



**BAC 7710-FW-P**

## **POSTAL REGULATORY COMMISSION**

**39 CFR Parts 3001, 3004, 3007**

**[Docket No. RM2018-3; Order No. 4679]**

### **Non-Public Information**

**AGENCY:** Postal Regulatory Commission.

**ACTION:** Final rule.

**SUMMARY:** The Commission is adopting final rules relating to non-public materials. The final rules ensure appropriate transmission and protection of non-public materials, maintain appropriate transparency, and modernize practice before the Commission.

**DATES:** *Effective* [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**FOR FURTHER INFORMATION CONTACT:** David A. Trissell, General Counsel, at 202-789-6820.

### **SUPPLEMENTARY INFORMATION:**

#### **Regulatory History**

83 FR 7338 (Feb. 20, 2018)

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## **I. Introduction**

In this Order, the Commission adopts final rules relating to non-public information. The final rules adopted by this Order replace, in their entirety, the existing rules appearing in 39 CFR part 3007. Additionally, the final rules amend and move the existing rules regarding information requests to 39 CFR part 3001, subpart E. Further, the final rules update two rules appearing in existing 39 CFR part 3004 concerning the application of the Freedom of Information Act (FOIA)<sup>1</sup> to materials that are provided to the Commission with the reasonable belief that the materials are exempt from public disclosure. The final rules appear after the signature of this Order in Attachment A.

## **II. Procedural History**

On February 13, 2018, the Commission issued the notice of proposed rulemaking (NPR), setting forth a proposed revision and reorganization of its rules relating to non-public information.<sup>2</sup> The NPR also appointed an officer of

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<sup>1</sup> 5 U.S.C. 552.

<sup>2</sup> Notice of Proposed Rulemaking Relating to Non-Public Information, February 13, 2018 (Order No. 4403). The Notice of Proposed Rulemaking Relating to Non-Public Information was published in the **Federal Register**; see 83 FR 7338 (February 20, 2018).

the Commission to represent the interests of the general public (Public Representative) and provided an opportunity for public comment. Order No. 4403 at 36-37. On March 23, 2018, the Commission received comments from the Postal Service, the Public Representative, and United Parcel Service, Inc. (UPS).<sup>3</sup>

### **III. Response to Significant Comments and Explanation of Changes**

#### **A. Overview**

The Commission has carefully considered all comments that it received. Generally, the three commenters express support for the Commission's efforts to streamline and simplify procedures as well as to reorganize and update the existing rules. See Postal Service Comments at 1; PR Comments at 1-2, UPS Comments at 8-9. The Commission appreciates these remarks.

Additionally, the commenters provide instructive perspectives on specific proposed rules. Notably, the commenters alert the Commission to areas that would benefit from additional clarification. All three commenters provide comments regarding the expiration of non-public treatment appearing in proposed § 3007.401. See Postal Service Comments at 8-11; PR Comments at 2, 4-6; UPS Comments at 1-7, 9-10. The Postal Service and the Public

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<sup>3</sup> Initial Comments of the United States Postal Service, March 23, 2018 (Postal Service Comments); Public Representative Comments in Response to Notice of Proposed Rulemaking Concerning Non-Public Information, March 23, 2018 (PR Comments); Comments of United Parcel Service, Inc. on Notice of Proposed Rulemaking Relating to Non-Public Information, March 23, 2018 (UPS Comments).

Representative also suggest rule changes affecting other issues.<sup>4</sup> Aside from the issues related to the expiration of non-public treatment, the issues raised by the Public Representative do not overlap with the issues raised by the Postal Service. Both the Postal Service and the Public Representative provide “redline” revisions to the NPR’s proposed rules. Postal Service Comments, Appendix (Postal Service Appendix); PR Comments at 17-49.

The Commission appreciates the time and effort of the commenters in preparing their filings, and their comments have contributed to an improved set of final rules. The final rules appearing after the signature of this Order incorporate suggestions offered by commenters, particularly with respect to improving precision and clarity; however, the substance of the rules and their effect on interested persons remains the same as the rules proposed in the NPR.

Accordingly, section III.B. reviews all issues raised by the three commenters related to the expiration of non-public treatment, provides analysis, and describes the resulting changes made to the proposed rules. Section III.C. reviews all other changes proposed by the Postal Service, provides analysis, and describes the resulting changes made to the proposed rules. Section III.D. reviews all other changes proposed by the Public Representative, provides analysis, and describes the resulting changes made to the proposed rules. Sections IV-VI provide the line-by-line discussion of the changes between the

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<sup>4</sup> Aside from the issues related to the expiration of non-public treatment, UPS did not recommend any other changes to the proposed rules. See *generally* UPS Comments.

existing rules and the final rules (as adopted) for each affected part of the Code of Federal Regulations. Section VII provides the analysis required under the Regulatory Flexibility Act. The final rules appear after the signature of this Order in Attachment A.

**B. Review of Comments Concerning the Expiration of Non-Public Treatment  
(Proposed § 3007.401)**

The following discussion summarizes all changes proposed by the Postal Service, the Public Representative, and UPS concerning the expiration of non-public treatment, provides analysis, and describes the resulting changes made to the proposed rules.

**1. Comments**

Generally, the Postal Service supports the procedure set forth in proposed § 3007.401(b)-(f). Postal Service Comments at 8-9. The Postal Service observes that many of the persons other than the Postal Service that have a proprietary interest in non-public information submitted by the Postal Service “lack familiarity with the Commission’s regulations as well as the resources to vigilantly watch for and react to upcoming deadlines that would place their commercially sensitive data at risk.” *Id.* at 9. The Postal Service asserts that this observation is appropriately addressed by proposed § 3007.401(b), which requires the person seeking public disclosure of the materials at issue to take the first step in the process for the Commission to determine whether to disclose the materials to the public. *Id.*

Referring to its 2008 comments in the initial rulemaking promulgating existing 39 CFR part 3007, the Postal Service renews its objection to the default expiration period being set at 10 years.<sup>5</sup> Noting that many of its customers have remained the same over the years, the Postal Service asserts that the non-public status of customer-specific information should not expire after 10 years. Postal Service Comments at 10. The Postal Service asserts “this 10-year period is significantly shorter than the appropriate period for protection of nonpublic materials recognized in other contexts.” *Id.* The Postal Service contends that this is exemplified by the FOIA’s provision of a time limit for only one of its nine exemptions (the 25-year time limit on the deliberative process privilege). *Id.* (quoting 5 U.S.C. 552(b)(5)). The Postal Service recommends changing the proposed rules to permit a longer initial period of time for which non-public status generally applies (such as 25 years) and to exempt the non-public status of customer-specific information from expiration. Postal Service Comments at 10. The Postal Service suggests changes to proposed §§ 3007.400(a) and 3007.401(a) in accordance with this recommendation. *Id.* at 10-11; Postal Service Appendix at xxiii-xxiv.

The Postal Service also suggests a procedural change to the response deadline appearing in proposed § 3007.401(c). Postal Service Comments at 11. The Postal Service asks to dispense with the expedited response deadline (3

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<sup>5</sup> *Id.* at 9-10 (quoting Docket No. RM2008-1, Initial Comments of the United States Postal Service, September 25, 2008, at 18 (Docket No. RM2008-1 Initial Postal Service Comments)).

business days rather than 7 calendar days) proposed for instances in which actual notice is given. *Id.* Stating that “[b]ecause it is unlikely that there would be great urgency to obtain materials that were filed at least 10 years before the request,” the Postal Service recommends that the response deadline be set at 7 calendar days, regardless whether actual notice is given. *Id.* The Postal Service suggests deleting text appearing in proposed § 3007.401(c) in accordance with its recommendation. Postal Service Appendix at xxv-xxvi.

The Public Representative objects that the procedure set forth in proposed § 3007.401(b)-(f), requiring a motion and continuing non-public treatment pending its resolution, effectively negates the provision that non-public materials shall lose their non-public status 10 years after submission. PR Comments at 5. He asserts that proposed § 3007.401(b)-(f) unfairly shifts the burden to the person seeking the materials. *Id.* He characterizes proposed § 3007.401(b)-(f) as an unexplained and major policy shift. *Id.* at 6. He contends that a motion should not be necessary and that the burden should remain with the submitter to request that non-public status be extended. *Id.* at 5. He questions whether it may be more effective and less administratively burdensome to review a limited number of requests for extension versus a potentially unlimited number of requests for disclosure that may lack a real interest in the materials at issue. *Id.* at 5, n.8. He suggests that the Commission can post materials to its Web site upon the expiration of protective conditions, on its own or upon receiving an informal request. *Id.* at 6. He provides sample language to make materials for

which non-public treatment has expired available to the public through a written request to the Secretary of the Commission. *Id.* at 47.

UPS similarly objects to proposed § 3007.401(b)-(f), asserting that the proposed rule creates a default condition of maintaining non-disclosure, even after 10 years. UPS Comments at 5. UPS characterizes proposed § 3007.401(b)-(f) as preventing disclosure unless the person seeking disclosure meets the burden to affirmatively seek disclosure and obtains Commission approval. *Id.* at 4. UPS cautions that this procedure may incentivize excessive redaction so as to hinder the success of a motion for disclosure of materials for which non-public treatment has expired. *Id.* at 5. Acknowledging that it does not disagree that certain information (such as customer-specific data) should remain sealed for an extended period, UPS suggests that after 10 years, disclosure of other data should be either automatic or place the burden of justification on the person seeking extended non-public status. *Id.* UPS suggests that the Commission promulgate a rule setting forth a framework including the timing of disclosure for different types of non-public information and the level of disclosure. *Id.* at 5-6.

UPS objects to the mechanism contained in proposed § 3007.401(b) as excessively burdensome stating that the proposed rule requires the movant to specify whether notice was provided to persons with a potential proprietary interest (including the dates, times, and methods of notice) and to provide detailed justifications for disclosure. *Id.* at 6. UPS further characterizes this

mechanism related to actual notice as burdensome if multiple persons with proprietary interests are implicated, noting that Universal Postal Union (UPU) data covers over 190 countries. *Id.*

UPS also objects to proposed § 3007.401(f)'s use of the applicable standard appearing in proposed § 3007.104 (balancing test), which UPS characterizes as negating the purpose of the 10-year expiration period. *Id.* Instead, UPS recommends that non-public materials generally be disclosed to the public after 10 years and be published on a regular schedule, unless it is demonstrated that such publication will result in material harm. *Id.* UPS asserts that material harm is the appropriate burden of proof to justify extension of non-public treatment “as a regulated entity with monopoly powers competing with the private sector should be held to transparency standards beyond those imposed on third parties and outside organizations.” *Id.* at 7.

## 2. Commission Analysis

The comments reflect a number of concerns with respect to proposed § 3007.401, which pertains to materials for which non-public treatment has expired. For the reasons discussed below, the Commission retains the basic process in final § 3007.401: the default expiration period remains 10 years; the person seeking the materials for which non-public treatment has expired triggers the process by filing a formal document in a Commission docket; there is an opportunity for response and reply filings by any interested person; and the Commission uses the applicable standard appearing in final § 3007.104 to

determine whether to publicly disclose the materials at issue. The Commission restates that it is maintaining the 10-year default period for protecting non-public materials, and that these regulation changes are not intended to extend or expand that default period of protection. As discussed below, the Commission makes minor modifications in order to simplify the procedure and better distinguish this process to seek public disclosure of materials for which non-public treatment has expired from the process to seek public disclosure of materials for which non-public treatment remains active under final § 3007.400. The changes include a terminology change from “motion” to “request,” the inclusion of a template request form in final Appendix A to subpart D of 39 CFR part 3007, and the deletion of all provisions related to the giving of actual notice.

All three commenters express their views on whether the person seeking the materials for which non-public treatment has expired or the person seeking extended non-public treatment should take the first step in the Commission’s process of determining whether to publicly disclose such materials. The process appearing in proposed § 3007.401 begins with the person seeking public disclosure formally identifying the materials sought, provides an opportunity for response and reply by any interested person, and concludes with a Commission order determining the non-public status of the materials. Generally, the Postal Service supports the process appearing in proposed § 3007.401. Postal Service Comments at 8-9. On the other hand, both the Public Representative and UPS favor an automatic disclosure approach. PR Comments at 5-6; UPS Comments

at 3-4. The Public Representative observes that the Commission can adopt a default procedure of automatic disclosure after 10 years (such as through posting to the Commission's public Web site), unless a person obtains extended non-public treatment in advance. PR Comments at 6. Similarly, UPS indicates that it assumed that the Commission would automatically disclose non-public materials after the passage of 10 years. UPS Comments at 3-4.

The existing rules were silent on the mechanism for administration of materials for which non-public treatment had expired. Broadly, the Commission considered two default approaches: (1) automatic disclosure (posting to the Commission's public Web site, unless a person obtains extended non-public treatment in advance); or (2) making materials available upon request (with an opportunity for interested persons to object and seek extended non-public treatment). The difference between the two approaches comes down to whether the person taking the first step in the Commission's process of determining whether to publicly disclose the materials should be the person seeking public disclosure or the person seeking extended non-public treatment.

The Commission agrees with the Postal Service that the proposed rule "appropriately requir[es] the parties who seek public disclosure, not the parties with a proprietary interest in the information, to take the first step in the Commission's process of determining whether to publicly disclose materials." Postal Service Comments at 9. The key issue is the level of attention to the expiration of non-public status in Commission dockets. As the Postal Service

observes, many of the persons other than the Postal Service that have a proprietary interest in non-public information submitted by the Postal Service may lack the resources to affirmatively monitor and timely respond to automated deadlines that would expose their proprietary information to public view. *See id.* Affected persons that may have a proprietary interest include customers, suppliers, PC postage providers, and foreign postal operators. *Id.* at 12-13. As the Postal Service further explains, it has engaged in the practice of providing one-time notice (rather than for each submission) using standard language contained in a contract, letter, or UPU circular. *Id.* at 13. Under these circumstances, a process that would require affected persons with a proprietary interest to seek extended non-public treatment in advance of the 10-year expiration, without any pending request for the materials at issue, may not adequately protect the substantive rights of such affected persons. Accordingly, the Commission maintains its conclusion that the first step in the process should be taken by the person seeking the materials. This conclusion, and the final rules adopted in this Order, take into account the need for transparency, sound records management practices, and according adequate protection to the commercial interests of affected persons, including the Postal Service. *See* Order No. 4403 at 32.

The process and content requirements are designed to mitigate against the Public Representative's concerns regarding a potentially unlimited number of requests for disclosure that may lack a real interest in the materials at issue. *See*

PR Comments at 5, n.8. The process requires the person seeking the materials to take the first step: formally file a document that identifies the materials sought and the date(s) of the original sealed submission. To better aid compliance with this content requirement, a template form is provided in final Appendix A to subpart D of 39 CFR part 3007 for use and modification. The additional steps in the process—the opportunity (but not a requirement) to file a response and a reply—may be indicative of the level of interest in the materials. Moreover, the Postal Service has sought indefinite protection of non-public materials in its initial application for non-public treatment in many dockets. See Order No. 4403 at 32 n.16. Accordingly, a procedure involving automatic disclosure after 10 years (unless an extended non-public treatment is sought and granted in advance) may result in a potentially large number of requests for extension (and potentially premature ones).

UPS raises a concern about excessive redactions. The Commission acknowledges that excessive redactions are improper and negatively affect the public interest in transparency. UPS expresses concern that the process appearing in proposed § 3007.401 may incentivize excessive redactions to obscure the non-public information and reduce the likelihood that a person seeking public disclosure after the passage of 10 years will be successful. However, the Commission observes that an automatic disclosure policy may also negatively affect the public interest in transparency by chilling the voluntary submission of non-public information.

Moreover, adequate procedural mechanisms exist in the final rules to address excessive redactions. Final § 3007.202 expressly provides that only the information that is claimed to be non-public shall be blacked out. It is also important to observe that members of the general public have the ability to request access to the materials under final § 3007.301 and that Public Representatives are granted access under final § 3007.300(a)(2). Further, any person may challenge the level of redaction earlier than 10 years through a motion for public disclosure under final § 3007.400.

While the Commission maintains the requirement that the person seeking the materials take the first step, the Commission adopts minor changes in final § 3007.401 to clarify that the intended content requirements associated with filing a formal document to seek materials for which non-public treatment has expired are lower than that requirements associated with filing a motion under final § 3007.400 to seek the public disclosure of materials for which non-public status remains active. UPS and the Public Representative appear to interpret the proposed rule as unfairly shifting the burden to the person seeking the materials. See UPS Comments at 5; PR Comments at 5. Part of this misunderstanding appears to lie within a misinterpretation of the content requirements pertaining to what the person seeking materials for which non-public treatment has expired must file with the Commission. To clarify this issue, the Commission provides a discussion of the distinction between the rules applicable to materials for which the non-public status remains active versus materials for which non-public

treatment has expired. Based on its review of the comments, the Commission also adopts revisions to the final rule to make these distinctions more clear.

By way of background, under proposed § 3007.200(a), whenever non-public materials are provided to the Commission, an application for non-public treatment must also be submitted that clearly identifies all non-public materials and describes the circumstances causing them to be submitted to the Commission.<sup>6</sup> Moreover, under proposed § 3007.201(a), the application, in addition to demonstrating that the materials at issue are of a type and nature eligible for non-public treatment, must contain all of the information and arguments to fulfill the burden of persuasion that the materials designated as non-public should be withheld from the public.<sup>7</sup> Under proposed § 3007.201(b), the application must include a “specific and detailed statement” containing (among other things) particular identification of the nature and extent of harm alleged and the likelihood of such harm.<sup>8</sup> Under proposed § 3007.102(a), the Commission preliminarily treats those materials as non-public.<sup>9</sup>

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<sup>6</sup> Proposed § 3007.200(a) expanded on existing § 3007.21(a), which applied only to Postal Service filings, to all submissions of non-public materials. See Order No. 4403 at 14-15.

<sup>7</sup> Proposed § 3007.201(a) expanded on existing § 3007.21(b), which applied only to Postal Service filings, to all submissions of non-public materials. See Order No. 4403 at 15.

<sup>8</sup> Proposed § 3007.201(b) expanded on existing § 3007.21(c), which applied only to Postal Service filings, to all submissions of non-public materials. See Order No. 4403 at 15-16.

<sup>9</sup> This is consistent with the Commission’s long-standing practice under existing § 3007.23. See Order No. 4403 at 12; see also Docket No. RM2008-1, Second Notice of Proposed Rulemaking to Establish a Procedure for According Appropriate Confidentiality, March 20, 2009, at 17 (Order No. 194).

The Commission's long-standing practice, retained under proposed § 3007.103, is that it does not *accept* any rationale for non-public treatment given in the application for non-public treatment unless the Commission makes a determination of non-public status, which may occur in response to a motion by an interested person or *sua sponte*. See Order No. 4403 at 7. Either procedure concludes with the issuance of a Commission order determining the non-public treatment to be accorded (if any) under the applicable standard described in proposed § 3007.104.

For materials for which the non-public status remains active (either because the non-public status has not expired or has been extended by order of the Commission), proposed § 3007.400(b) presents the requirements that must be met by those seeking public disclosure. By contrast, the burden to seek the public disclosure of materials for which non-public treatment has expired is lower. UPS characterizes proposed § 3007.401(b) as requiring that the person seeking the materials "provide detailed justifications for why the materials should be made public." UPS Comments at 6. Proposed § 3007.400(b), the rule applicable to materials for which the non-public status remains active, does require the filing of justification for why the materials should be made public, which must specifically address any pertinent rationale(s) provided in the application for non-public treatment. See Order No. 4403 at 29-30. However, proposed § 3007.401(b), the rule applicable to materials for which non-public status has expired, does not impose such a content requirement. See *id.* at 32-33.

Similarly, the Public Representative focuses on the usage of the term “motion” in objecting to proposed § 3007.401(b). PR Comments at 5-6. He suggests that instead “an informal request (something short of a motion)” be required. *Id.* at 6. These comments indicate that the final rules would benefit from more clear distinctions between the content requirements applicable under §§ 3007.400(b) and 3007.401(b). The Commission had intended that the formal filing of a motion for public disclosure under proposed § 3007.401(b) would be the procedural trigger for determining whether to publicly disclose materials for which non-public treatment has expired. The word “motion” was used in proposed § 3007.401(b)-(f) to correspond with the Commission’s practice that a motion (either by an interested person or by the Commission acting on its own) would trigger the process for the Commission to determine non-public status. The Commission acknowledges that the use of parallel language between §§ 3007.400(b) and 3007.401(b) may have resulted in confusion regarding the substantive contents of that triggering filing under proposed § 3007.401(b). To minimize confusion, the Commission adopts a change in terminology from “motion,” to “request” in final § 3007.401(b)-(f). To further clarify the Commission’s intent of minimal content requirements for such a request, a template request form is provided in final Appendix A to subpart D of 39 CFR part 3007 for use and modification.

