

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

Before Commissioners:

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

Inquiry into Cooperative Mail
Rule Exception

Docket No. PI2008-4

PUBLIC REPRESENTATIVE COMMENTS ON
COOPERATIVE MAIL RULE EXCEPTION

(June 24, 2008)

I. INTRODUCTION

A. Fundraising Exception to the Cooperative Mail Rule

On April 22, 2008, the Commission issued its Notice and Order Requesting Comments on Cooperative Mail Rule Exception. See PRC Order No. 72, April 22, 2008. Under the cooperative mail rule, eligible nonprofit mailers are entitled to significantly lower postage rates than for-profit mailers. In order to retain these favorable postage rates, if an eligible nonprofit mailer cooperates with another entity in a mailing, that other entity must also be an eligible nonprofit. Therefore, as a general matter, a nonprofit entity may not cooperate with a for-profit entity in its mailing and retain the favorable rate, with the exception of entering into a principal-agent relationship with a for-profit entity. An example of such a principal-agent relationship

would be where the nonprofit pays a fee for printing services, and the fee is one that is customarily charged in the community. See *id.* at 2.

In 2003, the Postal Service created an exception to the cooperative mail rule, which is often referred to as the “fundraising exception.” The exception allows a nonprofit mailer to cooperate in a mailing with a for-profit entity, usually a commercial fundraiser, without losing the favorable nonprofit postage rates, but only if the solicitation by the eligible nonprofit is limited to a solicitation for money.¹

Serious concerns have been raised about fundraising abuses in mailings, especially in instances where commercial fundraisers are involved. These concerns have led to Congressional inquiries into the cooperative mail rule’s fundraising exception. Anthony W. Conway, Executive Director of the Alliance of Nonprofit Mailers stated in his April 24, 2008 Congressional testimony that the fundraising exception to the cooperative mail rule has led to widespread abuses. He referred to recent reports that “suggest that some charities ... divert the majority of their contributions (and sometimes as much as 90 percent) to their professional staff, fundraising consultants, and overhead costs.”² When most of the funds raised by a charity are paid to non-program costs and commercial fundraising entities, one might argue that the intended objective of the cooperative mail rule is thwarted because much of the benefit of the reduced postage rates does not benefit the charitable purpose.

Congressional concern over deceptive and abusive fundraising practices resulted in the inclusion of a specific statutory mandate in the Postal Accountability and Enhancement Act (PAEA), Pub. L. 109-435, 120 Stat. 3218 (2006) directing the Commission to study, and make subsequent recommendations to the Postal Service, as

¹ See DMM § 703.1.6.3. See also 68 FR 23937 (May 6, 2003) and 68 FR 58273 (October 9, 2003), setting out the proposed and final rule, respectively. The final rule mandates 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 for-profit mailing partner or that the nonprofit execute a written waiver of such receipt.

² Statement before the Committee on Oversight and Government Reform, Subcommittee on the Federal Workforce, Postal Service, and the District of Columbia, April 24, 2008.

to whether the cooperative mail rule “contains adequate safeguards to protect against ... abuses of rates for nonprofit mail ... and ... deception of consumers. ...” See § 711, 120 Stat. 3248 (2006).

B. Vital Role of Charities in America

The American people are known for their generosity when it comes to charitable giving. According to GivingUSA, Americans gave \$295.02 billion to charities in 2006, an increase of \$11.97 billion over 2005.³ The nonprofit sector is not only a vital part of the American social fabric, but also an important part of the American economy.⁴ In order to maintain a healthy and thriving nonprofit sector, it is important that the American public retains confidence that their charitable gifts are used properly. By assuring that adequate safeguards are in place against abuses of the favorable nonprofit mailing rates, the Commission and the Postal Service can do their part to keep Americans confident that their charitable gifts will be used appropriately.

II. POSSIBLE AREAS OF INQUIRY

Without the benefit of a more concrete study by the Commission, the Public Representative can, at this time, only discuss likely areas of productive inquiry and possible modifications to the cooperative mail rule’s fundraising exception.

A. Use of Professional Fundraisers by Charities

An initial question is how often professional fundraisers are actually involved in fundraising efforts by charities. Based on a review of the limited data available to the Public Representative, it appears that the use of commercial fundraisers by charities is

³ See GivingUSA, press release, <http://www.givinginstitute.org/index.htm>, June 25, 2007.

