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POSTAL REGULATORY COMMISSION  
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Commissioners:

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Report of the Postal Regulatory Commission  
on the  
Fundraising Exception  
to the  
Cooperative Mail Rule

February 13, 2009

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### Commissioner Goldway Dissents

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## I. INTRODUCTION

*Statutory authority.* Section 711(a) of the Postal Accountability and Enhancement Act (PAEA) of 2006 directs the Postal Regulatory Commission (Commission) to examine the “Fundraising Exception” to the Cooperative Mail Rule for the purpose of determining whether the exception contains adequate safeguards to protect against two longstanding concerns: abuse of bulk nonprofit postal rates and deception of consumers. The PAEA further directs the Commission to report the results of its examination to the United States Postal Service, along with any recommendations the Commission finds appropriate.<sup>1</sup> Pub. L. 109-435, Title VII, § 711(a), Dec. 20, 2006, 120 Stat. 3248 (39 U.S.C. 501 Note 12).

*Scope of examination.* Pursuant to section 711, the Commission has reviewed the rulemaking that led to adoption of the Fundraising Exception in 2003, developments in the ensuing five years, and selected data and information. In support of this review, it:

- Established a formal docket, designated as a Public Inquiry, to obtain the views of the interested public;
- Directed questions related to administration and enforcement of the Cooperative Mail Rule and Fundraising Exception to the Postal Service and held related discussions with the Postal Service;
- Conferred with the Postal Service’s Office of Inspector General (OIG);
- Adopted working definitions of “abuse of rates” and “deception of consumers,” given the absence of such in section 711; and
- Considered Congressional hearing records, State laws, judicial decisions, charity rating websites, and Postal Service documents.

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<sup>1</sup> The full text of section 711, which includes an additional paragraph addressing the potential for further Commission action, appears in Appendix A.

*Organization.* This report presents the results of the Commission's examination, five related recommendations, and additional explanatory material. Section I consists of this Introduction. Section II presents the Commission's review of the Cooperative Mail Rule and the 2003 rulemaking record. Section III addresses post-rulemaking developments. Section IV presents a summary of comments in the Commission's Public Inquiry. Section V consists of the Commission's examination and its recommendations. A set of appendices provide selected supporting documentation. Appendix E provides a summary of U.S. Supreme Court decisions addressing charitable fundraising.

*Distribution.* As required by section 711, the Commission is providing this report to the Postal Service. It is also transmitting it to the Chairmen and Ranking Members of the Congressional committees and subcommittees with responsibility for oversight of the Postal Service, and to the United States Postal Service's Office of the Inspector General, and the United States Postal Inspection Service. The report will also be posted on the Commission's website.

*Acknowledgements.* The Commission acknowledges and appreciates the assistance it has received in conducting its examination from Congressional staff members; Postal Service employees and management; the Postal Service's Office of Inspector General; and commenters in the Commission's Public Inquiry.

## II. REVIEW OF 2003 RULEMAKING RECORD

### A. Background

Formal Postal Service action on the Fundraising Exception can be traced to May 6, 2003, when a notice of proposed rulemaking appeared in the *Federal Register*. The Postal Service's explanation indicated that the topic was linked to a set of postal regulations referred to as the Cooperative Mail Rule. See 68 FR 23937.<sup>2</sup>

The Cooperative Mail Rule, as administered by the Postal Service, controls access to nonprofit Standard Mail rates by limiting the ability of an entity with authorization for a nonprofit permit to “cooperate” or partner with another entity (typically a commercial enterprise, such as a professional fundraiser) in a bulk mailing and still retain eligibility for reduced rates. This is accomplished through provisions which:

- Require that each cooperating entity must *independently* qualify for nonprofit rates at the post office where the mailing is deposited;
- Require that the mail matter must be owned by the eligible entity; and
- Prohibit “sharing” a permit with an entity not authorized to mail at reduced rates.

Principal-agent relationships in a fee-for-service arrangement, such as for printing or creative services, generally have been considered outside the scope of the Cooperative Mail Rule; however, parties to the mailing must be able to show that the relationship is legitimate if questioned.

The longstanding rationale for the prohibitions in the Cooperative Mail Rule is that access to reduced rates is intended solely for the benefit of organizations authorized to mail at nonprofit rates. Moreover, access to this authorization is a privilege—with rates once subsidized by taxpayers, but more recently funded by other

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<sup>2</sup> See Appendix B for the full text of the provision.

mailers—and the restrictions help prevent abuse of this privilege and undue imposition on other mailers.

The extent of the financial benefit associated with a nonprofit permit has varied, but eligible nonprofit bulk mailings currently are assessed at 60 percent of the Regular (commercial) Standard Mail rate. Thus, a mailing that would incur postage costs of \$1,000 at Regular Standard Mail rates may be sent under a nonprofit bulk permit for \$600.

*Proposed version.* The Fundraising Exception, as originally proposed, read as follows:

Exception:

[T]his standard [pertaining to Cooperative Mail] does not apply to mailings by a nonprofit organization authorized to mail at Nonprofit Standard Mail rates soliciting monetary donations and not promoting or otherwise facilitating the sale or lease of any goods or service.

*Id.* at 23939.

This formulation of the regulation *excluded* voter registration officials and certain qualified political committees, which are authorized to mail at reduced rates. It also excluded solicitations not strictly limited to raising funds. *Id.*

*Final version.* Following consideration of comments, the Postal Service published a final rule on October 9, 2003, and established November 13, 2003 as the effective date. The final rule reflected several changes, but maintained key aspects of the initial conceptual approach, and thereby continued to reflect the Postal Service's interest in crafting a limited exception to the Cooperative Mail Rule. The final regulation, as adopted, provides:

Exception:

[E]ffective November 13, 2003, this standard [pertaining to Cooperative Mail] no longer applies to mailings by an organization authorized to mail at Nonprofit Standard Mail rates soliciting monetary donations to the authorized mailer and not promoting or otherwise facilitating the sale or lease of any goods or service. This exception applies only where the organization authorized to mail at Nonprofit Standard Mail rates is given a list of each donor, contact information (*e.g.*, address, telephone number) for each, and the amount of the donation or waives in writing the receipt of this list.

68 FR 58276.

This formulation of the regulation makes two substantive changes. First, in terms of eligibility, it now brings the previously-excluded voter registration officials and certain qualified political committees within the scope of the Fundraising Exception and thereby expands eligibility. Second, it requires the mailing partner to provide the entity with the nonprofit authorization with a detailed donor list or to have obtained a written waiver.

The Postal Service considered, but rejected, suggestions that would impose additional requirements on the cooperating parties, such as:

- Prohibiting or restricting close ties, including family relationships, between the nonprofit organization and the cooperating partner;
- Requiring a written contract between the nonprofit organization and the cooperating partner;
- Requiring prior written approval of the contract by the nonprofit organization's board of directors; and
- Requiring the inclusion of certain terms in the contract related to important aspects of control over the mailing and the proceeds.

*Id.* at 58275-76.

Potential restrictions associated with the last point include, among others, retention of intellectual property rights, limits on financing conditions, direct deposit of the proceeds in an account under the exclusive control of the nonprofit organization, and the right to receipt and exclusive ownership of a detailed donor list.

The Postal Service also rejected a suggestion to expand the proposal in a way that would exempt mailpieces promoting the sale of products and goods, even if those products and goods are of nominal value, from application of the Cooperative Mail Rule, and a suggestion that coverage be expanded to include other documents, such as thank you letters, newsletters, and confirmations of donations. *Id.* at 58276.

#### B. Observations

Review of the 2003 rulemaking record shows that the Postal Service's main objective was to carve a consensus provision out of myriad, and often competing, considerations. These considerations included, among others, some commenters' questions about the consistency of the underlying Cooperative Mail Rule with Congressional intent; related questions of agency leeway in statutory interpretation; the impact of State laws regulating charitable solicitations on the Postal Service's traditional insistence on "no shared risk" in reduced rate mailings; the effect of Supreme Court decisions striking down certain percentage-based limits on the viability of other regulatory restrictions; and concerns about Postal Service resources and enforcement authority.