Notably, in expressing their opposition to proposed § 3007.401, UPS and the Public Representative do not appear to consider the content requirements

imposed on the filing of a response opposing public disclosure under proposed § 3007.401(c). See UPS Comments at 3-7; PR Comments at 4-6. UPS characterizes proposed § 3007.401(f)'s use of the balancing test standard as negating the purpose of having a 10-year expiration provision. UPS Comments at 6. The Commission disagrees with this characterization. Proposed § 3007.401(c) provides that any response opposing public disclosure shall seek an extension of non-public status by including an application for non-public treatment compliant with proposed § 3007.201. Order No. 4403 at 33-34. In addition to meeting the requirements imposed by proposed § 3007.201 (including the burden of persuasion that the materials should be withheld from the public), proposed § 3007.401(c) requires this extension application to include specific facts supporting any assertion of commercial injury after the passage of 10 years. *Id.* at 34. This requirement is the very purpose of having the 10-year default period—the setting of a point in time to evaluate if the facts underlying the initial application's claim for non-public treatment have become stale. Further, a proponent of disclosure will have the opportunity to reply to any new arguments raised under proposed § 3007.401(d). Such a procedure allows any updates pertinent to the balancing test to be evaluated. The formal request filed under final § 3007.401(b) will trigger that process.

With respect to that process, all three commenters express views in favor of simplifying the process appearing in proposed § 3007.401. Therefore, the

Commission maintains that process generally, with some changes aimed to streamline the procedure.

The Commission generally agrees with the suggestion by the Public Representative to reduce the procedural complexity involved in the proposed procedure related to seeking materials for which non-public treatment has expired. See PR Comments at 6. Ultimately, a change in terminology throughout final § 3007.401(b)-(f) from “motion,” to “request” minimizes complexity. Also, to better convey the exact content requirements of a request, a template form is provided in final Appendix A to subpart D of 39 CFR part 3007 for use and modification to comply with final § 3007.401(b). It is useful to have such requests formally filed in dockets so as to provide near immediate notice of the request to the Postal Service and make the request (and any responses and replies filed) available to the public for viewing. Therefore, the requirement to formally file the request in a docket and the associated docketing instructions are retained in final § 3007.401(b).

Based on review of the comments received relating to instances of actual notice and a potential expedited response deadline, the Commission deletes such procedural requirements in the final rule in the interest of simplicity.

The Commission acknowledges the Postal Service’s observation that “it is unlikely that there would be great urgency to obtain materials that were filed at least 10 years before the request.” Postal Service Comments at 11. After the passage of 10 years, the difference between 3 business days versus 7 calendars

is less significant to the requestor (in contrast to examples when the information at issue is more recent and its usefulness to participants is more time-sensitive). Also, the additional response time may be beneficial to the submitter and any person with a proprietary interest, given the need to re-familiarize themselves with the materials 10 years later. Further, having a single response deadline is simpler for participants. Therefore, the Commission dispenses with the expedited response deadline appearing in proposed § 3007.401(c).

Given this determination, there is no compelling reason to keep the related proposed requirements appearing in proposed § 3007.401(b) (requiring specification if actual notice was given, and if so stated, requiring additional information) and proposed § 3007.401(f) (stating that the Commission may grant public disclosure any time after receiving a request representing that actual notice was given and the request was uncontested). The deletions simplify the procedural requirements relating to the disclosure of materials for which non-public treatment has expired. UPS also objected to the provisions appearing in proposed § 3007.401(b) for other reasons.<sup>10</sup>

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<sup>10</sup> The Commission disagrees with UPS's characterization of proposed § 3007.401(b) as excessively burdensome. See UPS Comments at 6. Proposed § 3007.401(b) did not require that actual notice be *given* (or attempted); it provided a mechanism to better isolate those instances in which the expedited response deadline appearing in proposed § 3007.401(c) would apply. Order No. 4403 at 32. The related proposed requirement appearing in proposed § 3007.401(b), to provide additional information, would apply only if it was stated that actual notice was given. See *id.* at 33. The deletion of the expedited response appearing in proposed § 3007.401(c) renders these requirements unnecessary.

UPS suggests using a different substantive standard to determine whether to publicly disclose materials for which non-public treatment has expired. UPS suggests that the Commission adopt a policy of automatic disclosure at the 10-year mark absent a showing that public disclosure will result in “material harm.” UPS Comments at 6-7. The Commission appreciates UPS’s comment as an effort to convey that any rationale for extended non-public treatment provided in an extension application that lacks adequate factual support should not be accepted. However, the applicable balancing test under final § 3007.104, taking into account the passage of time (which may render the harms alleged in the original application stale), adequately encompasses this concern.

The comments from the Postal Service and UPS also suggest changes to the proposed rules relating to the retention of the 10-year timeframe. The Commission declines to adopt changes to the proposed rules for the following reasons.

The Commission rejects the Postal Service’s suggestion to set 25 years as the new default timeframe for expiration of non-public status. The Postal Service’s observation that the FOIA sets a time limit of 25 years pertaining to information protectable under the deliberative process privilege is not persuasive. Generally in practice before the Commission, the types of information for which non-public treatment is sought involve issues pertaining to commercial injury, as contemplated by 39 U.S.C. 504(g)(3)(A). It is important to reconfirm that the final rules adopted in this Order do not alter the Commission’s long-standing practice

that it does not interpret “likely commercial injury” so narrowly as to exclude harm associated with other interests, such as the deliberative process. Order No. 194 at 11. In any event, the 10-year default period does not prejudice the ability of the Postal Service to seek extended protection, if circumstances warrant. The 10-year default period was set to “serve administrative convenience and sound records management practices while adequately protecting the commercial interest of the Postal Service.”<sup>11</sup> The Commission has not been presented with a rationale to disturb this earlier informed judgment.

The Commission also rejects the suggestion by the Postal Service to codify a rule providing for indefinite non-public treatment of customer-specific information. See Postal Service Comments at 10. Multiple orders state that “[t]he Commission has consistently denied requests for indefinite protection.” Order No. 4403 at 32 n.16. In any event, the 10-year default period does not prejudice the ability of the Postal Service to seek extended protection, if circumstances warrant.

Finally, the Commission rejects the alternative suggested by UPS to set forth the timing and level of disclosure for different types of non-public information. See UPS Comments at 5-6. The Commission appreciates the effort by UPS to try to develop an advance framework for evaluating these issues. In promulgating proposed § 3007.401(b)-(f), the Commission does not prejudice

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<sup>11</sup> Order No. 194 at 24-25; Docket No. RM2008-1, Final Rule Establishing Appropriate Confidentiality Procedures, June 19, 2009, at 13 (Order No. 225).

whether any information categorically would (or would not) require extended non-public status. The suggestion by UPS to consider setting forth different timing requirements based on whether the data was related to the Annual Compliance Report (ACR) or a negotiated service agreement (NSA) is not particularly useful to evaluating whether harm is still likely to occur. Data provided in connection with the ACR encompasses many forms, including NSA data. The suggestion by UPS to take into account distinctions based on level of granularity of the disclosure (such as whether the information at issue is specific to a customer, product, or class) may be relevant to the fact-specific analysis of the particular information at issue.

Therefore, the Commission does not find that a persuasive rationale has been provided to depart from its general premise that non-public status shall expire after the passage of 10 years, unless otherwise provided by the Commission. However, the Commission adopts changes to facilitate procedures for publically disclosing such material that are more clear and simple.

### 3. Changes to the Proposed Rules

Each line-by-line change to the proposed rules made in response to the comments related to the expiration of non-public treatment is reviewed below. Editorial changes made solely to improve global consistency, clarity, or precision are also reviewed below where applicable to final § 3007.401(b)-(f). The following changes to the proposed rules appear in the final rules.

*Final § 3007.401(b).* All references to “motion” are replaced with “request.” Usage of the word “materials” is replaced with “information” for precision in the second sentence. A sentence is added to notify the reader that completing and filing the template form appearing in final Appendix A to subpart D of 39 CFR part 3007 will satisfy the content requirements appearing in paragraph (b). The content requirements pertaining to whether or not actual notice has been given are deleted.

*Final § 3007.401(c).* The expedited response deadline applicable to instances when actual notice has been given is deleted. All references to “motion” are replaced with “request.” In one instance, the word “request” as used as a verb is replaced with “seek” to better distinguish between the usage of “request” as a noun to refer to the formal filing made under paragraph (b). In the last sentence, the word “exists” is replaced with “is likely to occur if the information contained in the materials is publicly disclosed” for precision because no injury would exist until the information contained in the materials is publicly disclosed. Also, in the last sentence, both cross-references are deleted because they are unnecessary.

*Final § 3007.401(d).* The word “movant” is replaced with “requestor.”

*Final § 3007.401(e).* The word “motion” is replaced with “request.”

*Final § 3007.401(f).* All references to “motion” are replaced with “request.”

The references to the expedited response deadline are deleted. In the last sentence, the phrase “balance the interests of the parties as” is replaced with

“follow the applicable standard” to more precisely encompass both standards (whichever may be applicable) appearing in paragraphs (a) and (b) of final § 3007.104.

*Final Appendix A to subpart D of 39 CFR part 3007—Template Request Form.* To aid compliance with final § 3007.401(b), which requires a requestor to identify the materials requested and date(s) that materials were originally submitted under seal, a template request form is created. Final Appendix A is added to subpart D of 39 CFR part 3007 contains a template form for requestors to use and modify.

#### C. Review of Other Changes Proposed by the Postal Service

The following discussion summarizes all changes proposed by the Postal Service (other than issues related to the expiration of non-public treatment), provides analysis, and describes the resulting changes made to the proposed rules.

##### 1. Postal Service Comments

Aside from the issues related to the expiration of non-public treatment, the Postal Service proposes changes to proposed §§ 3007.101(a), 3007.103, 3007.200, 3007.300, 3007.301, and Appendix A of subpart C of 39 CFR part 3007. Postal Service Comments at 2-8, 11-14; Postal Service Appendix at iii-vi, xi-xiii, xix.

With respect to proposed § 3007.101(a), which defines non-public material, the Postal Service suggests two changes. First, the Postal Service

requests to add text stating that inadvertent disclosure does not waive privilege or FOIA exemption status. Postal Service Comments at 7. Second, the Postal Service requests to add text stating that loss of non-public status applies only to the particular materials at issue, not to similar materials. *Id.* at 7-8.

With respect to proposed § 3007.103, the Postal Service requests to add text to ensure that notice and due process would occur in the event that the Commission issues an order to amend non-public status *sua sponte*. *Id.* at 8.

With respect to proposed § 3007.200, the Postal Service objects to the inclusion of existing § 3007.20, which requires that before submitting non-public materials to the Commission, each submitter contact any affected person who may have a proprietary interest in the non-public information contained therein. *Id.* at 11. The Postal Service asserts that this advance notice provision imposes a large and impracticable burden on persons that submit large amounts of third-party non-public information on a regular basis such as the Postal Service's NSA filings. *Id.* at 12. In particular, the Postal Service observes that the requirement to provide notice of docket numbers is impracticable because docket numbers are usually reserved on the day of filing. *Id.* The Postal Service states that it notifies NSA customers through template contract language, foreign postal operators through a UPU circular, and regularly involved third parties such as PC postage providers or suppliers through a general letter rather than through particular notification for each filing. *Id.* at 13. The Postal Service asserts that

the Commission should recognize these methods of addressing third party notification. *Id.* at 14.

As an alternative, the Postal Service proposes that the Commission adopt an exception “that limits the individualized notice requirement to situations where a third party has requested the individualized notice or the submitter has determined that any blanket notification is not sufficient.” *Id.* The Postal Service suggests adding text to proposed § 3007.200(b) that would allow the submitter to provide annual notice, without identification of particular docket number designations, if the information is filed in multiple dockets. *Id.* The Postal Service suggests adding text to proposed § 3007.200(b) that would waive the identification of docket number designations if the person with a proprietary interest has executed a contract or similar instrument providing notice. *Id.*

With respect to proposed §§ 3007.300, 3007.301, and Appendix A to subpart C of 39 CFR part 3007, the proposed rules and template forms relating to access to non-public material, the Postal Service raises three issues. *Id.* at 2-6.

First, the Postal Service contends that proposed § 3007.300(a)(3)’s insertion of the term “non-employee” before the term “subject matter experts” creates uncertainty as to whether such persons would be held to the similar requirements and conditions for contractors and attorneys described in that same subsection. *Id.* at 2. The Postal Service asserts that this uncertainty creates a risk that an individual may access non-public materials without being bound by a

contract or code of conduct that would prevent dissemination of the materials at will. *Id.* The Postal Service further states that although such behavior is prohibited under proposed § 3007.302, there are no apparent sanctions for such violations. *Id.* at 2-3. The Postal Service suggests that this can be remedied by inserting text in proposed § 3007.300(a)(3) stating that such persons have executed non-disclosure agreements. *Id.* at 3.

Second, the Postal Service requests that the Commission delete text appearing in proposed § 3007.300(b) and the corresponding template form in Appendix A to subpart C of 39 CFR part 3007 concerning “involved in competitive decision making.” *Id.* at 3-4. The Postal Service asserts that an attorney with access to non-public materials then would be able to use the knowledge gained through access (consciously or unconsciously) in formulating legal or business advice. *Id.* at 4. The Postal Service asserts that codifying the text appearing in the existing sample protective conditions “creates a risk of non-public materials being used in ways that could be competitively harmful.” *Id.*

Third, the Postal Service requests that the Commission delete text appearing in proposed § 3007.300(c) and the corresponding proposed § 3007.301(b)(2), which would permit persons to seek access solely for the purpose of aiding the initiation of a proceeding before the Commission. *Id.* at 5. The Postal Service objects that this proposed rule could enable persons to obtain access to non-public materials by providing only limited justification relating to a vague, undeveloped proposal to initiate a proceeding before the Commission. *Id.*

at 6. The Postal Service asserts that the proposed rules impose no consequences if the person granted access under this provision does not ultimately initiate the proceeding. *Id.* The Postal Service notes that an example referenced in the NPR was based on a request for continued access in the ACR proceeding after the issuance of the ACD. *Id.* at 5.

## 2. Commission Analysis

Based on the following analysis, the Commission adopts changes to proposed §§ 3007.101(a), 3007.103, 3007.200(b), 3007.205, and 3007.300(a)(3). Also, as discussed below, the Commission declines to make the Postal Service's suggested changes to proposed §§ 3007.300(b), 3007.300(c) and 3007.301(b)(2), and the template form in Appendix A to subpart C of 39 CFR part 3007.

*Proposed § 3007.101(a).* The Postal Service proposes that the definition of non-public materials in proposed § 3007.101(a) should state that inadvertent public disclosure does not constitute waiver of privilege or FOIA exemption status. *Id.* at 7. To support this proposal, the Postal Service quotes the Department of Justice Guide to the Freedom of Information Act (FOIA), in part. *Id.* The full sentence is reproduced, omitting the footnotes, using italics to display the text that was omitted from the Postal Service Comments: “[w]hile it is generally found that agency carelessness or mistake in permitting access to certain information is not equivalent to waiver, *on occasion courts have found*

*waiver in such releases*” (emphasis added) (footnotes omitted).<sup>12</sup> As the full statement indicates, numerous cases support this general principle, with certain boundaries and nuances.<sup>13</sup> The Commission appreciates the Postal Service’s aim to develop a rule that would provide certainty concerning recognition of this general principle. See Postal Service Comments at 7. However, the text suggested by the Postal Service would add no greater clarity or certainty than the line of cases referenced in its comments. Incorporating the suggested text into the definition of non-public materials used in the Commission’s procedural rules is unnecessary and imprecise.<sup>14</sup> Accordingly, this suggested revision is not adopted in final § 3007.101(a).

The Postal Service does not give a reason for suggesting to add a sentence to the definition of non-public materials in proposed § 3007.101(a)

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<sup>12</sup> Department of Justice Guide to the Freedom of Information Act, Discretionary Disclosure and Waiver, at 703-704; see n. 82 (available at <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/disclosure-waiver.pdf>).

<sup>13</sup> Moreover, in accordance with Fed. R. Evid. 502(b), which applies to a disclosure to a federal office or agency, inadvertent disclosure does not waive the attorney-client privilege or work-product protection in a federal or state proceeding if: “the holder of the privilege or protection took reasonable steps to prevent disclosure; and [] the holder promptly took reasonable steps to rectify the error. . . .” Fed. R. Evid. 502(b)(2)(3). Generally, federal courts consider a multi-factor test, which varies from case to case, in applying this rule. Fed. R. Evid. 502 advisory committee note (2008) (noting that Fed. R. Evid. 502 “does not explicitly codify that test, because it is really a set of non-determinative guidelines that vary from case to case”); see *Eden Isle Marina, Inc. v. United States*, 89 Fed. Cl. 480, 506-08 (2009) (quoting) (finding that the government waived work-product protection for a memorandum, via an inadvertent disclosure in response to a FOIA request, where the government failed to take prompt, affirmative, curative action); *Goodrich Corp. v. E.P.A.*, 593 F. Supp. 2d 184, 192–93 (D.D.C. 2009) (finding that agency’s failure to exercise “zealous stewardship” of its work-product protection to prevent inadvertent disclosure of the results of its model operated as subject-matter waiver with respect to the model itself).

<sup>14</sup> Substantive regulatory provisions should not be included in a definition. Nat’l Archives and Records Admin., Office of the Fed. Register, Document Drafting Handbook, Update May 2017, (Revision 6, dated May 1, 2018) at 2-28.

regarding the loss of non-public status for any reason. Postal Service Comments at 7-8; Postal Service Appendix at iii. The Commission interprets the intent of this suggestion to be an effort to seek clarification of the scope and operation of the loss of non-public status as a matter of procedure. Therefore, the Commission adds one sentence to final § 3007.101(a) stating that the cessation of non-public status applies to the particular document or thing and the particular information contained therein (in whole or in part, as applicable). This additional sentence provides sufficient clarification regarding the procedural question regarding the application of the loss of non-public status.

*Proposed § 3007.103.* The NPR proposed to dispense with a codified process and timeframes (as set forth in existing § 3007.32(b)-(d)) following the issuance of a notice of preliminary determination. Order No. 4403 at 13. The reason for the deletion was that the notice of preliminary determination would set forth the specific time allotted for the response and reply (if any). *Id.* The Postal Service asks to reincorporate these codified procedures and asks to codify the standard that would apply. Postal Service Comments at 8. The Commission agrees that it would be helpful to the public to codify additional detail regarding the conduct of proceedings after a preliminary determination has issued. Consistent with the NPR's intent, the final rule regarding response and reply a notice of preliminary determination allows the Commission flexibility to set the specific time allotted for the response and reply (if any). Therefore, the Commission adopts the Postal Service's suggestions with textual edits to

correspond with the terminology and flow of final § 3007.400 (relating to the procedure for motions by any interested person). Accordingly, final § 3007.103 reincorporates much of the content of existing § 3007.32.

*Proposed § 3007.200(b).* The Postal Service objects to proposed § 3007.200(b), which retains the existing requirement of § 3007.20(b), to provide advance notice to any other person who has a proprietary interest in the non-public material. Postal Service Comments at 11. The Postal Service's concerns appear to focus on the inclusion of the term "docket designation."<sup>15</sup> The Postal Service observes that when initiating a new docket, the unique number following the hyphen is usually not reserved or assigned until shortly before the actual filing. Postal Service Comments at 12. The Postal Service also complains that interpreting the rule to require advance individualized notice for each filing would substantially burden the Postal Service. *Id.* The Postal Service describes its practice of providing one-time notice (rather than for each filing) using standard language contained in a contract, letter, or UPU circular. *Id.* at 12-13.

The Commission acknowledges the business and practical difficulties for not providing individualized advance notice of each submission and of the complete unique docket number(s) and does not interpret the existing

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<sup>15</sup> *Id.* By way of background, when establishing a docket, the Commission assigns the docket a unique identification tag that contains three components. First, a letter code indicates the nature of the proceeding. Second, four digits identify the fiscal year in which the docket was established. Third, a hyphen and a unique number are assigned to indicate the number of that type of proceeding for that fiscal year. For instance, the tag assigned to this proceeding indicates that it is a rulemaking ("RM"), established in FY 2018 ("2018"), and that it is the 3<sup>rd</sup> rulemaking docket of FY 2018 ("-3").

requirement, nor the final rule, to prohibit the approaches described by the Postal Service. While it may not always be possible to provide advance notice of the full unique docket number, it should be possible to inform affected persons of the nature of proceeding in which the information may be used (such as by using the Postal Service's approach of listing the applicable docket designation letter code(s) and the fiscal year). To minimize confusion, the Commission adds a parenthetical "to the extent practicable" to the requirement that notice include "the pertinent docket designation(s)" in final § 3007.200(b).

*Proposed § 3007.205.* With respect to the Postal Service's concern regarding what happens in the event that non-public materials are inadvertently released to the public, the Commission finds there is a benefit to providing additional procedural detail. See Postal Service Comments at 6-8. The NPR included proposed § 3007.205, which "outlines a process to minimize exposure of sensitive information that may occur due to a filer's error." Order No. 4403 at 21. Although the Postal Service did not suggest changes to proposed § 3007.205, the Commission has determined to require that the application for non-public treatment concerning such inadvertently submitted materials shall also clearly indicate any special relief that is requested. This additional procedural detail provides better instruction to the person seeking to protect the interests of the submitter or other person(s) with a proprietary interest in the materials that is claimed to have been inadvertently submitted.

