

**Reply Comments of American Target Advertising, Inc.
in Response to Notice and Order of
April 22, 2008 on the Cooperative Mail Rule**

To the Honorable Commissioners:

American Target Advertising, Inc. (ATA) submitted Comments in this matter on May 20, 2008, and hereby replies to three comments, two of which proposed changes to the Cooperative Mail Rule (CMR).

As stated in ATA's Comments, the statutory assignment to the PRC is specific and expressly limited by Section 711 of the Postal Accountability and Enhancement Act (PAEA) to determine whether the CMR contains adequate safeguards to protect against abuses of the nonprofit postage rates and deception of consumers.

I. Comments Failed to Establish Any Need to Change, or Advisability of Changing, the CMR

No comment submitted any facts, substantiation or even persuasive opinions that the CMR should be changed to protect against abuses of nonprofit rates and deception of consumers. Instead, two comments re-submitted a proposal that the Postal Service rejected in 2003 when it issued a ruling on the CMR as applied to fundraising. The comments demonstrate no need or reasonable cause that their re-submission should now be accepted, nor do the comments show that their proposal serves any beneficial interest.

ATA's May 20 Comments suggested that those proposing any changes to the CMR bear an especially strong burden given how thoroughly debated this issue was prior to the 2003 ruling. ATA's Comments also stated that certain highly charged allegations about "abuses" in the nonprofit sector were entirely unrelated to the CMR. Comments in favor of changing the CMR have not demonstrated otherwise.¹

The comments fail to provide justifications for imposing more costs and burdens on nonprofits and the United States Postal Service, or for *changing* eligibility for the nonprofit rates by making them available to some nonprofits but not others. The comments entirely fail to establish any link between whatever nonprofit fundraising problems exist and any elements of

¹ Allegations cited by the Alliance of Nonprofit Mailers (ANM) at page 3 of their comments pertain to a hearing before the House Committee on Oversight and Government Reform on veterans' charities. The comments about the allegations are both inaccurate based on the record of that hearing, and are unrelated to any CMR issue. Indeed, the changes to the CMR proposed by ANM do not even remotely address the alleged problems to which ANM refers in its comments. Thus, ANM's reference to those allegations appears to be nothing more than spuriously designed to confuse the issues and task before the PRC. Section III of this Reply deals with inaccuracies in the Public Representative's comments.

the CMR.

The two comments favoring specific changes to the CMR represent that seven umbrella organizations support the proposed changes. ATA' s Comments noted that umbrella organizations favoring changes to the CMR represent less than four one-hundredths of one percent (.0004%) of the total number of nonprofit organizations, and that these organizations' members also include for-profit corporations and foundations. Therefore, support by those organizations *is not broad support* among the nonprofit sector for the proposal as proponents suggest. The material corporate composition of those organizations, even the ones that are not expressly representing commercial fundraisers, means that they are financed by, and therefore represent, interests other than nonprofit mailers.

ATA' s Comments stated that any membership or umbrella organization purporting to lobby for, or represent, nonprofits may establish their own membership requirements for their dues-paying members.² It would be inappropriate to force those membership rules, guidelines or codes of ethics on nonprofits that choose not to join and pay dues to those organizations.

Reviewing the membership guidelines or codes of conduct of the umbrella organizations favoring changes to the CMR reveals, curiously, that *none* of those organizations requires all or even most of the stricter rules that they now seek the PRC to impose on the entire nonprofit community. In fact, most of those umbrella organizations do not impose *any* of the stricter guidelines on their own members that they have asked the PRC to impose on the entire nonprofit community as a condition to mail at the nonprofit rates.³

This begs serious questions. Why haven' t these proponents of changing the CMR imposed their proposed standards on their own members? If their proposed changes to the CMR are somehow beneficial for donors, why haven' t these organizations adopted them on their own?

2 An official USPS spokesperson was quoted in industry publication *Direct Magazine* with the candid statement, "*the Alliance of Nonprofit Mailers is deliberately distorting this issue to get more members,*" following complaints by the Alliance of Nonprofit Mailers about the 2003 rule. See: http://directmag.com/mag/marketing_nonprofit_cooperative_postal/. As noted in Footnote 3 below, the Alliance of Nonprofit Mailers does not have guidelines or a code of ethics for its members, and therefore does not even impose these proposed changes on its own paid membership.