Thus, although the Postal Service asserted that there was broad support for the terms in the final version of the Fundraising Exception, the record also supports the conclusion that there was still a sharp divide over the Postal Service's rulemaking authority, its administration of the Cooperative Mail Rule, and its reluctance to stretch restrictions in the Fundraising Exception beyond those safely within the "consensus" category. Overall, the terms of the final rule were strongly influenced by the following factors:

The growing role of professional fundraising in charitable solicitations and expressions of interest, on the part of some nonprofit mailers, in partnering with them, given concerns about the impact of an economic downturn on the success of solicitation efforts;

Lack of congressional action on related legislation, coupled with congressional interest in an administrative solution; and

Passage of State laws and regulations posing substantive, and irreconcilable, conflicts with the Cooperative Mail Rule's ban on risk sharing.

The Postal Service acknowledged the seriousness of 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.* at 58274. However, the Postal Service characterized this as primarily involving consumer protection concerns, rather than postal concerns. It therefore regarded this as 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.* at 58275.

In a statement that bears directly on the Commission's mandate under section 711, the Postal Service affirmatively stated that the proposed rule "would not establish safeguards to address the concern that some professional fundraisers may seek to take advantage of unsophisticated clients." 68 FR 23939. Its reasoning was that:

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.*

### III. ASSESSMENT OF POST-RULEMAKING DEVELOPMENTS (2003 THROUGH 2008)

#### A. Outcome of Commission's Data and Information Request to Postal Service

In correspondence directed to the Postal Service, the Commission requested a range of data and information on administration of the Fundraising Exception. The Postal Service's response appears in Appendix C.<sup>3</sup>

The Postal Service's response is generally thoughtful and detailed; however, on the question of initial interest to the Commission—namely, the extent to which the Fundraising Exception is used, whether in terms of number of nonprofit organizations authorized to mail at reduced rates or volume—the Postal Service said it could not provide an answer because it does not collect this information. Postal Service Response at 2. The Commission then learned that the Office of the Inspector General was planning to conduct a statistical survey, and concluded that this data collection effort would likely provide a benchmark on usage.

A review of several other aspects of the response to the Data and Information Request follows.

#### 1. Authorizations to Mail and Volume

*Authorizations to use Nonprofit Standard Mail prices.* For an overall perspective on the use of Nonprofit Standard rates, the Postal Service provided annual data on the number of organizations authorized to mail in this category for fiscal years 2000 through 2007. The following table reproduces data from the Postal Service Response. The highlighted rows identify the fiscal year in which the Fundraising Exception was adopted (FY 2004) and the fiscal years immediately before and after.

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<sup>3</sup> Letter from Stephen L. Sharfman, General Counsel, Postal Regulatory Commission, May 13, 2008 (Data and Information Request); and Letter from R. Andrew German, Legal Policy and Ratemaking, Office of the General Counsel, United States Postal Service, June 19, 2008 (Postal Service Response).

Table 1.

<b>Nonprofit Standard Rates: Authorized Mailers and Volumes</b>		
<b>Fiscal Year</b>	<b>Authorized Mailers*</b>	<b>Volume</b>
2000	264,641	14, 250,295,000
2001	274,490	14, 423,446,000
2002	286,974	14,006,494,000
<b>2003</b>	<b>306,144</b>	<b>14,527,723,000</b>
<b>2004</b>	<b>317,496</b>	<b>14,441,837,000</b>
<b>2005</b>	<b>324,208</b>	<b>15,046,802,000</b>
2006	337,379	14,602,767,000
2007	352,823	14,783,682,000
<i>*As of end of respective fiscal year.</i>		

Source: Derived from Postal Service Response at 1 and 2.

The table shows that authorizations to use Nonprofit Standard rates have increased each year in the period for which data was provided and on a relatively steady basis. The Postal Service characterizes volumes as having remained relatively stable despite the increase in the number of organizations authorized to mail at Nonprofit Standard Mail prices and the adoption of the exception to the Cooperative Mail Rule. *Id.* at 2. The Commission notes that in FY 2004, relative to the preceding year, the Postal Service's data shows that authorizations increased, but volume decreased. FY 2005 saw an increase in both authorizations and volume. In FY 2006, authorizations continued to increase, but volume declined.

## 2. Information Concerning Complaints

The Postal Service provides data and information on three aspects of the Commission's inquiry into the number, nature, and source of complaints related to cooperative mailings and/or the Fundraising Exception. First, it states that its Consumer Advocate has not received any complaints, since the adoption of the rule, relating to the Fundraising Exception. *Id.* at 3. Second, it provides the following data on complaints received by the Postal Inspection Service and categorized broadly as "charitable fraud" for the 8-year period (FY 2000 through FY 2007) corresponding to the years covered by the permit and volume data in Table 1.

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Table 2.

**Postal Inspection Service Complaint Summary:  
Charitable Fraud**

<b>Fiscal Year</b>	<b>Subjects of Complaints</b>	<b>Number of Complaints</b>
2000	309	1,364
2001	221	839
2002	183	350
2003	186	541
2004	250	844
2005	200	770
2006	162	328
2007	96	190

*Source:* Adapted from Postal Service Response, Answer to Question No. 4.

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These data show that for the selected period, the peak year for complaints in the Postal Inspection Service's charitable fraud category was FY 2000, when 1,364 were identified. In FY 2004, the year of adoption of the Fundraising Exception, there were

884 complaints in this category. While this is higher than the number received in fiscal years 2002 and 2003, it is considerably lower than the 1,364 received in FY 2000. Moreover, since adoption of the Fundraising Exception, the number of complaints has continued to drop, reaching the lowest level—190—in FY 2007.

Finally, the Postal Service states that the Postal Inspection Service conducted an analysis of the 190 charitable fraud complaints received in FY 2007. It says that of this total, 42 alleged monetary losses relate to the reported scheme or fraud, and further explains:

These 42 complaints related to 28 different subjects of complaints. In other words, more than one complaint was received for some of the subjects. Of the 28 subjects ...,18 related to Charity Fraud. Ten of the subjects and their alleged schemes were miscategorized and related to investment fraud or other matters. The Postal Inspection Service opened investigations on three of the subjects. One investigation remains open, and the other two have been closed.

*Id.* at 3.

The Postal Inspection's analysis of FY 2007 data makes clear that the number of complaints associated with the category of charitable fraud in FY 2007 has diminished significantly since implementation of the Fundraising Exception.

### 3. Other Means of Eliminating Charitable Fraud

In response to a Commission query about other means to eliminate Charitable Fraud, the Postal Service said that it is difficult to provide a definitive response without knowledge of specific abuses that have occurred and the underlying circumstances in each instance. The Postal Service says that despite its best efforts, it has not received this information. It adds:

As a general matter, we continue to believe that educational efforts directed at nonprofit organizations and the individuals that receive charitable solicitations is an appropriate

measure. We note that the Postal Service defers to industry experts concerning the steps that nonprofit organizations and individuals should take to protect their interests, and believe that the proper role for the Postal Service is to assist in communicating the advice provided by these experts. The Postal Service stands willing to continue and expand on its partnership with industry experts by:

1. Improving its website to increase the information available, including links to appropriate governmental and private resources, and making this information more visible to those accessing the site[;]
2. Engaging in a direct mail campaign to consumers to pass on expert advice they should consider upon receipt of a charitable solicitation[;]
3. Considering making Charitable Fraud a focus during Consumer Protection Week[;]
4. Continuing to partner with industry representatives in presentations to nonprofit groups[; and]
5. Designating a point of contact within the Inspection Service for the industry members and consumers to report concerns regarding charitable solicitations[.]

*Id.* at 5.

#### B. Other Areas of Investigations

Commission staff contacted the National Association of Attorneys General (NAAG) and asked whether that organization had any records or reports of nonprofits using deceptive practices in soliciting funds from the public. Marjorie Tharp, Director of Communications, states that NAAG does not track these types of complaints. Commission staff also contacted the National Association of State Charity Officials (NASCO), currently headed by Chris Cash, who is also the Charities Program Manager for the Colorado Department of State. His office reported that NASCO does not track complaints.