⁴ See *generally*, testimony of Stanley J. Czerwinski Director, Strategic Issues, United States Government Accountability Office, Before the Subcommittee on Oversight, Committee on Ways and Means, House of Representatives, GAO-07-1084T, July 24, 2007.

limited. California, for example, reports that of the 93,000 registered charities most do not use professional fundraisers, and Pennsylvania, in its 2007 report, states that of 10,043 registered charities only 291 used commercial fundraisers.⁵ Based on conversations with attorneys in several States' Attorney General's Offices, however, there is some anecdotal evidence that the use of commercial fundraisers may be trending upwards.

Hugh R. Jones, President of the National Association of State Charity Officials (NASCO), in his April 30, 2008, Congressional testimony, pointed out that it is generally "state charity officials who serve as the primary regulators over public charities and are the parties most likely to pursue breaches" in that area. It appears that most states require that charities who use commercial fundraisers register their fundraising drives as well as the percentage of funds raised that are paid to the commercial fundraisers. The public representative in this docket (Public Representative) obtained some statistical information concerning fundraising by commercial fundraiser from several states.⁶ The California Office of the Attorney General states on its Web site:

The latest annual report issued by the Attorney General shows that in 2005 the average charity received less than 40 percent of the revenue raised in donation campaigns run by commercial fundraisers, with one-quarter of the campaigns netting nonprofits 15 percent or less of the total revenue. Historical data shows that a campaign conducted by a commercial fundraiser returns, on average, less than 50 percent of the contributions to the charity. Commercial fundraisers retain the rest as a fundraising fee.⁷

In addition to California's information for 2005, the Public Representative also reviewed information on percentages of funds raised paid to commercial fundraisers for

⁵ See Attachment.

⁶ The Public Representative would like to express her gratitude to Belinda J. Johns, Senior Assistant Attorney General for the California Attorney General's Office, for her assistance in obtaining information concerning fundraising by commercial fundraisers in several states.

⁷ See <http://ag.ca.gov/charities/index.php>.

other states.⁸ Ohio reports that 66 percent of total funds raised by commercial fundraisers in 2005 were paid to the charity.⁹ The following statistics are for the year 2007: (1) In Hawaii, 67 percent of charities who used commercial fundraisers received less than 50 percent of the funds collected; (2) in Maine and New York, 64 percent of charities who used commercial fundraisers received less than 50 percent of the funds collected, and (3) in Pennsylvania, 61 percent of charities who used commercial fundraisers received less than 50 percent of the funds collected.

From 1997 to 2007 in Washington State, charities received between 33 percent and 55 percent of the funds solicited by commercial fundraisers. The data available for Washington State also shows an upward trend for nonprofits' use of commercial fundraisers.¹⁰

State	Year	Number of Charities	Percent to Charities
Washington	2007	108	52%
Washington	2006	111	48%
Washington	2005	114	50%
Washington	2004	110	49%
Washington	2003	88	45%
Washington	2002	82	49%
Washington	2001	97	55%
Washington	2000	90	50%
Washington	1999	80	42%
Washington	1998	70	33%
Washington	1997	59	41%

The Commission might inquire into what percentage of charities nationwide actually use commercial fundraisers, whether that number is trending upward, and what average percentage of funds solicited is paid to those commercial fundraisers. The

⁸ See Attachment.

⁹ See http://www.ag.state.oh.us/business/pubs/char/char_annual_rpt2005.pdf and Attachment.

¹⁰ See Attachment.

Commission, in its study, could make use of much existing data collected by individual states.¹¹

B. Current State Enforcement Actions

Another area of inquiry for the Commission could be whether current state and Federal laws prohibiting fraudulent solicitations are sufficient in protecting consumers from fundraising abuses. Some states provide information about enforcement actions taken against charities. In April of 2006, for example, 19 states entered into an Assurance of Voluntary Compliance agreement with Newport Creative Communications (Newport), a commercial fundraiser. Newport agreed to cease certain sweepstakes and prize promotion mailings that the states considered misleading and deceptive because those promotions appeared to falsely promise that the recipient of the mailing had already won a prize.¹²

III. POSSIBLE SOLUTIONS

The Commission, after concluding its study, could find that the current cooperative mail rule with its fundraising exception is adequate and that individual cases of fraud and abuse are sufficiently handled by the appropriate Federal and state authorities. If, however, the Commission finds that fundraising abuses with regard to the cooperative mail rule's fundraising exception are widespread and not sufficiently addressed by Federal and state authorities, the Commission could recommend

¹¹ The Public Representative is cognizant that the percentage of funds retained by commercial fundraisers is also influenced by the actual costs of fundraising campaigns which may vary widely depending on the character of an individual campaign. Campaigns of a new, not yet established charity; campaigns for new donors; or campaigns to foster the growth of a charity are often more expensive than campaigns for an established charity with a large donor list. Therefore, the Commission may want to further distinguish or evaluate its findings considering these and other applicable factors.

