancing test over the section 504(g)(3)(A) two-factor test. Indeed, in Order No. 96, the Commission noted that, in contrast with the statutory command to apply the two-factor test set forth in section 504(g)(3)(A), the section 504(g)(3)(B) command to base on rule 26(c) “procedures for ensuring appropriate confidentiality for information furnished to any party” applied in the “**narrower context** of any ‘**discovery procedure.**’” Order No. 96, p. 3 (emphasis added). In Order No. 194, the Commission has applied the two-factor balancing test of section 504(g)(3)(A) to only one of four circumstances addressed, and has ignored the statutory test in favor of the Rule 26(c) balancing test in every other confidentiality matter.

Second, the Commission has presumed that it has discretion to depart from that statutory test, because it has decided that the Congressionally-required application of the test would be “inequitable.” But 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. *See* Hartford Underwriters Insurance Co. v. Union Planters Bank, 530 U.S. 1, 6 (2000).

B. The Commission’s Proposal Conflicts with the Statutory Purpose.

In addition, the Commission’s decision to supplant the two-part balancing test of PAEA section 504(g)(3)(A) with Rule 26(c) is **not** consistent with PAEA section 504(g) as a whole.¹ The Rule 26(c) seven-part “good cause balancing test” which the Commission invokes (Order No. 194, p. 5) was developed by courts in relation to a rule of civil procedure providing for a variety of appropriate protective orders guarding proprietary and other sensitive information uncovered in the discovery process in ordinary civil litigation between private parties. *See* Rule 26, Federal Rules of Civil Procedure. In contrast, PAEA section 504(g)(3)(A) was specially crafted by Congress to entrust a commission regulating an “independent establishment of the executive branch of the Government of the United States” with the duty to “promulgate rules and regulations and establish procedures ... to carry out their functions and obligations to the Government of the United States and the people” with respect to the operations of the Postal Service. *See* 39 U.S.C. §§ 501 and 503. PAEA section 504(g)(3)(A)’s two-factor balancing test was enacted by Congress to govern exercise of the Commission’s power to “publicly disclos[e] relevant information in furtherance of [all of] its duties” of oversight of the Postal Service, not just in those matters that might arise in an adversarial proceeding. *See* 39 U.S.C. § 504(g)(1)-(3). To that end, Congress dictated that the Commission be governed by a singular rule: “balanc[ing] [a] the nature and extent of the

¹ Statutory language should be construed according to the statutory scheme as a whole. *See* Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997).

likely commercial injury to the Postal Service against [b] the public interest in maintaining the financial transparency of a government establishment competing in commercial markets.”

C. The Commission’s Proposal Conflicts with PAEA Section 504(g)(3)(B).

It is in light of this overarching purpose that the language of section 504(g)(3)(B) — delimiting the Commission’s specific authority to promulgate regulations based on rule 26(c) of the Federal Rules to “establish procedures for ensuring appropriate confidentiality for information furnished to any party” — must be interpreted. As Valpak has observed before — in its Initial Comments submitted to the Commission in response to Order No. 96 — the language in section 504(g)(3)(B) authorizes the Commission to rely upon Rule 26(c) only to “**establish procedures,**” not to rewrite PAEA by drawing upon Rule 26(c)’s multi-factor “balancing test” to ascertain “the appropriate degree of confidentiality to be accorded information identified by the Postal Service” as nonpublic. Valpak Initial Comments, p. 8. Indeed, the Commission has reached outside of the text of Rule 26(c) to embrace a set of judicially-established “evidentiary principles,” based upon the rule’s generally stated substantive standards governing what “justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.” *See* Order No. 194, p. 5. PAEA section 504(g)(3)(B), however, does not refer to Rule 26(c)’s “justice” standards, much less to a court’s interpretive gloss on the balancing factors relevant to those standards. Rather, section 504(g)(3)(B) refers only to Rule 26(c) for the purpose of “establish[ing] **procedures** for ensuring appropriate confidentiality for information furnished to any party.” (Emphasis added.) Eight in number, those **procedures** are spelled out in such a way that the

courts have no discretion except to order “one or more” of them, as appropriate to secure the appropriate degree of confidentiality warranted in each case. *See* Rule 26(c)(1)(A) - (H).

Additionally, these eight **procedures** are clearly designed for implementation in an adversarial discovery setting. For example, Rule 26(c) specifies, in order to achieve the appropriate degree of confidentiality, the court may issue an order: (1) “forbidding the disclosure or discovery”; or (2) “specifying terms, including time and place, for the disclosure or discovery”; or (3) “prescribing a discovery method other than the one selected by the party seeking discovery”; or (4) “forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters,” etc. Thus, PAEA section 504(g)(3)(B) states that the Commission may employ such **procedural** rules from Rule 26(c) “in the course of any discovery procedure established in connection with a proceeding under this title.”