Terry Long in Colorado's Charities Program office acknowledged that while the Colorado Department of State tracks complaints, it does not differentiate between telemarketing, in person, or mail solicitations. He also stated that to his knowledge the office has never received a complaint about solicitations via mail.

Commission staff also explored the potential usefulness of the Federal Trade Commission's Sentinel database that compiles consumer complaints from multiple sources. It also accessed websites maintained by State consumer organizations.

#### IV. OUTCOME OF PUBLIC INQUIRY

##### A. Establishment of Public Inquiry and Request for Public Comments

The Commission established Docket No. PI2008-4 to obtain comments from the public on the scope and nature of its examination, report, and potential recommendations. To focus the discussion, it invited responses to questions on selected topics, but also encouraged commenters to address any matters they deemed relevant.<sup>4</sup> Questions directed at abuse of nonprofit rates asked:

To what extent have abusive fundraising practices identified in the 2003 rulemaking occurred since adoption of the Fundraising Exception?

Have there been any material changes in fundraising since the 2003 rulemaking that give rise to new concerns about abuse in connection with the Fundraising Exception?

To what extent have the nonprofit sector and the Postal Service engaged in education efforts designed to inform nonprofit organizations, especially those considered especially vulnerable to overreaching or predatory partners, about the scope of the Fundraising Exception and potential abuses? Are there reliable means of measuring or assessing the success of these efforts?

In terms of data, the Commission asked:

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?

*Deception of consumers.* With respect to section 711's concern about deception of consumers, the Commission inquired into State laws regulating charities, Postal Service education efforts, State education efforts, and related documentation of such efforts.

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<sup>4</sup> See Appendix D, PRC Order No. 72, Notice and Order Requesting Comments on Fundraising Exception, April 22, 2008 (Order No. 72). Comments can be accessed via the Commission's website.

The 2003 rulemaking mentioned that there was 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 the Fundraising Exception satisfactorily resolve relevant concerns?

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?

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?

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?

## B. Summary of Comments

The Commission requested comments from interested parties on several topics pertaining to the Fundraising Exception. See Order No. 72. Initial comments were submitted by the Alliance of Nonprofit Mailers (ANM); the Free Speech Coalition, Inc., *et al.* (FSC, *et al.*); the Public Representative;<sup>5</sup> the Association of Direct Response Fundraising Counsel (ADRFC);<sup>6</sup> and the American Target Advertising, Inc. (ATA).<sup>7</sup> Reply Comments were filed by ANM, FSC, *et al.*,<sup>8</sup> and ATA.<sup>9</sup>

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<sup>5</sup> Comments of Alliance of Nonprofit Mailers (ANM Comments); Free Speech Coalition, Inc., the Free Speech Defense and Education Fund, Inc., *et al.* (FSC, *et al.* Comments); and Public Representative Comments on Fundraising Exception (Public Representative Comments), all filed June 24, 2008.

<sup>6</sup> Letter from the Association of Direct Response Fundraising Counsel, June 25, 2008.

<sup>7</sup> Comments of American Target Advertising, Inc. in Response to the Notice and Order of April 22, 2008 on the Cooperative Mail Rule, May 20, 2008 (ATA Comments).

<sup>8</sup> Reply Comments of Alliance of Nonprofit Mailers (ANM Reply Comments); and Free Speech Coalition, Inc., Free Speech Defense and Education Fund, Inc., *et al.* Reply Comments Regarding Cooperative Mail Rule (FSC, *et al.* Reply Comments), both filed July 24, 2008.

<sup>9</sup> Reply Comments of American Target Advertising, Inc. in Response to Notice and Order of April 22, 2008 on the Cooperative Mail Rule, July 25, 2008 (ATA Reply Comments).

The comments demonstrate broad division on the matter at hand. While some parties believe that changing the Fundraising Exception is necessary to prevent alleged abuses of nonprofit rates, other parties argue that the alleged abuses are just that—allegations unsupported by substantive facts. ANM and ADRFC argue that there is a need to modify the current Fundraising Exception, and support their position by citing allegations of abuse. Conversely, ATA and FSC, *et al.* argue that the Fundraising Exception should not be modified because there is no evidence of abuse. The Public Representative suggests that changes to the Fundraising Exception may be warranted, but only if the Commission finds that the Fundraising Exception is being abused.

### C. Comments in Favor of Changing the Fundraising Exception

#### 1. ANM's Comments

ANM contends that the Fundraising Exception should be modified and cites allegations of fraud as its basis. In its comments, ANM gives a brief summary of events leading up to the adoption of the current Fundraising Exception. ANM notes that in 2003, a broad coalition of nonprofit organizations and fundraisers opposed the current Fundraising Exception. ANM Comments at 1. It goes on to say that a review of the exemption is overdue and adds that determining the full extent of the abuse would require the subpoena authority of the Postal Service Office of Inspector General. *Id.* at 3. ANM relies on reports suggesting some charities divert the majority of their contributions to their professional staff, fundraising consultants, and other overhead costs. *Id.* ANM claims that allegations of abuse by fundraisers surfaced during the hearing before the House Committee on Oversight and Government Reform.<sup>10</sup> Those allegations included the following:

- Hundreds of thousands of dollars in donations, raised supposedly to help wounded veterans, spent instead on the personal expenses of executives and fundraising officials;

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<sup>10</sup> Hearing on Assessing Veterans' Charities—Part II, House Committee on Oversight and Government Reform (Jan. 17, 2008).

- \$340,000 worth of meals, hotels, and entertainment;
- Six- and seven-figure personal loans; and
- \$17,000 country club membership.

ANM Comments at 3.

ANM admits that these allegations of misconduct are not necessarily proof of abuse. However, ANM believes that the concerns expressed in the hearing by members of Congress must be taken seriously. *Id.* at 4.

ANM filed its own comments with the Commission and also joined with ADRFC and five other organizations to submit a proposal for consideration. This proposal would add a new Domestic Mail Manual (DMM) section entitled, “Exception for Fundraising Mailings”. This section adds new language explaining how mailers who are unauthorized to send mail at nonprofit rates can qualify. It requires nonprofit organizations to certify in writing that the arrangement between the nonprofit and professional fundraiser or other party not eligible for the nonprofit rate satisfies a list of eight requirements.

Under the proposal, each nonprofit mailing must contain a certification of eight new factors on an entry statement including the following: (1) no officers, director, or fiduciary of any ineligible participant may serve the nonprofit as a key employee; (2) the arrangement is governed by a written contract; (3) contributions received from recipients of solicitations are deposited in a bank account under the exclusive control of the nonprofit; and (4) the ineligible party has no ownership of donor lists.<sup>11</sup>

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<sup>11</sup> See attachments to ANM Comments and ADRFC Comments.

## 2. The Public Representative's Comments

The Public Representative suggests several possible areas of inquiry, starting with how often professional fundraisers actually are involved in fundraising efforts. Public Representative Comments at 6-9. Based on limited data, she concludes that the use of commercial fundraisers is low.<sup>12</sup> *Id.* at 3-6. She also suggests that the Commission could examine whether current State and Federal laws prohibiting fraudulent solicitations are sufficient to protect consumers from fundraising abuses. *Id.* at 6.

The Public Representative caveats her proposals with the premise that the Fundraising Exception need only be modified if it is being abused. She notes that if individual cases of Cooperative Mail Rule abuse are sufficiently handled by the appropriate Federal and State authorities then changes may not be necessary. *Id.* The Public Representative offers a number of suggestions as to how the Cooperative Mail Rule might be modified upon findings of abuse. She offers that if abuse is found to be widespread, the Fundraising Exception could be abolished. *Id.* at 6-7.

The Public Representative discusses benchmarks as a way to prevent abuse of the Cooperative Mail Rule. *Id.* at 7-9. She says that the Postal Service could require that a set percentage of funds raised by commercial fundraisers on behalf of a nonprofit be paid to the nonprofit entity as opposed to the commercial fundraiser. Another potential benchmark would mandate that in order for a charity to qualify for the favorable nonprofit postage rates, it would be required to show that it spends a certain minimum percentage of its total funds on actual program expenses. *Id.* at 7. However, she warns of the conflicts that could prevent establishing such benchmarks. She references a trilogy of cases where courts considered preventative statutes designed to combat fraud by imposing prior restraints on solicitation when fundraising fees exceeded a specified reasonable level. In each instance, the court held the measures to be unconstitutional. *Id.* at 8.

