

ORDER NO. 72

UNITED STATES OF AMERICA
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Before Commissioners:

Dan G. Blair, Chairman;
Mark Acton, Vice Chairman;
Ruth Y. Goldway; and
Tony L. Hammond

Inquiry into Cooperative Mail
Rule Exception

Docket No. PI2008-4

NOTICE AND ORDER REQUESTING COMMENTS ON
COOPERATIVE MAIL RULE EXCEPTION

(Issued April 22, 2008)

I. INTRODUCTION

The Postal Accountability and Enhancement Act (PAEA), Pub. L. 109-435, 120 Stat. 3218 (2006), directs the Commission to prepare several reports on special topics. One directive requires the Commission to examine an exception to the cooperative mail rule to determine whether this change in eligibility for reduced postage contains adequate safeguards to protect against abuses of rates for nonprofit mail and deception of consumers. The Commission is to report the results of this examination to the Postal Service, along with any recommendations it deems appropriate. If the Postal Service fails to act thereon, the Commission may take such action it deems necessary to

prevent abuse of rates or deception of consumers. See section 711, 120 Stat. 3248 (2006).¹

The Commission establishes Docket No. PI2008-4 to facilitate compliance with the directive in section 711 and seeks comments from the public on the scope and nature of the examination, report, and potential recommendations. 39 U.S.C. § 505 requires the designation of an officer of the Commission in all public proceedings to represent the interests of the general public. The Commission designates Katja M. Eichinger to serve as the Public Representative. Pursuant to this designation, Ms. Eichinger will direct the activities of Commission personnel assigned to assist her and, upon request, will provide their names for the record. Neither she nor any of the assigned personnel will participate in or provide advice on any Commission decision in this proceeding.

II. THE COOPERATIVE MAIL RULE

The cooperative mail rule is a longstanding provision in the DMM. It traditionally has controlled access to reduced postage rates by limiting the ability of an entity that is eligible for reduced rates to “cooperate” or partner with another entity in a mailing and still retain its reduced rate eligibility for the mailing in question. The rule generally accomplishes this, in brief, by requiring that each cooperating entity independently qualify for nonprofit rates at the post office of mailing; by requiring that the mail matter being sent be that of the eligible entity; and by prohibiting “sharing” a permit with an entity not authorized to mail at reduced rates. These restrictions effectively foreclose a nonprofit from cooperating with a for-profit entity if the mailing is to be sent at nonprofit rates, unless the cooperation involves a legitimate principal-agent relationship in a fee-for-service arrangement. See DMM § 703.1.6.3.

¹ Section 711 of the PAEA refers to section E670.5.3 of the Domestic Mail Manual (DMM). The text of this provision now appears at DMM § 703.1.6.3 due to a reorganization of the DMM.

The traditional rationale for imposing limits on cooperative mailings has been that access to reduced rates is a privilege—initially subsidized by taxpayers, but more recently by other mailers—and that the limits help prevent abuse of this privilege. The extent of the benefit has varied in the years since its introduction, but eligible cooperative mailings currently pay 60 percent of the Regular Standard Mail rate.

III. THE EMERGENCE OF THE FUNDRAISING EXCEPTION

In 2003, the Postal Service initiated an administrative rulemaking to address a revision to the cooperative mail rule. The rulemaking resulted in a revision, effective November 13, 2003, widely referred to as the Fundraising Exception. In practical effect, this revision expands eligibility in a limited respect by exempting fundraising mailings seeking only monetary donations from application of the DMM's conditions for an eligible cooperative mailing. See 68 FR 23937 (May 6, 2003) and 68 FR 58273 (October 9, 2003), setting out the proposed and final rule, respectively. The revision requires that the cooperating nonprofit entity either receive a detailed donor list (containing the name of donor, contact information, and the amount of donation) from its mailing partner or execute a written waiver of such receipt.

A. The Fundraising Exemption, as Initially Proposed

The Postal Service notice of proposed rulemaking included a discussion of the history of the cooperative mail rule and its application to fundraising mailings; the traditional role of Congress with respect to eligibility for nonprofit Standard Mail rates; recent concerns about the impact of the cooperative mail rule on fundraising mailings; and proposed legislation to exempt certain fundraising mail from the rule. It noted, with respect to the impact of the rule on fundraising mailings, that over the last several years, some nonprofit organizations have made the Postal Service aware of concerns that the application of the cooperative mail rule was having a serious effect on their ability to solicit donations and, in some cases, might threaten the existence of many

nonprofit organizations, particularly given the economic climate many in the nonprofit sector were facing. It noted that the organizations that seemed to be the focus of most of the concern included those that, due to being new, of small size, or for other reasons, have to seek the assistance of professional fundraising organizations in seeking donations, rather than conduct their fundraising campaigns in-house. 68 FR 23938 (May 6, 2003). It added:

In many cases, the arrangements between the professional fundraiser and the nonprofit are cooperative under the longstanding application of the cooperative mail rule. Indeed, the Postal Service understands that some states require contractual terms between nonprofits and some (but not all) types of professional fundraisers to contain elements that would cause the resultant fundraising mailings to violate the cooperative mail rule.