3 Of the organizations that do have guidelines, not all of the organizations even make them mandatory for their members. The guidelines posted on the respective organizations' websites may be found at: http://www.adrfco.org/index_files/rules.htm, http://www.afpnet.org/ethics/guidelines_code_standards, <http://www.the-dma.org/nonprofitfederation/contractingwithfundraisingprofessionals.pdf>, http://www.the-dma.org/nonprofit_federation/EthicsGuidelines103007.pdf, http://www.independentsector.org/members/code_ethics.html, <http://www.ncdc.org/accountability/code.asp>.

The Alliance of Nonprofit Mailers appears to have no guidelines or code of ethics.

The proposed changes are *untested*, yet those organizations have been entirely free to impose all of those standards on their own members. How can these organizations credibly suggest that the PRC impose these changes on the entire nonprofit mailing community when the proponents have not even tested those changes by imposing them on their own members?

Given the lack of substantiation of need to change the CMR, and failure of proponents to describe the impact of their proposed changes, the PRC should not adopt the changes proposed.

II. Proponents of Changing the CMR Offer No Credible Reasons, and Their Proposed Changes to the CMR Would Be Bad Policy

The two comments that offer proposed changes to the CMR fail to provide any examples of abuses of the nonprofit rates or deception of consumers that their proposed changes would address. Indeed, the proponents' comments are entirely absent of any examples of abuses created by the 2003 rule on the CMR. Furthermore, those two comments fail to address the purposes of the proposed changes, or the potential effects on (1) donors, (2) nonprofits, (3) fundraising agencies, or (4) the USPS. Therefore, the proposed changes lack proper foundation and vetting, and should be disregarded, as they were in 2003.

Even though the proposed changes lack any reasonable basis to be considered in this matter -- or at all -- ATA addresses in Exhibit 1 just some of the reasons why those changes would be bad policy, would add unreasonable costs and burdens for nonprofits and the USPS, and do not even address the purposes of this matter before the PRC.

Most assuredly, the proposed point-of-entry certifications would cause bottlenecks at point-of-entry Post Offices, which will further delay delivery of nonprofit mail. And proponents of these changes do not say how third-party mailshops (which presort mail and deliver the mail to point-of-entry Post Offices) could certify the contractual and other matters to which they have no first-hand knowledge. See Attachment 1 attached hereto.

III. Comments of the Public Representative Are Flawed Materially to the Extent that Their Consideration Should Be Very Limited at Best

The comments submitted by the Public Representative are, unfortunately, based in materially flawed facts and observations.⁴ Those comments demonstrate why misperceptions and bad data about costs of fundraising can distort conclusions about direct mail fundraising.

The Public Representative relies on certain third-party statements and reports that are

⁴ For purposes of brevity, ATA focuses in this Reply on only some of the materially flawed facts. However, the facts and observations on which ATA focuses herein do not exhaust all that are either materially incorrect or flawed.

factually incorrect.⁵ For example, the Public Representative relies on reports of certain state attorneys general about fundraising fees “retained” by commercial fundraisers. Those data cited by the Public Representative, however, have nothing to do with the CMR because those data almost exclusively refer to fundraising *that is not conducted by direct mail*. Additionally, those data misrepresent fundraisers’ “fees” versus costs of fundraising programs. Therefore, those data and the Public Representative’s reliance on them are not only irrelevant for the purposes of this matter, but are misleading with regard to the matter and issues presently before the CMR.⁶

The Public Representative cites, for example, to a 2005 report by the California Attorney General’s office about the costs of fundraising.⁷ That report is quoted as stating that, “Commercial fundraisers *retain* [more than 50 percent of contributions] as a *fundraising fee*.” Comments of the Public Representative, page 4, citing to the Attorney General’s Summary of Results of Charitable Solicitation by Commercial Fundraisers, <http://ag.ca.gov/charities/index.php> (hereinafter, the “California Report”) (emphasis added).

Table 4 of the California Report (see, http://ag.ca.gov/charities/publications/2005cfr/Table_4.pdf) shows that of the 634 commercial fundraisers used to calculate those percentages, only *five* were direct mailers (.007). The rest were telemarketers, event planners, auctioneers, etc. Almost all direct mailers fall under another category. For that reason alone, those data are irrelevant to this matter.

Those data in the California Report, even as applied to event planning and other forms of fundraising, are objectively incorrect because even though less than 50 percent of the net proceeds were received by the charities, the remainder of the funds were applied to, of course, costs for facilities, food and other expenses of the respective fundraising events. For the California Report to suggest that the commercial fundraisers were paid “fees” in excess of 50 percent of the money raised is *objectively* incorrect and therefore misleading. The Public Representative, therefore, relied on the wrong data, which can only distort rather than clarify the

5 The Public Representative refers to statements by ANM and others at public hearings. Those statements were not subject to any form of cross-examination or probing questions. Their evidentiary foundations were never questioned, and thus they should not be relied upon in any way as conclusive. Indeed, ATA would be pleased to demonstrate that certain third-party assertions cited by the Public Representative would be proven as false, misleading or spurious. Given the forum of this Reply, and in the interests of brevity, ATA shall save that for a different forum or tribunal.