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<sup>12</sup> See also Attachment to Public Representative Comments.

The Public Representative recommends additional safeguards that were originally suggested by Patricia Read, Senior Vice President of Independent Sector,<sup>13</sup> in a letter to Congressman Henry Waxman, chairman of the Committee on Oversight and Government Reform. *Id.* at 9. These safeguards include a requirement that donations go directly to the nonprofit, that donor lists remain the property of the nonprofit, and that the nonprofit board has approved the contract governing the solicitation effort. *Id.* These requirements also appear in ANM's and ADRFC's proposed DMM revisions.

Along with her recommendations, the Public Representative encourages the Commission to consider the additional economic burdens that would be imposed on the Postal Service by any Commission recommendations for additional safeguards. *Id.* at 10. She argues that if the costs of adding safeguards 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. *Id.*

#### D. Comments Opposed to Modifying the Fundraising Exception

ATA and FSC, *et al.* contend that the Fundraising Exception should be left as is. They contend that none of the comments provide any reason to modify the Cooperative Mail Rule.

##### 1. ATA's Comments

ATA believes that the governing statute<sup>14</sup> supports its contention that the purpose of the Fundraising Exception is to prevent organizations from using nonprofit rates to mail commercial advertisements such as for travel, insurance, or financial services. ATA Comments at 2. ATA further supports its contention by citing legislative history

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<sup>13</sup> Independent Sector is one of the five organizations which joined with ANM in submitting its proposal on DMM revisions.

<sup>14</sup> 39 U.S.C. 3626(j)(1), which was added by amendments of 1990 (Pub. L. 101-509) and 1993 (Pub. L. 103-123).

which provides that the purpose of the Fundraising Exception was to eliminate the use of nonprofit third-class mail for promoting any item or service for which an organization is subject to unrelated business income tax. *Id.*

ATA also addresses the comments of other parties. ATA notes that the comments submitted by ANM and ADRFC lacked facts, substantiation, and persuasive opinions showing that the Cooperative Mail Rule should be changed to protect against abuses. ATA Reply Comments at 1. Next, ATA challenges ANM's representations that there is broad support for changing the Cooperative Mail Rule by pointing out that the umbrella organizations desiring to make changes to the Cooperative Mail Rule represent less than four one-hundredths of one percent (.0004) of the total number of nonprofit organizations. *Id.* at 1-2. ATA adds that its members also include for-profit corporations and foundations. *Id.* at 2.

As for the statements made during the oversight hearing cited by ANM and the Public Representative, ATA refers to them as objectively false. ATA Comments at 6; and ATA Reply Comments at 1, n.1. ATA argues that because the statements were not subject to cross-examination and their evidentiary foundations were never questioned, they should not be relied upon as conclusive in any way. ATA Reply Comments at 4. As such, the statements should not be used as support for modifying the Fundraising Exception.

## 2. FSC, *et al.*'s Comments

FSC, *et al.* expresses general satisfaction with the current rule. FSC, *et al.* Comments at 9. FSC, *et al.* filed comments on behalf of 47 nonprofit organizations and for-profit firms which assist nonprofit organizations in fundraising. FSC, *et al.* Reply Comments at 1. Though FSC, *et al.* is pleased with the Cooperative Mail Rule, it expresses discontent with the scope of the Commission's examination of the Fundraising Exception. FSC, *et al.* Comments at 4. FSC, *et al.* contends that the PAEA

requires the Commission to examine the entire Cooperative Mail Rule, and notes that the Commission's Notice and Order only solicits comments on the exception. *Id.*

FSC, *et al.* adds that the Postal Service was not created to regulate nonprofits, and that proper governance of charitable solicitations is a matter for the States. *Id.* at 8-9. It concludes by pointing out that the burden of proof is on those who want to change the Fundraising Exception, to make a clear showing that mail not eligible to be entered at nonprofit rates is currently being accepted by the Postal Service. *Id.* at 10.

In its reply comments, FSC, *et al.* contends there has been no reliable evidence offered as a basis for changing the Fundraising Exception. It argues that ANM and the Public Representative express concern about nonprofit organizations without establishing any legal or logical nexus between those concerns and proposed changes to the Cooperative Mail Rule. FSC, *et al.* Reply Comments at 4. In regard to the oversight hearing, FSC, *et al.* says statements offered at Congressional hearings by partisans, particularly statements which are not the subject of a meaningful adversarial process, are statements of position rather than statements of fact, and thus should not serve as the foundation of postal policy. *Id.* at 3. FSC, *et al.* points out that while ADRFC provides a proposal, it fails to provide any support for its proposed changes to the Fundraising Exception. *Id.* at 4. FSC, *et al.* opposes benchmarks as suggested by the Public Representative referring to them as unconstitutional in light of the cases she references. *Id.* at 8-9.

FSC, *et al.* also contends that if fraud is found, there exist proper mechanisms to deal with it. For example, some 41 states have laws regulating charitable solicitations. *Id.* at 5-6. Also, if fraud on the part of the nonprofit organization is discovered, the nonprofit will be disqualified from Federal income tax exempt status leading to the organization being ineligible for nonprofit postage rates. *Id.* at 6.

Last, FSC, *et al.* notes there is a Federal statute prohibiting mail fraud and providing for penalties, including up to 30 years in prison and \$1,000,000 in fines. See 18 U.S.C. § 1341. *Id.*

## V. RESULTS AND RECOMMENDATIONS

### A. Results

Despite strong support from some stakeholders, the Fundraising Exception continues to be controversial. The Public Inquiry indicates that there are several continuing, fundamental disagreements in the nonprofit community and in the professional fundraising field over the Postal Service's authority to regulate in this area. There are also continuing disputes on whether the Fundraising Exception should include terms directed at the tools some mailing partners might be able to employ to exert influence and control over mailers with authorization to mail at nonprofit rates.

The review also reveals two impediments that pose a barrier to the Commission's ability to reach definitive conclusions on section 711's central concern. One is the troubling absence of sound data and information on use of the Fundraising Exception, both in terms of the Postal Service's apparent decision not to collect it and the lack of any evidence put forward by commenters. This generally means that anecdotal evidence and conjecture are the main sources of estimates of usage, and these fall far short of providing statistical certainty.

The other impediment is that the Fundraising Exception, by Postal Service intent, includes very few of the elements one would expect to see if the purpose was to protect against abuse of rates and deception of consumers in a substantial way. In fact, the current version includes only one "check" in the form of a requirement that a detailed donor list be provided or that receipt be waived in writing. For the most part, this stems from the Postal Service's assertion that these matters are the province of other authorities and agencies. However, one aspect of the Fundraising Exception that the Postal Service promotes as a significant protection against abuse is its decision to limit mailings to monetary solicitations only. It sees this as excluding from the Fundraising Exception mailstream all mailings offering goods and products, even if those goods and services have only nominal value.

On a more positive note, the Commission found that the Postal Service has undertaken training and education efforts directed at improving administration of the Fundraising Exception. This should increase the likelihood that mailings that do not qualify for the Fundraising Exception are excluded from the mailstream, or are identified thereafter, prior to delivery. The Postal Service also cooperates with industry education efforts. These efforts likely provide a real, although unquantifiable, benefit in terms of prevention of abuse of rates and deception of consumers.

The Public Inquiry also revealed growing awareness of the emergence of “charity-rating” websites.

#### B. Recommendations

The results of the Commission’s examination support five recommendations. The recommendations generally urge closer oversight and monitoring of the use of the Fundraising Exception; continuation and enhancement of internal education and training; continuation and enhancement of external communication efforts; formal coordination with other authorities and agencies; and consideration of a legislative solution as essential to resolving persistent concerns about both the Cooperative Mail Rule and the Fundraising Exception. The recommendations are presented in numerical order primarily for ease of reference; however, the Commission considers the first recommendation a priority, given its relationship to accountability and transparency.