Such special relief may be sought to address a situation in which a person who has not obtained access under proposed §§ 3007.300 or 3007.301 has preserved, viewed, or disseminated the materials (and the information contained therein that is later claimed to be non-public) while they were still publicly available (due to the submitter's error). If a person who has not obtained access under proposed §§ 3007.300 or 3007.301 has preserved, viewed, or disseminated the materials at issue while they were still publicly available (through no fault of his or her own), this provision better ensures that person is aware if any special relief sought. The Commission notes that this a procedural issue (and more specifically, a notice issue). It does not prejudice the ability of any person to seek access or to challenge the filer's claim that the materials should be accorded non-public treatment. Nor does this provision prejudice how the Commission would adjudicate such fact-specific issues.

*Proposed § 3007.300(a)(3)*. The Postal Service focuses on the concern that non-employee subject matter experts may access non-public materials without an appropriate non-disclosure agreement in place. See Postal Service Comments at 2-3. The Postal Service asks to codify that all non-employees assisting the Commission execute appropriate non-disclosure agreements before accessing non-public materials. See *id.* The Commission adopts the Postal Service's suggestion in final § 3007.300(a)(3), with linguistic edits for clarity and simplicity. Final § 3007.300(a)(3) provides that access may be granted without issuance of an order to “[n]on-employees who have executed appropriate non-

disclosure agreements (such as contractors, attorneys, or subject matter experts), assisting the Commission in carrying out its duties.”

*Proposed § 3007.300(b) and Appendix A to subpart C of 39 CFR part 3007.* Proposed § 3007.300(b) prohibits granting access to persons involved in competitive decision-making for any entity or individual that might gain a competitive advantage from using the materials at issue. The Postal Service does not object to this exclusion. The Postal Service suggests deleting two sentences appearing in proposed § 3007.300(b) and the corresponding template form in Appendix A to subpart C of 39 CFR part 3007 that provides a non-exhaustive list of the types of persons included and not included in the exclusion. *Id.* at 3-4.

The Commission disagrees with the Postal Service’s assertion that codifying the text at issue, which appears in the existing sample protective conditions “creates a risk of non-public materials being used in ways that could be competitively harmful.” *Id.* at 4. This language has been used in the protective conditions governing access in standard practice for many years.<sup>16</sup> Moreover, the Postal Service did not object to its inclusion in existing Appendix A to 39 CFR part 3007.<sup>17</sup> The Postal Service does not explain how adding this

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<sup>16</sup> See, e.g., Docket No. RM2017-3, Motion of the National Postal Policy Council, the Major Mailers Association, and the National Association of Presort Mailers for Access to Nonpublic Document, Statement of Compliance with Protective Conditions, March 21, 2018, at 1.

<sup>17</sup> See generally Docket No. RM2008-1, Initial Postal Service Comments; Docket No. RM2008-1, Reply Comments of the United States Postal Service, October 10, 2008; Docket No. RM2008-1, Comments of the United States Postal Service in Response to Second Notice of

language in paragraph (b), and retaining it in the template form, would *create* a risk of misuse. See Postal Service Comments at 4. Moreover, the Postal Service's suggested approach, to retain the categorical prohibition on access for any person involved in competitive decision-making, but exclude any sort of explanation of what type of persons would be included, would render the final rule (and the corresponding template form) vague, overbroad, and unhelpful.

The Commission acknowledges the Postal Service's concern regarding individuals serving in dual capacities.<sup>18</sup> The Commission does not interpret the final rule (nor the corresponding template form) from preventing these concerns from being addressed when the Commission is balancing the interests of the parties consistent with the analysis undertaken by a federal court when applying the protective conditions appearing in Federal Rule of Civil Procedure 26(c).<sup>19</sup>

Paragraph (b) categorically excludes certain persons from access to non-public

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Proposed Rulemaking, April 27, 2009; Docket No. RM2008-1, Reply Comments of the United States Postal Service in Response to Second Notice of Proposed Rulemaking, May 11, 2009.

<sup>18</sup> See, e.g., *Seal Shield, LLC v. Otter Prod., LLC*, No. 13-CV-2736 CAB (NLS), 2014 WL 12160746, at \*2-3 (S.D. Cal. Feb. 7, 2014) (entering protective order denying access to plaintiff's in-house counsel based on finding that the attorneys had prior and current involvement in business and product decisions such as to qualify them as competitive decision-makers and there was no record evidence that plaintiff could not retain outside counsel).

<sup>19</sup> For example, federal courts may restrict access to highly confidential information to independent outside counsel. See, e.g., *W. Conv. Stores, Inc. v. Suncor Energy (U.S.A.) Inc.*, No. 11-CV-01611, 2014 WL 561850, at \*1 (D. Colo. Feb. 13, 2014) ("During discovery, [the non-party competitor's] interest was addressed by a protective order that entitled Western's counsel and retained experts to view [the non-party competitor's] wholesale purchase and retail sales information, but forbade the recipients of the information from sharing it with [the plaintiff's owner] . . ."); *Norbrook Laboratories LTD. v. G.C. Hanford Mfg. Co.*, No. 5:03-CV-165, at 10, 2003 U.S. Dist. LEXIS 6851, \*15-17 (N.D. N.Y. Apr. 24, 2003) (denying outside counsel, who also served as corporate secretary and a board member, access to discovery materials containing trade secrets because the situation would place his fiduciary duties in conflict with his ethical obligations as an attorney and the restriction would not unduly prejudice his client).

materials. Paragraph (b) does not restrict a submitter or a person with a proprietary interest from seeking to exclude additional persons from access on an *ad hoc* basis or opposing a request for access for a particular individual.<sup>20</sup> Similarly, inclusion of this language in the proposed template form also does not restrict participants from seeking or negotiating stricter protections. Therefore, the Commission does not adopt the Postal Service's suggested deletions.

*Proposed §§ 3007.300(c) and 3007.301(b)(2).* Finally, the Commission declines to adopt the Postal Service's suggestion to delete the provisions appearing in proposed §§ 3007.300(c) and 3007.301(b)(2) that would permit persons to seek access to non-public materials solely for the purpose of aiding the initiation of a proceeding before the Commission. See Postal Service Comments at 5. The Postal Service misinterprets proposed § 3007.301(b)(2) as enabling persons to obtain access to non-public materials by providing only limited justification relating to a vague, undeveloped proposal to initiate a proceeding before the Commission. *Id.* at 6. Proposed § 3007.301(b)(2) requires that a motion for access include a detailed statement justifying the request for access. Also, proposed § 3007.301(b)(2)(ii) requires that a motion for access to aid initiation of a proceeding before the Commission shall describe the subject of the proposed proceeding, how the materials sought are relevant to that

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<sup>20</sup> See, e.g., Docket No. RM2017-3, Notice of the United States Postal Service of Filing Non-Public Materials, Attachment to Notice of Non-Public Filing, March 16, 2018, at 8-9 (requesting that certain persons not be granted access to the non-public materials or only be granted access subject to more stringent protective conditions).

proposed proceeding, and when the movant anticipates initiating the proposed proceeding. These requirements ensure that the request for access is made in good faith, but are not so strict as to require that the planned proceeding is fully ready. Further, final § 3007.301(c) permits the filing of a response to a motion for access. Therefore, there are sufficient procedural mechanisms to ensure that the justification given is adequate. Ultimately, the standard to grant access balances the interests of the parties, which takes into account the interests of the person seeking access and the interests of any person opposing access.

The Postal Service also objects that the proposed rules impose no consequences if the person granted access under this provision does not ultimately initiate the proceeding. *Id.* This corresponds with the existing practice, which does not impose consequences against a person who obtains access but then opts not to file a document with the Commission. Because the person requesting access has no opportunity to review the sealed materials *in camera* prior to obtaining access, it is possible that the person will opt against filing with the Commission after obtaining access. The underlying concern expressed by the Postal Service is not a failure to move forward with the planned proceeding; rather, the Postal Service is raising a concern of misuse, dissemination, or lack of care of the materials. The final rules prohibit such practices. Persons who obtain access are subject to protective conditions imposed by order and the rules, which limit use and dissemination of the non-public materials and the information contained therein. Final § 3007.303(a) provides for sanctions for

violation of protective conditions. Final § 3007.303(b) reserves the right of any person, including the Postal Service, to pursue other remedies.

The Postal Service reviews the potential to use indirect procedural mechanisms to aid persons to initiate a proceeding before the Commission, such as requesting that the Commission initiate a public inquiry docket and then seeking access, or seeking access in (and continuing access) in the ACR proceeding. *Id.* at 5-6. The Postal Service asserts that such indirect options undermine the necessity of the proposed rule. *Id.* at 6. Final §§ 3007.300(c) and 3007.301(b)(2) provide a direct mechanism. This makes the rules plain and more accessible to the public. Further, it facilitates the design and enforcement of protective conditions that will ensure the non-public material, and the non-public information contained therein, are used only for the purposes supplied. Therefore, the Commission does not adopt the Postal Service's suggested deletions.

### 3. Changes to the Proposed Rules

Each line-by-line change to the proposed rules made in response to the Postal Service's comments is reviewed below. Editorial changes made solely to improve global consistency, clarity, or precision are also reviewed below where applicable to the final rule at issue. The following changes to the proposed rules appear in the final rules.

*Final § 3007.101(a).* A sentence is added to the end of this paragraph to reflect that the cessation of non-public status applies to the particular document

or thing and the particular information contained therein (in whole or in part, as applicable).

*Final § 3007.103.* This rule is divided into three paragraphs.

*Final § 3007.103(a).* This paragraph contains the first sentence of proposed § 3007.103, informing the reader of examples of the types of action by which the Commission may seek additional information to determine the non-public treatment, if any, to be accorded. For global consistency, the word “given” is replaced with “accorded.” Clarifying text is also added to reflect that the materials at issue are those that are claimed by any person to be non-public.

*Final § 3007.103(b).* This paragraph contains the second sentence of proposed § 3007.103, but deletes the reference to *sua sponte* amendment and instead focuses on amendment prompted by motions practice. For global consistency, the word “given” is replaced with “accorded.”

*Final § 3007.103(c).* This paragraph codifies the specific procedure relating to instances in which the Commission, on its own motion, issues notice of a preliminary determination. The first sentence of final § 3007.103(c), which outlines the first step of this process—the issuance of notice of a preliminary determination, is based on existing § 3007.32(a) and the Postal Service’s suggested language. See Postal Service Appendix at iv. The second sentence of final § 3007.103(c), which sets forth the response timeframe, is based on existing § 3007.32(b) and the Postal Service’s suggested language, with edits to correspond with final § 3007.400(c). See *id.* The third sentence of final

§ 3007.103(c), which sets forth the general rule regarding reply, is based on existing § 3007.32(c), with edits to correspond with final § 3007.400(d). The fourth sentence of final § 3007.103(c), which reflects that the Commission will continue to accord non-public treatment to the materials while the issue is pending, incorporates the Postal Service's suggested text and corresponds with final § 3007.400(e). *See id.* The fifth sentence of final § 3007.103(c) which explains the timing for the Commission ruling, is based on existing § 3007.32(d) and the Postal Service's suggested language, with edits to correspond with final § 3007.400(f). *See id.* at iv-v.

The sixth sentence of final § 3007.103(c), which explains the standards for the Commission ruling, is based on the Postal Service's suggested text. *See id.* at v. Specifically, the sixth sentence of final § 3007.103(c) replaces the Postal Service's suggested phrase "balance the interests of the parties as" with "follow the applicable standard." This revision is made to more precisely encompass both standards (whichever may be applicable) appearing in paragraphs (a) and (b) of final § 3007.104. This modified phrasing of the sixth sentence also corresponds with final § 3007.400(f).

*Final § 3007.200(b).* The parenthetical "if applicable" is replaced with "to the extent practicable."

*Final § 3007.205(c).* An additional paragraph is added to provide additional instruction for an application for non-public treatment regarding materials that are claimed to have been inadvertently submitted publicly. If

special relief is sought, the application for non-public treatment must clearly request it. Such special relief may include that any person not granted access to the materials in accordance with the Commission's rules immediately destroy or return all versions of such material; refrain from disclosing or using such materials (and the information contained therein); and, if applicable, take reasonable steps to retrieve such materials (and the information contained therein) that were disclosed to any person not granted access to the materials in accordance with the Commission's rules prior to the filing of the application for non-public treatment.

*Final § 3007.300(a)(3)*. The text is clarified to reflect that access may be granted without issuance of an order to non-employees who have executed appropriate non-disclosure agreements (such as contractors, attorneys, or subject matter experts), assisting the Commission in carrying out its duties.

#### D. Review of Other Changes Proposed by the Public Representative

The following discussion summarizes all changes proposed by the Public Representative (other than issues related to the expiration of non-public treatment), provides analysis, and describes the resulting changes made to the proposed rules.

##### 1. Public Representative Comments

Aside from the issues related to the expiration of non-public treatment, the Public Representative discusses seven major issue areas. *See generally* PR Comments. First, he asserts that a framework should be adopted for the

consistent usage of terminology throughout the proposed rules. *Id.* at 2-4. To illustrate this suggestion, the Public Representative proposes a framework for how to describe the manifestations of information, which he categorizes into documents, things, and communications similar to Federal Rule of Civil Procedure 26(b)(5). *Id.* at 3. As an alternative, he suggests adopting the “documents or other matter” terminology based on 39 U.S.C. 504(g). *Id.* at 3, n.5. He acknowledges that fully consistent usage may not be possible in all instances, specifically with respect to the FOIA rules appearing in part 3004 of this chapter. *Id.* n.3.

Second, he contends that proposed § 3007.100(a) omits a reference to the ability to claim protection for materials provided by the Postal Service of its own volition. *Id.* at 7. Therefore, he suggests omitting the reference to materials being provided in response to a subpoena or request of the Commission. *Id.*

Third, he suggests the term “other person” as used is unclear and that in each instance the Commission should specify “person other than the Postal Service” or “person other than the submitter.” *Id.*

Fourth, he suggests that the Commission consider expansion of the proposed rules to apply to information exchanged by oral communications (meetings or consultations between the Commission and the Postal Service and users of the mail). *Id.* at 8. He describes past experience in which persons attending closed hearings involving the discussion of non-public information

signed non-disclosure agreements prior to entry and suggests formalization of such procedure would be beneficial. *Id.*

Fifth, he notes that filing materials in closed dockets is administratively inconvenient under the existing Filing Online interface—closed dockets are not displayed in the menu and Dockets personnel typically seek internal approval before posting materials in closed dockets. *Id.* He also observes that the proposed G docket is not currently accessible under the existing Filing Online interface. *Id.* He suggests the Commission update its Filing Online interface and Dockets procedures to accommodate such filings. *Id.* at 9.

Sixth, he requests additional explanation for the conforming changes to proposed § 3004.30. *Id.* at 11. He believes that the proposal “would appear to require the Postal Service to concomitantly file a Protective Conditions Statement on every occasion that non-public information or materials are revealed in any discussions or consultations with the Commission (or an individual Commissioner, or Commission staff).” *Id.* He states that he does not oppose such a requirement. *Id.* He does not suggest any edits to proposed §§ 3004.30 or 3004.70. *See id.* at 10-11.

Seventh, the Public Representative offers specific line-by-line editorial revisions to proposed subpart E of 39 CFR part 3001 and 39 CFR part 3007. *See id.* at 9-10, 11-16.

## 2. Commission Analysis

The following discussion addresses the first six major issue areas raised by the Public Representative, and then addresses the seventh major issue through a more detailed discussion of the specific line-by-line editorial revisions he suggests.

First, with respect to the Public Representative's suggested framework, the Commission clarifies the distinction between "information" (the substance, such as explanations, confirmations, factual descriptions, and data) and its manifestations into "materials" (tangible matter that conveys information). With respect to "materials," the Commission distinguishes between "documents" and "things." This framework parallels the "documents or other matter" framework of 39 U.S.C. 504(g). "Documents" convey information in hard copy (paper) or electronic forms. All other matter that conveys information are referred to as "things." Generally, nearly all materials submitted to the Commission are "documents;" "things" is a catch-all category for all other matter. Changes to implement this framework are made throughout the final rules appearing in subpart E of 39 CFR part 3001 and 39 CFR part 3007.

Second, the Commission agrees that deleting proposed § 3007.100(a)'s reference to materials being provided under a subpoena or in response to a Commission request would better describe the applicability of protection for materials that the Postal Service submits to the Commission. The Postal Service may seek non-public treatment for materials that are submitted to the Commission voluntarily. This is consistent with existing practice for any person

(including the Postal Service) and the Commission is authorized to provide for such procedural mechanisms consistent with its general rulemaking authority. See 39 U.S.C. 503.

Third, the Commission agrees that use of the phrases “person other than the submitter” or “person other than the Postal Service,” whichever is applicable, would improve clarity. This suggestion is adopted globally throughout the final rules.

Fourth, at this time, the Commission declines to codify specific rules relating to non-public information conveyed through oral communications during consultations and meetings.<sup>21</sup> The Commission believes that addressing this issue *ad hoc* is sufficient. With respect to communications during Commission meetings, hearings, and other widely publicized Commission events existing Commission policy confirms, “[f]or events that include presentation of non-public materials, interested persons may be limited to persons complying with provisions intended to protect non-public materials.” *Ex Parte Communications Policy* at 8. This policy similarly addresses technical conferences “[i]n dockets

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<sup>21</sup> By way of background, the Commission’s *ex parte* rules and policy provide that *ex parte* communications do not include: (1) documents filed using the Commission’s docketing system; (2) communications during the course of public Commission meetings, hearings, and other widely publicized Commission events; (3) communications during the course of a public off-the-record technical conference associated with a matter before the Commission or the pre-filing conference required for a nature of service case; (4) questions regarding procedures, status, or scheduling; and (5) communications unrelated to the matter before the Commission. See 39 CFR 3008.2; see also *Ex Parte Communications Policy*, Policy # OGC-16-1, June 30, 2016, at 7, (*Ex Parte Communications Policy*) available at [prc.gov](http://prc.gov), hover over “References” and follow “*Ex Parte Policy*” hyperlink.

that include non-public materials, interested persons may be limited to persons complying with provisions intended to protect non-public materials.” *Id.* at 15.

By way of additional background, two types of informal consultations and briefings occur subject to the Commission’s *ex parte* policy that are not open to the public. *Id.* at 13-14. First, the Commission and the Postal Service regularly consult (at the highest organizational levels) to share operational information. *Id.* at 13. Second, the Postal Service periodically briefs the Commission (at all organizational levels) on matters of interest. *Id.* at 14. The communications made during these consultations and briefings are subject to the *ex parte* policy—discussion of pending or anticipated matters before the Commission, deliberations, and decisional discussions are prohibited. *Id.* at 13-14. Because these consultations and briefings are attended by officers and employees of the federal government (including the Postal Service and the Commission), protections are already in place under the law.<sup>22</sup> Moreover, the Commission has internal policies and procedures that train employees not to disclose non-public information, provide procedures to immediately report and remediate potential exposure in the event of breach, and for employee discipline (if applicable). Also, as part of its standard contracting practice, contractors assisting the Commission have non-disclosure provisions in their contracts and, as suggested by the Postal

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<sup>22</sup> See, e.g., 18 U.S.C. 1905 (prohibiting an officer or employee of the United States, or of any department or agency thereof, from disclosing confidential information except as authorized by law; prohibited disclosure shall result in removal from office or employment as well as monetary fines, imprisonment of not more than one year, or both).

Service, this practice has been formally codified in final § 3007.300(a)(3).

Therefore, the existing safeguards applicable to non-public information conveyed through oral communications render the suggested changes unnecessary.

Further, the existing rules appearing in 39 CFR part 3007 are focused on materials that are submitted to the Commission in a tangible fashion.

Fifth, the Commission acknowledges the administrative issues noted by the Public Representative with respect to filing in closed dockets and G dockets. The Commission will make the necessary technical updates to allow for filings in Docket No. G2018-1 by the time these final rules will go into effect.

The existing interface permits filings to be made in closed dockets. The interface to create a new filing record instructs the filer to type remarks into a designated box, if the drop-down menu does not list the docket number in which the filing should be posted. The interface explains that any text typed into this designated box is viewed only by Dockets personnel. Therefore, any filer that intends to file in a closed docket may use this feature in the existing interface to type in the closed docket number, consistent with existing practice.

Sixth, the Commission provides the following explanation with respect to the requirements applicable to the Postal Service's submitting non-public materials outside of a filing (*e.g.*, not in the context of docketed proceedings or periodic reporting requirements). As stated in the NPR, the proposed rules "reflect that *in all instances in which the Postal Service submits materials to the Commission* that it reasonably believes to be exempt from public disclosure, the

Postal Service shall follow the submission procedures appearing in subpart B of 39 CFR part 3007.” Order No. 4403 at 36 (emphasis added); see *also* UPS Comments at 8.