6 The very many flaws of the 40 state charitable solicitation registration and disclosure systems are far too numerous to address in this Reply. However, in ATA’s initial Comments, it noted that the multi-state system affect more than just direct mail fundraising, and the failures of the multi-state system should be addressed rather than tinkering with eligibility for the nonprofit postage rates. Changing the eligibility for nonprofit mail by misapplying the CMR is not the solution.

7 The subdivision of the Attorney General’s office responsible for that report is called the Registry of Charitable Trusts.

issue presently before the PRC.⁸

The California Report does not reference costs of fundraising by Fundraising Consultants, which is an entirely different category of fundraising professionals under California and most state laws, and include overwhelmingly most direct mailers. Fundraising Consultants don't collect or handle funds, and don't solicit, but provide other services such as counsel, copy writing, etc. Contributions are mailed directly to the charity or to Post Office boxes where they are collected by banks or bonded "cagers" that act on behalf of the charity and deposit collected funds into the bank accounts of the charity.⁹

Even with regard to the five direct mailers identified as Commercial Fundraisers in the California Report, use of the word "retained" with regard to contributions is objectively incorrect. Direct mail fundraising agents are paid a relatively small percentage of the costs of the mailings, typically less than even the costs of postage. The types of expenses of direct mailings by nonprofits that either *use* or *don't use* third-party fundraisers are quite the same. For example, list rentals, data processing, printing, mailshop and backend are expenses that are not part of the funds "retained" by fundraising agents. And nonprofits that do not use commercial fundraising agents must pay those very same direct mail expenses. Therefore, fundraising agents don't "retain" those expenses as "fees," and to characterize them as part of the commercial fundraising agents' fees is objectively false and misleading.⁰

The Public Representative's failure to distinguish which commercial fundraisers employ direct mail versus telemarketing or other types of fundraising means that the data on which it relied are irrelevant for purposes of the matter before the PRC. It also demonstrates how easy it may be to confuse costs of fundraising as indicia for postal regulatory matters. For example, the statistics fail to distinguish public policy nonprofits, such as IRC 501(c)(4) organizations, whose

8 The use of the California Report is illustrative of the reliance by the Public Representative on data not relevant to this postal matter, and demonstrates the confusion that these state reports on costs of fundraising often sow.

9 Recent reports of theft and misappropriation of funds by employees and insiders at such high-profile organizations as the National Republican Congressional Committee (<http://ap.google.com/article/ALeqM5jEW-egZWOPxQIGpzXCk040qyoqorwD918PS0G0>), Points of Light Institute and the Association of Community Organizations for Reform Now (<http://philanthropy.com/news/index.php?id=5140>) demonstrate that nonprofits and qualified political committees that mail at the nonprofit rates are not immune to problems of theft, etc., by employees.

10 Professional fundraising agents may actually help improve the cost of the fundraising ratios for nonprofits because their expertise may result in (1) finding cheaper print vendors, (2) better postage pricing through design of the mail packages, and other factors in the numerator of that ratio, and (3) improving the amount of gross contributions to the nonprofit, which is the denominator of that ratio. In fact, ATA is not familiar with a single set of statistics showing that nonprofits improve their cost of fundraising ratios by conducting their direct mail fundraising using only in-house staff. Indeed, the tendency of new, small and less-endowed nonprofits to use third-party fundraising agents suggests *strongly* that cost of fundraising ratios must be *better* than if such fundraising efforts were conducted using in-house staff.

direct mail involve petitioning the government. Costs of fundraising ratios differ considerably based on the purposes, objectives, forms, popularity, brand-recognition, etc., of nonprofits.

The statistics also fail to distinguish the cost of fundraising ratios for nonprofits that rely entirely on low-dollar citizen contributions (for which costs of fundraising are a higher percentage of total funds raised) versus nonprofits whose incomes are derived in any substantial part from (1) unrelated business income, (2) dividends from stock holdings, (3) foundation grants, (4) government grants, and (5) other large sources of income that make the costs of fundraising for those nonprofits lower as a percentage of their total funds.