**Recommendation No. 1: Improve Oversight of Use of the Fundraising Exception to Enhance PAEA Goals of Accountability and Transparency in the Administration of this Regulation**

- The Postal Service, to provide accountability and transparency with respect to the administration of the Fundraising Exception, should devise a cost-effective method for establishing a current, baseline estimate of use of the Fundraising Exception, and thereafter should monitor use periodically; the results should be made publicly available, perhaps via an existing reporting method.

The Commission recognizes that the Postal Service faces tremendous challenges in the current economic environment, and that it is addressing difficult issues across the full range of its operations. Thus, the Commission does not lightly recommend a task that may distract from other more immediate and pressing concerns. At the same time, sound administration of the Fundraising Exception and accountability to Congress and other stakeholders calls for a concerted effort at developing an estimate of use of the Fundraising Exception. The Commission does not recommend a specific measurement tool nor specific reporting periods as it believes the Postal Service, perhaps in consultation with stakeholders, is better situated to determine these matters. One possibility may be to revise the standard form submitted with each mailing by adding a box that allows the mailer to indicate whether the mailing involves the Fundraising Exception. Another may be to develop a sampling technique.

**Recommendation No. 2: Develop a Coordinated Internal Plan that Builds on Existing In-house Training and Education, with Added Emphasis on both the Cooperative Mail Rule and the Fundraising Exception**

The Postal Service's response to the Commission's request for information on its efforts in this area indicates that it conducts training on the Fundraising Exception and the Cooperative Mail Rule, and the Commission finds no reason to believe that this is not the case. At the same time, it is not clear whether this is a fully-coordinated, comprehensive effort, or an ad hoc approach. If the effort more closely resembles the latter, the Postal Service should enhance its existing training capabilities so that all field personnel and managers likely to encounter Fundraising Exception issues are well-versed in the subject matter.

**Recommendation No. 3: Develop a Comprehensive External Communications Plan that Builds on Concerns of the Nonprofit Mailing Community, the Professional Fundraising Community, and the Donor Community and, as Part of This, Consider Whether Editorial Improvements in the Wording of the Cooperative Mail Rule Would Enhance a Lay Audience's Understanding of these Regulations**

The Commission's examination shows that the Postal Service already communicates with stakeholders about the Cooperative Mail Rule and the Fundraising Exception, but that the wording of the Cooperative Mail Rule can pose an initial barrier to ready comprehension. Information is also divided across a variety of websites, publications, and other sources. To foster administration of the Cooperative Mail Rule and the Fundraising Exception, the Postal Service should build on its existing relationships with external groups, to develop and implement a coordinated, comprehensive communications plan for interested mailers and their mailing partners, including:

Maintaining (or reinstating) the practice of distributing information about the Cooperative Mail Rule at time an application for reduced-rate mailing privileges is filed;

Expanding mailers' awareness of the availability of advice in advance of a mailing in the form of a Customer Support Ruling;

Considering whether editorial (non-substantive) improvements in the wording of the Cooperative Mail Rule would reduce or eliminate confusion over "eligible" and "ineligible" cooperative mailings;

Enhancing training arrangements with nonprofits;

Designating a Headquarters-level employee to operate as "key contact" for the nonprofit mailing community, other interested parties, and as a referral for the Postal Service's Consumer Advocate; and

Leveraging the power of Postal Service websites as a communications tool, possibly with the addition of links to, or information about, other websites of interest.

**Recommendation No. 4: Consider Whether Ties to Other Authorities and Agencies Should be Formalized and, if This is Warranted, Periodically Provide a Brief Report on the Activities of This Group Via an Established Reporting Mechanism**

The Postal Service's response to the Commission's data and information query confirms that postal personnel interact with other authorities or agencies; however, it is unclear whether these contacts are the result of a systematic, agency-wide commitment to coordination and cooperation, or whether they reflect more occasional interaction. To foster confidence in its administration of both the Fundraising Exception and the Cooperative Mail Rule, management should consider establishing a formal system of cooperation with a wide range of authorities, agencies, and industry associations. The Postal Service should make the general composition of this working group a matter of public record and report on the group's activities.

**Recommendation No. 5: Consider Whether Persistent Concerns About Undue Influence or Control Over Nonprofit Organizations Warrant Revisiting a Decision in the 2003 Rulemaking, to Exclude from the Fundraising Exception Any Terms that Would Address These Matters, and Whether Substantive Revisions Warrant Developing a New Legislative Proposal**

The preamble to the 2003 rulemaking makes clear that the Postal Service excluded terms that some commenters believed would address over-reaching and undue influence on grounds that these matters were “consumer protection” issues that were the province of other agencies. However, the Postal Service also held out the possibility that it might revisit its position if circumstances warranted.

For some time, the Postal Service’s attention has been repeatedly drawn to the concerns that are the focus of section 711, even as much broader issues, such as fundamental postal reform. The Commission’s examination makes clear that the Postal Service has taken steps to address these issues via regulation, appearances at Congressional hearings, responses to the Commission’s Data and Information Request, and other means, including working with the nonprofit mailing community and other stakeholders. Nevertheless, comments filed in the Commission’s Public Inquiry demonstrate that criticisms of the Cooperative Mail Rule and the Fundraising Exception not only persist, but that the divide over the appropriate approach may have grown wider. Given these circumstances, management should consider whether an effective solution requires that it develop, for Congressional consideration, a legislative proposal that would provide the agency with definitive guidance on its role in addressing abuses of nonprofit rates and deception of consumers.

The Commission recognizes that preparation of a legislative proposal does not guarantee gaining sponsorship, a hearing, or enactment, but the results of the Public Inquiry indicate that it might be useful for the Postal Service to consider making its position clear to Congress.

# **APPENDICES**

## APPENDIX A

### Section 711 of the Postal Accountability and Enhancement Act

#### SEC. 711. PROVISIONS RELATING TO COOPERATIVE MAILINGS.

(a) STUDY.—

(1) IN GENERAL.—The Postal Regulatory Commission shall examine section E670.5.3 of the Domestic Mail Manual to determine whether it contains adequate safeguards to protect against—

- (A) abuses of rates for nonprofit mail; and
- (B) deception of consumers.

(2) REPORT.—The Commission shall report the results of its examination to the Postal Service, along with any recommendations that the Commission determines appropriate.

(b) FAILURE TO ACT.—If the Postal Service fails to act on the recommendations of the Commission, the Commission may take such action as it determines necessary to prevent abuse of rates or deception of consumers.

**APPENDIX B**  
**Postal Regulations**  
**(Cooperative Mail Rule and Fundraising Exception)**

**United States Postal Service Domestic Mail Manual**

**703 Nonprofit Standard Mail and Other Unique Eligibility**

**1.0 Nonprofit Standard Mail**

...

**1.6.3 Cooperative Mailing**

A cooperative mailing may be made at the Nonprofit Standard Mail prices only when each of the cooperating organizations is individually authorized to mail at the Nonprofit Standard Mail prices at the Post Office where the mailing is deposited. A cooperative mailing involving the mailing of any matter on behalf of or produced for an organization not itself authorized to mail at the Nonprofit Standard Mail prices at the Post Office where the mailing is deposited must be paid at the applicable Regular or Enhanced Carrier Route Standard Mail prices. The mailer may appeal the decision under 607.2.0. Exception: This standard does not apply to mailings by an organization authorized to mail at Nonprofit Standard Mail prices soliciting monetary donations to the authorized mailer and not promoting or otherwise facilitating the sale or lease of any goods or services. This exception applies only where the organization authorized to mail at Nonprofit Standard Mail prices is given a list of each donor, contact information (e.g., address, telephone number) for each, and the amount of the donation or waives in writing the receipt of this list.

*Note:* Due to an editorial reorganization of the Domestic Mail Manual (DMM), the postal regulation that Section 711(a) of the Postal Accountability and Enhancement Act directs the Commission to examine appears at DMM 670.5.3, as set out above.