As the NPR discussed, the existing rules do not clearly address the applicable procedural requirements if the Postal Service submits non-public materials to the Commission outside of a filing. Order No. 4403 at 14. As the NPR explained such submissions may occur in accordance with the Commission’s *ex parte* policy. *Id.*

The NPR aimed to better address the procedural requirements that would be applicable if the Postal Service submits non-public materials to the Commission outside of a filing. *Id.* This would include situations involving the submission of materials claimed by the Postal Service to contain non-public information during the course of consultations and briefings that occur in accordance with the *ex parte* policy. *See id.* Accordingly, if the Postal Service submits materials to the Commission that the Postal Service believes to contain non-public information (including related to consultations or briefings), the Postal Service must submit an application for non-public treatment, a redacted version of the non-public materials, and an unredacted version of the non-public materials. *See id.* As the NPR explained, the final rules are designed to facilitate the Commission’s determination of non-public treatment (if any) that should be accorded to materials that are submitted outside of a docketed proceeding or

periodic reporting, better ensure that confidential treatment is properly accorded, and facilitate the Commission's resolution of motions practice. *See id.*

As applied to the specific procedural question presented by the Public Representative, if the Commission (including an individual Commissioner or employee) takes custody of an unredacted version of a document during a consultation or briefing (*e.g.*, the Postal Service employee hand delivers or electronically transmits a document to a member of the Commission or Commission staff) and the Postal Service claims that the document contains non-public information, there must be a concomitant submission of the application for non-public treatment and a redacted version of the document in accordance with final §§ 3004.30(d) and 3007.200(a).

This situation, which permissibly may occur subject to the *ex parte* rules outside of a docketed proceeding or a periodic reporting requirement, does not require the use of the Filing Online system to submit the application for non-public treatment and a redacted version of the document. Therefore, in the example at issue, it would be permissible for the Postal Service employee to provide the application for non-public treatment and a redacted version of the document (concomitantly with the unredacted version of the document) to a member of the Commission or Commission staff. Final §§ 3007.201 and 3007.202 impose requirements for the *contents* of the application for non-public treatment and the redacted version of the document claimed to contain non-public information. The same content requirements apply to persons other than

the Postal Service that submit non-public materials under final § 3004.70(a). See Order No. 4403 at 15, 36.

The unredacted version of the non-public document (displaying the information that is claimed to be non-public) must be appropriately marked in accordance with final § 3007.203(a). In accordance with final § 3007.203(b), the Filing Online interface that results in the posting of a document on the Commission's public Web site may not be used to submit the unredacted version of a non-public document. If the non-public document is a spreadsheet, more specific form requirements apply to the unredacted version under final § 3007.203(d). Submission of the unredacted version of the non-public document that is made during a consultation or briefing is not required to be made using sealed envelopes or the alternative system approved by the Secretary under final § 3007.203(c)). Because the issues discussed during such consultation or briefing do not involve discussion of pending or anticipated matters before the Commission, deliberations, or decisional discussions, the Commission does not interpret its final rules to require use of either filing method. However, a person making such submission should use care to ensure that he or she does not waive any applicable protection; using sealed envelopes for hard copy materials or a secure transmission method for electronic submissions would be prudent. The same requirements apply to persons other than the Postal Service that submit non-public materials under final § 3004.70(a). See *id.*

With respect to the Public Representative's inquiry regarding non-public information conveyed through oral communications at consultations and briefings (in accordance with the *ex parte* rules), as stated above, the Commission does not adopt a specific procedural rule. The final rules apply to materials—documents and things—not oral communications. The protection of non-public information exchanged orally will continue to be handled through the existing safeguards.

Seventh, generally the Public Representative's editorial revisions (with some variations) are adopted to improve the clarity and precision of the final rules. Additional explanation follows.

*Proposed § 3001.100.* The Commission generally adopts the proposed editorial changes to improve readability and conform to the distinction between information and the materials used to convey information. See PR Comments at 9, 17-18.

With respect to the distinctions between types of materials, the final rule varies slightly from the Public Representative's proposal. The Public Representative proposes to categorize materials into documents, things, and communications similar to Federal Rule of Civil Procedure 26(b)(5). *Id.* at 3. As an alternative, he suggests categorizing materials into "documents or other matter" based on 39 U.S.C. 504(g). *Id.* at 3, n.5. As discussed above, the Commission uses the terms documents and things as its framework for describing the types of materials that may be provided to the Commission. The

final rule informs the reader that the information request may seek information that already exists in some tangible form as well as the creation of a tangible document or thing that describes the information sought. Whether the response might involve the creation of a tangible document or thing or the identification of an existing document or thing depends on the situation. The final rule is intended to be construed broadly to encompass whichever would be applicable and appropriately responsive to the information request. This is consistent with existing practice before the Commission.

To the extent that information that was orally communicated is sought, the information request would typically seek the underlying substance of the oral communication through tangible matter (e.g., explanations, confirmations, factual descriptions, and data). Generally, the person responding to the information request would create document(s) or thing(s) to convey the underlying substance of the communication or identify existing responsive document(s), whichever may be applicable and appropriately responsive. As an example, a response to an information request may involve creating a narrative response containing the requested explanations, confirmations, factual descriptions; creating workpapers or tables containing the requested data; or identifying responsive document(s) or thing(s) that already exist.

Practice before the Commission differs from practice before federal courts in that *occurrence* of oral communications are rarely at issue in information

requests.<sup>23</sup> In the unlikely instance that the *occurrence* of the oral communication itself was at issue in an information request, then the information request would likely seek a document or thing memorializing the occurrence of such oral communication. As an example, a response to such an information request may involve creating a narrative response containing confirmation that the oral communication at issue occurred (or did not occur), a description of the facts surrounding the occurrence (or non-occurrence) of the oral communication, or identification of an existing responsive document or thing relating to the occurrence (or non-occurrence) of the oral communication.

*Proposed § 3001.101.* The Commission generally adopts the proposed editorial changes to improve readability and conform to the framework of information, documents, and things. See *id.* at 10, 19-20. The Commission also adopts the proposed change of the second sentence of paragraph (b) to the passive voice to minimize confusion regarding the ability of the Chairman of the Commission or the presiding officer to make a judgment independent of the full Commission.

The references to “filing” a motion are deleted in paragraph (b) to reduce unnecessary text. The Commission does not interpret paragraph (b) to prohibit a motion from being stated orally on the record; these references to “filing” a

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<sup>23</sup> It is also important to recognize that information requests serve as a Commission procedure separate and distinct from the discovery mechanisms appearing in existing 39 CFR part 3001 such as depositions, requests for admissions, interrogatories, and requests for production.

motion appear in existing § 3007.3(c). However, the movant may be instructed to reduce his or her oral motion to a writing and file it under § 3001.30(g) of this chapter. The proposed change to abbreviate the end of the third sentence of paragraph (b) is not adopted; the additional text is retained in the final version of the rule to better inform the reader of what an information request based on a motion may include.

*Proposed § 3007.100.* The Commission generally agrees with the issues raised by the Public Representative. *See id.* at 11. With respect to applicability, the text of proposed § 3007.100 is redesignated as final § 3007.100(a) with four subparagraphs (1)-(4). Because the rules appearing in 39 CFR part 3007 are derived not only from the Commission's specific authority in 39 U.S.C. 504(g), but also the Commission's general rulemaking authority (see Order No. 4403 at 6), the specific cross-reference is deleted to minimize confusion. Therefore, the final rule abbreviates the Public Representative's suggested text. Similarly, the text quoted directly from section 504(g)(1) of title 39 relating to materials provided by the Postal Service in response to a subpoena or otherwise at the request of the Commission is deleted to minimize confusion. The Postal Service may provide materials to the Commission in the absence of a subpoena or a direct Commission request and apply for non-public treatment, if circumstances warrant.

Generally, the other clarifying language suggested by the Public Representative is adopted throughout final § 3007.100(a). *See PR Comments at*

11. In final § 3007.100(a)(3) and (4), a simpler phrase, “any person,” is adopted in lieu of the suggested phrase, “the Postal Service or any person other than the Postal Service.”

Throughout final § 3007.100(a)(1)-(4), edits are made to conform to the distinction between information and the materials used to convey information. Final § 3007.100(b), which replicates the scope text appearing in final § 3001.100(b), is added to assist readers.

*Proposed § 3007.101(a).* The Commission generally adopts the proposed edits to the first sentence, to better distinguish between information and the means of conveying information, with minor variations to fit the selection of the documents or things framework. See *id.* at 24. The Commission also adopts the Public Representative’s suggestion to divide the text into more sentences. See *id.* at 11-12. Accordingly, three revised sentences explain the applicable bases for the Postal Service, any person other than the Postal Service, and any person to claim that information is non-public. The final rule varies slightly from the Public Representative’s suggestion to reflect the potential that any person (including the Postal Service) may cite to 5 U.S.C. 552(b) as a basis to claim that information is non-public. Potential examples involving a person other than the Postal Service may involve another government agency subject to FOIA or a business providing information in accordance with 5 U.S.C. 552(b)(4).

The Commission declines to adopt the Public Representative’s suggestion to replace the proposed terminology “publicly discloses” with “publicly provides

access to” the materials to avoid potential confusion with access granted subject to protective conditions. *See id.* at 24.

*Proposed § 3007.102.* In response to the Public Representative’s concern, edits are adopted to more explicitly convey that disclosure of or access to the non-public information contained within non-public materials is prohibited, except in accordance with final 39 CFR part 3004 or final 39 CFR part 3007. *See id.* at 12.

*Proposed § 3007.104.* The Commission adopts the Public Representative’s suggestion to clarify the distinction between materials and the information conveyed therein in the heading and in paragraph (a). *See id.* at 12, 26. The Commission declines to adopt the suggestion to replace the proposed terminology “publicly disclose” and “public disclosure of” in the heading and in paragraph (a) with “publicly allow access to” and “public access to” materials to avoid potential confusion with access granted subject to protective conditions. *See id.* at 26.

The Commission agrees with the Public Representative that the description of the standard in paragraph (b) should be amplified and adopts his suggestion. *See id.* at 12-13.

*Proposed § 3007.200.* The Commission adopts the Public Representative’s proposed edit in paragraph (a) to use the word “concomitantly” rather than “on the same business day” to emphasize that the submissions shall

occur as closely in time as practicable on the same business day. *See id.* at 13, 26.

The Commission adopts the Public Representative's proposed clarifying edits in paragraph (b). *See id.* at 13, 27.

*Proposed § 3007.201(b).* The Commission adopts the Public Representative's proposed clarifying edits in paragraph (b), with one exception. *See id.* at 13, 27-28. The phrase "or both" is retained in subparagraph (b)(2) to emphasize that the submitter must either identify multiple individuals or ensure that a single designated individual will provide notice to the affected person.

*Proposed § 3007.202.* Taking the view that this proposed rule only applies to documents, not all materials, the Public Representative suggests limiting its applicability accordingly in the heading and in paragraph (a). *See id.* at 14, 29. Generally, the Commission's rules focus on documents (either hard copy or electronic). Although the category of "things" is simply a catch-all, that is unlikely to be used, paragraphs (b) and (c) allow sufficient flexibility to account for the practical difficulty in redacting a thing. Therefore, the Commission declines to adopt this suggestion. The Commission adopts the Public Representative's other proposed clarifying edits in paragraph (a) to more precisely refer to the information that is claimed to be non-public. *See id.* at 29.

The two line edits suggested for the first sentence of paragraph (b) are not adopted because they are not necessary. *See id.* First, using "shall" is sufficient to convey that it is mandatory to justify using a method other than blackout to

redact non-public information appearing in the materials. Second, replacing “using” with “the use of” does not produce an appreciable improvement in clarity.

*Proposed § 3007.203.* The Commission adopts the suggestions to re-divide the paragraphs, with some variations. *See id.* at 30-31. Final paragraph (a) pertains solely to the marking requirement; final paragraph (b) pertains to the prohibition on using the Filing Online interface that results in the public posting of a document; final paragraph (c) pertains to the method to file non-public materials; and final paragraph (d) pertains to requirements specific to non-public spreadsheets.

The Commission generally adopts the suggested edits to final paragraph (a) with minor variations due to the selection of the documents or things framework. *See id.* at 14, 30.

The Commission adds an additional phrase to the first sentence of final paragraph (b) to accommodate the potential that the existing Filing Online interface may be modified to accept non-public documents in a secure manner. *See id.* at 14. The existing Filing Online interface causes a public filing to be made, leading to the posting of a document to the Commission’s public-facing Web site. Filers may not submit the unredacted version of the non-public materials (the version that displays the non-public information) using the existing Filing Online interface.

In final paragraph (c), the suggestion to replace “materials” with “documents” is adopted in part. *See id.* at 14, 30-31. This change is not adopted

in the introductory text of final paragraph (c); instead, other text is deleted so that the sentence is more generally applicable. In final subparagraph (c)(1), text pertaining to materials, as a broad category, is confined to the first two sentences. The suggestion to refer specifically to a document is adopted in the third and fourth sentences of final subparagraph (c)(1). This change is also not adopted in final subparagraph (c)(2); the Secretary's authority to approve and administer an alternative filing system includes all materials.

The suggestion to reword final subparagraph (c)(2)'s reference to the Secretary is adopted. See *id.* at 31. The suggested additional description is adopted in the third sentence of final subparagraph (c)(1) to reflect that "DVDs" may be digital video discs or digital versatile discs. See *id.* at 14, 31.

The Commission agrees with the Public Representative's observation that the requirements relating to spreadsheets appearing in proposed subparagraph (b)(1) are off-topic. See *id.* at 14. The Commission appreciates his suggestion to address certain requirements for spreadsheets in a different part of the Commission's regulations and may consider it in future rulemaking. Moving these two sentences to final paragraph (d) minimizes the diversion. The reason that the sentences are not deleted from final § 3007.203 is to convey that there are certain minimal form and content requirements associated with the unredacted version of a spreadsheet, a matter that is entirely within the scope of 39 CFR part 3007. This is necessary to include because in some instances the

formulas and links to related spreadsheets contain non-public information and, therefore, are masked in the redacted version of the spreadsheet.

*Proposed § 3007.204.* The clarifying language suggested by the Public Representative is adopted in the header and text. *See id.* at 14, 31.

*Proposed § 3007.205.* With respect to the suggestion to replace “could” with “should” in the first sentence, the Commission instead rephrases to better focus the issue not on the technical capability of making a sealed filing but rather on having a cognizable legal basis to assert a claim that the materials could have been subject to a claim for non-public treatment. *See id.* at 14-15, 32. The Commission declines to use “should” to avoid a potential interpretation that the final rule prejudices whether the materials at issue actually should (ought to) be withheld from the public.

With respect to the suggestion to strike the last sentence pertaining to repeated mistakes, the Commission declines to adopt the suggestion. *See id.* at 15, 32. This sentence is retained to notify the reader that any reoccurring problems may be addressed by the Secretary administratively. It is also retained to emphasize that this procedure to minimize the potential exposure from an error made by a filer is meant to be rarely invoked.

With respect to the suggestion to strike text to broaden the rule’s applicability to materials submitted outside the context of a formal filing, the Commission instead incorporates this suggestion in a separate final paragraph (b). *See id.* Because such submissions related to consultations and briefings

would most likely not be directed to Dockets personnel, the person making the request should contact the Commission personnel to whom the submission was directed. The heading of the final rule is changed to accommodate the addition of final paragraph (b).

*Proposed § 3007.301.* The Commission adopts the Public Representative's proposed clarifying edits in paragraphs (a), (b)(1), and (e). See *id.* at 15, 34, 36. The Commission agrees with the Public Representative that the description of the standard in paragraph (e) should be amplified and adopts his suggestion. See *id.* at 15.

*Proposed § 3007.302.* The Commission adopts the Public Representative's proposed clarifying edit in paragraph (a). See *id.* at 15, 36.

*Proposed § 3007.303.* The Commission adopts the Public Representative's proposal to replace "shall" with "may" in paragraph (a) to acknowledge that a sanction may not be applied in every instance of an infraction. See *id.* at 15, 37. This change is consistent with the practice employed by federal courts and is equivalent to retaining the word "shall" and applying a nominal sanction.<sup>24</sup> The Commission adopts his suggestions to provide two additional illustrative types of sanctions in final paragraphs (a)(3)–(4). See PR Comments at 16, 37.

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<sup>24</sup> In federal practice, sanctions are mandatory "[i]f a certification violates this rule without substantial justification." Fed. R. Civ. P. 26(g)(3).

The Commission declines to adopt the proposed edit in paragraph (b). See *id.* at 16, 38. The phrase “or both” is retained to emphasize precisely who may face sanctions.<sup>25</sup>

*Proposed § 3007.304.* The Commission agrees with the Public Representative’s observation that it would be beneficial to convey that if judicial review occurs, access may continue through the duration of the review and any Commission response thereto. See PR Comments at 16. Final paragraph (a)(1) varies slightly from the suggested edit because if judicial review does occur, the final event triggering termination of access would be when judicial review expires for that decision or the Commission’s actions in response to that decision. See *id.* at 38.

*Proposed § 3007.400.* The Public Representative suggests changing terminology from “public disclosure” or “publicly disclosed” to using “public availability” or “made publicly available” in the heading of Subpart D, the heading of proposed § 3007.400, and the text of proposed § 3007.400(b). See *id.* at 45. The suggested changes are not adopted because they are unnecessary. Using terminology based on the phrase “publicly disclose” appears in existing § 3007.33(a) and (b) (describing the applicable standard for the Commission ruling) to refer to unsealing materials filed as non-public (and the information therein claimed to be non-public). This terminology has been retained in final §

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<sup>25</sup> See Fed. R. Civ. P. 26(g)(3) (“If a certification violates this rule without substantial justification, the court, on motion or on its own, must impose an appropriate sanction on *the signer, the party on whose behalf the signer was acting, or both.*”) (emphasis added).

3007.104(a) and (b) and it has been used globally throughout the final rules. Using terminology based on the term “disclose” is sufficient to refer to unsealing materials filed as non-public (and the information therein claimed to be non-public).<sup>26</sup> The Public Representative’s proposed clarifying edit to replace “materials” with “information” in the second sentence of paragraph (b) is adopted. See PR Comments at 45.

### 3. Changes to the Proposed Rules

Each line-by-line change to the proposed rules made in response to the Public Representative’s comments is reviewed below. Editorial changes made solely to improve global consistency, clarity, or precision are also reviewed below where applicable to the final rule at issue. The following changes to the proposed rules appear in the final rules.

*Final § 3001.100(a).* This paragraph is divided into subparagraphs (1) and (2) to improve readability. The phrase “other person” in final § 3007.100(a)(2) is clarified to refer to “person other than the Postal Service.” Editorial changes are made throughout final § 3007.100(a)(1)-(a)(2) to clarify that information, and any associated documents or things, may be sought.

*Final § 3001.100(b).* This paragraph is clarified to better illustrate the distinctions between information (substantive knowledge) and materials (the means of conveyance of information). A non-exhaustive list of examples of

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<sup>26</sup> See Merriam-Webster Dictionary, available at <http://www.merriam-webster.com/dictionary/disclose> (“disclose” defined as “to expose to view” and “to make known or public”).

documents is provided. Things is a catch-all category for materials that are not documents.

*Final § 3001.101(a).* This paragraph is clarified to conform to the framework of information, documents, and things. The phrase “the Postal Service or any other person” is simplified to “any person.”

*Final § 3001.101(b).* This paragraph is edited to conform to the framework of information, documents, and things. The references to “filing” of a motion are deleted to simplify the text. The second sentence is changed to the passive voice is made to minimize confusion regarding the ability of the Chairman of the Commission or the presiding officer to make a judgment on a pending motion for issuance of an information request independent of the full Commission.

*Final § 3004.70.* The Commission replaces the word “nonpublic” with “non-public” in paragraphs (b) and (c) for consistent usage of terminology throughout this rule.

*Final § 3007.100.* Text is added to the heading to refer to scope. The text of the final rule is reorganized into paragraphs (a) and (b) to address applicability and scope. Descriptive headings are added at the paragraph-level.

*Final § 3007.100(a).* A descriptive paragraph-level heading is added. The first sentence is abbreviated to remove the statutory cross-reference. Each of the described situations of applicability are reorganized into four subparagraphs (1) through (4). Throughout subparagraphs (1) through (4), text is conformed to the distinction between materials and the information contained in materials. In

subparagraph (1), the phrase “under a subpoena issued under 39 U.S.C. 504(f), or otherwise at the request of the Commission” is deleted to more precisely reflect that the Postal Service may seek protection for materials that it submits to the Commission voluntarily. In subparagraph (2), the phrase “other person” is clarified to refer to “person other than the Postal Service.” In subparagraphs (3) and (4), the phrase “the Postal Service or any other person” is simplified to “any person.” In subparagraphs (3) and (4), the phrase “in the process of” is added for clarification.

*Final § 3007.100(b).* A descriptive paragraph-level heading is added.

New text is added to illustrate the distinctions between information, documents, things, and materials.

*Final § 3007.101(a).* This paragraph is edited to conform to the framework of information, documents, and things. The various bases for seeking non-public treatment are subdivided into multiple sentences to clarify which basis is applicable to the Postal Service, persons other than the Postal Service, or both.

*Final § 3007.102.* Textual references to non-public information are added to clarify that the final rules apply to the non-public information contained within non-public materials.

*Final § 3007.104.* The heading and text of paragraph (a) are edited to reflect that materials contain information. Additional clarifying text is added to paragraph (b) to better explain that the Commission will use an analytical

framework consistent with that of a federal court when applying the protective conditions appearing in Federal Rule of Civil Procedure 26(c).