¹² See <http://www.oag.state.tx.us/oagNews/release.php?print=1&id=1421>. Other states have also reported enforcement actions, but often those reports are related to the failure by the charities or commercial fundraisers to properly register with the state authorities. For example, Maine reports 2007 consent agreements with the Children's Charity Fund and with Community Support, Inc, a commercial fundraiser, as well as 2008 agreements with Planet Aid and the Robin Hood Foundation. See http://www.maine.gov/pfr/professionallicensing/professions/charitable/discipline_alpha_index.shtml.

abolishing the fundraising exception altogether, or recommend to add additional safeguards to the fundraising exception. The Public Representative will discuss below such possible additional safeguards.

A. Use Of Benchmarks

One suggestion to curb fundraising abuses by commercial fundraisers has been to set certain measurable benchmarks which eligible nonprofit mailers must comply with to maintain their eligibility for the lower postage rates under the cooperative mail rule.¹³ For example, the Postal Service could require that a set percentage of funds raised by commercial fundraisers on behalf of a nonprofit must be paid to the nonprofit entity and not the commercial fundraiser. Another possible benchmark is that for a charity to qualify for the favorable nonprofit postage rates, it could be required to show that it spends a certain minimum percentage of its total funds on actual program expenses. *See id.*

One criticism of the proposed use of benchmarks has been that it is difficult to have one benchmark that is appropriate for all types of fundraising drives organized by commercial fundraisers. The percentage of funds retained by commercial fundraisers is influenced by the actual costs of fundraising campaigns which may vary widely depending on the character of any individual campaign. Campaigns of a new, not yet established charity; campaigns for new donors; or campaigns to foster the growth of a charity are often more expensive than campaigns for an established charity with an existing large donor list. However, that issue might be addressed by granting a waiver or exception in certain instances where the actual fundraising costs are particularly and justifiably high.

Setting such benchmarks for eligibility for the lower nonprofit postage rates could also raise First Amendment concerns. In *Madigan v. Telemarketing Assoc. Inc.*, 538

¹³ See also April 30, 2008, Statement of Hugh R. Jones, President of the National Association of State Charity Officials to the Subcommittee on the Federal Workforce, Postal Service, and the District of Columbia of the United States House of Representatives Oversight and Government Reform Committee.

U.S. 600 (2003), the United States Supreme Court held that states may maintain individual and specific fraud actions against fundraisers who actively, through false representations, mislead donors about how their donations will be used. In the *Telemarketing* case, the fundraisers represented that a significant amount of the donations would be used to aid Vietnam veterans when, in fact, 85 percent of the gross receipts from donors were paid to the telemarketing company.¹⁴ In the same case, the Court reaffirmed, however, its trilogy of decisions in the *Schaumburg*, *Munson* and *Riley* cases in which the Court “held that certain regulations of charitable solicitation barring fees in excess of a prescribed level effectively imposed prior restraints on fundraising, and were therefore incompatible with the First Amendment.”¹⁵ Prior to the *Telemarketing* case, “[t]he Court ha[d] not previously addressed the First Amendment’s application to individual fraud actions ... ha[d], however, three times considered prophylactic statutes designed to combat fraud by imposing prior restraints on solicitation when fundraising fees exceeded a specified reasonable level. Each time, the Court held the prophylactic measures unconstitutional.”¹⁶ It is not certain whether a

¹⁴ *Id.* at 601. (Ruling on a motion to dismiss, reversing and remanding the case.)

¹⁵ *Id.* at 600 (citing *Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980); *Secretary of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947 (1984); and *Riley v. National Federation of Blind of N. C., Inc.*, 487 U.S. 781 (1988)).

¹⁶ *Telemarketing* at 612. The court in *Telemarketing* summarized the *Schaumburg*, *Munson* and *Riley* cases on pages 612-615 (citations omitted):

In *Schaumburg*, decided in 1980, the court invalidated a village ordinance that prohibited charitable organizations from soliciting contributions unless they used at least 75 percent of their receipts “directly for the charitable purpose of the organization.”...

Four years later, in *Munson*, the Court invalidated a Maryland law that prohibited charitable organizations from soliciting if they paid or agreed to pay as expenses more than 25 percent of the amount raised. ...