Yet, the Commission mistakenly proposes that the Rule 26(c) balancing test must be applied outside an adversarial proceeding, including: (i) a request that nonpublic information be made public if such request implicates “a third-party ... proprietary interest” (*see* Order No. 194, proposed section 3007.33); and (ii) a request for “access to, or continued access to, non-public materials relevant to compliance under 39 U.S.C. 3653.” *See* proposed sections 3007.50 and 3007.52. Such an application of Rule 26(c) takes it completely out of its statutory context, and applies it to a nonadversarial event, completely devoid of any “discovery process.”

Irrespective of third-party concerns, and irrespective of the nature of the event in which a claim of public disclosure is sought, section 504(g)(3)(A) prescribes the exclusive standard by which the Commission must determine “the appropriate degree of confidentiality to

information identified by the Postal Service” as nonpublic. Section 504(g)(3)(B) only authorizes the Commission to implement its determinations of the degrees of confidentiality by protective “procedures,” consistent with the procedures in Rule 26(c) of the Federal Rules of Civil Procedure, in order to facilitate discovery access to nonpublic information by a party in a proceeding before the Commission. Rule 26(c) has no application other than that specified in section 504(g)(3)(B), and that is limited to the establishment of **procedures**. Limiting Rule 26(c) to its statutorily-prescribed role does not mean that third-party proprietary interests will be ignored.

III. Third-Party Proprietary Interests in Confidentiality Are Statutorily Protected by the Section 504(g)(3)(A) Two-Factor Balancing Test.

In Order No. 194, the Commission has rightfully expressed concern that its rules governing confidentiality be tailored in such a way as to protect “third-party sensitive information.” *See* Order No. 194, pp. 1-2, 10-12. Apparently, the Commission has gravitated to the Rule 26(c) multi-factor balancing test because it agrees with those mailers who claimed, in response to Order No. 96, that the statutory test in section 504(g)(3)(A) would not provide adequate protection to third-party sensitive information. *See* Order No. 194, pp. 16-18.

Although Valpak is also concerned with protecting confidential information submitted by third parties to the Postal Service from becoming public, Valpak believes that section 504(g)(3)(A), rightfully applied, should provide adequate protection for such information.

Of course, it is possible that issues of confidentiality could arise when third parties seek access to confidential information (such as under a protective order), or when they seek general release of information such as by termination of nonpublic status. In either case, it would

appear reasonable to anticipate that under PAEA some of the instances in which the Commission will be required to apply section 504(g)(3)(A) could involve the interest of a third party (such as a mailer). This represents a change from the past where — under the adversarial system employed under the Postal Reorganization Act of 1970 — parties sponsored witnesses who submitted testimony, responded to discovery, and were subject to oral cross-examination before the Commission, and mailer-specific information could be requested directly from a mailer.

Under the PAEA model, however, information is not routinely compelled from a mailer — although this could possibly happen when a mailer files a complaint. It is, however, possible that third-party proprietary information could be provided to the Commission not directly by the mailer, but, indirectly, via the Postal Service.² *See, e.g.*, Comments of Pitney Bowes Inc., p. 4 (Sept. 25, 2008). Even though it appears unlikely that proprietary information of a third party will often be at issue, Valpak believes the Commission is wise to consider this possibility in its rulemaking.

Under the statutory two-factor formula, the Commission is directed initially to ascertain “the nature and extent of the likely commercial injury to the Postal Service.” To operate properly, often the Postal Service must have access to third party (*e.g.*, mailer) proprietary information. Disclosure of such information would impair not just the third-party’s interest, but also the commercial interests of the Postal Service, and thus, are protected by section

² Additionally, such a situation could arise, for example, where the Postal Service is asked for information about a market dominant negotiated service agreement (“NSA”), but there, mailers know that significant reporting about the NSA is required by Commission rules.

504(g)(3)(A). Under the first prong of the statutory test, the Commission would consider third-party proprietary information submitted by the Postal Service and claimed by the Postal Service as nonpublic pursuant to section 410(c) in determining whether the Postal Service had made its case for keeping the information nonpublic. *See* 39 U.S.C. section 504(g)(1).

