

**BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON DC 20268-0001**

INQUIRY INTO COOPERATIVE MAIL
RULE EXCEPTION

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Docket No. PI2008-4

**REPLY COMMENTS OF
ALLIANCE OF NONPROFIT MAILERS**

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The Alliance of Nonprofit Mailers (“ANM”) respectfully submits these reply comments pursuant to Order No. 72, *Notice and Order Requesting Comments on Cooperative Mail Rule Exception*, (issued April 22, 2008), 73 Fed. Reg. 22449 (April 25, 2008). ANM responds to the initial comments of American Target Advertising, Inc. (“ATA”) and Free Speech Coalition, Inc., *et al.* (“FSC”).

ATA and FSC oppose any narrowing of the 2003 exception to the cooperative mailing rule for fundraising solicitations. ATA and FSC offer no credible support for this position, however.

**I. NEITHER ATA NOR FSC CHALLENGE THE EVIDENCE THAT THE 2003
RULE CHANGE HAS LED TO ABUSES.**

Neither ATA nor FSC offers any serious response to the evidence that the 2003 exemption of fundraising solicitations from the cooperative mail restriction has led to abusive practices. ATA observes (correctly) that high fundraising costs are not necessarily abusive. ATA Comments at 5-7. The recent evidence goes far beyond high expense ratios, however. The allegations of abusive practices that surfaced during the

hearing before the Committee on Oversight and Government Reform earlier this year, for example, included the following:

- Hundreds of thousands of dollars in donations, raised supposedly to help wounded veterans, spent instead on the personal expenses of insiders.
- \$340,000 worth of meals, hotels and entertainment.
- Six- and seven-figure personal loans.
- A \$17,000 country club membership.
- Airplane tickets to Hawaii.

See Hearing On Assessing Veterans' Charities—Part II, House Committee on Oversight and Government Reform (Jan. 17, 2008); Report of Majority Staff to Members of the House Committee on Oversight and Government Reform Re Additional Information About The Activities of Roger Chapin's Charitable Organizations (Jan. 17, 2008). ATA's failure to confront these allegations in its comments is telling.

FSC asserts that the current rule must be adequate because it “was the result of extensive work by the Postal Service in 2003” and because “there have been no developments” since then “with which we are familiar which would indicate that the so-called exception should be narrowed.” FSC Comments at 9. Like ATA, however, FSC offers no explanation for the welter of specific allegations of abuse that have surfaced in the recent oversight hearings. FSC also neglects to mention that views of the Postal Service on the adequacy of the current rule has changed. As Postmaster General Potter testified three months ago:

As earlier hearings have established, in some cases these relationships have resulted in significant financial advantages for the fundraiser. In one case, the nonprofit organization received only one dollar out of every four raised.

Speaking both as Postmaster General and as an individual who receives and responds to fundraising letters, I find this extremely disturbing. Beyond the obvious issue of the funds available to support a legitimate organization's work on behalf of veterans and other deserving groups, imbalances of this magnitude can unfairly affect public perceptions of groups asking for their generosity - not only through the mail, but by other channels as well. This can inhibit needed donations, further limiting the extent of help those organizations can provide. And because their services often complement and enhance those available through public agencies, there is an important public policy element to this issue.

Statement of Postmaster General/CEO John E. Potter Before The House Subcommittee On Federal Workforce, Postal Service, And The District Of Columbia Of The Committee On Oversight And Government Reform (April 24, 2008) (downloaded July 21, 2008, from www.usps.com/communications/newsroom/testimony/2008/pr08_pmg0424.htm).¹

II. THE COMMISSION HAS JURISDICTION TO RECOMMEND RESTRICTIONS ON COOPERATIVE FUNDRAISING ARRANGEMENTS.

ATA and FSC also suggest that the Commission and the Postal Service cannot properly tighten the rules against cooperative fundraising solicitations because the 1993 amendments to Title 39 that explicitly codified the cooperative mail rule had the effect of confining the rule to mail soliciting the sale of goods or services. ATA Comments at 2-3; FSC Comments at 7. This contention is also unfounded.

