

Guard submits evidence to support the allegations of the complaint, while the respondent may submit evidence in rebuttal or mitigation. The Administrative Law Judge renders a decision on the basis of the evidence adduced at the hearing and the law. The Administrative Law Judge's decision is given to the respondent.

(i) In a case where an appeal is made by either party (Coast Guard or respondent), the notice of appeal is filed in accordance with the procedures of 33 CFR 20.1001(a).

* * * * *

Dated: June 22, 2009.

Stefan G. Vencus,

Chief, Office of Regulations and
Administrative Law, United States Coast
Guard.

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POSTAL REGULATORY COMMISSION

39 CFR Part 3007

[Docket No. RM2008-1; Order No. 225]

Treatment of Non-Public Materials Submitted by the Postal Service

AGENCY: Postal Regulatory Commission.

ACTION: Final rule.

SUMMARY: The Commission is adopting a final rule on the treatment of non-public material submitted by the Postal Service. This action is consistent with Commission obligations under a recent change in law.

DATES: Effective July 29, 2009.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

Regulatory History

73 FR 50532 (August 26, 2008).

74 FR 13370 ((March 27, 2009).

I. Introduction

II. Statutory Standards for According Confidentiality to Materials Filed With the Commission

III. Analysis of Comments on Order No. 194

IV. Section-by-Section Analysis

V. Ordering Paragraphs

I. Introduction

In this order, the Postal Regulatory Commission (Commission) adopts rules which implement 39 U.S.C. 504(g) of the Postal Accountability and Enhancement Act (PAEA), Public Law 109-435, 120 Stat. 3218 (2006). These final rules establish a procedure for according appropriate confidentiality

for non-public materials¹ filed with the Commission.

These rules lay a foundation for the Commission's treatment of non-public materials filed by the Postal Service and other parties. This order focuses primarily on comments which suggest a need for changes, and the Commission incorporates its discussion of the proposed rules, especially for those issues that did not receive comments published in PRC Order No. 194, March 20, 2009, located at 74 FR 13370 (March 27, 2009). The remainder of part I of this order includes background information and sets forth the procedural history of this docket. Part II of this order briefly recapitulates the statutory standards for according confidentiality. Part III gives an overview of the comments and presents a discussion of the issues raised by the parties in response to the second notice of proposed rulemaking. Part IV provides a section-by-section analysis of each final rule. The complete final rules are set forth at the end of this order.

On August 13, 2008, the Commission issued a notice and order of proposed rulemaking to establish rules governing the treatment of non-public materials.² Order No. 96 proposed rules to meet the statutory standards for according confidentiality to Postal Service materials. The rules proposed in that order only applied to materials filed by the Postal Service and claimed to be non-public. *Id.* at 5-6. The rules used one test applicable to discovery requests and requests to publicly disclose Postal Service non-public materials. *Id.* at 7.

The Commission received eight comments and five reply comments on the proposed rules. Comments identified two main shortcomings in the proposed rules. Several commenters requested a mechanism to protect third-party non-public materials. *See, e.g.,* Comments of Pitney Bowes Inc., September 25, 2008, at 6-7. Several comments also addressed the Commission's departure from the test articulated in 39 U.S.C. 504(g)(3)(A), which is designed to balance the Postal Service's interest in avoiding commercial injury against the public's interest in financial transparency of a

¹ The term "non-public materials" as used in this order is defined in 39 CFR 3007.1(b). Essentially "non-public materials" means any document, information, or thing filed with the Commission and claimed exempt from disclosure under applicable sections of the United States Code by the Postal Service or protected from disclosure under Federal Rule of Civil Procedure 26(c) by a third party with a proprietary interest in the materials.

² PRC Order No. 96, Notice of Proposed Rulemaking to Establish a Procedure for According Appropriate Confidentiality, August 13, 2008 (Order No. 96).

government agency competing in commercial markets. *See, e.g.,* Valpak Direct Marketing Systems, Inc. and Valpak Dealers' Association, Inc. Comments Regarding Regulations to Establish a Procedure for According Appropriate Confidentiality, September 25, 2008, at 11. On review, the Commission found those comments persuasive and subsequently issued a second notice of proposed rulemaking.³

In Order No. 194, the Commission modified its proposed rules to address commenter issues and respond to developments in ongoing proceedings. First, the Commission proposed procedures for any person to request early termination of non-public treatment of materials. The proposed rule's standard for decision was the balancing test set forth in 39 U.S.C. 504(g)(3)(A). *See id.* at 18. Second, the Commission proposed rules to govern the submission of third-party non-public materials and to establish procedures for challenging those assertions of confidentiality. *Id.* at 16, 18-20.

Because 39 U.S.C. 504(g) is silent as to the treatment of materials belonging to parties other than the Postal Service, the Commission proposed a different framework, under its general rulemaking authority in 39 U.S.C. 503, for assessing challenges to third-party assertions of confidentiality. *See* § 3007.33(b). *Id.* As 39 U.S.C. 504(g)(3)(B) directs the Commission to establish procedures for ensuring appropriate confidentiality for information furnished to any party, the Commission created §§ 3007.40-42 and 3007.50-52 to develop a framework for requests for access to non-public materials. *Id.* Other changes proposed in Order No. 194 include provision for ongoing access to non-public materials which are relevant to compliance and a mechanism for a person to make a data or information request to the Postal Service. *Id.* at 20.

II. Statutory Standards for According Confidentiality to Materials Filed With the Commission

As discussed in detail in Order No. 96 and Order No. 194, the PAEA directs the Commission to develop procedures for handling materials the Postal Service claims are non-public.

39 U.S.C. 504(g)(1) provides that the Postal Service may determine "that any document or other matter it provides to the Postal Regulatory Commission" is

³ PRC Order No. 194, Second Notice of Proposed Rulemaking to Establish a Procedure for According Appropriate Confidentiality, March 20, 2009 (Order No. 194).

exempt from public disclosure under 39 U.S.C. 410(c) or 5 U.S.C. 552(b). Under 39 U.S.C. 504(g)(3)(A), the Commission may not publicly disclose materials claimed to be non-public by the Postal Service unless it “has adopted regulations under section 553 of title 5, that establish a procedure for according appropriate confidentiality * * *.”

Similarly, 39 U.S.C. 504(g)(3)(B) allows the Commission to develop procedures to require production of designated non-public materials. However, 39 U.S.C. 504(g) is silent as to the Commission’s treatment of third-party sensitive materials. The Commission relies on its general authority under 39 U.S.C. 503 to promulgate rules which govern whether and to what extent designated third-party non-public materials shall be accessed or released. *See* 39 U.S.C. 503. Rules governing the treatment of third-party non-public materials are necessary for the Commission to carry out its functions under the PAEA.

III. Analysis of Comments on Order No. 194

The Commission received five comments and three reply comments on the revised rules.⁴ With one exception, the comments support the Commission’s proposed procedures for according appropriate confidentiality to non-public materials filed with the Commission.

The Commission finds the comments in this docket thoughtful and helpful and appreciates the efforts of all commenters to refine and critique the proposed rules. Several comments identify minor aspects of the proposed rules that would benefit from a revision. Thus, these final rules differ slightly from the proposed rules in ways

designed to clarify and improve the rules in response to the comments.

Overall, the comments in response to Order No. 194 indicate approval of the revised proposed rules, with several suggestions. *See, e.g.*, Postal Service Comments at 5; Public Representative Comments at 1; Discover Financial Services Comments at 2; GCA Reply Comments at 7; and PSA Reply Comments at 1. In its comments, Valpak reiterates several issues it believes remain relevant in spite of the revisions made between Order No. 96 and Order No. 194. *See* Valpak Comments. A more detailed discussion of the comments follows.