Among information protected from public disclosure by section 410(c) are: “(1) the name or address, past or present, of any postal patron [and] (2) information of a commercial nature, including trade secrets, **whether or not obtained from a person outside the Postal Service, which under good business practice would not be disclosed.**” *See* 39 U.S.C. section 410(c)(1) and (2) (emphasis added). Thus, in ascertaining whether a particular request for public disclosure, made either in conjunction with a “proceeding” or a “compliance” report, the Postal Service would be expected to present to the Commission a claim of “likely commercial injury to the Postal Service” because that would be the result of disclosure. 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.

To be sure, not every third-party claim for confidentiality would “trump” the “public interest in maintaining the financial transparency” of the Postal Service. But it is not for the Commission to decide in favor of such a third-party claim according to the more flexible balancing test of Rule 26(c). That option has been foreclosed by Congress. By statute, the threats to a third-party proprietary interest is a subset of “commercial injury to the Postal Service,” and thus a factor to be considered in according the appropriate degree of

confidentiality to the information, a matter which is left to the discretion of the Commission by the express terms of section 504(g)(3)(A).

With respect to a request for public disclosure of a nonpublic matter that implicates a third party's proprietary interest, that interest would be taken into account by the PAEA two-factor balancing test as weighing in favor of nondisclosure in light of the "likely commercial injury" that any such disclosure would cause to the Postal Service. *See* 39 U.S.C. sections 410(c) and 504(g)(1). With respect to a request for public disclosure in relation to periodic reports required of the Postal Service, section 504(g)(3)(A)'s two-factor formula would ensure that the "users of the mail [and] affected parties" were afforded an "opportunity for comment" under 39 U.S.C. section 3653(a). At the same time, third-party proprietary interests would be taken into account in assessing the extent and significance of "commercial injury" to the Postal Service. *See* 39 U.S.C. sections 410(c) and 504(g)(1). Finally, with respect to a Commission proceeding in which a party seeks access to nonpublic information via the discovery process, the request for disclosure of confidential information would be assessed substantively by PAEA's two-factor balancing process, but the terms of disclosure, if any, would be governed by one or more of the **procedural** options set forth in Rule 26(c).

IV. The Proposed Rules Appropriately Place the Burden of Persuasion on the Postal Service throughout the Process.

Since PAEA became law, while there have been no final regulations implementing section 504(g)(1), the Postal Service has been able to assert that it is holding certain information confidential without meaningful explanation. *See, e.g.*, Docket No. ACR2008, Postal Service FY 2008 Annual Compliance Report, pp. 69-71. The Postal Service has not

needed to justify appropriately its claims. With the adoption of rules by the Commission, this era will come to an end.

In the future, when the Postal Service submits to the Commission materials it wants to be considered nonpublic, it must apply for non-public treatment. The proposed rules wisely state:

(b) An application for non-public treatment is to **fulfill the burden of persuasion** that the non-public materials should be withheld from the public. [Proposed rule 3007.21(b).]

This statement properly reflects the statutory requirement that, with the filing of the non-public materials:

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**). [39 U.S.C. § 504(g)(1) (emphasis added).]

As the Postal Service is the party seeking confidentiality for materials (that are required to be submitted to the Commission), it will have the responsibility for justifying its requests. Section 3007.21(b) signals that, when claiming nonpublic status for information presented to the Commission, the Postal Service has the burden of establishing its case for nonpublic treatment. The proposed rule properly provides that the Postal Service's application will inform the Commission and the public of the nature of its claims for confidentiality and that the Postal Service is to present its case for nonpublic treatment at that time.

V. Valpak Supports the Proposal's Provision for Mailer Requests for Commission Information Requests.

Valpak greatly appreciates that Order No. 194 would formalize the process under which mailers may request the Commission to issue an information request:

Any person may request that the Commission issue a **data or information request** for documents, information, and things covered by rule 3007.2 **by filing a motion** with the Commission, pursuant to rule 3001.21 of the Commission's rules of practice and procedure, which describes the documents, information, and things sought, explains the reasons the Commission should make the request, and includes a statement of how the materials sought are **relevant and material** to the Commission's duties under title 39. [Proposed rule 3007.3(b) (emphasis added).]

This proposed provision apparently derives from Valpak's motions practice in Docket No. ACR2008 (*see* Docket No. ACR2008, Valpak Motion for Issuance of Commission Information Request Concerning Core Costing Data on Detached Address Labels). *See, e.g.*, Order No. 194, p. 14. *See also* Docket No. RM2008-4, Postal Service Reply Comments, pp. 4-5.

Although the Commission declined to permit parties to file discovery directly with the Postal Service, Valpak is hopeful that the Commission's rules could work well, assuming the Commission acts promptly on such motions to direct responses from the Postal Service, and then monitors Postal Service responses to ensure that they are complete and timely.

Respectfully submitted,

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