¹ FSC's further claim that the 2003 rules should be deemed adequate today because "67 parties" commented on them in 2003 (FSC at 9) requires little response. Most of the comments in favor of the 2003 exemption were form pleadings—many of them identical or virtually identical in wording—that appear to have been orchestrated by one of the supporters of the rule. Form pleadings of this kind merit little weight. See *CBS Corp. v. FCC*, No. 06-3575 (3rd Cir., July 21, 2008), slip op. at 7 n. 2. In any event, actual experience gained after the implementation of the rule change in 2003 clearly has more probative value than predictions, however sincere, made before the change took effect.

The Postal Service's restrictions on cooperative mailings predate the 1993 legislation by many years. The restrictions were implicit in the eligibility requirements for nonprofit rates even before the enactment of the Postal Reorganization Act of 1970, and were upheld by the courts in the late 1970s. See *National Retired Teachers Association v. USPS*, 430 F.Supp. 141 (D.D.C. 1977), *aff'd*, 593 F.2d 1360 (D.C. Cir. 1979). In upholding the cooperative mailing restriction as a lawful exercise of the interpretive authority of the Postal Service, the D.C. Circuit found that the "limitations are eminently reasonable as effectuating the implicit purpose of the provisions" of Title 39 that limit eligibility for special nonprofit rates to organizations that are organized and operated for qualifying nonprofit purposes, "and not for other purposes such as commercial activities inconsistent with the grant of qualification." *Id.*, 593 F.2d at 1364. While *National Retired Teachers Association* involved solicitations of the sale of goods and services, the same logic applies with equal force to other kinds of cooperative mailings, including fundraising solicitations that generate excessive profits for commercial fundraisers.²

Contrary to ATA, nothing in the language or legislative history of the 1993 amendments that enacted 39 U.S.C. § 3626(j)(1)(D) suggests that the legislation was intended to exclude fundraising solicitations from the scope of the Postal Service's

² *National Retired Teachers Association* also disposes of ATA's claim that applying cooperative mail rule to fundraising solicitations would amount to a "change in classification, and that may be done only by statute." ATA Comments at 4. The D.C. Circuit, in holding the Postal Service had authority to interpret the underlying statute by adopting cooperative mailing rules, specifically held that the "USPS possesses a residuum of authority to interpret mail classifications in the process of implementing them, so long as that interpretation does not effect a substantive change in the types of mail or the identity of mailers encompassed within the classification." 593 F.2d at 1363.

implicit authority over cooperative mailings. Cf. ATA 2. In particular, the 1993 legislation left unchanged 39 U.S.C. § 3626(k)(1), which provides that

No person or organization shall mail, or cause to be mailed by contractual agreement or otherwise, at the rates for mail under former section 4452(b) or 4452(c) of this title, any matter to which those rates do not apply.

ATA suggests that the First Amendment bars the Postal Service from imposing effective restrictions on cooperative fundraising arrangements. See ATA at 5 n. 10 and 9 nn. 20 & 21. ATA ignores the distinction between a *prohibition* and a *condition* on the availability of a financial *benefit*.

The Supreme Court indisputably has held that states and localities may not prohibit solicitations by charities or professional fundraisers if administrative or fundraising costs exceed a specified percentage of the funds raised. *Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980); *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947 (1984); *Riley v. National Federation of Blind of North Carolina, Inc.*, 487 U.S. 781 (1988); *Illinois ex rel. Madigan v. Telemarketing Associates, Inc.*, 538 U.S. 600 (2003).

But the cooperative mailing rule avoids these constitutional problems. Nothing in the cooperative mailing rule forbids nonprofit organizations and commercial fundraisers from sending fundraising solicitations that violate the rule. To be sure, the mailings must be entered at commercial rates rather than the lower rates offered to the nonprofit subclasses. That consequence, however, is one that the First Amendment allows. Special nonprofit postal rates are a benefit created by Congress; and, Congress (and through it, the Postal Service) may impose conditions on the availability of the benefit, including restrictions on speech, without violating the First Amendment. The Supreme