Appropriate standard for decision. Valpak directs most of its comments to its assertion that the balancing tests in rules 3007.33(b), 3007.42 and 3007.52 as provided “in Order No. 194 still unlawfully displace the statutorily-required two-factor formula with the Rule 26(c) seven-factor [formula], contrary to the mandates of the PAEA * * *.” Valpak Comments at 4–5. The rules at issue provide the standard of decision for termination of non-public status for third-party non-public materials, and access to Postal Service or third-party non-public materials.

Valpak argues that since the language of 39 U.S.C. 504(g)(3)(A) sets forth a two-factor balancing test, the Commission may not include any other elements. *See id.* at 5–8. Valpak claims third-party interests are adequately protected under the test articulated in 39 U.S.C. 504(g)(3)(A), and claims that the Postal Service’s interests align with any third party which may submit sensitive materials through it. *Id.* at 8–14. Valpak also takes issue with the language of 39 U.S.C. 504(g)(3)(B) which directs the Commission to establish, based on “rule 26(c) of the Federal Rules of Civil Procedure * * * procedures for ensuring appropriate confidentiality for information furnished to any party.” *Id.* at 9. Valpak asserts that the “procedures” referred to in 39 U.S.C. 504(g)(3)(B) refer to “protective conditions” and do not allow the Commission to use an alternative standard for decision in determining the appropriate degree of confidentiality in the context of access to non-public materials. *Id.* at 9–10. In sum, Valpak believes the Commission erred by using the common law rule 26(c) balancing test to determine whether third-party non-public materials should be publicly disclosed and using the same test to determine if non-public materials may be accessed.

In its reply comments, the Greeting Card Association (GCA) addresses most of the points Valpak raises regarding the

appropriate balancing tests. GCA points out that the test articulated in 39 U.S.C. 504(g)(3)(A) is preceded by 39 U.S.C. 504(g)(1), which states that the Postal Service may submit non-public materials if it claims they are exempt under 39 U.S.C. 410(c) and 5 U.S.C. 552(b). GCA Reply Comments at 6. GCA argues that the statutory language does not mandate exclusive use of the test or factors articulated in 39 U.S.C. 504(g)(3)(A). *Id.* at 2. GCA also refutes Valpak’s assertion that the Postal Service’s interests would always be aligned with a third-party submitter, especially in circumstances where the Postal Service elected not to pursue a business relationship with the third party. *Id.* at 4–7. GCA recommends that the Commission adopt the rules as proposed in Order No. 194. *Id.* at 7.

The Commission is not persuaded by Valpak’s assertions. First, 39 U.S.C. 504 makes no reference to third-party non-public materials. 39 U.S.C. 504(g)(1) provides:

If the Postal Service determines that any document or other matter it provides to the Postal Regulatory Commission * * * contains information which is described in section 410(c) of this title, or exempt from public disclosure under section 552(b) of title 5, 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).

All that follows the 504(g)(1) introduction is predicated on the Postal Service’s submission and determination that a document is exempt from disclosure under 39 U.S.C. 410(c) or 5 U.S.C. 552(b). The balancing test set forth in 39 U.S.C. 504(g)(3)(A) also only takes into account “commercial injury to the Postal Service” and “public interest in maintaining the financial transparency of a government establishment competing in commercial markets[,]” two factors which are not applicable to third-party materials.⁵

Second, the test in 39 U.S.C. 504(g)(3)(A) focuses on commercial injury to the Postal Service, and it does not protect third-party interests directly. For example, the Postal Service is presumably indifferent if “Company A” loses market share to “Company B” provided their volumes are shipped via the Postal Service. As GCA points out, Valpak’s contention that only the statutory language should apply offers inadequate protection of third-party interests.

GCA’s comment and hypothetical that third-party non-public materials which

⁴ Comments of Valassis Direct Mail, Inc. on Second Notice of Proposed Rulemaking (Valassis Comments); Comments of the United States Postal Service in Response to Second Notice of Proposed Rulemaking (Postal Service Comments); Public Representative Comments on Second Notice of Proposed Rulemaking to Establish a Procedure for According Appropriate Confidentiality (Public Representative Comments); 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), all filed on April 27, 2009; Comments of Discover Financial Services, April 28, 2009 (DFS Comments); Reply Comments of the Greeting Card Association, May 11, 2009 (GCA Reply Comments); Reply Comments of the United States Postal Service in Response to Second Notice of Proposed Rulemaking, May 11, 2009 (Postal Service Reply Comments); and Reply Comments of the Parcel Shippers Association in Response to Second Notice of Proposed Rulemaking, May 12, 2009 (PSA Reply Comments).

The Motion of Discover Financial Services for Late Acceptance of Comments, filed on April 28, 2009, is granted.

⁵ This is not to minimize the importance of financial transparency of the government entity itself.

belong to a party no longer in negotiations or partnership with the Postal Service and would not implicate any commercial injury to the Postal Service is well taken. See GCA Reply Comments at 4–6. By its reading of 39 U.S.C. 504(g)(3)(A), Valpak would impose an exclusive test for determining the status of non-public materials when the statute does not require it, and significantly, regardless of the legitimate interests of third parties in the non-public materials at issue.

Third-party non-public materials are not referenced in 39 U.S.C. 504; however, the Commission receives such materials in the course of exercising its duties under title 39. Therefore, the Commission must exercise its general authority under 39 U.S.C. 503 to create a procedure for the treatment of such third-party non-public materials. The Commission adopts the standard as proposed in § 3007.33(b).

Third, Valpak's claim that the Commission's proposed rules conflict with 39 U.S.C. 504(g)(3)(B) is not persuasive. 39 U.S.C. 504(g)(3)(B) directs the Commission to develop "procedures for ensuring appropriate confidentiality[.]" but it does not state that those "procedures" are exclusively the "procedural remedies" found in Federal Rule of Civil Procedure 26(c). For example, 39 U.S.C. 504(g)(3)(A) directs the Commission to adopt regulations "that establish a procedure for according appropriate confidentiality * * *." Part 3007 contains the regulations that establish a procedure for according appropriate confidentiality. By Valpak's logic, the Commission would be barred from introducing any substantive elements to its rules which establish such a procedure.

The Commission, therefore, adopts the procedures for ensuring appropriate confidentiality for access to non-public materials as described in §§ 3007.42 and 3007.52.

Notice requirement for expedited requests. Valassis recommends that when third-party non-public materials are requested under §§ 3007.40 and 3007.50, the requesting party should provide that third party with actual notice of the request to allow the Commission to resolve the issue in an expedited manner. Valassis Comments at 1–3. Discover Financial Services supports the notion of "actual notice" to the third party with a proprietary interest, but also believes a 7-day time to respond would be more appropriate. DFS Comments at 2–4. Parcel Shippers Association also agrees that actual notice is appropriate, and suggests that the Commission adopt Valassis's

proposed language. See PSA Reply Comments. Finally, the Postal Service supports the actual notice requirement, but questions how a requester should get access to the name of the appropriate party. Postal Service Reply Comments at 2–4.

Valassis's suggestion is reasonable and is adopted. The 3-day response period is designed to expedite access to non-public materials. Requiring actual notice to the third party in the form of a conversation or e-mail exchange will ensure that the third party has timely notice and an opportunity to respond. Moreover, the requirement is not burdensome.