## APPENDIX C

### Postal Service Response to Commission Data and Information Request

*Note:* This Appendix does not include comments on the 2003 rulemaking, the educational presentation, or the brochure referred to in the Postal Service's Response.



POSTAL REGULATORY COMMISSION  
Washington, DC 20268-0001

Office of the General Counsel

May 13, 2008

Andrew German, Managing Counsel  
Legal Policy and Ratemaking  
Office of the General Counsel  
United States Postal Service  
475 L'Enfant Plaza SW, Room 6537  
Washington, DC 20260-1100

Dear Mr. German:

This follows up on the Postmaster General's recent suggestion that the Commission contact you to obtain access to data and information the Commission believes is necessary to fulfill that obligation. I appreciate the opportunity to meet with you and other Postal Service personnel on matters related to the Commission's obligation, under section 711 of the Postal Accountability and Enhancement Act, to study and provide recommendations on the Fundraising Exception to the co-operative mail rule.

For convenience, an attachment to this letter provides an initial list of the requested data and information. The Commission is also interested in having its staff talk to Postal Service personnel familiar with this material.

I will contact you in a few days to discuss this matter in more detail.

Thank you.

Sincerely,

A handwritten signature in black ink, appearing to read "Stephen L. Sharfman".

Stephen L. Sharfman  
General Counsel

For purposes of the study the Postal Regulatory Commission is to conduct under section 711 of the Postal Accountability and Enhancement Act, the Commission is interested in access to the following data and information, covering a period to be determined:

- Number of nonprofit Mail Standard permits
- Number of co-operative mailings and associated volume
- Number of mailings sent under the Fundraising Exception and associated volume
- Number, nature, and source of complaints related to co-operative mailings and/or Fundraising Exception
- Resolution of complaints
- Expenses associated with the Postal Service's administration of the co-operative mail rule and the Fundraising Exception
- Extent, nature and timing of Postal Service education efforts for nonprofit entities concerning the co-operative mail rule
- Extent and nature of Postal Service education efforts for recipients of charitable fundraising solicitations via the mail (including samples of any related documents)
- Number of Postal Service Customer Support Rulings issued on the co-operative mail rule and/or the Fundraising Exception
- A complete set of the comments the Postal Service received in response to its 2003 rulemaking



June 19, 2008

Mr. Stephen L. Sharfman  
General Counsel  
Postal Regulatory Commission  
901 New York Avenue, Suite 200  
Washington, DC 20268-0001

Dear Mr. Sharfman:

This responds to your May 13 letter seeking information related to the Commission's study on the "fundraising exception" to the cooperative mail rule. Responses to each of your ten questions are provided below:

1. **Number of nonprofit Standard Mail permits:** The number of organizations authorized to mail at Nonprofit Standard Mail prices follows. The totals were calculated as of the end of the fiscal year.

<b>FY</b>	<b>Authorized Mailers</b>
2000	264,641
2001	274,490
2002	286,974
2003	306,144
2004	317,496
2005	324,208
2006	337,379
2007	352,823

Although there may be a small number of duplicates, these numbers represent the total number of organizations authorized to mail at Nonprofit Standard Mail prices. That is, while an organization may have obtained authorizations to mail in more than one city, it is only counted once in the total.

2. **Number of co-operative mailings and associated volume:** The Postal Service does not collect this information. We note, however, that the phrase "cooperative mailing" is not clear in this context, and could be given several different meanings. For example, if two organizations are

each authorized to mail at Nonprofit Standard Mail prices in a city, they may partner to make a mailing at those prices in that location (sometimes referred to as a "legal cooperative mailing"). We do not ask mailers to identify these mailings; the party signing the postage statement certifies, as is done with all Nonprofit Standard Mail, that the mailing does not violate the cooperative mail rule or other restriction on Nonprofit Standard Mail. Similarly, we do not ask mailers to identify mail properly entered as Standard Mail because it violates the cooperative mail rule (one example of such mail may be solicitations sent out to college alumni. These mailings may not be eligible for Nonprofit Standard Mail because they violate restrictions on solicitations for travel, insurance, or financial instruments, but they also may be ineligible because they violate the cooperative mail rule). Finally, there may be attempts by mailers to enter, as Nonprofit Standard Mail, matter that violates the cooperative mail rule. As noted above, mailers are required to submit a postage statement with this mail that certifies that the mail is eligible for Nonprofit Standard Mail prices, and mailers attempting to enter ineligible mail risk rejection of the mail (if caught at acceptance) or administrative (revenue deficiency) assessments or civil or criminal proceedings if caught later. We cannot provide the number of mailings identified and resolved locally (i.e. where the mailing is rejected or revenue deficiency assessed) without an appeal to the Pricing and Classification Service Center (PCSC) or Mailing Standards at Postal Service headquarters. We suspect the number is very low, and there have only been a handful of such cases appealed to the PCSC and/or Mailing Standards in recent years.

3. **Number of mailings sent under the Fundraising Exception and associated volume:** The Postal Service does not collect this information; i.e. we do not know how much Nonprofit Standard Mail consists of fundraising solicitations nor, even if this information were known, whether mailers retained fundraising professionals or the financial arrangements between the parties. A review of recent Nonprofit Standard Mail volumes indicates that volumes have remained relatively stable despite the increase in the number of organizations authorized to mail at Nonprofit Standard Mail prices and the adoption of the exception to the cooperative mail rule. Volumes for fiscal years since 2000 are as follows:

<b>FY</b>	<b>Volume</b>
2000	14,250,295,000
2001	14,423,446,000
2002	14,006,494,000
2003	14,527,723,000
2004	14,441,837,000
2005	15,046,802,000
2006	14,602,767,000
2007	14,783,682,000

4. **Number, nature, and source of complaints related to cooperative mailings and/or Fundraising exception:** The Postal Service's Consumer Advocate has not received any complaints, since the adoption of the rule, relating to the Fundraising Exception. The number of complaints received by the Postal Inspection Service concerning Charitable Fraud has decreased since the adoption of the rule.

FY	Subjects of Complaints	No. Of Complaints
2000	309	1364
2001	221	839
2002	183	350
2003	186	541
2004	250	844
2005	200	770
2006	162	328
2007	96	190

5. **Resolution of complaints:** The Postal Inspection Service conducted an analysis of the 190 Charitable Fraud complaints received in 2007. Of this total, 42 alleged monetary losses relating to their reported scheme or fraud. These 42 complaints related to 28 different subjects of complaints. In other words, more than one complaint was received for some of the subjects. Of the 28 subjects for the 42 complaints, 18 related to Charity Fraud. Ten of the subjects and their alleged schemes were miscategorized and related to investment fraud or other matters. The Postal Inspection Service opened investigations on three of the subjects. One investigation remains open, and the other two have been closed.
6. **Expenses associated with the Postal Service's administration of the cooperative mail rule and the Fundraising Exception:** The adoption of the Fundraising Exception to the cooperative mail rule does not appear to have resulted in any significant increase in Postal Service administrative costs. Compliance with the cooperative mail rule is only one of the standards considered by business mail entry units in accepting Nonprofit Standard Mail. Adoption of the exception has not eliminated the need for acceptance personnel to review mail for compliance with these standards. The Postal Service has incurred additional costs in training postal personnel and customers concerning the new standard. We have not quantified these costs but believe them to be insignificant.
7. **Extent, nature, and timing of Postal Service education efforts for nonprofit entities concerning the cooperative mail rule:** The Postal Service engages in two types of educational efforts for organizations authorized to mail at Nonprofit Standard Mail prices. The first involves training concerning the eligibility standards for this mail, including the

cooperative mail rule and the Fundraising Exception. Presentations on these issues are provided in venues such as National Postal Forums, Postal Customer Councils (PCCs), and other industry meetings that invite postal speakers. A copy of a typical presentation, that has been made available to PCCs, has been provided separately. The second type of effort was motivated by concerns expressed to the Postal Service that unscrupulous fundraisers may attempt to take advantage of unsophisticated nonprofit mailers. After adoption of the Fundraising Exception, the Postal Service undertook efforts to work with industry experts to raise awareness in nonprofit organizations of factors they should consider when retaining assistance from professional fundraisers. The advice given by these experts was summarized and made available to nonprofit mailers through articles in postal publications, see enclosed article from the January, 2004, *Memo to Mailers*, as well as a brochure enclosed with the authorization to each organization that successfully applied to enter Nonprofit Standard Mail, whether that was the organization's initial authorization or an authorization for an existing nonprofit mailer to enter mail at another post office. Industry experts also provided advice to nonprofit organizations through presentations at venues such as National Postal Forums.