Court has “reject[ed] the ‘notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State.’” *Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 546 (1983) (holding that statutory restriction on lobbying by organizations with tax exemption under IRC § 501(c)(3) did not violate the First Amendment). *Accord*, *Jones v. North Carolina Prisoners’ Labor Union, Inc.*, 433 U.S. 119, 130-31 (1977) (denial of bulk mailing privileges to prisoners’ union “does not fundamentally implicate *free speech* values”) (emphasis in original); *The Enterprise, Inc. v. United States*, 833 F.2d 1216, 1224-26 (6th Cir. 1987) (relying on *Regan* to uphold paid-subscriber eligibility requirement for second-class mail against First Amendment challenge); *Currier v. Henderson*, 190 F.Supp.2d 1221 (W.D. Wash. 2002) (relying on *Regan* in denying claim that First Amendment required USPS to provide no-fee mailboxes or decentralized general delivery to homeless residents of Seattle).

Finally, ATA has failed to explain how an “online disclosure system for nonprofits that solicit contributions from the general public” (ATA Comments at 9-10) could be an adequate substitute for enforcement of the cooperative mailing rule.³ ATA fails to specify (1) what information nonprofits would be required to disclose, (2) how often the disclosures would need to be updated, (3) how compliance with the disclosure requirement would be enforced, and (4) what penalties could be imposed for inaccurate or incomplete disclosure. It is hard to believe, however, that a “disclosure system” with sufficient teeth to be effective would be acceptable to ATA.

³ ATA also proposes to impose new restrictions on the eligibility of qualified political committees to mail at nonprofit postal rates. ATA Comments at 10-11. ANM takes no position on the merits of this proposal, which is clearly beyond scope of the study mandated by Section 711 of PAEA.

A staff report earlier this year to the House Committee on Oversight and Government Reform found earlier this year that Help Homeless Veterans, a “veterans” charity affiliated with ATA, reports on its website that HHV spends the vast majority of its revenue on “program services.”⁴ In fact, Richard Chapin, the operator of HHV, acknowledged in an interview with the committee staff that the opposite is true:

I told you what our costs are. You know, direct mail—this is before the allocation thing, which hopefully we can get into at some point—is you know, 60, 65 percent range, the whole mix of a program, not any given mailing, but the whole mix of a program, 60, 65 percent. You put \$0.10 on top of that or 10 percent on top of that for administration and overhead—this is without any, you know, allocation business—you are into—you are pushing 75 percent. So you got \$0.25 goes to the charity, you know. I will be very up front with you about that.⁵

Why has HHV failed to disclose this information to potential donors? “Because we wouldn’t raise any money. I mean, that’s a pretty straight answer.”⁶

III. ATA AND FSC HAVE OFFERED EVIDENCE THAT REASONABLE REFORMS WOULD DISCRIMINATE AGAINST SMALL OR START-UP NONPROFITS.

FSC and ATA assert that effective restrictions on cooperative fundraising arrangements would “disqualify smaller and newer organizations” from raising money, and thereby prevent such organizations from competing with larger and better-established organizations. FSC Comments at 9; *accord*, ATA Comments at 7-9. These are attacks on a straw man. The rules attached to ANM’s June 24 comments, which

⁴ Report of Majority Staff to Members of the House Committee on Oversight and Government Reform Re Additional Information About The Activities of Roger Chapin’s Charitable Organizations (Jan. 17, 2008) at 5.

⁵ *Id.* at 4-5 & n. 4.

⁶ *Id.* at 5 n. 8.

are cosponsored by Association of Direct Response Fundraising Counsel, Association of Fundraising Professionals, DMA Nonprofit Federation, Independent Sector, and National Catholic Development Conference, are carefully designed to allow the flexible funding arrangements needed by small and startup organizations—many of which are members or clients of the sponsoring parties. What the proposed reforms would achieve—as the status quo does not—is provide meaningful protection for the interests of the public that donates money to nonprofits, and the clients that rely on nonprofits for services.

CONCLUSION

Alliance of Nonprofit Mailers respectfully requests that the Commission solicit further comments on adoption of the standards jointly proposed by ANM, Association of Direct Response Fundraising Counsel, Association of Fundraising Professionals, DMA Nonprofit Federation, Independent Sector, and National Catholic Development Conference.

Respectfully submitted,

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