The Postal Service expresses concern regarding situations where the third party's identity may be confidential. In considering this issue, the Commission finds it appropriate to add § 3007.21(c)(2), which instructs the Postal Service to provide the name and contact information for the appropriate third party or for a Postal Service employee if the third party's identity is confidential. The Commission also finds it appropriate to add to §§ 3007.40(b)(1) and 3007.50(b)(1) to provide that actual notice may be accomplished by a face-to-face or telephone conversation or e-mail exchange.

Public Representative's suggestions. The Public Representative suggests that the rules redefine "non-public materials" to include a caveat that they are non-public upon identification by the Postal Service or third party, unless disclosure has been ordered under this part. Public Representative Comments at 4.

The Commission agrees that refining the definition of non-public materials will clarify an ambiguity in the rules, and modifies the definition in § 3007.1(b) accordingly.

The Public Representative also suggests that the Commission create a cross-reference within the confidentiality rules to the rules in part 3004 governing Freedom of Information Act procedures. *Id.* The Postal Service opposes this suggestion, arguing that the Commission may become a *de facto* Freedom of Information Act appellate body.

The Commission does not agree that it is appropriate to overlap the Freedom of Information Act requests and requests for access or disclosure under the confidentiality rules. The Commission will shortly revise its rules governing Freedom of Information Act procedures, and will resolve any ambiguity in its revisions to part 3004.

The Public Representative also asserts that the phrase "the Commission may issue an order" used in §§ 3007.40(d)(2)

and 3007.50(d)(2) is unclear. *Id.* at 5–6. The rule, according to the Public Representative, is ambiguous as to when a person could attain access to non-public materials when no objection is made. *Id.* The Postal Service believes that it is "a consistent expectation on the part of all parties that access is available only by order of the Commission* * *." Postal Service Reply Comments at 3–4. However, the Postal Service believes that the use of the word "may" preserves the Commission's discretion to preemptively quash an inappropriate request. *Id.* at 4.

The Commission agrees with the Public Representative and the Postal Service that access to non-public materials should only be granted following an appropriate order or ruling. The Commission also agrees with the Postal Service that discretion should be maintained for the Commission, *sua sponte*, to issue an order quashing an inappropriate request. Therefore, the Commission finds it appropriate to add language to §§ 3007.40 and 3007.50 that access commences only following the issuance of an appropriate order or ruling.

Finally, the Public Representative makes two minor editorial suggestions. First, the Public Representative suggests altering the title of § 3007.24 to read "Commission and Court access to non-public materials." Public Representative Comments at 6. In the same rule, the Public Representative recommends editing paragraph (a)(2) of this section to read "Commission employees including public representatives carrying out their appropriate responsibilities;" *Id.*

The Commission agrees with the Public Representative that the rules will benefit from these suggestions and revises the rules accordingly.

IV. Section-by-Section Analysis

Below, the Commission provides a concise description of each rule, designed to assist commenters in understanding the scope and nature of the rules and changes.

Rule 3007.1 Definitions. This provision sets forth definitions of terms used in part 3007. The term "non-public materials" is defined as any information, documents, and things filed by the Postal Service which, pursuant to 39 U.S.C. 504(g), it determines to be exempt from disclosure. The term is also used to describe materials submitted by the Postal Service or other party in which a third party has a proprietary interest, *i.e.*, the third party believes is protectable under Federal Rule of Civil Procedure 26(c). Section 3007.1(b) is

edited to state that non-public materials are no longer non-public if such status expires or is terminated pursuant to this part. As used in the rules, the phrase "materials claimed to be non-public" has the same meaning as "non-public materials."

Rule 3007.2 Scope. This provision sets forth the scope of information, documents, and things that the Commission (or its authorized representative) may require the Postal Service to provide in connection with the Commission's responsibilities under chapter 36 of title 39 of the United States Code. It is intended to encompass information, documents, and things in whatever form likely to materially assist the Commission in fulfilling its statutory responsibilities.

Rule 3007.3 Data or information requests. This rule provides that the Commission, or its authorized representative, may issue data or information requests to the Postal Service concerning materials covered by § 3007.2. Under this rule, a person may request that the Commission issue such a request. Consistent with commenters' suggestions that the Commission protect third-party non-public material, paragraph (c) is added to this rule to allow the Commission to issue a data or information request to a third party.

Rule 3007.10 Submission of non-public materials under seal. This rule sets forth the manner in which non-public materials are to be filed with the Commission. More specifically, it provides that non-public materials are not to be filed electronically pursuant to § 3001.9, but are to be filed in sealed envelopes clearly marked as confidential. The rule requires non-public materials to be filed in hard copy as well as electronic form (compact discs), with the latter subject to certain conditions to ensure their utility. In addition, the rule requires that a redacted copy of the non-public materials be filed electronically pursuant to § 3001.9. The rule also requires that when the Postal Service or third party files redacted copies of non-public materials in electronic form, they must be in a searchable format (such as searchable Adobe PDF format), but spreadsheets, data files, or programs must be in native format. The method of redaction for hard copy submissions under this rule shall be the "blackout" or "graphical" redaction method unless the Postal Service or third party identifies particular, likely injury which may result from the use of such a method. If any other method is used, the Postal Service or third party must indicate, at the site of each redaction, in

lines or pages, the amount of material removed.

Rule 3007.20 Application for non-public treatment. This rule directs the Postal Service to file an application for non-public treatment whenever it files non-public materials. It also instructs the Postal Service to contact any third party, which may have a proprietary interest in materials filed with the Commission to give that party an opportunity to file an application for non-public treatment, and address its confidentiality concerns directly with the Commission.

Rule 3007.21 Content of the Postal Service application for non-public treatment. This rule requires the Postal Service to identify the materials it asserts are non-public and to provide a detailed statement in support thereof, addressing, among other things, the rationale for the claim, including the statutory authority, the nature and extent of any commercial harm, a hypothetical example of such harm, the extent of public protection from public disclosure deemed necessary, and any other factors relevant to the application for non-public treatment. The rule also requires the Postal Service to identify and provide contact information for any third party who is known to have a proprietary interest in the non-public materials, or in the alternative, to provide contact details for a Postal Service employee who shall provide notice to that third party.

Rule 3007.22 Content of third-party applications for non-public treatment. This rule gives guidance to a third party with a proprietary interest in non-public materials on the content of an application for non-public treatment. The rule directs the third party to provide justification for non-public treatment of materials it believes should not be publicly disclosed or accessed.

Rule 3007.23 Treatment of non-public materials. This rule provides that the Commission will not disclose non-public materials except as pursuant to the rules in part 3007.

Rule 3007.24 Commission access to non-public materials. This rule permits Commissioners, Commission employees, including public representatives, other persons assisting the Commission in carrying out its statutory duties, and reviewing court personnel access to non-public materials subject to the limitations in 39 U.S.C. 504(g)(2)(A) and (B). Access to non-public materials for all persons not covered by this rule is by motion under §§ 3007.40 and 3007.50.

Rule 3007.25 Use of non-public materials. This rule states that persons with access to non-public materials

under § 3007.24 may not use non-public materials for purposes other than those for which they were supplied or allow any other person to have access to the non-public materials.

Rule 3007.30 Termination of non-public status. This rule states that non-public status shall expire 10 years after filing, unless otherwise provided by the Commission or its authorized representative.

In the context of FOIA requests under part 3004, the Commission provides that information submitted to the Commission and claimed to be exempt from disclosure under 5 U.S.C. 552(b) (namely, trade secrets or commercially or financially sensitive materials) will lose any such exemption 10 years after its submission. The Commission believes that a 10-year sunset provision in this instance will also serve administrative convenience and sound records management practices while adequately protecting the commercial interest of the Postal Service.