*Final § 3007.200(a).* To convey that the submissions shall be made as closely in time as practicable on the same business day, the phrase “on the same business day” is replaced with “concomitantly.”

*Final § 3007.200(b).* Text is conformed to the distinction between materials and the information contained therein. For clarity, the phrase “other person” is replaced with “person other than the submitter.”

*Final § 3007.201(a).* For global consistency, the word “material” is replaced with “materials.”

*Final § 3007.201(b)(2)-(3).* Text is conformed to the distinction between materials and the information contained therein. For clarity, the phrase “other person” is replaced with “person other than the submitter.”

*Final § 3007.202(a).* Text is conformed to the distinction between materials and the information contained therein.

*Final § 3007.203(a).* This paragraph is edited to more plainly emphasize that the materials must be appropriately marked on each page or portion thereof.

*Final § 3007.203(b).* In the first sentence, text is added to emphasize that the prohibition applies to using the Filing Online interface that results in posting a document that is available to the public.

*Final § 3007.203(c).* The requirements specific to filing methods are redesignated as a separate paragraph with editorial revisions. The cross-

reference and the descriptive text concerning the requirements are deleted to reduce unnecessary text. Organization and textual edits are made to subparagraph (c)(1) to reflect requirements applicable to materials versus requirements that only apply to documents. A second description of DVD is added in subparagraph (c)(1). Subparagraph (c)(2) has been reworded to refer to “[t]he secretary of the Commission.”

*Final § 3007.203(d).* The requirements specific to spreadsheets are redesignated as a separate paragraph with editorial revisions.

*Final § 3007.204.* For clarity, the phrase “other person” is replaced with “person other than the submitter” in the heading and text of the final rule.

*Final § 3007.205.* The heading is changed to accommodate the addition of final paragraph (b).

*Final § 3007.205(a).* For clarity, the phrase “filed non-publicly” is changed to “subject to a claim for non-public treatment is contained.” For global consistency, the word “material” is replaced with “materials.” The tenses of the associated verbs are conformed to reflect the changes from singular to plural nouns.

*Final § 3007.205(b).* This paragraph is added to provide a procedure to address inadvertent submissions that may occur outside the context of public filings.

*Final § 3007.301.* Paragraph (a) and subparagraph (b)(1) are edited to conform to the distinctions between information and materials. For clarity in

paragraph (e), the phrase “other person” is replaced with “person other than the submitter.” Additional clarifying text is added to the fourth sentence in paragraph (e) to better explain that the Commission will use an analytical framework consistent with that of a federal court when applying the protective conditions appearing in Federal Rule of Civil Procedure 26(c). Also, the inadvertent repetition of the words “balance the” is corrected in the fourth sentence in paragraph (e).

*Final § 3007.302(a).* Explicit reference to the non-public information contained within non-public materials is added. Commas are added for clarity.

*Final § 3007.303(a).* The word “shall” is changed to “may” for precision. Two types of illustrative sanctions are added in final § 3007.303(a)(3) and (4). To accommodate the new text, the catch-all content appearing in proposed § 3007.303(a)(3) is redesignated as final § 3007.303(a)(5).

The phrase “any or all of the following” is added to the introductory text of paragraph (a) to better convey that the sanctions appearing in subparagraphs (1)-(5) are illustrative, and that the Commission may determine to apply any or all of them. Corresponding with this change, the word “or” is used in subparagraph (4).

*Final § 3007.304(a)(1).* Text is added to reflect that access may continue throughout the duration of the Commission’s response to judicial review (if applicable).

*Final § 3007.400(a).* For global consistency, the word “material” is replaced with “materials.”

*Final § 3007.400(b).* For precision, the word “materials” is replaced with “information”.

*Final § 3007.400(f).* For global consistency, the word “given” is replaced with “accorded” in the second sentence. In the last sentence, the phrase “balance the interests of the parties as” is replaced with “follow the applicable standard” to more precisely encompass both standards (whichever may be applicable) appearing in paragraphs (a) and (b) of final § 3007.104. This modified phrasing of this last sentence also corresponds with final § 3007.103(c).

#### **IV. Section-by-Section Analysis of the Final Changes to 39 CFR Part 3001**

*Final subpart E of 39 CFR part 3001.* The Commission adds subpart E to existing 39 CFR part 3001.

Existing §§ 3007.2 and 3007.3, which relate to information requests, are included in existing 39 CFR part 3007, which relates to non-public information. Information requests are not limited to situations involving non-public materials. Therefore, the Commission moves the procedural requirements relating to information requests to the Commission’s rules of practice and procedure under existing 39 CFR part 3001. To minimize disruption associated with moving these rules to existing 39 CFR part 3001, the Commission adds proposed subpart E to 39 CFR part 3001. Final subpart E to 39 CFR part 3001 contains two rules applicable to information requests.

*Final § 3001.100 Applicability and scope.* The first sentence of final § 3001.100(a) mirrors the first sentence of existing § 3007.2, which informs the reader that the Commission may require that the Postal Service provide certain information that is likely to materially assist the Commission in fulfilling its statutory responsibilities. Consistent with existing § 3007.3(b), the second sentence of final § 3001.100(a) informs the reader that the Commission may request that persons other than the Postal Service provide certain information that is likely to materially assist the Commission in fulfilling its statutory responsibilities.

Final § 3001.100(b) is based on the second sentence of existing § 3007.2 and includes a non-exhaustive list of the types of information that may be sought in an information request. Final § 3001.100(b) is intended to encompass information, documents, and things in whatever form that is likely to materially assist the Commission in fulfilling its statutory responsibilities.

*Final § 3001.101 Information request.* Final § 3001.101(a) combines existing § 3007.3(a) and (b). Final § 3001.101(a) provides that an information request may be directed to any person (including the Postal Service) and describes the contents of an information request. Final § 3001.101(a) dispenses with the defined term “authorized representative” and instead specifies that an information request may be issued by the Commission, the Chairman of the Commission, or the presiding officer, consistent with existing practice and 39

U.S.C. 504(f)(2). Consistent with existing practice, final § 3001.101(a) provides that the issuance of an information request is discretionary.

Final § 3001.101(b) is based on existing § 3007.3(c). Final § 3001.101(b) provides that a request to issue an information request shall be via a motion listing the proposed questions and justifying the request. Final § 3001.101(b) codifies that the Commission, the Chairman of the Commission, or the presiding officer may issue an information request at any time after the motion. Any or all of the proposed questions may be included or modified in the information request.

#### **V. Section-by-Section Analysis of the Final Changes to 39 CFR Part 3004**

*Final § 3004.30 Relationship among the Freedom of Information Act, the Privacy Act, and the Commission's procedures for according appropriate confidentiality.* The Commission amends the introductory text to paragraph (d) of the existing rule to reflect that in all instances in which the Postal Service submits materials to the Commission that it reasonably believes to be exempt from public disclosure, the Postal Service shall follow the submission procedures appearing in final subpart B of 39 CFR part 3007. The Commission also amends paragraph (e) of the existing rule to dispense with the use of the term “third party” to refer to a person other than the Postal Service.

*Final § 3004.70 Submission of non-public materials by a person other than the Postal Service.* The Commission amends the heading identified in the existing rule to dispense with the use of the term “third party” to refer to a person other

than the Postal Service. The Commission amends paragraph (a) of the existing rule to reflect that any other person providing materials to the Commission that it reasonably believes to be exempt from public disclosure shall follow the submission procedures appearing in final subpart B of 39 CFR part 3007. The Commission also amends paragraph (b) of the existing rule to dispense with the use of the term “third party” to refer to a person other than the Postal Service. The Commission also amends paragraph (c) of the existing rule so as to update the cross-reference to the provision containing the requirements for an application for non-public treatment from existing § 3007.10 to final § 3007.201. Finally, the Commission replaces the word “nonpublic” with “non-public” in paragraphs (b) and (c) for consistent usage of terminology throughout this final rule.

## **VI. Section-by-Section Analysis of the Final Changes to 39 CFR Part 3007**

As described below, the Commission amends 39 CFR part 3007 by replacing the existing heading and text of the rules.

*Final heading identified in 39 CFR part 3007.* The Commission revises the heading to reflect that 39 CFR part 3007 applies to non-public materials provided to the Commission rather than merely the treatment of non-public materials filed by the Postal Service.

### **A. Final Subpart A of 39 CFR Part 3007—General Provisions**

*Final subpart A of 39 CFR part 3007.* The Commission adds subpart A to 39 CFR part 3007 containing general provisions.

*Final § 3007.100 Applicability and Scope.* Final § 3007.100(a) identifies that final 39 CFR part 3007 applies when: (1) the Postal Service claims that any materials it provides to the Commission contain non-public information; (2) any person other than the Postal Service claims that any materials provided to the Commission contain non-public information; (3) the Commission is determining what type and degree of confidential treatment should be accorded to the materials claimed by any person (including the Postal Service) to contain non-public information; or (4) the Commission is determining what protective conditions should apply to any person (including the Postal Service) that is accessing non-public materials. Final § 3007.100(b) sets forth the scope by distinguishing between information (the substance) and materials (tangible matter that conveys information). Materials refers to documents and things. Examples of documents are provided. Things refers to a catch-all category for tangible matter used to convey information that is not a document.

*Final § 3007.101 Definitions.* Final § 3007.101(a) is based on the definition of non-public materials appearing in existing § 3007.1(b).

Final § 3007.101(a) modifies the existing definition of non-public materials to reflect the inclusion of materials that are claimed to contain information that is described in 39 U.S.C. 410(c) or exempt from public disclosure under 5 U.S.C. 552(b). Such information is protectable if provided by the Postal Service to the Commission pursuant to 39 U.S.C. 504(g)(1), 3652(f)(1), or 3654(f)(1). Such information is defined as non-public materials under existing § 3007.1(b) if the

claim for non-public treatment is made by the Postal Service. This final rule reflects the Commission's practice to treat such information as non-public materials regardless of who submits the materials and regardless of who makes the claim for non-public treatment. This final rule clarifies that non-public information includes commercially sensitive information, whether it belongs to the Postal Service or any other person.<sup>27</sup>

Final § 3007.101(a) adds that materials cease to be non-public (except for inadvertent public submissions corrected in accordance with final § 3007.205) if the person making the submission publicly discloses the materials, subject to the consent of each affected person with a proprietary interest in the materials (if applicable). This final rule reflects that consensual voluntary public disclosure of materials that were initially claimed to be non-public has been used to resolve issues of whether public or non-public treatment should apply in some instances. This final rule also protects the interests of a person other than the submitter that has a proprietary interest in the materials in those instances where the interests of the person making the submission may not be the same as the interests of a

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<sup>27</sup> Such information is protectable under 5 U.S.C. 552(b)(4), which exempts from public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential."

Further, if the information is provided by the Postal Service, then the information is also protectable under 5 U.S.C. 552(b)(3) and 39 U.S.C. 410(c)(2). Section 552(b)(3) of title 5 exempts from public disclosure information that is specifically exempted by another statutory provision, such as 39 U.S.C. 410(c)(2). Section 410(c)(2) of title 39 provides that the Postal Service shall not be required to disclose "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 publicly disclosed."

person other than the submitter that has a proprietary interest in the materials. This final rule clarifies that the cessation of non-public status applies to the particular document or thing and the particular information contained therein.

Final § 3007.101(b) defines the term submitter. The usage of this term helps to unify several procedural rules that apply to the Postal Service and any other person that provides non-public materials to the Commission. Consistent with § 3001.5(f) of this chapter, this final rule uses person to include both a natural person (individual) and a legal person (entity).<sup>28</sup>

*Final § 3007.102 Treatment of non-public materials.* Final § 3007.102(a) incorporates existing § 3007.23, which informs the reader that the Commission will not disclose or allow access to non-public materials, except as provided by 39 CFR part 3007. Final § 3007.102(a) adds a cross-reference to the Commission's FOIA regulations in 39 CFR part 3004 and adds a parenthetical to refer to the non-public information appearing in non-public materials.

Final § 3007.102(b) retains the content of existing § 3007.60. Final § 3007.102(b) adds references to non-public information so as to clearly encompass the non-public information appearing in non-public materials.

*Final § 3007.103 Commission action to determine non-public treatment.* Final § 3007.103 informs the reader about the types of action that the

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<sup>28</sup> 39 CFR 3001.5(f) provides “[p]erson means an individual, a partnership, corporation, trust, unincorporated association, public or private organization, or governmental agency.”

Commission may take after receiving non-public materials. Final § 3007.103 is divided into three paragraphs.

Final § 3007.103(a) informs the reader that the Commission may seek additional information to determine the non-public treatment, if any, to be accorded to materials claimed be non-public. Consistent with practice, final § 3007.103(a) identifies examples such as the issuance of information requests, preliminary notices, or interim orders.

Final § 3007.103(b) states that upon a motion by any person, the Commission may issue an order containing a description of the non-public treatment accorded (if any) and the timeframe for which non-public treatment is accorded.

Final § 3007.103(c) is based on the procedure appearing in existing § 3007.32, which provides the specific procedure relating to instances in which the Commission, on its own motion, issues notice of a preliminary determination of non-public treatment. Final § 3007.103(c) sets forth the response timeframe, the general rule regarding reply, and the timing and standards for the Commission ruling.

*Final § 3007.104 Standard for public disclosure of materials claimed to contain non-public information.* Final § 3007.104 incorporates the content appearing in existing § 3007.33. Final § 3007.104(a) modifies the language appearing in existing § 3007.33(a) because the existing rule did not appear to contemplate situations where materials containing Postal Service non-public

information were submitted by another person (such as a person granted access to non-public Postal Service materials) or were provided by the Postal Service outside of a filing. Final § 3007.104(b) modifies the content of existing § 3007.33(b) by replacing the reference to “a third party” to more precisely reflect that this final rule applies to materials that are claimed to be non-public because the materials contain the proprietary information of any person other than the Postal Service. Final § 3007.104(b) amplifies the explanation of the standard appearing in existing § 3007.33(b) by stating that the Commission will use an analytical framework consistent with that of a federal court when applying the protective conditions appearing in Federal Rule of Civil Procedure 26(c).

B. Final Subpart B of 39 CFR Part 3007—Submitting Non-public Materials and Seeking Non-public treatment

*Final subpart B of 39 CFR part 3007.* The Commission adds subpart B to 39 CFR part 3007 containing rules applicable to submitting non-public materials to the Commission and seeking non-public treatment of those materials.

*Final § 3007.200 General requirements for submitting non-public materials and seeking non-public treatment.* Final § 3007.200 explains the process to provide non-public materials to the Commission applicable to all submitters. Final § 3007.200(a) requires the provision of three things as closely in time as practicable on the same business day—an application for non-public treatment, a redacted version of the non-public materials, and an unredacted version of the non-public materials. Consistent with existing practice, the

application for non-public treatment and the redacted version of the non-public materials are public documents. Consistent with existing practice, the unredacted version of the non-public materials shall be submitted under seal. Final § 3007.200(a) unifies aspects of the content of existing §§ 3007.10, 3007.20(a), 3007.21(a), and 3007.22(a).

Final § 3007.200(a) also addresses situations that are not adequately addressed in the existing rules. Existing §§ 3007.20(a) and 3007.21(a) require the Postal Service to file an application whenever it files non-public material. However, the existing rules do not clearly address the procedural requirements applicable if the Postal Service submits non-public materials to the Commission outside of a filing made in accordance with §§ 3001.9 and 3001.10 of this chapter. Such submissions are permissible, subject to the Commission's *ex parte* policy appearing in 39 CFR part 3008. Requiring that the Postal Service submit an application for non-public treatment, a redacted version of the non-public materials, and an unredacted version of the non-public materials will facilitate the Commission's determination of non-public treatment (if any) that should be accorded to those materials and would better ensure that confidential treatment is properly accorded to those non-public materials. Moreover, these requirements will facilitate the Commission's resolution of motions practice related to those materials.

Moreover, although existing § 3007.22(a) sets forth the requirements of an application made by a third party, that existing rule appears to contemplate

situations where a person other than the Postal Service files an application for non-public treatment of a Postal Service filing that contains the person's non-public information. This option is preserved under final § 3007.204. However, the existing rules are silent regarding whether a person other than the Postal Service that submits non-public materials (either by formal filing or by informal submission) must include an application. Existing § 3004.70(a) reflects that a third party submitting materials claimed to be non-public to the Commission "may" lodge an application for non-public treatment. Requiring the submission of an application by any submitter of non-public materials will promote fairness and will facilitate the Commission's determination of the type and degree of non-public treatment (if any) that should be accorded to those materials.

Final § 3007.200(b) requires that before submitting non-public materials to the Commission, each submitter contact any affected person who may have a proprietary interest in the information contained in the non-public materials. This final rule expands the application of existing § 3007.20(b) to Postal Service submissions made outside formal filings and to submissions made by persons other than the Postal Service. The final rule will better ensure the protection of an affected person's proprietary information contained in the materials by giving the affected person an opportunity to file an application for non-public treatment and address its confidentiality concerns directly with the Commission.

*Final § 3007.201 Application for non-public treatment.* Final

§ 3007.201(a) retains the same burden of persuasion appearing in existing § 3007.21(b) and expands it to apply to all submitters.

Final § 3007.201(b) sets forth the required contents of an application. Existing §§ 3007.21 and 3007.22 require slightly different content requirements based on whether the application is made by the Postal Service or any other person. Final § 3007.201(b) makes the requirements uniform. In addition to simplifying the procedural rules, this better ensures that the Commission will receive adequate justification of an application. These requirements will aid the Commission's determination of the non-public treatment, if any, to be accorded to the materials.

The uniform content requirements appearing in final § 3007.201(b)(1), (3)-(8) remains substantially the same as existing § 3007.21(c)(1), (3)-(8). Final § 3007.201(b)(1), (3)-(8) contain changes to improve clarity and update cross-references.

Final § 3007.201(b)(2) is based on existing § 3007.21(c)(2), which requires the Postal Service to identify any third party known to have a proprietary interest in the information contained in the materials or a designated Postal Service employee to notify each affected third party (if identification of the third party is sensitive). Final § 3007.201(b)(2) applies this requirement to all applications (even if made by a person other than the Postal Service) and modifies this requirement as follows.

Final § 3007.201(b)(2) requires the application to identify a foundational fact—whether the submitter, any person other than the submitter, or both have an interest in the information contained in the non-public materials. This final rule will improve transparency, especially for persons seeking access or public disclosure of the non-public materials. This final rule reflects the growing complexity related to the non-public materials submitted to the Commission. In simple scenarios, the information in the non-public materials belongs solely to the submitter. In more complex instances, the information in the non-public materials is a reproduction of the proprietary information of a business partner of the submitter or non-public materials to which the submitter has been granted access. Scenarios that are even more complex exist when the submitter manipulates the proprietary information of another person and comingles it with the submitter’s own proprietary information.

Depending on whether the proprietary interest of the submitter, any person other than the submitter, or both is implicated, the application must provide contact information for an individual designee of the submitter pursuant to final § 3007.201(b)(2)(i), each person other than the submitter pursuant to final § 3007.201(b)(2)(ii), or both pursuant to final § 3007.201(b)(2)(iii).

If the submitter’s interest is implicated, final § 3007.201(b)(2)(i) requires that the application identify an individual (such as an employee, executive, or attorney) designated by the submitter to accept actual notice of a motion related

to the non-public materials or notice of the pendency of a subpoena or order requiring production of the materials.

If the proprietary interest of any person other than the submitter is implicated, final § 3007.201(b)(2)(ii) requires that the application identify each affected person. Consistent with existing § 3007.21(c)(2), the application need not identify each affected person (other than the submitter) if identification would be sensitive. The application also need not identify each affected person (other than the submitter) if identification would be impracticable. This final rule reflects situations not contemplated by existing § 3007.21(c)(2), such as if multiple persons speaking multiple languages were affected. Consistent with existing § 3007.21(c)(2), if each affected person is not identified, the submitter shall identify an individual designated by the submitter to provide notice to each affected person. Moreover, if the submitter does not identify each affected person, whether that identification were asserted to be sensitive or impractical, final § 3007.201(b)(2)(ii) requires that the application provide an explanation. This final rule will better ensure that the sensitivity or impracticability exceptions to identifying each affected person would not be overused and would be consistent with the past instances of when impracticability was asserted as a basis not to identify each affected person.

If the proprietary interest of both the submitter and another person are implicated, final § 3007.201(b)(2)(iii) requires the application to comply with the requirements of both final § 3007.201(b)(2)(i) and (ii). Final § 3007.201(b)(2)(iii)

permits the submitter to designate the same individual to serve as the designated point of contact on behalf of the submitter and any other affected person whose identification is asserted to be sensitive or impracticable. Designating the same individual would likely reduce the burden on the submitter and any person attempting to contact the designee.

Final § 3007.201(c) allows incorporation by reference to streamline applications that support the submission of non-public materials that have previously been claimed to be non-public by a prior application. Incorporation by reference may be particularly appropriate if a person granted access to non-public materials submitted by another person reproduces or otherwise uses those non-public materials in a submission to the Commission. In such instances, referring back to the original application would likely be sufficient to meet the requirements of § 3007.201(b) and reduce the burden involved in drafting the application. Final § 3007.201(c) imposes requirements to ensure that the prior application is clearly identified, which facilitates evaluation of the prior application by the members of the public and the Commission. Any application that incorporates by reference a prior application that is accessible through the Commission's Web site (<http://www.prc.gov>) must provide the date, docket number, and name of the filer of the prior application. In all other circumstances, the application must attach the document that is being incorporated by reference.