The Public Representative does note that there are multiple factors that need to be considered. However, the Public Representative presents no apples-to-apples statistics showing (1) the costs of direct mail fundraising by nonprofits that employ third-party fundraising agents as a percentage of direct mail income, versus (2) the costs of direct mail fundraising by nonprofits that do not engage third-party fundraising agents as a percentage of direct mail income. Nor does the Public Representative present data about costs of direct mail fundraising versus income *excluding all other sources of income*, which is the only valid way to approach an apples-to-apples review of fundraising ratios for direct mail.

The criticisms in this Reply about the Public Representatives comments are not meant to detract from the Public Representatives efforts. They are merely intended to show that (1) even the most objective observations of costs of fundraising will be flawed if they rely on the wrong data, and (2) obtaining the correct data is difficult if not impossible because the state data, which constitutes the bulk of what is available, are flawed and even present objectively incorrect statements.

The Public Representative suggests more studies, and refers to others' suggesting fundraising "benchmarks" as a condition of eligibility for the nonprofit postage rates. However, there can be no valid conclusion reached about appropriate "benchmarks" to be used for determining eligibility for the nonprofit postage rates based on costs of fundraising and net income to the nonprofits, since there are too many factors and variables involved. The Public Representative does cite to four United States Supreme Court decisions noting that prior regulatory attempts to establish benchmarks using cost of fundraising ratios were found to be unconstitutional.

While ATA does understand that the Public Representative's comments are not to blame for the incorrect underlying data from third-parties (and those seeking changes to the CMR), ATA does note that the Public Representative's comments do not address any link between certain well-publicized problems in nonprofit fundraising and the CMR issue before the PRC. The Public Representative does not even claim that the issues it addressed were the product of (1) cooperative mailings or (2) the 2003 rule on the CMR.

Indeed, the absence of any of substantiation by any of the comments appears to be further

evidence that the 2003 rule on the CMR and fundraising has not caused or created any abuses of the nonprofit rates or deception of consumers.

If eligibility for the nonprofit postage rates were to be tied to certain benchmarks, as some suggest may be appropriate, then instead of using cost of fundraising ratios, which would affect worthy but cash-strapped charities and other eligible nonprofits, the Postal Service may instead focus on need. For example, there are nonprofits that receive annually hundreds of millions of dollars from sources other than citizen-donors. Many charities receive congressionally earmarked funds and federal cash subsidies, so the nonprofit rates appear to be superfluous government generosity to those nonprofits. Some nonprofits own tens of millions of dollars in assets (including real estate and office buildings not subject to taxation). Some wealthier nonprofits can afford Washington-based lobbyists, while the overwhelmingly large majority of nonprofits cannot. Clearly, the larger, wealthier charities can *afford* to send their mail at higher postage rates, perhaps more so than many for-profit businesses.¹¹

Benchmarks based on cost of fundraising ratios are a backwards, unconstitutional solution, as the Supreme Court has ruled repeatedly. Benchmarks for eligibility to mail at the nonprofit rates tied to cost of fundraising ratios would make those mailings *more expensive* by making them ineligible for the nonprofit rates. That's an illogical approach, to say the least. Backdoor attempts to achieve those same results of stifling and even silencing some nonprofits are not a solution, and would likely cause litigation.

Perhaps the benchmarks for eligibility for the nonprofit rates, if there are to be any new ones, should be based on *need*. Perhaps nonprofits with large holdings of assets and wealth, or those that receive government subsidies, should pay higher rates. That certainly would appeal to many American citizens and even businesses that do not have the exorbitant wealth of those large and taxpayer-subsidized nonprofits.

IV. Conclusion

None of the comments have demonstrated cause to change the CMR, and none have presented any substantiation whatsoever that the current CMR does not have adequate safeguards. The changes proposed in two comments would add expense and complexity for worthy nonprofits and the USPS. The organizations that suggest these changes have not even adopted those policies for their own organizations, so not only are they untested changes, but those changes would have detrimental effects on the larger universe of nonprofits and the USPS. Absent substantiation for the need to change the CMR, one should conclude that the changes

¹¹ Some Members of Congress use earmarks to fund nonprofits with which they have affiliations. One example, recently reported, is that a nonprofit named after a Member of Congress received \$1.9 million in earmarks last year in addition to a \$690,500 federal grant. The Member, perhaps even abusing congressional franking privileges, sent fundraising letters on official U.S. House of Representatives stationery to individuals and entities with matters before the committee he chairs. See, "Rep. Rangel's Tin Cup," <http://www.washingtonpost.com/wp-dyn/content/article/2008/07/16/AR2008071602535.html>.

proposed in two comments would be nothing more than limitation on competition within the nonprofit sector.