Rule 3007.31 Request for early termination of non-public status. This rule states that any person may request that non-public status be removed from materials filed with the Commission. The rule gives details of the form and procedure of such a request. A request for early termination of non-public status must specifically address the Postal Service or third-party claims in its application for non-public treatment.

If a request for early termination of non-public status is made, the Postal Service or any third party with a proprietary interest may submit an answer within 7 days (or such longer period as specified in the notice). Given the expedited timetables under which the Commission ordinarily operates, this rule does not allow any filings after the initial answers. Thus, requests and answers should address all issues relevant to whether the non-public materials should be publicly disclosed. Following the receipt of the answers, if any, the Commission will issue an order concerning the appropriate status of the non-public materials.

Rule 3007.32 Preliminary determination of non-public status. This rule recognizes that as a matter of course, the Commission will review Postal Service materials designated as non-public for substance, and in the course of such review may have cause to question the claim that part or all of the materials should not be disclosed. Thus, the rule provides that the Commission may issue a notice of preliminary determination concerning the appropriate degree of protection, if

any, to be accorded non-public materials filed by the Postal Service.⁶

If a preliminary determination of non-public status is made, the Postal Service or any third party with a proprietary interest may submit an answer within 7 days (or such longer period as specified in the notice). Given the expedited timetables under which the Commission ordinarily operates, this rule does not allow any filings after the initial answers. Thus, those answers should address all issues relevant to whether the non-public materials should be publicly disclosed. Following the receipt of the answers, if any, the Commission will issue an order concerning the appropriate status of the non-public materials.

Rule 3007.33 Standard for decision for early termination of non-public status. Paragraph (a) of this rule sets out the balancing test prescribed in 39 U.S.C. 504(g)(3)(A) for determining the appropriate degree of confidentiality to be accorded Postal Service non-public materials for which a request for early termination of non-public status or a preliminary determination of non-public status has been made. Paragraph (b) of this rule sets out the balancing test, adapted from 39 U.S.C. 504(g)(3)(A), applicable to a request for early termination of non-public status for materials in which the Commission determines that a third party has proprietary interest.

Rule 3007.40 Request for access to non-public materials. This rule provides that any person, during a Commission proceeding and pursuant to the Commission's rules of practice, may make a motion to request access to non-public materials filed by the Postal Service under 39 U.S.C. 504(g)(1). Any person requesting access must file a motion, which must include a detailed statement in support of granting access. The person requesting access must identify all relevant affiliations, including employer, organization, agency or contractual relationships, and ties to the delivery services, communications, or mailing industry.⁷

Given the expedited timetables under which the Commission generally operates, these rules contemplate procedures that will expedite the

process. Thus, this rule provides that the person submitting the motion may agree in advance to execute and attach protective conditions and must provide actual notice to any third party previously identified as having a proprietary interest in the non-public materials or the Postal Service's designee for such notice as identified in § 3007.21(c). In that event, answers to the motion are due within 3 days.⁸

Recognizing that protective conditions may vary based on the nature of the non-public materials at issue, the Commission encourages any person attaching protective conditions to tailor the conditions to fit that situation, e.g., limiting access to competitive information to certain individuals. Persons attaching protective conditions should describe those conditions, particularly alterations to the standard form. If an executed copy of protective conditions is not attached, answers to the motion are due in 7 days. Following the filing of the answer, the Commission may issue an order concerning access to the non-public materials, or, if protective conditions are approved by the Postal Service or third party with a proprietary interest, the Commission or its authorized representative will grant access subject to the agreed protective conditions.

The rule explicitly provides that access shall commence only following an appropriate order or ruling.

Rule 3007.41 Termination of access to non-public materials. This rule states that access obtained under § 3007.40 terminates for all persons when the proceeding during which the materials were requested ends (by Commission order or report) or the person otherwise withdraws or ceases to be involved in the proceeding. Access granted under § 3007.40 may be maintained, subject to any applicable protective conditions, pending action on a motion to continue access made under § 3007.50.

Rule 3007.42 Standard for decision for request for access to non-public materials. This rule creates a balancing test to accord appropriate confidentiality. This test directs the Commission to balance the interests of the parties, similar to balancing done in Federal civil litigation under Federal Rule of Civil Procedure 26(c). The standard balances the need of the requesting party to have access to participate effectively in a Commission proceeding against the Postal Service or third party with a proprietary interest in

the materials rights derived from section 26 of the Federal Rules of Civil Procedure.

Rule 3007.50 Request for access to non-public materials relevant to compliance. This rule provides procedures for any interested person to request access to non-public materials relevant to the ACD when outside an ongoing Commission proceeding. This rule also allows a person who has access subject to protective conditions (under §§ 3007.40 or 3007.50) to file a motion to continue access if the materials are relevant to compliance under 39 U.S.C. 3653. Any person requesting access must file a motion, which includes a statement justifying why access should be granted, and stating how the requested materials are relevant to the Commission's annual determination of compliance under 39 U.S.C. 3653. As with § 3007.40, the person requesting access must identify all relevant affiliations to assist the Postal Service in determining whether to object to access.

Given the short timetables under which the Commission often must operate, the rules provide procedures that will expedite the process. Thus, this rule provides that the person submitting the motion may execute and attach to the motion protective conditions and must provide actual notice to any third party previously identified as having a proprietary interest in the non-public materials or the Postal Service's designee for such notice as identified in § 3007.21(c). In that event, answers to the motion are due within 3 days.

Recognizing that protective conditions may vary based on the nature of the non-public materials at issue, the Commission encourages any person attaching protective conditions to tailor the conditions to fit that situation, e.g., limiting access to competitive information to certain individuals. Persons attaching protective conditions should describe those conditions, particularly alterations to the standard form. If a copy of executed protective conditions is not attached, answers to the motion are due in 7 days. Following the filing of any answers, the Commission may issue an order concerning access to the non-public materials, or, if protective conditions are approved by the Postal Service or third party with a proprietary interest, the Commission or its authorized representative will grant access subject to the agreed protective conditions.

Under this rule, a person previously granted access to materials may make requests for continuing access to non-public materials.

⁶ This aspect of the rule is designed to enable the Commission to address claims of confidentiality by the Postal Service or a third party on its own initiative. It is not intended to imply that the Commission will necessarily make a preliminary determination with respect to each filing by the Postal Service of non-public materials.

⁷ Industry affiliations of the party requesting access to materials designated as protected by the Postal Service are disclosed to enable the Postal Service to determine whether to object in the context of an expedited matter.

⁸ Consistent with the Commission's rules, any prescribed time period of 5 days or less excludes Saturdays, Sundays and legal holidays. See § 3001.15.

Rule 3007.51 Termination of access to non-public materials relevant to compliance. This rule states that access terminates for all persons with access under § 3007.50 when the Commission issues its next ACD or the person otherwise withdraws or ceases to be involved. This rule also allows a person who has access to maintain access, subject to any applicable protective conditions, pending action on a motion to continue access made under § 3007.50.

Rule 3007.52 Standard for decision for request for access to non-public materials relevant to compliance. This rule creates a balancing test to accord appropriate confidentiality when determining restrictions on access to materials requested by a person which are relevant to the ACD. The standard instructs the Commission to balance the parties' interests, similar to balancing done by the Federal courts under Federal Rule of Civil Procedure 26(c).