*Final § 3007.202 Redacted version of the non-public materials.* Final § 3007.202 provides the requirements applicable to the submission of the redacted (public) version of the non-public materials.

Consistent with existing § 3007.10(c), final § 3007.202(a) explains that submitters must graphically redact (blackout) the information that is claimed to be non-public from the materials. Final § 3007.202(a) also incorporates the prohibition on excessive redactions (blacking out information that is not non-public), which appears in existing § 3007.10(b), and expands its applicability to all submitters. This final rule will promote fairness and improve transparency.

Final § 3007.202(b) incorporates the requirement that the Postal Service justify the use of any other redaction method and specifically identify the alterations made to the materials, which appears in existing § 3007.10(c), and expands its applicability to all submitters so as to promote fairness and improve transparency. Final § 3007.202(b) modifies existing § 3007.10(c)'s requirement to justify the use of another redaction method, stating with particularity the competitive harm associated with using the blackout method, to also allow the application to state with particularity the practical difficulty associated with using the blackout method. Based on experience under the existing rules, the Commission expects that the use of a redaction method other than the blackout method will continue to be rare.

Consistent with existing § 3007.10(b), final § 3007.202(c) provides that electronic versions of redacted materials must be filed in a searchable format.

Final § 3007.202(c) permits the use of a non-searchable format only if accompanied by a certification that providing a searchable format would be impracticable. Based on experience under the existing rules, the Commission expects that such an occasion would occur rarely as most non-public materials are filed in .doc, .pdf, .xls, or similar formats.

*Final § 3007.203 Unredacted version of the materials.* Final § 3007.203 sets forth the manner for submission of the unredacted version of the non-public materials.

Consistent with existing § 3007.10(d), final § 3007.203(a) requires that upon submitting the unredacted version of the non-public materials, each page or portion (whichever is applicable) of the materials be marked in a manner reasonably calculated to alert custodians to its confidential nature.

Consistent with existing § 3007.10(a), final § 3007.203(b) reflects that non-public materials may not be submitted through the Filing Online method that results in the posting of a document that is available to the public, which is accessible through the Commission's public Web site (<http://www.prc.gov>). This is a public Web site and does not presently allow for the submission of non-public documents to the Commission.

Final § 3007.203(c) sets forth additional requirements pertaining to the filing of the unredacted version of the non-public materials. Final § 3007.203(c) sets forth how filings shall be performed for the unredacted versions of the non-public materials.

Final § 3007.203(c)(1) requires filing of the unredacted version of the non-public materials in sealed envelopes marked “Confidential. Do Not Post on Web,” consistent with existing § 3007.10(a). Existing § 3007.10(a) requires filing of both electronic (via compact disc (CD) or DVD and hard copy (paper) versions of the non-public materials. To reduce the burden, final § 3007.203(c)(1) allows the filer to provide only the electronic version of a non-public document. If it is impracticable to submit the electronic version, final § 3007.203(c)(1) permits the filer to provide the paper version of a non-public document instead.

The Commission is exploring the use of an alternative system to allow secure online transmission of non-public materials. This alternative system would significantly increase speed and reduce the overall burden, especially for submissions that are frequent, voluminous, or both. Therefore, final § 3007.203(c)(2) sets forth the requirements associated with use of any alternative system. Final § 3007.203(c)(2) provides that the Secretary has the authority to approve the use of a secure alternative system to file non-public materials online. It also states that no other system may be used to file non-public materials online. It also provides the Secretary with authority to set forth any minimum requirements associated with using an alternative system. If a filer fails to comply with any of the Secretary’s requirements, the Secretary would have discretion to impose requirements specific to a particular filer. The Secretary may also revoke a filer’s eligibility to use the alternative system and to require the filer to provide non-public materials in accordance with final § 3007.203(c)(1).

Final § 3007.203(d) sets forth the requirements for the unredacted versions of spreadsheets.

*Final § 3007.204 Protections for any person other than the submitter with a proprietary interest.* Final § 3007.204 incorporates existing § 3007.20(c), which allows any person other than the submitter with a proprietary interest in non-public materials filed with the Commission to lodge an application for non-public treatment. Final § 3007.204 expands the applicability of this requirement to involve submissions made outside of filings and illustrates the procedural mechanisms by which an affected person may raise confidentiality concerns with the Commission.

*Final § 3007.205 Non-public materials inadvertently submitted publicly.* Final § 3007.205(a) pertains to instances in which a person discovers that information that could have been subject to a claim for non-public treatment is contained within a public filing made in accordance with §§ 3001.9 and 3001.10 of this chapter. Final § 3007.205(a) instructs the person to notify Dockets by telephone to remove the non-public materials from the publicly available material. The person must file an application for non-public treatment and the non-public materials within 1 business day of this request to Dockets. Final § 3007.205(a) states that the Secretary has the discretion to impose additional filing requirements on any filer that repeatedly invokes this rule. The Commission expects this proposed rule will be invoked rarely. The Commission Web site is public and the Commission expects that filers will transmit documents using a

reasonable degree of care for any non-public information. This final rule outlines a process to minimize exposure of sensitive information that may occur due to a filer's error.

Final § 3007.205(b) pertains to instances in which a person discovers that information that could have been subject to a claim for non-public treatment is contained within a publicly available submission (other than a public filing made in accordance with §§ 3001.9 and 3001.10 of this chapter). Final § 3007.205(b) instructs the person to telephone the Commission personnel receiving the submission with the request to segregate the materials claimed to be non-public. The person must submit an application for non-public treatment and the non-public materials within 1 business day of this request. Final § 3007.205(b) states that the Secretary has the discretion to impose additional filing requirements on any submitter that repeatedly invokes this rule. This final rule outlines a process to minimize exposure of sensitive information that may occur due to a submitter error. The Commission expects this final rule will be invoked rarely because persons submitting materials to the Commission are incentivized to avoid errors.

Final § 3007.205(c) provides additional procedural instruction for a person making an application pursuant to final § 3007.205(a) or (b). Final § 3007.205(c) requires any special relief sought to be clearly indicated in the application. Final § 3007.205(c) provides three non-exhaustive examples to illustrate types of special relief. The three examples focus on minimizing exposure of information

claimed to be non-public that has already been preserved, viewed, or disseminated prior to the submitter taking action under final § 3007.205(a) or (b).

#### C. Final Subpart C of 39 CFR Part 3007—Seeking Access to Non-public Materials

*Final subpart C of 39 CFR part 3007.* The Commission adds subpart C to 39 CFR part 3007 containing rules applicable to seeking access to non-public materials. These rules allow non-public materials to remain under seal and allow specific persons to access the materials subject to protective conditions.

*Final § 3007.300 Eligibility for access to non-public materials.* Final § 3007.300(a) incorporates existing § 3007.24(a), which provides that non-public materials may be disclosed to Commission and reviewing court personnel. Final § 3007.300(a) adds clarifying language to indicate that such disclosure may be made without the need for issuance of an order.

Final § 3007.300(b) codifies the standard of ineligibility for access that was included in the sample Statement of Protective Conditions provided in existing Appendix A to 39 CFR part 3007. Final § 3007.300(b) provides that persons involved in competitive decision-making shall not be granted access to non-public materials and defines the terms consistent with the language appearing in existing Appendix A to 39 CFR part 3007. Codifying this standard in the final rules, rather than only in the Statement of Protective Conditions, will enhance uniformity and protection against competitive harm without impeding the ability to participate in Commission proceedings.

Final § 3007.300(c) mirrors existing § 3007.24(b) by explaining the circumstances and cross-referencing the relevant provision for other persons to obtain access (via proposed § 3007.301). Final § 3007.300(c) unifies existing §§ 3007.40(a) and 3007.50(a) to apply to an access request made for the purpose of aiding participation in a pending Commission proceeding (including a compliance proceeding). Final § 3007.300(c) also expands the scope to allow a person to seek access for the purpose of aiding the initiation of a proceeding before the Commission. Any person seeking to view non-public materials for other purposes may file a motion for disclosure pursuant to final § 3007.400 or a FOIA request under 39 CFR part 3004. Any person seeking to view materials for which non-public treatment has expired may file a request pursuant to final § 3007.401.

*Final § 3007.301 Motion for access to non-public materials.* Final § 3007.301 concerns requests for access to non-public materials. This final rule combines the text of existing §§ 3007.40, 3007.42, 3007.50, and 3007.52, which have separate access rules for non-public materials based on whether or not the person seeking access seeks to use the materials in a compliance proceeding or other type of proceeding. Because this distinction does not produce a material difference in procedures, the Commission unifies this content for simplicity.

Final § 3007.301(a) combines language appearing in existing §§ 3007.40 and 3007.50, which instruct the person seeking access to file a motion. Final §

3007.301(a) also adds an instruction that any part of the motion revealing non-public information must be filed under seal.

Final § 3007.301(a) also adds instructions pertaining to the docket in which the motion must be filed. The motion must be filed in the docket in which the non-public materials sought were filed or are intended to be used, if such a docket (open or closed) exists. The Commission expects that an existing docket (open or closed) would accommodate most, and quite likely all, motions for access filed. However, if no docket (open or closed) meeting either of those conditions exists, then the motion shall be filed in the G docket for the applicable fiscal year.

The Commission creates the G docket designation to serve as the administrative default designation. If the Commission determines that it is more convenient, expeditious, or otherwise appropriate to resolve any issue arising in a G docket in a different docket(s), the Commission may consolidate or sever proceedings in accordance with § 3001.14 of this chapter.

The Commission expects that the filing of a motion for access in a G docket would be rare—limited to situations in which the materials sought were not filed in an existing docket (open or closed) and the movant proposes to use the materials to initiate a Commission proceeding. Any movant considering filing in a G docket should telephone Dockets personnel to discuss whether a more appropriate docket exists.

Final § 3007.301(b) sets forth the content requirements for the motion based on the text appearing in existing §§ 3007.40(a) and 3007.50(a). Final § 3007.301(b)(1) requires identification of the non-public materials for which access is sought. Consistent with existing §§ 3007.40(a)(1) and 3007.50(a)(1), final § 3007.301(b)(2) requires a detailed statement justifying the access request.

Final § 3007.301(b)(2) also specifies the minimum information necessary to justify the request, which may vary if the movant proposes to use the materials in a pending Commission proceeding or to initiate a Commission proceeding.

Final § 3007.301(b)(2)(i) pertains to using the materials in a pending Commission proceeding. In this instance, the motion must identify all proceedings in which the movant proposes to use the materials and how those materials are relevant to those proceedings. This final rule will provide additional guidance to movants regarding the justification required for access requests. Also, because in past practice, persons have sought to use non-public materials in multiple dockets, this final rule will ensure that adequate justification is provided relating to each docket at issue.

Final § 3007.301(b)(2)(ii) pertains to using the materials to aid initiation of a proceeding before the Commission. In that instance, the justification required must describe the subject of the proposed proceeding, how the materials sought are relevant to that proceeding, and the expected timeframe to initiate that proceeding. This final rule will provide additional guidance to movants regarding the justification required in these instances.

Final § 3007.301(b)(3) remains consistent with existing §§ 3007.40(a)(2) and 3007.50(a)(2)'s requirements to list relevant affiliations.

Final § 3007.301(b)(4) requires the movant to indicate whether actual notice has been provided to each person identified in the application under § 3007.201(b)(2). This final rule will make it clear whether the expedited deadline for a response under proposed § 3007.301(c) applies.

If the motion states that actual notice has been provided to any person, the motion should identify the individual receiving actual notice, the date and approximate time, and the method of notification. This identification requirement will help to protect the interests of the submitter and any person with a proprietary interest. Moreover, this identification requirement will help to resolve motions seeking non-public materials that were submitted years ago—for instance, if there is a successor to the individual designated in the application.

If the motion states that actual notice has been provided to any person, the motion should also state whether the movant is authorized to represent that the motion (in whole or in part) has been resolved or is contested by such person. This final rule will expedite the resolution of motions where it is represented that motion is uncontested (in whole or in part).

Final § 3007.301(b)(5) requires attachment of a description of protective conditions executed by the movant's attorney or non-attorney representative.

Final § 3007.301(b)(6) requires attachment of an executed certification to comply with protective conditions from each person (and any individual working on behalf

of that person) for whom access is sought. Both of these requirements may be satisfied by using the final template Protective Conditions Statement and Certification to Comply with Protective Conditions included in Final Appendix A to subpart C of 39 CFR part 3007.

Final § 3007.301(c) sets the response period at 3 business days if there has been actual notice. In all other circumstances, the response period remains 7 calendar days. These response timeframes remains consistent with existing §§ 3007.40(b) and 3007.50(b).

Final § 3007.301(d) remains consistent with existing §§ 3007.40(c) and 3007.50(c) regarding reply.

Final § 3007.301(e) sets forth information related to the Commission's ruling. Consistent with past practice, final § 3007.301(e) explains that the Commission may rule on an uncontested access motion at any time after receiving the motion. Consistent with past practice, final § 3007.301(e) provides that the Commission may rule on an unresolved access motion at any time after the response period has expired. Final § 3007.301(e) sets forth the standard for the Commission ruling, which remains consistent with the standard appearing in existing §§ 3007.42 and 3007.52. Final § 3007.301(e) states that access shall begin after issuance of the order setting forth all protective conditions.

*Final § 3007.302 Non-dissemination, use, and care of non-public materials.* Final § 3007.302 sets forth the duties of persons granted access to non-public materials in Commission proceedings. Final § 3007.302(a) remains

consistent with existing § 3007.62(a) by prohibiting dissemination of non-public materials to any person not granted access by the Commission under proposed §§ 3007.300 (Commission and reviewing court personnel) or 3007.301 (persons granted access by order of the Commission). Final § 3007.302(b) remains consistent with existing § 3007.25(a) by limiting the use of non-public materials to only the purpose for which the non-public materials are supplied. Final § 3007.302(c) is based on the prohibition on allowing unauthorized persons to have access to the materials, which appears in existing § 3007.25(b). Final § 3007.302(c) also incorporates the standard of care appearing in existing Appendix A to 39 CFR part 3007, which requires a person granted access to non-public materials to use reasonable care to prevent the unauthorized disclosure of non-public materials.

*Final § 3007.303 Sanctions for violating protective conditions.* Final § 3007.303(a) remains consistent with existing § 3007.62(a) relating to the sanctions for violations of the order granting access subject to protective conditions. Final § 3007.303(a) provides examples of the types of sanctions that may be applied.

Final § 3007.303(b) adapts the language of existing § 3007.62(b). Existing § 3007.62(b) refers only to the Postal Service. To reflect that persons other than the Postal Service may be adversely affected by violations of protective conditions, final § 3007.303(b) states that the Commission's rules do not impair the ability of any person, including the Postal Service, to pursue other

remedies available under the law related to violations of an order granting access subject to protective conditions.

*Final § 3007.304 Termination and amendment of access to non-public materials.* Final § 3007.304(a) combines the text appearing in existing §§ 3007.41 and 3007.51, which relate to the termination of access to non-public materials. Existing §§ 3007.41 and 3007.51 divide the rules applicable to termination of access depending on whether the non-public materials at issue are relevant to general proceedings or compliance proceedings. Final § 3007.304(a) treats termination procedures consistently in both instances.

Final § 3007.304(a)(1) remains consistent with the timeframes for the termination of access described in existing §§ 3007.41(a)(1) and 3007.51(a)(1).

Final § 3007.304(a)(2) remains consistent with the procedural requirements upon termination described in existing §§ 3007.41(c) and 3007.51(c). Final § 3007.304(a)(2) provides that the applicable non-public materials must be destroyed or returned to the Commission and notification of compliance must be filed with the Commission. As described below, the Commission revises the applicable template form to be filed with the Commission upon termination of access in final Appendix A to subpart C of 39 CFR part 3007.

Final § 3007.304(b) sets forth the procedure for a person to seek amendment of any protective conditions. This final rule will facilitate prompt resolution of common issues such as seeking access for additional time (as

encompassed under existing §§ 3007.41(b) and 3007.51(b)) or for an additional employee or consultant.

*Final § 3007.305 Producing non-public materials in non-Commission proceedings.* Final § 3007.305 clarifies existing § 3007.61.

Final § 3007.305(a) retains the existing § 3007.61(a)'s 2-day notification requirement imposed upon any person who is the target of a subpoena or order to produce non-public materials that were obtained in a Commission proceeding. Existing § 3007.61(a) requires the target to notify the Postal Service and does not adequately address situations in which the materials were submitted by or claimed to be non-public by a person other than the Postal Service. Therefore, final § 3007.305(a) requires the target to notify all persons identified in the underlying application for non-public treatment pursuant to proposed § 3007.201(b)(2). The final rule better serves its purpose, which is to give the affected person the opportunity to object to the production or to seek a protective order or other relief.

Final § 3007.305(b) clarifies the language of existing § 3007.61(b). Final § 3007.305(b) requires a good faith effort to obtain protective conditions at least as effective as those ordered by the Commission regarding the disclosure of non-public materials in non-Commission proceedings.

Final § 3007.305(c) clarifies the language of existing § 3007.61(c). Final § 3007.305(c) provides that unless overridden in a non-Commission proceeding, the protective conditions ordered by the Commission will remain in effect.

*Final Appendix A to subpart C of 39 CFR part 3007—Template Forms.*

Existing Appendix A to 39 CFR part 3007 contains three template forms relating to seeking or terminating access to non-public materials. The Commission moves this content to subpart C of 39 CFR part 3007, which pertains to access to non-public materials. To better reflect its content, the Commission updates the heading identified in existing Appendix A to 39 CFR part 3007, “Statement of Compliance with Protective Conditions,” to “Template Forms.”

The content of each proposed template form is revised to conform with the changes to the rules appearing in final 39 CFR part 3007 and to improve readability. The first template form is a Protective Conditions Statement to aid compliance with final § 3007.301(b)(5), which requires attachment of a description of protective conditions to a motion for access to non-public materials. The second template form is a Certification to Comply with Protective Conditions to aid compliance with final § 3007.301(b)(6), which requires attachment of a certification to comply with protective conditions executed by each person (and any individual working on behalf of that person) seeking access to non-public materials. The third template form is a Certification of Compliance with Protective Conditions and Termination of Access to aid compliance with final § 3007.304(a)(2), which requires the filing of certifications executed by each person (and any individual working on behalf of that person) granted access to non-public materials upon the termination of access.

D. Final Subpart D of 39 CFR Part 3007—Seeking Public Disclosure of Non-public Materials

*Final subpart D of 39 CFR part 3007.* The Commission adds subpart D to 39 CFR part 3007 containing rules applicable to seeking public disclosure of non-public materials.

*Final § 3007.400 Motion for disclosure of non-public materials.* Final § 3007.400 applies to situations when a person seeks to challenge the non-public treatment claimed for materials—that is, to have the materials disclosed to the public, also known as “unsealed.”

Final § 3007.400(a) specifies that this rule applies to materials for which the non-public status remains active—either because the non-public status has not expired or has been extended by order of the Commission.

Final § 3007.400(b) explains that a request to have non-public materials unsealed shall be made by motion and sets forth the contents of a motion. Consistent with existing § 3007.31(a), the motion must explain why the materials should be made public and address any pertinent rationale(s) provided in the application for non-public treatment. Also, consistent with existing § 3007.31(a), the motion may not publicly disclose the information that is designated as non-public pending resolution of the motion.

Final § 3007.400(b) requires the movant to indicate whether actual notice has been provided to all persons identified in the application under final §

3007.201(b)(2). This final rule will make it clear whether the expedited deadline for a response under final § 3007.400(c) applies.

If the motion states that actual notice has been provided to any person, the motion should identify the individual receiving actual notice, the date and approximate time, and the method of notification. This identification requirement will help to protect the interests of the submitter and any person with a proprietary interest. Moreover, this identification requirement will help to resolve motions seeking non-public materials that were submitted years ago—for instance, if there is a successor to the individual designated in the application.

If the motion states that actual notice has been provided to all identified persons, the motion should also state whether the movant is authorized to represent that the motion (in whole or in part) has been resolved or is contested by such persons. This final rule will facilitate expedited resolution of motions where it is represented that motion is uncontested (in whole or in part) and particularly when a person other than the submitter has a proprietary interest in the non-public materials. The Commission observes that in accordance with final § 3007.101(a), a motion for public disclosure can be avoided if all persons identified pursuant to final § 3007.201(b)(2) consent to allowing the submitter to file the materials at issue publicly.

Final § 3007.400(b) also adds instructions pertaining to the docket in which the motion must be filed. The motion must be filed in the docket in which the non-public materials sought were filed or are intended to be used, if such a

docket (open or closed) exists. However, if no docket (open or closed) meeting either of those conditions exists, then the motion shall be filed in the G docket for the applicable fiscal year. Any movant considering filing in a G docket should telephone Dockets personnel to discuss whether a more appropriate docket exists.