8. **Extent and nature of Postal Service education efforts for recipients of charitable fundraising solicitations via the mail (including samples of any related documents):** In addition to efforts to investigate complaints regarding Charitable Fraud, the Inspection Service engages in efforts to educate recipients of these solicitations. The Inspection Service website, <http://postalinspectors.uspis.gov/>, provides the public with information on Charity Fraud; see, particularly, <http://postalinspectors.uspis.gov/investigations/MailFraud/fraudschemes/financialfraud/CharityFraud.aspx>. In addition, a portion of Publication 300-A, *U.S. Postal Inspection Service Guide to Preventing Mail Fraud*, is devoted to this issue. A copy of this publication has been provided separately. Finally, some of the presentations made to the public by Inspection Service Public Information Officers address this area, and suggest public sources where individuals can obtain information concerning nonprofit organizations that are soliciting donations.
9. **Number of Postal Service Customer Support Rulings issued on the cooperative mail rule and/or the Fundraising Exception:** Copies of five Customer Support Rulings (CSRs) have been provided separately. These include: PS-310, *Materials Mailed by Voting Registration Officials*; PS-233, *Special Event Fundraising Mailings*; PS-209, *Cooperative Mailings*; PS-128, *Political Action Committee*; and PS-55, *State Committee of a Political Party*. CSRs are available on the Postal Explorer website, [www.pe.usps.gov](http://www.pe.usps.gov).

10. **A complete set of the comments the Postal Service received in response to its 2003 rulemaking:** Copies of the 67 comments have been provided separately.

In addition to these questions, you asked us whether other means may be available to eliminate charitable fraud, whether directed at nonprofit organizations or at the recipients of their solicitations. It is difficult to provide a definitive response to this question without knowledge of specific abuses that have occurred and the underlying circumstances in each instance and, despite our efforts, we have not received this information. As a general matter, we continue to believe that educational efforts directed at nonprofit organizations and the individuals that receive charitable solicitations is an appropriate measure. We note that the Postal Service defers to industry experts concerning the steps that nonprofit organizations and individuals should take to protect their interests, and believe that the proper role for the Postal Service is to assist in communicating the advice provided by these experts. The Postal Service stands willing to continue and expand on its partnership with industry experts by:

1. Improving its website to increase the information available, including links to appropriate governmental and private resources, and making this information more visible to those accessing the site
2. Engaging in a direct mail campaign to consumers to pass on expert advice they should consider upon receipt of a charitable solicitation
3. Considering making Charitable Fraud a focus during Consumer Protection Week
4. Continuing to partner with industry representatives in presentations to nonprofit groups
5. Designating a point of contact within the Inspection Service for industry members and consumers to report concerns regarding charitable solicitations

Please let us know if you have any questions or need further information.



R. Andrew German

Enclosure

# New standards for nonprofit mailers

If you're a nonprofit organization that uses the mail for fund-raising, a change in Postal Service rules could affect the way you solicit donations. Nonprofits have new options for contracting with professional fund-raising organizations to conduct these mailings at nonprofit postage rates.

Organizations that are authorized to mail at Nonprofit Standard Mail rates are entitled to mail at significantly lower rates than postal customers who use commercial Standard Mail rates. In order to prevent abuse of these privileges, there are certain eligibility restrictions on the use of Nonprofit rates. The oldest restriction is commonly known as the cooperative mail rule.

The rule is based on the principle that only nonprofits should benefit from Nonprofit rates. Under limited types of financial arrangements, they could get outside help to prepare mailings entered at Nonprofit rates. But, until recently, they couldn't share risk, profits or management control with a for-profit company and use Nonprofit rates.

As a practical matter, these standards limited the ability of some nonprofit organizations to retain the services of professional fund-raising organizations. This was particularly detrimental to the fund-raising efforts of newer and smaller groups that could benefit from using professional fund-raising organizations instead of conducting campaigns in-house. Accordingly, in recent years, members of Congress raised concerns that application of the cooperative mail rule was having a serious effect on the ability of some nonprofits to solicit donations.

This prompted a change, effective Nov. 13, to eliminate the application of the cooperative mail rule on mailings by authorized nonprofit organizations seeking monetary donations.

As a result of the change, mailings that solicit financial donations will not be ineligible for Nonprofit rates merely because the nonprofit engages a professional fund-raising organization under an arrangement in which risk is shared.



**Senny Boone, executive director of the DMA Nonprofit Federation, says nonprofit groups need to be aware of key issues.**

The new rule requires that when nonprofits turn to professional fund-raisers, the nonprofit organizations must be given a list containing the names of all donors, contact information and the amount of their donations, unless the nonprofit waives receipt of that information in writing.

As a caution, nonprofit organizations should remain aware that other restrictions on the use of Nonprofit rates remain in place. 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's a cooperative arrangement involving such goods or services, the mailpieces will not be eligible for Nonprofit Standard Mail rate. And if the mailpiece violates any of the other standards for Nonprofit mail, it will also be precluded from using Nonprofit rates.

The Postal Service cannot provide advice to nonprofit organizations on whether they should utilize the services of professional fund-raising organizations or, if they choose to do so, what they should consider in entering such arrangements. However, nonprofit organizations can obtain guidance on the use of professional fund-

raisers from the Direct Marketing Association (DMA), the DMA Nonprofit Federation and PostCom. Go to [www.nonprofitfederation.org](http://www.nonprofitfederation.org) or [www.the-dma.org/cgi/disp-newsstand?article=1650](http://www.the-dma.org/cgi/disp-newsstand?article=1650) for this information.

"Our goal is to educate nonprofit organizations about the issues involved when they engage the services of outside fund-raising professionals," says Senny Boone, executive director of the DMA Nonprofit Federation. "This rule change is an opportunity for many nonprofits to reach new donors. But it also shines the light on the need for nonprofits to be aware of the key issues — such as control over address lists and assets — that arise when entering into contracts with professional fund-raisers."

Additionally, due to the concerns expressed by some that unscrupulous firms will attempt to utilize the rule to take advantage of unsophisticated nonprofits, the Postal Service, through its Consumer Advocate, will monitor implementation of the new rule to determine if abuses are occurring. If such abuses or other unintended consequences do occur, the Postal Service will consider a further rulemaking or other administrative actions. ■

## The DMA Nonprofit Federation, PostCom and the Direct Marketing Association offer these suggestions to nonprofit groups:

- Do not waive your right to know who gave and how much he/she gave.
- Be sure to negotiate the arrangement at "arms length."
- Set out every arrangement with an outside fund-raiser in a written contract.
- Deposit donations received from the public in a bank account under the exclusive control of your nonprofit organization.
- Insist that the list of contributors is the exclusive property of your nonprofit group.
- Take steps to ensure that your nonprofit organization's master list of donors is not misused.
- Before accepting financing from a fund-raiser, get the details in writing and make sure the offer does not lock you into continued employment of the fund-raiser.
- Retain all ownership rights to any intellectual property in the fund-raising package developed at the nonprofit organization's expense.
- Work with the professional fund-raiser to develop a reliable system to report each campaign's costs and results.

APPENDIX D

Commission Order No. 72

**FOR FURTHER INFORMATION CONTACT:**  
Stephen L. Sharfman, General Counsel,  
202-789-6820 and  
[stephen.sharfman@prc.gov](mailto:stephen.sharfman@prc.gov).

**SUPPLEMENTARY INFORMATION:**

**I. Introduction**

The Postal Accountability and Enhancement Act (PAEA), Public Law 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).<sup>1</sup>

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.