Rule 3007.60 Limitations on access to non-public materials. This rule identifies various limitations on access to non-public materials that may be ordered by the Commission pursuant to 39 U.S.C. 504(g)(3)(B). These limitations, which are generally similar to relief provided by Federal civil courts in discovery disputes under section 26(c) of the Federal Rules of Civil Procedure include, *inter alia*, not requiring the public disclosure of the materials, specifying the terms for public disclosure, ordering a specific method of disclosure, restricting to whom the information may be disclosed, specifying a time when access terminates, and such other relief as the Commission deems appropriate.

Rule 3007.61 Continued effectiveness of protective conditions. This rule specifies procedures to be followed if a court or other administrative agency issues a subpoena for (or otherwise orders production of) non-public materials which a person has obtained pursuant to a protective order issued by the Commission. This rule requires that any person required to disclose non-public materials make a good faith effort to obtain protective conditions in accord with those prescribed by the Commission. The rule also provides that unless overridden by the reviewing court, the protective conditions of the Commission (or its authorized representative) remain in effect. The procedures require notice to the Postal Service.

Rule 3007.62 Sanctions for violations of protective conditions. This rule reiterates that the protective conditions bar the dissemination of non-public materials by every person

granted access to such materials to any person not authorized to access such materials. The rule provides sanctions for any person contravening the protective conditions. The sanctions include dismissing the proceeding in whole or part, issuing a default judgment against the violator of the protective conditions, and such other relief as the Commission (or its authorized representative) deems appropriate. In addition, the rule provides that the Postal Service may pursue whatever remedies may be available to it under law against the violator as well as the entity on whose behalf that person was acting.

V. Ordering Paragraphs

It is Ordered:

1. The Commission hereby adopts the final rules applicable to treatment of non-public materials that follow the Secretary's signature into the Commission's Rules of Practice and Procedure to appear in 39 CFR part 3007.

2. These rules shall take effect 30 days after publication in the **Federal Register**.

3. The Secretary shall arrange for publication of this order in the **Federal Register**.

List of Subjects in 39 CFR Part 3007

Administrative practice and procedure, Confidential business, Postal Service.

By the Commission.

Steven W. Williams,
Secretary.

■ For the reasons discussed above, the Commission amends 39 CFR chapter III by adding part 3007 to read as follows:

PART 3007—TREATMENT OF NON-PUBLIC MATERIALS PROVIDED BY THE POSTAL SERVICE

Sec.

- 3007.1 Definitions for purposes of this part.
- 3007.2 Scope.
- 3007.3 Data or information requests.
- 3007.10 Submission of non-public materials under seal.
- 3007.20 Application for non-public treatment.
- 3007.21 Content of the Postal Service application for non-public treatment.
- 3007.22 Content of third-party application for non-public treatment.
- 3007.23 Treatment of non-public materials.
- 3007.24 Commission access to non-public materials.
- 3007.25 Use of non-public materials.
- 3007.30 Termination of non-public status.
- 3007.31 Request for early termination of non-public status.
- 3007.32 Preliminary determination of non-public status.

- 3007.33 Standard for decision for early termination of non-public status.
- 3007.40 Request for access to non-public materials.
- 3007.41 Termination of access to non-public materials.
- 3007.42 Standard for decision for request for access to non-public materials.
- 3007.50 Request for access to non-public materials relevant to compliance.
- 3007.51 Termination of access to non-public materials relevant to compliance.
- 3007.52 Standard for decision for request for access to non-public materials relevant to compliance.
- 3007.60 Limitations on access to non-public materials.
- 3007.61 Continued effectiveness of protective conditions.
- 3007.62 Sanctions for violations of protective conditions.
- Appendix A to Part 3007—Statement of Compliance with Protective Conditions

Authority: 39 U.S.C. 503, 504.

§ 3007.1 Definitions for purposes of this part.

(a) *Authorized representative* means any Commissioner designated by the Chairman, any administrative law judge appointed by the Commission under 5 U.S.C. 3105, and any employee of the Commission designated by the Commission. The authorized representative may administer oaths, examine witnesses, take depositions, and receive evidence with respect to any proceeding before the Commission under title 39 of the U.S. Code or obtain information to assist the Commission in the preparation of a report or performance of a function under title 39 of the U.S. Code.

(b) *Non-public materials* means any information, documents, and things filed with the Commission which are claimed to be exempt from disclosure by the Postal Service pursuant to 39 U.S.C. 504(g), 3652(f) or 3654(f), or claimed to be protectable under Federal Rule of Civil Procedure 26(c) by a third party with a proprietary interest in the materials. Non-public materials cease to be non-public if the status has expired or been terminated by the Commission pursuant to this part.

§ 3007.2 Scope.

The Commission or its authorized representative may require the Postal Service to provide any information, documents, and things in its possession or control, or any information, documents, and things that it can obtain through reasonable effort and expense, that are likely to materially assist the Commission in its conduct of proceedings, in its preparation of reports, or in performance of its functions under title 39 of the U.S. Code. Information, documents, and

things the Postal Service may be required to provide, include, but are not limited to, paper hard copy and electronically stored data and materials—including writings, notes, e-mails, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations—stored in any medium from which information can be obtained either directly or, if necessary, after translation into a reasonably usable form; or any tangible things.

§ 3007.3 Data or information requests.

(a) The Commission or its authorized representative may issue data or information requests to the Postal Service seeking information, documents, and things covered by § 3007.2. A data or information request shall describe the documents, information, and things sought, briefly explain the reason for the request, and specify a timeframe for receiving the requested information and materials.

(b) The Commission or its authorized representative may issue data or information requests to third parties seeking any information, document or thing. A data information request shall describe the documents, information and things sought, briefly explain the reason for the request, and specify a timeframe for receiving the requested materials.

(c) Any person may request that the Commission issue a data or information request by filing a motion with the Commission, pursuant to § 3001.21 of this chapter, 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 of the U.S. Code.

§ 3007.10 Submission of non-public materials under seal.

(a) Non-public materials shall not be filed electronically pursuant to § 3001.9 of this chapter, but shall be filed in sealed envelopes clearly marked "Confidential. Do Not Post on Web." The person filing the non-public materials shall submit two copies consisting, where practicable, of two paper hard copies as well as two copies in easily usable electronic form such as compact discs (CDs) or digital video discs (DVDs) of the non-public materials which shall also be clearly marked "Confidential. Do Not Post on Web." Spreadsheets submitted in electronic form shall display the formulas used, their links to related spreadsheets, and shall not be password protected. All

workpapers or data shall be submitted in a form, and be accompanied by sufficient explanation and documentation to allow them to be replicated using a publicly available PC application. Each page of any paper hard copy non-public materials submitted shall be clearly marked as non-public.

(b) The person submitting the non-public materials shall also file an electronic public (redacted) copy of the non-public materials pursuant to § 3001.9 of this chapter. The electronic public (redacted) copy of the materials which are not spreadsheets, data files, or programs must be submitted in a searchable electronic format, but need not be submitted in its native format. As part of its publicly available electronic filing, the Postal Service must appropriately redact materials that contain both public and non-public information. For example, the Postal Service may not identify a whole page or a whole table as non-public materials if the page or table contains both public and non-public information, but must redact only the information it claims to be non-public. If practicable, the Postal Service shall sequentially number each page of the materials identified as non-public.

(c) The Postal Service or third party shall use the graphical redaction (blackout) method for all redacted materials. Should the Postal Service wish to use any other method, it must state with particularity the competitive harm associated with use of the graphical redaction method to justify the use of any other method, and indicate the number of lines or pages removed at each redaction.

(d) The Postal Service or third party shall mark each page, item, and thing, or portion thereof, that it seeks to protect from disclosure in a manner reasonably calculated to alert custodians to the confidential nature of the information or materials.