Final § 3007.400(c) imposes an expedited response deadline for motions if there has been actual notice. If there has been actual notice, proposed § 3007.400(c) sets the response period at 3 business days. In all other circumstances, the response period remains 7 calendar days, consistent with existing §§ 3007.40(b) and 3007.50(b). This final rule will encourage movants to provide actual notice and thereby streamline motions practice.

Final § 3007.400(d) remains consistent with existing §§ 3007.40(c) and 3007.50(c) regarding reply.

Final § 3007.400(e) reflects that the Commission will continue to accord non-public treatment to the materials while the motion is pending.

Final § 3007.400(f) sets forth information related to the Commission's ruling. Final § 3007.400(f) remains consistent with existing § 3007.31(d), which explains the timing for the Commission ruling. Final § 3007.400(f) adds that if there has been actual notice and the motion is uncontested, the Commission may rule before the response period expires. Final § 3007.400(f) remains consistent with existing § 3007.33, which explains the standards for the Commission ruling.

*Final § 3007.401 Materials for which non-public treatment has expired.*

Final § 3007.401 applies to materials for which non-public treatment has expired. Consistent with existing § 3007.30, final § 3007.401(a) provides that non-public status shall expire after the passage of 10 years, unless otherwise provided by the Commission.

The existing rules do not set forth the mechanism for the handling of materials when non-public treatment has expired. Final § 3007.401(b)-(f) provide the procedural mechanisms to take effect after 10 years have passed. Final § 3007.401(b)-(f) take into account the need for transparency, sound records management practices, and adequate protection of the commercial interests of affected persons, including the Postal Service.

Final § 3007.401(b) provides that any person may request the disclosure of materials for which non-public treatment has expired. Final § 3007.401(b) explains the content of such a request. This request must identify the materials requested and date(s) that the materials sought were originally submitted under seal. Final § 3007.401(b) notifies the reader that completing and filing the template form appearing in final Appendix A to subpart D of 39 CFR part 3007 will satisfy these content requirements. Final § 3007.401(b) informs the reader that all documents are treated in accordance with the Commission's record retention schedule, which may reduce the availability of some non-public information.

Final § 3007.401(b) also adds instructions pertaining to the docket in which the request must be filed. The request must be filed in the docket in which the non-public materials sought were filed or are intended to be used, if such a docket (open or closed) exists. However, if no docket (open or closed) meeting either of those conditions exists, then the request shall be filed in the G docket for the applicable fiscal year. Any requestor considering filing in a G docket should telephone Dockets personnel to discuss whether a more appropriate docket exists.

Final § 3007.401(c) sets forth the timing and content requirements pertaining to any response opposing the request. Final § 3007.401(c) sets the response period at 7 calendar days. A response opposing the request must ask for an extension of non-public status by including an application for non-public treatment compliant with final § 3007.201 and include specific facts supporting any assertion that commercial injury is likely to occur if the information contained in the materials is publicly disclosed 10 years after the original sealed submission.

Final § 3007.401(d) permits a reply to be filed within 7 calendar days of the response.

Final § 3007.401(e) states that the information designated as non-public will be accorded non-public treatment pending resolution of the request.

Final § 3007.401(f) sets forth the timing and standard of the ruling. The request may be granted any time after the response period described in

proposed § 3007.401(c) expires. A request may be denied any time after the reply period described in final § 3007.401(d) expires. The Commission ruling shall follow the applicable standard described in final § 3007.104.

*Final Appendix A to subpart D of 39 CFR part 3007—Template Request Form.*

To aid compliance with final § 3007.401(b), which requires a requestor to identify the materials requested and date(s) that materials were originally submitted under seal, final Appendix A to subpart D of 39 CFR part 3007 contains a template form Request for Materials for Which Non-Public Treatment Has Expired.

## **VII. Regulatory Flexibility Act Analysis**

The Regulatory Flexibility Act requires federal agencies, in promulgating rules, to consider the impact of those rules on small entities. See 5 U.S.C. 601, *et seq.* (1980). If the proposed or final rules will not, if promulgated, have a significant economic impact on a substantial number of small entities, the head of the agency may certify that the initial and final regulatory flexibility analysis requirements of 5 U.S.C. 603 and 604 do not apply. See 5 U.S.C. 605(b).

The Commission's primary responsibility is in the regulatory oversight of the United States Postal Service. The rules that are the subject of this rulemaking have an impact on participation in Commission proceedings, but impose no further financial obligation upon any entity. For entities other than the United States Postal Service, participation is strictly voluntary. Based on these findings, the Chairman of the Commission certifies that the rules that are the

subject of this rulemaking will not have a significant economic impact on a substantial number of small entities. Therefore, pursuant to 5 U.S.C. 605(b), this rulemaking is exempt from the initial and final regulatory flexibility analysis requirements of 5 U.S.C. 603 and 604.

### **VIII. Ordering Paragraphs**

*It is ordered:*

1. Parts 3001, 3004, and 3007 of title 39, Code of Federal Regulations, are revised as set forth below the signature of this Order, effective 30 days after publication in the **Federal Register**.

2. The Secretary shall arrange for publication of this Order in the **Federal Register**.

By the Commission.

**Stacy L. Ruble,**

*Secretary.*

## **List of Subjects**

### **39 CFR Part 3001**

Administrative practice and procedure, Confidential business information, Freedom of information, Sunshine Act.

### **39 CFR Part 3004**

Administrative practice and procedure, Freedom of information, Reporting and recordkeeping requirements.

### **39 CFR Part 3007**

Administrative practice and procedure, Confidential business information.

For the reasons stated in the preamble, the Commission amends chapter III of title 39 of the Code of Federal Regulations as follows:

## **Part 3001—RULES OF PRACTICE AND PROCEDURE**

1. The authority citation for part 3001 continues to read as follows:

**Authority:** 39 U.S.C. 404(d); 503; 504; 3661.

2. Add subpart E to read as follows:

### **Subpart E—Information Requests**

Sec.

3001.100 Applicability and scope.

3001.101 Information request.

#### **§ 3001.100 Applicability and scope.**

- (a) *Applicability.* The Commission may:

(1) Require the Postal Service to provide any information, and any associated documents or things in its possession or control, or any information, and any associated documents or 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.

(2) Request that any person other than the Postal Service provide any information, and any associated documents or things in its possession or control, or any information, and any associated documents or 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.

(b) *Scope.* Information includes, but is not limited to, explanations, confirmations, factual descriptions, and data. Document refers to a hard copy or electronic conveyance of information and may be stored in any medium from which information can be obtained either directly or, if necessary, after translation into a reasonably usable form. Documents include, but are not limited to, writings, notes, graphs, charts, data files, emails, drawings, photographs, and images. Things include all matter, other than documents, that convey information. Documents and things shall collectively be referred to as materials.

**§ 3001.101 Information request.**

(a) An information request may be issued at the discretion of the Commission, the Chairman of the Commission, or the presiding officer seeking that any person provide information, documents, or things covered by § 3001.100. An information request shall describe the information, documents, or things sought, briefly explain the reason for the request, and specify a date on which the response(s) shall be due.

(b) Any person may request the issuance of an information request by motion. The motion shall list the information, documents, or things sought; explain the reasons the information request should be made, and justify why the information sought is relevant and material to the Commission's duties under title 39 of the U.S. Code. At any time after the motion, the Commission, the Chairman of the Commission, or the presiding officer may issue an information request that includes all or some of the proposed questions or modifies the proposed questions.

#### **PART 3004—PUBLIC RECORDS AND FREEDOM OF INFORMATION ACT**

3. The authority citation for part 3004 continues to read as follows:

**Authority:** 5 U.S.C. 552; 39 U.S.C. 503.

4. Amend § 3004.30, by revising paragraphs (d) introductory text and (e) to read as follows:

**§ 3004.30 Relationship among the Freedom of Information Act, the Privacy Act, and the Commission's procedures for according appropriate confidentiality.**

\* \* \* \* \*

(d) *Requesting a Postal Service record.* The Commission maintains custody of records that are both Commission and Postal Service records. In all instances that the Postal Service submits materials to the Commission that the Postal Service reasonably believes to be exempt from public disclosure, the Postal Service shall follow the procedures described in subpart B of part 3007 of this chapter.

\* \* \* \* \*

(e) *Requesting a record submitted under seal by a person other than the Postal Service.* The Commission maintains records of a confidential nature submitted by persons other than the Postal Service as non-public materials.

(1) A request made pursuant to FOIA for records designated as non-public by a person other than the Postal Service shall be considered in light of all applicable exemptions; and

(2) A request made pursuant to part 3007 of this chapter for records designated as non-public by a person other than the Postal Service shall be considered under the applicable standards set forth in that part.

5. Amend § 3004.70, by revising the section heading and paragraphs (a), (b), and (c) to read as follows:

**§ 3004.70 Submission of non-public materials by a person other than the Postal Service.**

(a) *Overlap with treatment of non-public materials.* Any person who submits materials to the Commission (submitter) that the submitter reasonably believes to be exempt from public disclosure shall follow the procedures described in subpart B of part 3007 of this chapter.

(b) *Notice of request.* Except as provided in § 3004.30(d), if a FOIA request seeks materials designated as non-public materials, the Commission will provide the submitter with notice of the request. The Commission may also provide notice when it has reason to believe that materials submitted by a person other than the Postal Service are possibly exempt from disclosure and may fall within the scope of any FOIA request.

(c) *Objections to disclosure.* A submitter may file written objections to the request specifying all grounds for withholding the information under FOIA within 7 days of the date of the notice. If the submitter fails to respond to the notice, the submitter will be considered to have no objection, beyond those objections articulated in its application for non-public treatment pursuant to § 3007.201 of this chapter, to the disclosure of the information.

\* \* \* \* \*

6. Revise part 3007 to read as follows:

**PART 3007—NON-PUBLIC MATERIALS PROVIDED TO THE COMMISSION**

### **Subpart A—General Provisions**

Sec.

3007.100 Applicability and Scope.

3007.101 Definitions.

3007.102 Treatment of non-public materials.

3007.103 Commission action to determine non-public treatment.

3007.104 Standard for public disclosure of materials claimed to contain non-public information.

### **Subpart B—Submitting Non-public Materials and Seeking Non-public Treatment**

3007.200 General requirements for submitting non-public materials and seeking non-public treatment.

3007.201 Application for non-public treatment.

3007.202 Redacted version of the non-public materials.

3007.203 Unredacted version of the non-public materials.

3007.204 Protections for any person other than the submitter with a proprietary interest.

3007.205 Non-public materials inadvertently submitted publicly.

### **Subpart C—Seeking Access to Non-public Materials**

3007.300 Eligibility for access to non-public materials.

3007.301 Motion for access to non-public materials.

3007.302 Non-dissemination, use, and care of non-public materials.

3007.303 Sanctions for violating protective conditions.

3007.304 Termination and amendment of access to non-public materials.

3007.305 Producing non-public materials in non-Commission proceedings.

Appendix A to subpart C of part 3007—Template Forms

### **Subpart D—Seeking Public Disclosure of Non-public Materials**

3007.400 Motion for disclosure of non-public materials.

3007.401 Materials for which non-public treatment has expired.

Appendix A to subpart D of part 3007—Template Form

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

### **Subpart A—General Provisions**

**§ 3007.100 Applicability and Scope.**

(a) *Applicability.* The rules in this part apply whenever:

(1) The Postal Service claims that any materials it provides to the Commission in connection with any proceeding or other purpose under title 39 of the U.S. Code, contain non-public information;

(2) Any person other than the Postal Service claims that any materials it provides to the Commission contain non-public information;

(3) The Commission is in the process of determining the appropriate degree of confidentiality to be accorded materials identified by any person to contain non-public information in accordance with these rules; or

(4) The Commission is in the process of determining how to ensure appropriate confidentiality for materials identified to contain non-public information that is furnished to any person in accordance with these rules.

(b) *Scope.* Information includes, but is not limited to, explanations, confirmations, factual descriptions, and data. Document refers to a hard copy or electronic conveyance of information and may be stored in any medium from which information can be obtained either directly or, if necessary, after translation into a reasonably usable form. Documents include, but are not limited to, writings, notes, graphs, charts, data files, emails, drawings, photographs, and images. Things include all matter, other than documents, that convey information. Documents and things shall collectively be referred to as materials.

**§ 3007.101 Definitions.**

(a) *Non-public materials* means any documents or things that are provided to the Commission and identified as containing non-public information. The Postal Service may claim that information that would be exempt from disclosure pursuant to 39 U.S.C. 410(c), 504(g), 3652(f), or 3654(f) is non-public information. Any person other than the Postal Service with a proprietary interest in the materials may claim that information that would be protectable under Federal Rule of Civil Procedure 26(c) is non-public information. Any person may claim that information that is exempt from public disclosure under 5 U.S.C. 552(b) is non-public information. Non-public materials cease to be non-public if the status has expired or been terminated by the Commission pursuant to this part. Except as provided by § 3007.205, non-public materials cease to be non-public if the submitter publicly discloses the materials with the consent of each affected person with a propriety interest in the materials (if applicable). The cessation of non-public status applies to the particular document or thing and the particular information contained therein (in whole or in part, as applicable).

(b) *Submitter* means any natural or legal person, including the Postal Service, that provides non-public materials to the Commission and seeks non-public treatment in accordance with the rules of this part.

**§ 3007.102 Treatment of non-public materials.**

(a) Except as described in part 3007 or part 3004 of this chapter, the Commission will neither disclose nor grant access to any non-public materials (and the non-public information contained therein).

(b) To accord appropriate confidentiality to non-public information and 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):

(1) Prohibit the public disclosure of the non-public information and non-public materials;

(2) Specify terms for public disclosure of the non-public information and non-public materials;

(3) Order a specific method for disclosing the non-public information and non-public materials;

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

(5) Restrict who may access the non-public information and non-public materials;

(6) Require that a trade secret be revealed only in a specific and limited manner or to limited or specified persons; and

(7) Order other relief as appropriate including sealing a deposition or part of a proceeding.

**§ 3007.103 Commission action to determine non-public treatment.**

(a) Information requests as described in subpart E of part 3001 of this chapter, preliminary notices, or interim orders may be issued to help the

Commission determine the non-public treatment, if any, to be accorded to the materials claimed by any person to be non-public.

(b) Upon motion by any person, the Commission may issue an order containing a description of and timeframe for the non-public treatment, if any, to be accorded to materials claimed by any person to be non-public.

(c) Upon its own motion, the Commission may issue notice of its preliminary determination concerning the appropriate degree of protection, if any, to be accorded to materials claimed by any person to be non-public. A response is due within 7 calendar days of issuance of the preliminary determination, unless the Commission otherwise provides. No reply to a response shall be filed, unless the Commission otherwise provides. Pending the Commission's resolution of the preliminary determination, information designated as non-public will be accorded non-public treatment. The Commission will enter an order determining what non-public treatment, if any, will be accorded to the materials after the response period described in this paragraph has expired. The determination of the Commission shall follow the applicable standard described in § 3007.104.

**§ 3007.104 Standard for public disclosure of materials claimed to contain non-public information.**

(a) In determining whether to publicly disclose materials claimed by the Postal Service to contain non-public information, 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 materials in which the Commission determines any person other than the Postal Service has a proprietary interest, the Commission shall balance the interests of the parties consistent with the analysis undertaken by a federal court when applying the protective conditions appearing in Federal Rule of Civil Procedure 26(c).

**Subpart B—Submitting Non-public Materials and Seeking Non-public Treatment**

**§ 3007.200 General requirements for submitting non-public materials and seeking non-public treatment.**

(a) Whenever providing non-public materials to the Commission, the submitter shall concomitantly provide the following: 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 in accordance with § 3007.201, a redacted (public) version of the non-public materials in accordance with § 3007.202, and an unredacted (sealed) version of the non-public materials in accordance with § 3007.203.

(b) Before submitting non-public materials to the Commission, if the submitter has reason to believe that any person other than the submitter has a proprietary interest in the information contained within the non-public materials, the submitter shall inform each affected person of the nature and scope of the

submission to the Commission, including the pertinent docket designation(s) (to the extent practicable) and that the affected person may address any confidentiality concerns directly with the Commission.

**§ 3007.201 Application for non-public treatment.**

(a) *Burden of persuasion.* An application for non-public treatment shall fulfill the burden of persuasion that the materials designated as non-public should be withheld from the public.

(b) *Contents of application.* An application for non-public treatment shall include a specific and detailed statement setting forth the information specified in paragraphs (b)(1) through (8) of this section:

(1) The rationale for claiming that the materials are non-public, including the specific statutory provision(s) supporting the claim, and an explanation justifying application of the provision(s) to the materials.

(2) A statement of whether the submitter, any person other than the submitter, or both have a proprietary interest in the information contained within the non-public materials, and the identification(s) specified in paragraphs (b)(2)(i) through (iii) of this section (whichever is applicable). For purposes of this paragraph, identification means the name, phone number, and e-mail address of an individual.

(i) If the submitter has a proprietary interest in the information contained within the materials, identification of an individual designated by the submitter to

accept actual notice of a motion related to the non-public materials or notice of the pendency of a subpoena or order requiring production of the materials.

(ii) If any person other than the submitter has a proprietary interest in the information contained within the materials, identification of each person who is known to have a proprietary interest in the information. If such an identification is sensitive or impracticable, an explanation shall be provided along with the identification of an individual designated by the submitter to provide notice to each affected person.

(iii) If both the submitter and any person other than the submitter have a proprietary interest in the information contained within the non-public materials, identification in accordance with both paragraphs (b)(2)(i) and (ii) of this section shall be provided. The submitter may designate the same individual to fulfill the requirements of paragraphs (b)(2)(i) and (ii) of this section.

(3) A description of the information contained within the materials claimed to be non-public in a manner that, without revealing the information at issue, would allow the Commission to thoroughly evaluate the basis for the claim that the information contained within the materials are non-public.

(4) Particular identification of the nature and extent of the harm alleged and the likelihood of each harm alleged to result from disclosure.

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

(6) The extent of the protection from public disclosure alleged to be necessary.

(7) The length of time for which non-public treatment is alleged to be necessary with justification thereof.

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

(c) *Incorporation by reference.* If the material designated as non-public has been previously claimed to be non-public material by a prior application for non-public treatment, the submitter may incorporate by reference the prior application. Any application that incorporates by reference a prior application that is accessible through the Commission's Web site (<http://www.prc.gov>) shall state the date, docket number, and the name of the filer of the prior application. In all other circumstances, the application that incorporates by reference a prior application shall attach the prior application.

**§ 3007.202 Redacted version of the non-public materials.**

(a) Except as allowed under paragraph (b) of this section, the submitter shall use the graphical redaction (blackout) method to redact non-public information from the materials. The submitter shall blackout only the information that is claimed to be non-public.

(b) The submitter shall justify using any other redaction method. The application for non-public treatment shall state with particularity the competitive harm or practical difficulty alleged to result from using the blackout method. The

submitter shall specifically identify any alterations made to the unredacted version, including the location and number of lines or pages removed.

(c) If electronic, the redacted version shall be filed in a searchable format, unless the submitter certifies that doing so would be impracticable.

**§ 3007.203 Unredacted version of the non-public materials.**

(a) Each page or portion of the unredacted version of the materials for which non-public treatment is sought shall be marked in a manner reasonably calculated to alert custodians to the confidential nature of the materials.

(b) The Filing Online method that results in posting a document that is available to the public, which is accessible through the Commission's Web site (<http://www.prc.gov>) described under §§ 3001.9 and 3001.10 of this chapter may not be used to submit the unredacted version of non-public materials.

(c) The filing of the unredacted version of the non-public materials shall be made in accordance with the following requirements.

(1) Except if using an alternative system approved by the Commission under paragraph (c)(2) of this section, the unredacted version of the non-public materials shall be filed in a sealed envelope clearly marked "Confidential. Do Not Post on Web" to the Office of Secretary and Administration, Postal Regulatory Commission, 901 New York Avenue NW, Suite 200, Washington, DC 20268-0001. The unredacted version of the non-public materials may not be password protected. Two copies of the unredacted version of a non-public document shall be filed using an electronic format such as compact discs (CDs), or digital video

discs or digital versatile discs (DVDs) that shall be clearly marked “Confidential. Do Not Post on Web.” If making an electronic unredacted version of a non-public document is impracticable, two hard copies (paper) versions of the non-public document may be filed.

(2) The Secretary of the Commission has authority to approve the use of a secure alternative system to file non-public materials. The Secretary may set forth any minimum requirements associated with using an alternative system. If a filer using the alternative system fails to comply with any of the Secretary’s requirements, the Secretary has discretion to revoke the filer’s eligibility to use the alternative system or impose requirements specific to the filer as necessary to ensure secure transmission of non-public materials.

(d) The unredacted version of a spreadsheet shall display the formulas used and their links to related spreadsheets. The unredacted version of 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.

**§ 3007.204 Protections for any person other than the submitter with a proprietary interest.**

Any person other than the submitter with a proprietary interest in materials that have been or will be submitted to the Commission may address any confidentiality concerns directly with the Commission by seeking non-public treatment in accordance with the requirements of this subpart, responding to a

motion for access to non-public materials in accordance with the requirements of subpart C of this part, or responding to a motion for disclosure of non-public materials in accordance with the requirements of subpart D of this part.