Respectfully submitted,

Mark J. Fitzgibbons
President of Corporate and Legal Affairs
American Target Advertising, Inc.
9625 Surveyor Court, Suite 400
Manassas, VA 20110
(703) 392-7676, mfitzgibbons@americantarget.com

July 18, 2008

ATTACHMENT

Two comments submitted proposed changes to the CMR. Those comments suggest a new section 1.6.3.2.(b) added to the CMR. The following are just some reasons why the changes to the CMR proposed in two comments would be bad policy.

Subsection (b) would require a new layer of certification at the point of entry of all nonprofit mail. One problem with that proposal is that third-party vendors commonly referred to as “mailshops,” presort mail on behalf of the nonprofits, and physically deliver that mail to Post Offices. Such third-parties *could not certify* to the underlying contractual arrangements, etc., between qualified nonprofits and *another* party, such as a commercial fundraising agent.

The proposed changes would require the USPS to intervene in contractual matters and areas in which it has no expertise or experience. This, most assuredly, *will result in errors and delayed mailings* of urgent and time-sensitive communications that may or may not appeal for contributions. With nonprofit mail already delivering at a pace slower than other mail, this will only act to further slow delivery of nonprofit mail because of bottlenecks at the point of entry.

Additionally, the proposed changes would be a massive, expensive undertaking requiring nonprofits to amend their existing contracts with fundraisers to affirmatively meet these new criteria. Those contract amendments would need to be filed in the many states that require filing of contracts and changes, adding even more expense for nonprofits. Given the absence of cause described in ATA’ s principal Reply, such an expensive and massive undertaking is clearly not justified.

The proponents of these changes to the CMR fail to address how the Postal Service will enforce them, or what the costs of enforcement would be. Clearly, these new requirements would require additional Postal personnel and training. Again, given the total absence of substantiation of abuses or the need for such changes, the proponents fail to justify the imposition on the USPS.

The following track the numbered paragraphs under proposed subsection (b).

(1) Intermingling principals and family members. This is not a postal issue. The Internal Revenue Code and state charitable solicitation laws already govern issues such as private inurement, private benefit, etc.

(2) Requirements of written contracts between nonprofit and commercial fundraisers. This, too, is already governed by state charitable solicitation laws. We see no reason for the USPS to have oversight of nonprofit contracts, and this would merely add more costs for the USPS to oversee this requirement. Besides, that would change eligibility for use of the nonprofit mails, and only Congress may lawfully do that.

(3) Fundraisers have no financial interest in premiums. Proponents have failed to demonstrate why this issue is even raised. If nonprofits are eligible to mail premiums, and by law they already control the content of their mailings, why should nonprofits be restricted in which premiums they choose?

(4) Contributions deposited into bank account under control of nonprofits. This is another area already controlled by state charitable solicitation laws. Would, however, this requirement be employed to ban the common use of cagers?

(5) Ownership and control of donor lists. As one proponent of changing the CMR describes in its own code of ethics:

The donor list also has secondary, but considerable, value due to its potential as a commodity in the direct response business.

[T]he donor list is inherently the property of the nonprofit. At the same time, we recognize that the list resource can afford the means by which a nonprofit, especially one that is new or undercapitalized, can sustain a fundraising program.

A nonprofit is free to dispose of its list resource – like any other property – in any manner it chooses . . . The Association believes that *voluntary* restraints upon dispositions of list rights are essential. (ADRFCO, Rules of Ethics & Practices, see Footnote 3 of ATA’ s Reply. Emphasis added.)

(6) Ownership of packages (i.e., copyrights and other intellectual property). Federal law already governs who should own intellectual property rights, for how long, and under which circumstances they may be assigned or transferred. It would be inappropriate for the USPS to force authors and creators to give up ownership of intellectual property rights. If nonprofits may obtain copy, graphics, techniques, etc. at a lower cost by not demanding ownership rights from the author, nonprofits should be free to do so. Many nonprofits use printers of direct mail packages that offer pre-fab packages developed and owned by the printers and their creative divisions. The proposed rule would create complications, and would likely generate litigation over ownership that proponents ignore or have failed to address.

(7) Extensions of credit. The proposal would limit how debt could be repaid by nonprofit organizations. This would inhibit extensions of credit to nonprofit organizations. Large, wealthy organizations can finance their own mailings, especially prospect mailings, and even at substantial losses. This proposed change would therefore favor large, wealthy nonprofits, and would harm new and small nonprofits.

(8) Excess benefit transactions. This is a complex area of law and fact governed by the Internal Revenue Code, is an area of law that is entirely outside the jurisdiction of the USPS, and proponents have not explained how the USPS could enforce this proposed change even if the subject area were appropriate for USPS jurisdiction.