§ 3007.20 Application for non-public treatment.

(a) Whenever the Postal Service files non-public materials with the Commission, it shall at the same time file an application for non-public treatment under § 3007.21.

(b) Before the Postal Service files non-public materials with the Commission which the Postal Service has reason to believe may implicate a third-party proprietary interest, the Postal Service shall inform each such third party:

(1) Of the nature and scope of the filing with the Commission, including the pertinent docket, and

(2) That it may address its confidentiality concerns directly with the Commission.

(c) A third party with a proprietary interest in the materials may, if it deems necessary, independently seek non-public treatment under § 3007.22.

§ 3007.21 Content of the Postal Service application for non-public treatment.

(a) Whenever the Postal Service files non-public materials with the Commission, it must submit an application for non-public treatment that clearly identifies all non-public materials and describes the circumstances causing them to be submitted to the Commission.

(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.

(c) The application for non-public treatment must include a specific and detailed statement setting forth:

(1) The rationale for claiming that the materials are non-public, including the specific statutory basis for the claim, and a statement justifying application of the provision(s);

(2) Identification, including name, phone number, and e-mail address for any third party who is known to have a proprietary interest in the materials, or if such an identification is sensitive, contact information for a Postal Service employee who shall provide notice to that third party;

(3) A description of the materials claimed to be non-public in a manner that, without revealing the materials at issue, would allow a person to thoroughly evaluate the basis for the claim that they are non-public;

(4) Particular identification of the nature and extent of commercial harm alleged and the likelihood of such harm;

(5) At least one specific hypothetical, illustrative example of each alleged harm;

(6) The extent of protection from public disclosure deemed to be necessary;

(7) The length of time deemed necessary for the non-public materials to be protected from public disclosure with justification thereof; and

(8) Any other factors or reasons relevant to support the application.

§ 3007.22 Content of third-party application for non-public treatment.

(a) The application for relief from public disclosure submitted by a party other than the Postal Service must clearly identify all materials believed to be protected from disclosure.

(b) The application for non-public treatment must include a specific and detailed statement setting forth:

(1) A description of the materials claimed to be non-public in a manner that, without revealing the materials at issue, would allow a person to thoroughly evaluate the basis for the claim that they are non-public;

(2) Particular identification of the nature and extent of the harm alleged and the likelihood of such harm; and

(3) Any other factors or reasons relevant to support the application.

§ 3007.23 Treatment of non-public materials.

The Commission or its authorized representative will not publicly disclose or grant access to non-public materials except as provided in the rules of this part.

§ 3007.24 Commission and court access to non-public materials.

(a) Non-public materials may be disclosed to the following persons:

- (1) Members of the Commission;
- (2) Commission employees including public representatives carrying out their appropriate responsibilities;
- (3) Contractors, attorneys, or other subject matter experts assisting the Commission in carrying out its statutory duties;

(4) Reviewing courts and their staffs; or

(5) Court reporters, stenographers, or persons operating audio or video recording equipment for such court reporters or stenographers at hearings or depositions.

(b) Access to non-public materials for all persons not covered by this section is pursuant to §§ 3007.40 and 3007.50.

§ 3007.25 Use of non-public materials.

Except as pursuant to this part, persons with access to non-public materials under § 3007.24 may not:

(a) Use such materials for purposes other than the purposes for which they are supplied.

(b) Permit anyone who is not allowed access under § 3007.24 to have access to any such materials.

§ 3007.30 Termination of non-public status.

Ten years after the date of filing with the Commission, non-public materials shall lose non-public status unless the Commission or its authorized representative enters an order extending the duration of that status.

§ 3007.31 Request for early termination of non-public status.

(a) Any person may make a request to the Commission that non-public materials be publicly disclosed. Each such request shall provide a specific and detailed statement justifying why

the non-public materials should be made public, giving specific recognition to any pertinent rationale(s) provided in the application for relief submitted pursuant to § 3007.21 or § 3007.22. The request, however, shall not publicly disclose any of the non-public materials. If it is necessary to use the non-public materials to formulate the argument in favor of public disclosure, the argument utilizing the non-public materials shall be filed under seal.

(b) Any interested person, including the Postal Service, may file a response to the request within 7 days after such a request is filed, unless a longer period is specified by the Commission.

(c) Unless the Commission otherwise provides, no reply to a response filed pursuant to paragraph (a) of this section shall be filed.

(d) Following the filing of responses, if any, the Commission will issue an order determining the appropriate degree of protection, if any, to be accorded to the materials claimed to be non-public by the Postal Service or third party with a proprietary interest in the materials.

§ 3007.32 Preliminary determination of non-public status.

(a) Whenever the Postal Service files non-public materials, the Commission may issue a notice of preliminary determination concerning the appropriate degree of protection, if any, to be accorded to such materials.

(b) Any interested person, including the Postal Service, may file a response to the Commission's notice of preliminary determination within 7 days after such a notice is filed, unless a longer period is specified.

(c) Unless the Commission otherwise provides, no reply to a response filed pursuant to paragraph (b) of this section shall be filed.

(d) Following the filing of responses, if any, the Commission will issue an order determining the appropriate degree of protection, if any, to be accorded to the materials claimed to be non-public by the Postal Service or third party with a proprietary interest in the materials.

§ 3007.33 Standard for decision for early termination of non-public status.

(a) In determining whether to publicly disclose non-public materials filed by the Postal Service, the Commission shall balance the nature and extent of the likely commercial injury identified by the Postal Service against the public interest in maintaining the financial transparency of a government entity competing in commercial markets.

(b) In determining whether to publicly disclose non-public materials in which

the Commission determines a third party has a proprietary interest, the Commission shall balance the interests of the parties based on Federal Rule of Civil Procedure 26(c).

§ 3007.40 Request for access to non-public materials.

(a) During a Commission proceeding, any person may file a motion pursuant to § 3001.21 of this chapter requesting access to non-public materials. The motion shall include:

(1) A detailed statement providing justification for access; and

(2) A list of relevant affiliations, including employment or other relationship (including agent, consultant or contractor) with the party requesting access, and whether that party is affiliated with the delivery services, communications or mailing industries.

(b) To expedite the process, each person seeking access to non-public materials may attach to the motion an executed copy of protective conditions such as those provided in Appendix A of this part.

(1) If an executed copy of protective conditions is attached and if actual notice of the motion has been provided by conversation or e-mail exchange to all persons identified by the Postal Service under § 3007.2(c), answers are due within 3 days after such a motion is filed.

(2) In all other circumstances, answers are due within 7 days after such a motion is filed.

(c) Unless the Commission otherwise provides, no reply to an answer filed pursuant to paragraph (b)(1) or paragraph (b)(2) of this section shall be filed.

(d) Following the filing of answers, if any:

(1) The Commission will issue an order allowing or denying access and setting forth the appropriate protective conditions, if any, to be accorded non-public materials, or

(2) If the Postal Service or third party with a proprietary interest does not contest a person's access subject to agreed protective conditions, the Commission or its authorized representative may issue an order allowing access subject to the agreed protective conditions.

§ 3007.41 Termination of access to non-public materials.

(a) Except as provided in paragraph (b) of this section, access to non-public materials obtained under § 3007.40 terminates either when the Commission issues a final order or report in the relevant proceeding or the person

withdraws or is otherwise no longer involved in the proceeding, whichever occurs first. For purposes of this section, an order or report is not considered final until after the possibility of judicial review expires.

(b) Access to non-public materials shall continue for persons seeking continued access under § 3007.50.