[T]he North Carolina charitable solicitation [controls] at issue in *Riley* directly regulated professional fundraisers. North Carolina’s law prohibited professional fundraisers from retaining an “unreasonable” or “excessive” fee. ... Relying on *Schaumburg* and *Munson*, the Court’s decision in *Riley* invalidated North Carolina’s endeavor to rein in charitable solicitors’ fees. The Court held, once again, that fraud might not be inferred simply from the percentage of charitable donations absorbed by fundraising costs.

Postal Service regulation concerning the availability of favorable postage rates for nonprofits would raise the same First Amendment concerns as the state and local laws addressed by the Supreme Court; nonetheless, it is a concern that should be carefully examined and evaluated when deciding whether benchmarks are a viable option.

B. Additional Possible Safeguards

An additional set of possible safeguards for the cooperative mail rule was laid out by Patricia Read, Senior Vice President of the Independent Sector, a 501(c)(3) coalition of nonprofits. She proposed in her March 24, 2008 letter to Chairman Waxman of the Committee on Oversight and Government Reform of U.S. House of Representatives the following additional requirements:

- (1) A requirement that no officer, director, or key employee of the nonprofit organization have primary responsibility or be related to someone with primary responsibility at the for-profit entity;
- (2) A requirement that donations go directly to the nonprofit;
- (3) A requirement that the donor list remain the property of the nonprofit; and,
- (4) A requirement that the board of the nonprofit organization has approved a written contract governing the solicitation effort.¹⁷

Other safeguards to consider are: (1) requiring that fundraising solicitations clearly show that a commercial fundraiser is involved (including the fundraiser's contact information so that potential donors can inquire into the amount of the reimbursements that commercial fundraiser will receive); (2) restricting eligibility for the lower nonprofit postage rates to those charities that have fee-based contracts with commercial fundraisers; (3) requiring charities that apply for the reduced postage rates, and their fundraisers, to provide proof of current registration and reporting status in the states that require them to do so; and (4) requiring the Postal

¹⁷ See http://www.independentsector.org/programs/gr/Letter_to_Waxman_re_Cooperative_Mail_032408.pdf.

Service to undertake annual mail campaigns to educate postal customers about deceptive fundraising practices and alert them to specific fundraising scams.¹⁸

C. Economic Burden of Additional Safeguards

The Commission must also take into consideration the additional economic burdens that would be imposed on the Postal Service by any Commission recommendations for additional safeguards. Postmaster General John E. Potter, in his Congressional testimony on May 8, 2008, pointed out that although the decline in mail volume may be due to the current economic downturn, it also likely is an indicator of “more profound and long-term changes in mail use patterns.”¹⁹

The Postal Service, through its unique Universal Service Obligation, assures delivery of mail to each and every household in the United States six days a week. It is within the public’s interest to ensure the economic viability of the Postal Service. Therefore, the value of any additional safeguards to the cooperative mail rule must be weighed against the additional burdens imposed on the Postal Service. If the costs of adding safeguards necessary to curb abuses under the fundraising exception to the cooperative mail rule become too high, the balance might be tipped in favor of abolishing the fundraising exception altogether instead of implementing overly costly safeguards.

¹⁸ See *also* April 30, 2008, Statement of Hugh R. Jones, President of the National Association of State Charity Officials to the Subcommittee on the Federal Workforce, Postal Service, and the District of Columbia of the United States House of Representatives Oversight and Government Reform Committee.

¹⁹ Statement of Postmaster General/CEO John E. Potter Before Committee on Oversight and Government Reform, Subcommittee on the Federal Workforce, Postal Service, and the District of Columbia, May 8, 2008. See *also* Statement of William H. Young, President of the National Association of Letter Carriers Before Committee on Oversight and Government Reform, Subcommittee on the Federal Workforce, Postal Service, and the District of Columbia, May 8, 2008 (remarking on the negative effect of the economic downturn on the Postal Service’s business).

IV. SUMMARY

After considering the issues surrounding the cooperative mail rule and its “fundraising exception,” it is readily apparent that a comprehensive and concrete study by the Commission will be necessary to properly assess how wide-spread the problem of abuses of rates for nonprofit mail and deception of consumers actually is and what, if any, necessary corrective steps should be taken.²⁰

Respectfully submitted,

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²⁰ With regard to the specific questions raised by the Commission in its April 22, 2008 Order, it appears that the information to answer those questions is most readily available to the Postal Service, state charity officials, nonprofit organizations, commercial fundraisers and related national associations. The Public Representative looks forward to reading their comments and benefitting from their insights regarding these issues.