**§ 3007.205 Non-public materials inadvertently submitted publicly.**

(a) Any filer or person with a proprietary interest that discovers the inclusion of materials that could have been subject to a claim for non-public treatment are contained within a public filing made in accordance with §§ 3001.9 and 3001.10 of this chapter shall telephone Dockets personnel immediately to request that the non-public materials be removed from the publicly available materials. Upon receipt of that telephone request, Dockets personnel will remove from the publicly available materials those materials for which non-public treatment are being requested until the end of the next business day in order to provide the filer or person with a proprietary interest an opportunity to file an application for non-public treatment and the non-public materials in accordance with the requirements of this subpart. If any filer makes repeated use of this rule, the Secretary has discretion to impose additional requirements on this filer as necessary to ensure secure filing of non-public materials.

(b) Any submitter or person with a proprietary interest that discovers the inclusion of materials that could have been subject to a claim for non-public treatment are contained within a publicly available submission made to the Commission in circumstances other than through a public filing made in accordance with §§ 3001.9 and 3001.10 of this chapter shall telephone the

Commission personnel to whom the submission was directed immediately to request that the non-public materials be removed from the publicly available materials. Upon receipt of that telephone request, the Commission personnel will remove from the publicly available materials those materials for which non-public treatment are being requested until the end of the next business day in order to provide the submitter or person with a proprietary interest an opportunity to submit an application for non-public treatment and the non-public materials in accordance with the requirements of this subpart. If any submitter makes repeated use of this rule, the Secretary has discretion to impose additional requirements on this submitter as necessary to ensure secure submission of non-public materials.

(c) An application for non-public treatment made under paragraph (a) or (b) of this section shall also clearly indicate if any special relief is sought. Examples of special relief include a request that any person not granted access to the materials under § 3007.300 or § 3007.301 perform any or all of the following actions:

(1) Immediately destroy or return all versions of the materials that are claimed to have been inadvertently submitted publicly;

(2) Refrain from disclosing or using the materials, and the information contained therein, that are claimed to be non-public; and

(3) Take reasonable steps to retrieve any materials, and the information contained therein, that are claimed to be non-public and were disclosed to any

person not granted access to the materials under § 3007.300 or § 3007.301 prior to the submission of application for non-public treatment.

**Subpart C—Seeking Access to Non-public Materials**

**§ 3007.300 Eligibility for access to non-public materials.**

(a) The following persons may access non-public materials without an order issued pursuant to § 3007.301(e):

(1) Members of the Commission;

(2) Commission employees, including Public Representatives, carrying out their official responsibilities;

(3) Non-employees who have executed appropriate non-disclosure agreements (such as contractors, attorneys, or subject matter experts), assisting the Commission in carrying out its duties;

(4) Reviewing courts and their staffs;

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

(b) No person involved in competitive decision-making for any individual or entity that might gain competitive advantage from using non-public materials shall be granted access to non-public 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 an individual or entity having a proprietary interest in the protected material.

(c) Any person not described in paragraph (a) or (b) of this section may request access to non-public materials as described in § 3007.301, for the purpose of aiding participation in a pending Commission proceeding (including compliance proceedings) or aiding the initiation of a proceeding before the Commission.

**§ 3007.301 Motion for access to non-public materials.**

(a) *Filing requirements.* A request for access to non-public materials shall be made by filing a motion with the Commission. Any part of the motion revealing non-public information shall be filed in accordance with subpart B of this part. The motion shall be filed in the docket in which the materials were filed or in the docket in which the materials will be used; in all other circumstances, the motion shall be filed in the G docket for the applicable fiscal year.

(b) *Content requirements.* The motion shall:

(1) Identify the particular non-public materials to which the movant seeks access;

(2) Include a detailed statement justifying the request for access:

(i) If access is sought to aid participation in any pending Commission proceeding, the motion shall identify all proceedings (including compliance

proceedings) in which the movant proposes to use the materials and how those materials are relevant to those proceedings, or

(ii) If access is sought to aid initiation of a proceeding before the Commission, the motion shall describe the subject of the proposed proceeding, how the materials sought are relevant to that proposed proceeding, and when the movant anticipates initiating the proposed proceeding;

(3) List all relevant affiliations, including employment or other relationship (including agent, consultant or contractor) with the movant, and whether the movant is affiliated with the delivery services, communications or mailing industries;

(4) Specify if actual notice of the motion has been provided to each person identified in the application pursuant to § 3007.201(b)(2). If the motion states that actual notice has been provided, the motion shall identify the individual(s) to whom actual notice was provided, the date(s) and approximate time(s) of actual notice, the method(s) of actual notice (by telephone conversation, face-to-face conversation, or an exchange of telephone or e-mail messages), and whether the movant is authorized to represent that the motion (in whole or in part) has been resolved or is contested by the submitter or any other affected person;

(5) Attach a description of protective conditions completed and signed by the movant's attorney or non-attorney representative, who may use and modify the template Protective Conditions Statement in Appendix A to this subpart; and

(6) Attach a certification to comply with protective conditions executed by each person (and any individual working on behalf of that person) seeking access, who may use and modify the template Certification to Comply with Protective Conditions in Appendix A to this subpart.

(c) *Response.* If actual notice of the motion was provided in advance of the filing to each person identified pursuant to § 3007.201(b)(2) by telephone conversation, face-to-face conversation, or an exchange of telephone or e-mail messages, a response to the motion is due within 3 business days of the filing of the motion, unless the Commission otherwise provides. In all other circumstances, a response to the motion is due within 7 calendar days of filing the motion, unless the Commission otherwise provides.

(d) *Reply.* No reply to a response shall be filed, unless the Commission otherwise provides.

(e) *Commission ruling.* The Commission may enter an order at any time after receiving a motion if the movant states that: actual notice has been given to each person identified pursuant to § 3007.201(b)(2) and that the movant is authorized to represent that the motion is uncontested. In all other circumstances, the Commission will enter an order determining if access will be granted after the response period described in paragraph (c) of this section has expired. If no opposition to the motion has been filed by the submitter or any person other than the submitter with a proprietary interest before the expiration of the response period described in paragraph (c) of this section, the Commission

may issue an order granting access, subject to the agreed protective conditions. In determining whether to grant access to non-public materials, the Commission shall balance the interests of the parties consistent with the analysis undertaken by a Federal court when applying the protective conditions appearing in Federal Rule of Civil Procedure 26(c). If access is granted, access shall commence following the issuance of the appropriate order setting forth all protective conditions.

**§ 3007.302 Non-dissemination, use, and care of non-public materials.**

(a) No person who has been granted access to non-public materials in accordance with § 3007.300 or § 3007.301 may disseminate the materials or the information contained therein, in whole or in part, to any person not allowed access pursuant to § 3007.300 or § 3007.301.

(b) Persons with access to non-public materials under § 3007.300 or § 3007.301 shall use non-public materials only for the purposes for which the non-public materials are supplied.

(c) Persons with access to non-public materials under § 3007.300 or § 3007.301 shall protect the non-public materials from any person not granted access under § 3007.300 or § 3007.301 by using the same degree of care, but no less than a reasonable degree of care, to prevent the unauthorized disclosure of these materials 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.

**§ 3007.303 Sanctions for violating protective conditions.**

(a) If a person who has been granted access to non-public materials under § 3007.301 violates the terms of the order granting access, the Commission may impose sanctions on the person who violated the order, the persons or entities on whose behalf the person was acting, or both. The sanctions may include any or all of the following:

- (1) Dismissing the proceeding in whole or in part;
- (2) Ruling by default against the person who violated the order or the persons or entities on whose behalf the person was acting;
- (3) Revoking access to non-public materials;
- (4) Restricting access to non-public materials in the future; or
- (5) Such other sanctions, as deemed appropriate by the Commission.

(b) This rule does not prevent any person, including the Postal Service, whose interests are damaged by the violation of an order granting access subject to protective conditions, from pursuing any remedies available under the law against the person who violated the order, the persons or entities on whose behalf the person was acting, or both.

**§ 3007.304 Termination and amendment of access to non-public materials.**

(a) *Termination of access.* (1) Except as provided in paragraph (b) of this section, access to non-public materials granted under § 3007.301 terminates either when the Commission issues the final order or report concluding the proceeding(s) in which the participant who filed the motion seeking access

represented that the non-public materials would be used, or when the person granted access withdraws or is otherwise no longer involved in the proceeding(s), whichever occurs first. For purposes of this paragraph, an order or report is not considered final until after the possibility of judicial review expires (including the completion of any Commission response to judicial review, if applicable).

(2) Upon termination of access, all non-public materials, and any duplicates, in the possession of each person (and any individual working on behalf of that person) granted access shall be destroyed or returned to the Commission. The participant who filed the motion seeking access shall file with the Commission a notice of termination of access and attach a certification of compliance with protective conditions executed by each person (and any individual working on behalf of that person) granted access to the non-public materials. The template Certification of Compliance with Protective Conditions and Termination of Access in Appendix A to this subpart may be used and modified to comply with this requirement.

(b) *Amendment of access.* Any person may file a motion seeking to amend any protective conditions related to access of non-public materials, including extending the timeframe for which access is granted or expanding the persons to whom access is to be granted, in accordance with § 3007.301.

**§ 3007.305 Producing non-public materials in non-Commission proceedings.**

(a) If a court or other administrative agency issues a subpoena or orders production of non-public materials that a person 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, notify each person identified pursuant to § 3007.201(b)(2) of the pendency of the subpoena or order to allow time to object to that production or to seek a protective order or other relief.

(b) Any person that has obtained non-public materials under protective conditions ordered by the Commission and seeks to disclose the non-public materials in a court or other administrative proceeding 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) Unless overridden by the reviewing court or other administrative agency, protective conditions ordered by the Commission will remain in effect.

**Appendix A to Subpart C of Part 3007—Template Forms**

### **Protective Conditions Statement**

\_\_\_\_\_ (name of submitter of non-public materials) requests confidential treatment of non-public materials identified as \_\_\_\_\_ (non-confidential description of non-public materials) (hereinafter “these materials”) in Commission Docket No(s). \_\_\_\_\_ (designation of docket(s) in which these materials were filed).

\_\_\_\_\_ (name of participant filing motion) (hereinafter “the movant”) requests access to these materials related to \_\_\_\_\_ (designation of docket(s) or description of proposed proceeding(s) in which these materials are to be used) (hereinafter “this matter”).

The movant has provided to each person seeking access to these materials:

- this Protective Conditions Statement,
- the Certification to Comply with Protective Conditions,
- the Certification of Compliance with Protective Conditions and Termination of Access; and
- the Commission’s rules applicable to access to non-public materials filed in Commission proceedings (subpart C of part 3007 of the U.S. Code of Federal Regulations).

Each person (and any individual working on behalf of that person) seeking access to these materials has executed a Certification to Comply with Protective Conditions by signing in ink or by typing /s/ before his or her name in the signature block. The movant attaches the Protective Conditions Statement and the executed Certification(s) to Comply with Protective Conditions to the motion for access filed with the Commission.

The movant and each person seeking access to these materials agree to comply with the following protective conditions:

1. In accordance with 39 CFR 3007.303, the Commission may impose sanctions on any person who violates these protective conditions, the persons or entities on whose behalf the person was acting, or both.

2. In accordance with 39 CFR 3007.300(b), no person involved in competitive decision-making for any individual or entity that might gain competitive advantage from using these materials 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 an individual or entity having a proprietary interest in the protected material.

3. In accordance with 39 CFR 3007.302(a), a person granted access to these materials may not disseminate these materials in whole or in part to any person not allowed access pursuant to 39 CFR 3007.300(a) (Commission and court personnel) or 3007.301 (other persons granted access by Commission order) except in compliance with:

- a. Specific Commission order,
- b. Subpart B of 39 CFR 3007 (procedure for filing these materials in Commission proceedings), or

c. 39 CFR 3007.305 (production of these materials in a court or other administrative proceeding).

4. In accordance with 39 CFR 3007.302(b) and (c), all persons granted access to these materials:

a. must use these materials only related to this matter; and

b. must protect these materials from any person not authorized to obtain access under 39 CFR 3007.300 or 3007.301 by using the same degree of care, but no less than a reasonable degree of care, to prevent the unauthorized disclosure of these materials 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.

5. The duties of each person granted access to these materials apply to all:

a. Disclosures or duplications of these materials in writing, orally, electronically, or otherwise, by any means, format, or medium;

b. Excerpts from, parts of, or the entirety of these materials;

c. Written materials that quote or contain these materials; and

d. Revised, amended, or supplemental versions of these materials.

6. All copies of these materials will be clearly marked as "Confidential" and bear the name of the person granted access.

7. Immediately after access has terminated pursuant to 39 CFR 3007.304(a)(1), each person (and any individual working on behalf of that

person) who has obtained a copy of these materials must execute the Certification of Compliance with Protective Conditions and Termination of Access. In compliance with 39 CFR 3007.304(a)(2), the movant will attach the executed Certification(s) of Compliance with Protective Conditions and Termination of Access to the notice of termination of access filed with the Commission.

8. Each person granted access to these materials consents to these or such other conditions as the Commission may approve.

Respectfully submitted,

(signature of representative)

/s/

---

(print name of representative)

(address line 1 of representative)

(address line 2 of representative)

(telephone number of representative)

(e-mail address of representative)

(choose the appropriate response)

Attorney / Non-Attorney Representative  
for

(name of the movant)

You may delete the instructional text to complete this form. This form may be filed as an attachment to the motion for access to non-public materials under 39 CFR 3007.301(b)(5).

### **Certification to Comply with Protective Conditions**

\_\_\_\_\_ (name of submitter of non-public materials) requests confidential treatment of non-public materials identified as \_\_\_\_\_ (non-confidential description of non-public materials) (hereinafter “these materials”) filed in Commission Docket No(s). \_\_\_\_\_ (designation of docket(s) in which these materials were filed).

\_\_\_\_\_ (name of participant filing motion) requests that the Commission grant me access to these materials to use related to \_\_\_\_\_ (designation of docket(s) or description of proposed proceeding(s) in which these materials are to be used) (hereinafter “this matter”).

I certify that:

- I have read and understand the Protective Conditions Statement and this Certification to Comply with Protective Conditions;
- I am eligible to receive access to these materials because I am not involved in competitive decision-making for any individual or entity that might gain competitive advantage from using these materials; and
- I will comply with all protective conditions established by the Commission.

(signature of individual receiving access)

/s/

(print name of individual receiving access)

(title of individual receiving access)

(employer of individual receiving access)

(name of the participant filing the motion)

(date)

You may delete the instructional text to complete this form. This form may be filed as an attachment to the motion for access to non-public materials under 39 CFR 3007.301(b)(6).

**Certification of Compliance with Protective Conditions and  
Termination of Access**

\_\_\_\_\_ (name of submitter of non-public materials) requests confidential treatment of non-public materials identified as \_\_\_\_\_ (non-confidential description of non-public materials) (hereinafter “these materials”) filed in Commission Docket No(s). \_\_\_\_\_ (designation of docket(s) in which these materials were filed).

The Commission granted the request by \_\_\_\_\_ (name of participant filing notice) to grant me access to these materials to use related to \_\_\_\_\_ (designation of docket(s) or description of proposed proceeding(s) in which these materials are to be used) (hereinafter “this matter”).

I certify that:

- I accessed, maintained, and used these materials in accordance with the protective conditions established by the Commission;
- Effective \_\_\_\_\_ (date), my access to these materials was terminated;  
and
- Effective \_\_\_\_\_ (date), I no longer have any of these materials or any duplicates.

(signature of individual granted access)

/s/

(print name of individual granted access)

(title of individual granted access)

(employer of individual granted access)

(name of participant filing notice)

(date)

You may delete the instructional text to complete this form. This form should be filed as an attachment to the notice of termination of access to non-public materials under 39 CFR 3007.304(a)(2).

## **Subpart D—Seeking Public Disclosure of Non-public Materials**

### **§ 3007.400 Motion for disclosure of non-public materials.**

(a) *Application of this section.* This section applies to non-public materials during the initial duration of non-public status, up to 10 years, and any non-public materials for which the Commission enters an order extending the duration of that status under § 3007.401(a).

(b) *Motion for disclosure of non-public materials.* Any person may file a motion with the Commission requesting that non-public materials be publicly disclosed. Any part of the motion revealing non-public information shall be filed in accordance with subpart B of this part. The motion shall justify why the non-public materials should be made public and specifically address any pertinent rationale(s) provided in the application for non-public treatment. The motion shall specify whether actual notice of the motion has been provided to each person identified in the application pursuant to § 3007.201(b)(2). If the motion states that actual notice has been provided, the motion shall identify the individual(s) to whom actual notice was provided, the date(s) and approximate time(s) of actual notice, the method(s) of actual notice (by telephone conversation, face-to-face conversation, or an exchange of telephone or e-mail messages), and whether the movant is authorized to represent that the motion (in whole or in part) has been resolved or is contested by the submitter or any other affected person. The motion shall be filed in the docket in which the materials were filed or in the

docket in which the materials will be used; in all other circumstances, the motion shall be filed in the G docket for the applicable fiscal year.

(c) *Response*. If actual notice of the motion was provided in advance of the filing to each person identified pursuant to § 3007.201(b)(2) by telephone conversation, face-to-face conversation, or an exchange of telephone or e-mail messages, a response to the motion is due within 3 business days of the filing of the motion, unless the Commission otherwise provides. In all other circumstances, a response to the motion is due within 7 calendar days of filing the motion, unless the Commission otherwise provides.

(d) *Reply*. No reply to a response shall be filed, unless the Commission otherwise provides.

(e) *Non-public treatment pending resolution*. Pending the Commission's resolution of the motion, information designated as non-public will be accorded non-public treatment.

(f) *Commission ruling*. The Commission may enter an order at any time after receiving a motion if the movant states that: actual notice has been given to each person identified pursuant to § 3007.201(b)(2) and that the movant is authorized to represent that the motion is uncontested. In all other circumstances, the Commission will enter an order determining what non-public treatment, if any, will be accorded to the materials after the response period described in paragraph (c) of this section has expired. The determination of the Commission shall follow the applicable standard described in § 3007.104.

**§ 3007.401 Materials for which non-public treatment has expired.**

(a) *Expiration of non-public treatment.* Ten years after the date of submission to the Commission, non-public materials shall lose non-public status unless otherwise provided by the Commission.

(b) *Request for Disclosure of Materials for Which Non-Public Treatment has Expired.* Any person may request that materials for which non-public treatment has expired under paragraph (a) of this section be publicly disclosed. Any part of the request revealing non-public information shall be filed in accordance with subpart B of this part. The request shall identify the materials requested and date(s) that materials were originally submitted under seal. The template Request for Materials for Which Non-public Treatment Has Expired in appendix A to this subpart may be used and modified to comply with this requirement. The request shall be filed in the docket in which the materials were filed or in the docket in which the materials will be used; in all other circumstances, the request shall be filed in the G docket for the applicable fiscal year. All documents are treated in accordance with the Commission's record retention schedule, which may reduce the availability of some non-public information.

(c) *Response.* A response to the request is due within 7 calendar days of the filing of the request, unless the Commission otherwise provides. Any response opposing the request shall seek an extension of non-public status by including an application for non-public treatment compliant with § 3007.201. This

extension application shall also include specific facts in support of any assertion that commercial injury is likely to occur if the information contained in the materials is publicly disclosed despite the passage of 10 years or the timeframe established by Commission order.

(d) *Reply.* Within 7 calendar days of the filing of a response, any person (including the requestor) may file a reply, unless the Commission otherwise provides.

(e) *Non-public treatment pending resolution.* Pending the resolution of the request by the Commission, information designated as non-public will be accorded non-public treatment.

(f) *Ruling.* The Commission may grant the request at any time after the response period described in paragraph (c) of this section has expired. The Commission may deny the request and enter an order extending the duration of non-public status at any time after the reply period described in paragraph (d) of this section has expired. The determination of the Commission shall follow the applicable standard described in § 3007.104.

**Appendix A to Subpart D of Part 3007—Template Request Form**

Before the  
POSTAL REGULATORY COMMISSION  
WASHINGTON, DC 20268-0001

(Caption) \_\_\_\_\_ Docket No. \_\_\_\_\_ - \_\_\_\_\_  
\_\_\_\_\_

REQUEST FOR MATERIALS  
FOR WHICH NON-PUBLIC TREATMENT HAS EXPIRED

\_\_\_\_\_, 20\_\_ (date)

On \_\_\_\_\_ (date non-public materials were initially submitted), non-public treatment was requested for the materials identified as \_\_\_\_\_ (non-confidential description of non-public materials) (hereinafter "these materials"). Because the non-public treatment of these materials has expired, I request that these materials be disclosed to the public.

Respectfully submitted,

(signature of representative)

/s/

(print name of representative)

(address line 1 of representative)

(address line 2 of representative)

(telephone number of representative)

(e-mail address of representative)

(choose the appropriate response)

Attorney / Non-Attorney Representative  
for

(name of the requestor)

You may delete the instructional text to complete this form and file a request under 39 CFR 3007.401(b).

[FR Doc. 2018-14183 Filed: 7/2/2018 8:45 am; Publication Date: 7/3/2018]