(c) Upon termination of access under paragraph (a) of this section, all non-public materials in a person's possession must be destroyed, and the form attached to the protective conditions certifying destruction must be executed and filed with the Commission.

§ 3007.42 Standard for decision for request for access to non-public materials.

In determining whether to grant a request for access to non-public materials, the Commission shall balance the interests of the parties based on Federal Rule of Civil Procedure 26(c).

§ 3007.50 Request for access to non-public materials relevant to compliance.

(a) Any person may file a motion pursuant to § 3001.21 of this chapter requesting access to, or continued access to, non-public materials relevant to compliance under 39 U.S.C. 3653. The motion shall include:

(1) A detailed statement providing justification for access, including reference to the materials' relevance to compliance under chapter 36 of title 39 of the U.S. Code; and

(2) A list of relevant affiliations, including employment or other relationship (including agent, consultant or contractor) with the party requesting access, and whether that party is affiliated with the delivery services, communications or mailing industries.

(b) To expedite the process, each person seeking access to non-public materials may attach to the motion an executed copy of protective conditions such as those provided in Appendix A of this part.

(1) If an executed copy of protective conditions is attached and if actual notice of the motion has been provided by conversation or e-mail exchange to all persons identified by the Postal Service under § 3007.21(c), answers are due within 3 days after such a motion is filed.

(2) In all other circumstances, answers are due within 7 days after such a motion is filed.

(c) Unless the Commission otherwise provides, no reply to an answer filed pursuant to paragraph (b)(1) or paragraph (b)(2) of this section shall be filed.

(d) Following the filing of answers, if any:

(1) The Commission will issue an order allowing or denying access and setting forth the appropriate protective conditions, if any, to be accorded the non-public materials, or

(2) If the Postal Service or third party with a proprietary interest does not contest a person's access subject to agreed protective conditions, the Commission or its authorized representative may issue an order allowing access subject to the agreed protective conditions.

§ 3007.51 Termination of access to non-public materials relevant to compliance.

(a) Access to non-public materials obtained under § 3007.50 terminates either when the Commission issues its next Annual Compliance Determination (ACD) or the person withdraws or is otherwise no longer involved in the relevant proceeding, whichever occurs first.

(b) Access to non-public materials shall continue for persons seeking continued access under § 3007.50.

(c) Upon termination of access under paragraph (a) of this section, all non-public materials in a person's possession must be destroyed, and the form attached to the protective conditions certifying destruction must be executed and filed with the Commission.

§ 3007.52 Standard for decision for request for access to non-public materials relevant to compliance.

In determining whether to grant a request for access to non-public materials relevant to compliance, the Commission shall balance the interests of the parties based on Federal Rule of Civil Procedure 26(c).

§ 3007.60 Limitations on access to non-public materials.

To afford appropriate confidentiality to non-public materials during any stage of a proceeding before the Commission, or in connection with any other purpose under title 39 of the U.S. Code, the Commission may, based on Federal Rule of Civil Procedure 26(c):

(a) Prohibit the public disclosure of the non-public materials;

(b) Specify terms for public disclosure of the non-public materials;

(c) Order a specific method for disclosing the non-public materials;

(d) Restrict the scope of the disclosure of the non-public materials as they relate to certain matters;

(e) Restrict who may have access to non-public materials;

(f) Require that a trade secret be revealed only in a specific and limited

manner or to limited or specified persons; and

(g) Order other relief as appropriate including, but not limited to, sealing a deposition or part of a proceeding.

§ 3007.61 Continued effectiveness of protective conditions.

(a) If a court or other administrative agency issues a subpoena or orders production of non-public materials which a person has obtained under protective conditions ordered by the Commission, the target of the subpoena or order shall, within 2 days of receipt of the subpoena or order for production, notify the Postal Service of the pendency of the subpoena or order to allow the Postal Service time to object to the production or to seek a protective order or seek such other relief as it deems appropriate.

(b) Any person seeking to disclose non-public materials shall make a good faith effort to obtain protective conditions at least as effective as those set forth in the Commission order establishing the protective conditions.

(c) Protective conditions ordered by the Commission or its authorized representative shall remain in effect throughout any subsequent review unless overridden by the action of the reviewing court.

§ 3007.62 Sanctions for violations of protective conditions.

(a) No person who has been granted access to materials subject to protective conditions shall disseminate the materials in whole or in part to any person not authorized to obtain access under the protective conditions imposed by the Commission. If a person who has been granted access to such non-public materials under a protective order violates the terms of such order, the Commission or its authorized representative shall impose sanctions on the person who violated the protective order or the individuals or entities on whose behalf the person was acting, or both. The sanctions may include:

(1) Dismissing the proceeding in whole or in part;

(2) Ruling by default against the person who violated the protective order; and

(3) Such other sanctions as the Commission or its authorized representative deems appropriate.

(b) The Postal Service, in its discretion, may pursue any remedies available to it under the law against the individual who violated the protective order, or the individuals or entities on whose behalf the person was acting, or both.

Appendix A to Part 3007—Statement of Compliance with Protective Conditions

The Postal Service (or a third party) has filed non-public materials identified as _____ in Commission Docket No. (if any) _____. The Postal Service (or a third party) requests confidential treatment of the materials (hereinafter “these materials”).

The following protective conditions limit access to these materials identified as _____ by the Postal Service (or third party). Each person seeking to obtain access to these materials must agree to comply with these conditions, complete the attached certifications, and provide the completed certifications to the Commission and counsel for the Postal Service.

1. Access to these materials is limited to a person as defined in rule 5(f), 39 CFR 3001.5(f), or an individual employed by such person, or acting as agent, consultant, contractor, affiliated person, or other representative of such person for purposes related to the matter identified as _____. However, no person involved in competitive decision-making for any entity that might gain competitive advantage from use of this information shall be granted access to these materials. “Involved in competitive decision-making” includes consulting on marketing or advertising strategies, pricing, product research and development, product design, or the competitive structuring and composition of bids, offers or proposals. It does not include rendering legal advice or performing other services that are not directly in furtherance of activities in competition with a person or entity having a proprietary interest in the protected material.
2. No person granted access to these materials is permitted to disseminate them in whole or in part to any person not authorized to obtain access under these conditions.
3. Immediately after access has terminated under 39 CFR 3007.41 or 3007.51, a person (and any individual working on behalf of that person) who has obtained a copy of these materials shall certify to the Commission:
 - (a) That the copy was maintained in accordance with these conditions (or others established by the Commission); and

- (b) That the copy (and any duplicates) either have been destroyed or returned to the Commission.
- 4. The duties of each person obtaining access to these materials shall apply to material disclosed or duplicated in writing, orally, electronically, or otherwise, by any means, format, or medium. These duties shall apply to the disclosure of excerpts from or parts of the document, as well as to the entire document.
- 5. All persons who obtain access to these materials are required to protect the document by using the same degree of care, but no less than a reasonable degree of care, to prevent the unauthorized disclosure of the document as those persons, in the ordinary course of business, would be expected to use to protect their own proprietary material or trade secrets and other internal, confidential, commercially sensitive, and privileged information.
- 6. These conditions shall apply to any revised, amended, or supplemental versions of these materials provided in the matter identified as _____.
- 7. The duty of nondisclosure of each person obtaining access to these materials is continuing, terminable only by specific order of the Commission, or as specified in paragraphs 9 and 10, below.
- 8. Each person granted access to these materials consents to these or such other conditions as the Commission may approve.
- 9. Any written materials that quote or contain materials protected under these protective conditions are also covered by the same protective conditions and certification requirements, and shall be filed with the Commission only under seal. Documents submitted to the Commission as confidential shall remain sealed while in the Secretary's office or such other place as the Commission may designate so long as they retain their status as stamped confidential documents.
- 10. If a court or other administrative agency subpoenas or orders production of confidential information which a person has obtained under the terms of this protective order, the target of the subpoena or order shall promptly (within 2 business days) notify the Postal Service of the pendency of the subpoena or order to allow it time to object to that production or seek a protective order.