Id.

The Postal Service said it was sensitive to the plight of these nonprofit organizations, but was reluctant to propose an administrative solution because expanding or reducing eligibility to mail at nonprofit or other preferred status traditionally has been a legislative function; discriminating between its customers is prohibited by statute, except where authorized by law; and expanding eligibility for nonprofit rates could create a significant competitive advantage for a newly-eligible mailer, relative to those still mailing at the commercial rate. *Id.* It also noted that some members of the nonprofit industry had raised a concern that if contractual terms between nonprofits and fundraisers were no longer a postal concern (given an exemption from application of the cooperative mail rule), some fundraisers might impose financial terms that could take advantage of unsophisticated nonprofits or even seek to create nonprofit organizations of their own to enrich themselves off of fundraising mailings, rather than to benefit the public. *Id.*

The Postal Service acknowledged the seriousness of the issues raised by the nonprofits, but characterized them as appearing primarily to raise consumer protection

concerns, rather than postal concerns. It therefore considered them a type of social policy concern best addressed elsewhere, such as through Federal legislation or the state officials who regulate the relationship between professional fundraisers and nonprofit organizations. *Id.* However, noting that Federal legislation addressing this topic had been introduced but had no guarantee of passage and reiterating its reluctance to tread in an area historically addressed through legislation, the Postal Service said it had decided to propose a rule to eliminate application of the cooperative mail rule on mailings by authorized nonprofit organizations seeking monetary donations. *Id.* As to the breadth of the proposal, the Postal Service raised six cautions. Three pertained to the scope of the exception. First, the Postal Service noted that the proposal:

. . . only exempts fundraising mailings seeking monetary donations. Mailings that include solicitations for products or services, whether through sale, lease, or other arrangements, will not be exempt from application of the cooperative mail rule. If there is a cooperative arrangement involving such goods or services, the mailpiece will not be eligible for Nonprofit Standard mail rates.

Id. at 23939. The rationale for this limitation, according to the Postal Service, was that exempting mailings that advertise goods or services from application of the cooperative mail rule would create significant potential for abuse by commercial organizations and may also place small businesses and other for-profit organizations who sell similar goods and services at a significant competitive disadvantage. *Id.*

Second, the Postal Service said the exemption was only from application of the cooperative mail rule, and that affected mailings would continue to be subject to all other applicable postal standards. *Id.* Third, it said the exemption would only apply to nonprofit organizations authorized to mail at nonprofit Standard Mail rates; other organizations so entitled, which are voter registration officials and certain qualified political committees, would not be exempt. *Id.*

The next point was that the rule, if adopted, would be a change of postal policy rather than a clarification of existing standards, and thus would be prospective only, effective on the date of adoption. It would not form the basis for a request for a refund. *Id.* The Postal Service's fifth point was that the proposed rule "would not establish safeguards to address the concern that some professional fundraisers may seek to take advantage of unsophisticated clients." *Id.* It added:

In our discussions with nonprofit representatives and Congressional representatives, no consensus was reached on an effective and administratively feasible method to accomplish this goal. However, this rulemaking does not prevent other interested federal or state agencies from regulating such practices. Moreover, it is also hoped that the nonprofit sector may undertake educational efforts to inform potential targets of such practices.

Id.

The Postal Service's final point was that it would be alert to the consequences of the new standard, should it be adopted, and might revisit the exception and consider a further rulemaking or other appropriate administrative measures if it resulted in the types of abuses that had been discussed or any other unintended consequences. *Id.*

B. The Fundraising Exception as Adopted

In the explanation accompanying the final rule, the Postal Service characterized the 67 comments it had received as diverse in terms of types of entities represented and broad as to the range of views.² Its overall assessment was that a significant majority of the comments urged adoption of the rule as proposed. However, it acknowledged that a small number recommended the proposal be withdrawn or that it

² Commenters included nonprofit organizations and organizations representing such organizations; professional fundraisers and organizations representing these commercial entities; Congressional representatives; private individuals; and an organization representing state officials that regulate charities. 68 FR 58274 (October 9, 2003).

be adopted with additional restrictions, while “a lesser number” of commenters recommended that the exception be expanded. It also said that several commenters had recommended making the rule retroactive. *Id.*