CERTIFICATION

The undersigned represents that:

Access to these materials provided in the matter identified as _____ by the Postal Service has been authorized by the Commission. The cover or label of the copy obtained is marked with my name. I agree to use the information only for purposes of analyzing matters at issue in the matter identified as _____. I certify that I have read and understand the above protective conditions and am eligible to receive access to materials under paragraph 1 of the protective conditions. I further agree to comply with all protective conditions and will maintain these materials in strict confidence in accordance with all of the protective conditions set out above.

Name _____

Firm _____

Title _____

Representing _____

Signature _____

Date _____

CERTIFICATION

The undersigned represents that:

Access to these materials provided in the matter identified as _____ by the Postal Service has been terminated.

I certify that I have destroyed or returned to the Commission, all materials subject to protective conditions, relevant to the above matter. I also certify that these materials were maintained in accordance with the established protective conditions.

Name _____

Firm _____

Title _____

Representing _____

Signature _____

Date _____

[FR Doc. E9-15367 Filed 6-26-09; 8:45 am]

BILLING CODE 7710-FW-C

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 52 and 81

[EPA-R05-OAR-2009-0219; FRL-8921-2]

Approval and Promulgation of Implementation Plans and Designation of Areas for Air Quality Planning Purposes; Michigan; Redesignation of the Detroit-Ann Arbor Area to Attainment for Ozone

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is making a determination under the Clean Air Act (CAA) that the Detroit-Ann Arbor nonattainment area has attained the 8-hour ozone National Ambient Air Quality Standard (NAAQS). The Detroit-Ann Arbor area includes Lenawee, Livingston, Macomb, Monroe, Oakland, St. Clair, Washtenaw, and Wayne Counties. This determination is based on quality-assured ambient air quality monitoring data for the 2006–2008 ozone seasons that demonstrate that the 8-hour ozone NAAQS has been attained in the area. EPA is approving a request from the State of Michigan to redesignate the Detroit-Ann Arbor area to attainment of the 8-hour ozone NAAQS. The Michigan Department of Environmental Quality (MDEQ) submitted this request on March 6, 2009. In approving this request, EPA is also approving, as a revision to the Michigan State Implementation Plan (SIP), the State's plan for maintaining the 8-hour ozone NAAQS in the area through 2020. EPA is approving the 2005 base year emissions inventory for the Detroit-Ann Arbor area as meeting the requirements of section 182(a)(1) of the CAA. EPA also finds adequate and is approving the State's 2020 Motor Vehicle Emission Budgets (MVEBs) for the Detroit-Ann Arbor area. EPA proposed these actions on April 23, 2009. EPA provided a 30-day review and comment period, which closed on May 26, 2009. EPA received comments in support of the redesignation from Consumers Energy and the Southeast Michigan Council of Governments. EPA received no comments in opposition to the proposal.

DATES: This final rule is effective June 29, 2009.

ADDRESSES: EPA has established a docket for this action: Docket ID No.

EPA-R05-OAR-2009-0219. All documents in the docket are listed on the <http://www.regulations.gov> Web site. Although listed in the index, some information is not publicly available, *i.e.*, Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically at <http://www.regulations.gov> or in hard copy at the U.S. Environmental Protection Agency, Region 5, Air and Radiation Division, 77 West Jackson Boulevard, Chicago, Illinois 60604. This facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays. We recommend that you telephone Kathleen D'Agostino, Environmental Engineer, at (312) 886-1767 before visiting the Region 5 office.

FOR FURTHER INFORMATION CONTACT:

Kathleen D'Agostino, Environmental Engineer, Criteria Pollutant Section, Air Programs Branch (AR-18J), U.S. Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 886-1767, dagostino.kathleen@epa.gov.

SUPPLEMENTARY INFORMATION:

Throughout this document whenever “we,” “us,” or “our” is used, we mean EPA. This supplementary information section is arranged as follows:

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- I. What Is the Background for This Rule?
- II. What Comments Did We Receive on the Proposed Rule?
- III. What Action Is EPA Taking?
- IV. Statutory and Executive Order Reviews

I. What Is the Background for This Rule?

A. What Is the General Background Information?

On July 18, 1997 (62 FR 38856), EPA promulgated an 8-hour ozone standard of 0.08 parts per million (ppm). EPA published a final rule designating and classifying areas under the 1997 8-hour ozone NAAQS on April 30, 2004 (69 FR 23857).

On March 12, 2008, EPA promulgated a more stringent 8-hour ozone standard of 0.075 ppm which was published in the **Federal Register** on March 27, 2008 (73 FR 16436). EPA will designate nonattainment areas under the 2008 8-hour ozone standard in 2010. Today's approval of Michigan's SIP revision addresses only the status of the Detroit-Ann Arbor area with respect to the 1997 8-hour ozone standard.

The background for today's actions with respect to the 1997 ozone standard is discussed in detail in EPA's April 23, 2009, proposal (74 FR 18479). In that rulemaking, we noted that, under EPA regulations at 40 CFR part 50, the 8-hour ozone standard is attained when the three-year average of the annual fourth-highest daily maximum 8-hour average ozone concentrations is less than or equal to 0.08 ppm. (*See* 69 FR 23857 (April 30, 2004) for further information.) The data completeness requirement is met when the average percent of days with valid ambient monitoring data is greater than 90%, and no single year has less than 75% data completeness, as determined in accordance with appendix I of part 50.

Under the CAA, EPA may redesignate nonattainment areas to attainment if sufficient complete, quality-assured data are available to determine that the area has attained the standard and that it meets the other CAA redesignation requirements in section 107(d)(3)(E).

On March 6, 2009, MDEQ submitted a request to redesignate the Detroit-Ann Arbor area to attainment of the 8-hour ozone standard. The request included three years of complete, quality-assured data for the period of 2006 through 2008, indicating the 8-hour NAAQS for ozone had been achieved. The April 23, 2009, proposed rule provides a detailed discussion of how Michigan met this and other CAA requirements.

B. What Are the Impacts of the December 22, 2006, and June 8, 2007, United States Court of Appeals Decisions Regarding EPA's Phase 1 Implementation Rule?

On December 22, 2006, in *South Coast Air Quality Management Dist. v. EPA*, the U.S. Court of Appeals for the District of Columbia Circuit vacated EPA's Phase 1 Implementation Rule for the 8-hour ozone standard (69 FR 23951, April 30, 2004). 472 F.3d 882 (D.C. Cir. 2006). On June 8, 2007, in response to several petitions for rehearing, the D.C. Circuit Court clarified that the Phase 1 Rule was vacated only with regard to those parts of the rule that had been successfully challenged. *Id.*, Docket No. 04-1201. Therefore, the Phase 1 Rule provisions related to classifications for areas currently classified under subpart 2 of Title I, part D of the CAA as 8-hour nonattainment areas, the 8-hour attainment dates, and the timing for emissions reductions needed for attainment of the 8-hour ozone NAAQS remain effective. The June 8th decision left intact the Court's rejection of EPA's reasons for implementing the 8-hour standard in certain nonattainment areas under subpart 1 in lieu of subpart 2. By