In response to the comments, the Postal Service modified the proposed rule in several respects. It added a condition related to donor lists by providing that the fundraising exemption applies only where the nonprofit organization is either given a list of the donors, their contact information, and the amount of their donations, or waives, in writing, the receipt of such list. *Id.* at 58276. It extended eligibility for the exemption from authorized nonprofits to voter election officials and certain qualified political committees. *Id.* It also revised the rule to clarify two points: (1) the exception applies only where the monetary donations solicited are for the entity authorized to mail at nonprofit rates, and (2) operates prospectively only. *Id.*

The Postal Service discussed, but did not accept, commenters’ suggestions that would have resulted in a regulation that:

- prohibited or restricted close ties between the cooperating entities;
- required written approval of the contract by the cooperating nonprofit’s board of directors; and
- mandated inclusion of certain contractual terms related to numerous control or ownership issues, such as receipt and exclusive ownership of a donor list; direct deposit of funds into the nonprofit’s bank account; and intellectual property in the mailing.

Id. at 58274-76.

IV. INVITATION TO COMMENT

The preceding summary makes clear that the Fundraising Exception expands eligibility for nonprofit Standard Mail rates for certain types of mailings, but does so in a relatively limited way. It also makes clear that the Fundraising Exception, as adopted, did not include many of the checks, or safeguards, some commenters believed should be included to ward off abuse of nonprofit rates and consumer deception. The

Commission invites comments from the general public to facilitate its examination of whether the Fundraising Exception contains adequate safeguards to protect against abuse of nonprofit rates and consumer protection, and preparation of the related report and recommendations. Comments may address any relevant topic; however, the Commission also presents the following questions to help focus the discussion.

A. Abuse of Nonprofit Rates

The directive in section 711 speaks to abuse of nonprofit rates, rather than fraud. In connection with the scope and extent of abuse that may occur under the Fundraising Exemption, the Commission is especially interested in the following matters:

1. The 2003 rulemaking acknowledged that commenters had raised concerns about several types of abusive fundraising practices, including predatory credit arrangements. To what extent have these practices occurred, since the 2003 revision, in connection with mailings sent under the Fundraising Exemption?

2. Have there been any material changes in fundraising practices since the Postal Service's 2003 rulemaking that give rise to new concerns about abuse in connection with the Fundraising Exemption?

3. To what extent has the nonprofit sector engaged in education efforts designed to inform nonprofits, especially those considered especially vulnerable to overreaching or predatory partners, about the scope of the Fundraising Exemption and potential abuses? Also, are there reliable means of measuring or assessing the success of these efforts?

4. To what extent has the Postal Service (including any organizational division) engaged in education efforts specifically directed at the Fundraising Exception and potential abuses? Are there reliable means of measuring or assessing the success of these efforts?

5. What information and data are available about the extent to which the Fundraising Exception has been used by mailers eligible for nonprofit rates since adoption in 2003, in terms of features such as number and type of entities using the Fundraising Exception, volume, and total postage involved?

B. Deception of Consumers

The directive in section 711 also extends to deception of consumers. The Commission is interested in commenters' views on all relevant aspects of consumer deception, including:

1. The 2003 rulemaking mentioned that there were a growing number of state laws on charitable fundraising that created a potential for conflict with cooperative mail as then formulated. Has there been an increase in the number of states proposing or adopting such laws? What safeguards or protections are included in these laws? Do these laws pose any conflicts with the 2003 Fundraising Exception or did this Exception satisfactorily resolve relevant concerns?

2. To what extent has the Postal Service undertaken efforts to educate consumers (in the capacity of a donor or potential donor responding to a mailed solicitation) about abuses or potential fundraising abuses?

3. To what extent have individual states engaged in efforts to educate consumers (in the capacity of a donor or potential donor responding to a mailed solicitation) about abuses or potential fundraising abuses?

4. To what extent has deception of potential donors been reported or documented by the Postal Service, nonprofit mailer organizations, state or local consumer protection agencies, or others?

It is ordered:

1. The Commission establishes Docket No. PI2008-4, Inquiry into Cooperative Mail Rule Exception, to facilitate compliance with section 711 of the Postal Accountability and Enhancement Act.
2. The Commission designates Katja M. Eichinger as the Public Representative representing the interests of the general public in this proceeding.
3. Comments on issues related to the directive in section 711 of the PAEA are due 60 days from the date of publication of this Notice in the *Federal Register*.
4. Reply comments are due 90 days from the date of publication of this Notice in the *Federal Register*.
5. The Secretary shall arrange for publication of this Notice in the *Federal Register*.

By the Commission.

Steven W. Williams
Secretary