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

**POSTAL REGULATORY COMMISSION**

[Docket No. PI2008-4; Order No. 72]

**Study on Reduced Postal Rates**

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

**SUMMARY:** The Commission seeks comments from the public on a study of a postal rule that allows certain fundraising mailings to be sent at reduced rates. The comments will assist the Commission in preparing a statutorily-required report and recommendations.

**DATES:** Initial comments due June 24, 2008; reply comments due July 24, 2008.

**ADDRESSES:** Submit comments electronically via the Commission's Filing Online system at <http://www.prc.gov>.

<sup>1</sup> 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.

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.<sup>2</sup> 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 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;

<sup>2</sup> 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).

- 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 Exception?

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 Exception 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?

##### V. Ordering Paragraphs

*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 June 24, 2008.

4. Reply comments are due July 24, 2008.

5. The Secretary shall arrange for publication of this Notice in the **Federal Register**.

By the Commission.

Steven W. Williams,

Secretary.

[FR Doc. E8–9210 Filed 4–24–08; 8:45 am]

BILLING CODE 7710–FW–P

#### POSTAL SERVICE

##### Board of Governors Sunshine Act Meeting

##### Board Votes To Close April 14, 2008, Meeting

By telephone vote on April 14, 2008, the Board of Governors of the United States Postal Service voted unanimously to close to public observation its meeting held via teleconference. The Board determined that prior public notice was not possible.

##### Items Considered

1. Strategic Planning.
2. Personnel Matters and Compensation Issues.

##### General Counsel Certification

The General Counsel of the United States Postal Service has certified that the meeting was properly closed under the Government in the Sunshine Act.

*Contact Person for More Information:* Requests for information about the meeting should be addressed to the Deputy General Counsel, William R. Gilligan, at (202) 268–2952.

William R. Gilligan,

Deputy General Counsel.

[FR Doc. E8–8865 Filed 4–24–08; 8:45 am]

BILLING CODE 7710–12–M

#### SECURITIES AND EXCHANGE COMMISSION

##### Sunshine Act Meeting

Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Public Law 94–409, that the Securities and Exchange Commission will hold a Closed Meeting on Tuesday, April 29, 2008 at 2 p.m.

Commissioners, Counsel to the Commissioners, the Secretary to the Commission, and recording secretaries will attend the Closed Meeting. Certain staff members who have an interest in the matters may also be present.

## Appendix E

### Summary of Selected Cases on Charitable Fundraising Solicitations

#### A. Introduction

The record demonstrates general awareness that there are legal restrictions on the Postal Service's ability to impose certain types of conditions on nonprofit mailers and others. However, there appears to be some uncertainty about the rationale for such restrictions and few readily-available explanations for the lay reader. This summary attempts to fill that gap by reviewing several pertinent U.S. Supreme Court cases.

Four U.S. Supreme Court cases are directly on point. Three were decided in the 1980s; one in May 2003. Thus, all predate issuance of the Postal Service's 2003 rulemaking. The first three cases are *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980); *Secretary of State v. Joseph H. Munson Co.*, 467 U.S. 947 (1984); and *Riley v. National Federation of the Blind for North Carolina, Inc.*, 487 U.S. 781 (1988). The fourth case is *Illinois ex rel. Madigan v. Telemarketing Associates, Inc.*, 538 U.S. 600 (2003).

In brief, in the first three cases (*Schaumburg*, *Munson*, and *Riley*), the Supreme Court reviewed—and struck down—several variations on local and state laws that established percentage limits on the application of donations to fundraising expenses or on the division of fundraising proceeds. *Riley* also struck down an advance disclosure requirement that applied to professional fundraisers relating to average percentage of receipts transmitted to the charity. Some legal observers had thought that this alternative would survive judicial scrutiny, but it was found unconstitutional.

The fourth case, *Madigan*, clarified the Supreme Court's intention regarding restrictions aimed at protecting against fraud.

B. *Schaumburg*

*Background.* *Schaumburg* involved a request from Citizens for a Better Environment (CBE) for a solicitation permit from the Village of Schaumburg (Village) in suburban Chicago, Illinois to conduct a door-to-door fundraising campaign. (No aspect of use of the U.S. Mail to solicit donations was involved in this case.)

CBE had satisfied certain threshold requirements for obtaining the permit. For example, as required, it had registered as a charitable organization with the Illinois Attorney Charitable Trust Division and had obtained tax-exempt status from the Internal Revenue Service. Denial rested on grounds that CBE had not complied with a percentage limit on use of the solicitation proceeds. Specifically, the Village ordinance required that permit applications include satisfactory proof that at least 75 percent of the proceeds of such solicitations be used directly for the charitable purpose of the organization. It also provided that in determining whether this requirement has been met, certain items would *not* be deemed to be used for “the charitable purpose” of the organization. These not only included salaries or commissions paid to the door-to-door solicitors, but also certain administrative expenses of the organization, such as salaries, attorney fees, telephone, advertising expenses, certain contributions to other organizations and persons, and related expenses incurred as administrative or overhead items.

*Developments at the District Court level.* CBE appealed the Village’s denial of its request to the District Court. It alleged, among other things, that:

[I]ncident to its purpose, CBE employs ‘canvassers’ who are engaged in door-to-door activity in the Chicago metropolitan area, endeavoring to distribute literature on environmental topics and answering questions of an environmental nature when posed; solicit contributions to financially support the organization and its programs; receive grievances and complaints of an environmental nature regarding which CBE may afford assistance in the evaluation and redress of these grievances and complaints.

The Village defended its denial of the permit on grounds that CBE is primarily devoted to raising funds for the benefit and salary of its employees, and its charitable purposes are negligible compared with the primary objective of raising funds. It buttressed this claim with the assertion that more than 60 percent of the funds collected [by CBE] had been spent for benefits of employees, rather than for any charitable purposes.

The District Court awarded summary judgment to CBE on grounds that the Village's requirement was a form of censorship prohibited by the First and Fourteenth Amendments. It declared the ordinance void on its face, enjoined enforcement, and ordered the Village to issue a charitable solicitation permit to CBE. The Village appealed this decision to the U.S. Court of Appeals for the Seventh Circuit.

*Developments at the Court of Appeals level.* The U.S. Court of Appeals acknowledged that the Village had a legitimate interest in regulating solicitation to protect its residents from fraud and disruption, but said that such regulation must be done with narrow specificity when First Amendment interests are affected. It concluded that even if the ordinance's 75-percent requirement might be valid as applied to other types of charitable solicitation, the Village's requirement was unreasonable on its face because it barred solicitation by advocacy-based organizations even where it is made clear that the contributions will be used for the salaries of the solicitors who gather and disseminate information pertaining to the organization's purpose.

The Court of Appeals distinguished *National Foundation v. Fort Worth*, 415 F.2d 41 (CA5 1969), *cert. denied*, which had upheld an ordinance authorizing denial of charitable solicitation permits to organizations with excessive solicitation costs. The difference was that although the Fort Worth ordinance deemed solicitation costs in excess of 20 percent of gross receipts unreasonable, it permitted a showing demonstrating the reasonableness of such costs. The Village pursued its position, and the U.S. Supreme Court agreed to review the determination that the ordinance violated the First and Fourteenth Amendments.

*Supreme Court decision.* The U.S. Supreme Court held that the ordinance was unconstitutionally overbroad in violation of the First and Fourteenth Amendments. With respect to the type of fundraising (on the street and door-to-door), Justice Blackmun, writing for the majority, said:

While soliciting financial support is subject to reasonable regulation, such regulation must give due regard to the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes, or for particular views on economic, political, or social issues, and to the reality that without solicitation the flow of such information and advocacy would likely cease. Moreover, since charitable solicitation does more than inform private economic decisions and is not primarily concerned with providing information about the characteristics and costs of goods and services, it is not dealt with as a variety of purely commercial speech.

*Id.* at 628-32.

The Supreme Court observed that the issue was not whether charitable solicitations in residential neighborhoods are within the protections of the First Amendment, indicating that it is well settled that they are. Instead, it framed the issue as whether the Village had exercised its power to regulate solicitation in such a manner as not to intrude upon the rights of free speech. The court agreed with the Court of Appeals that the 75-percent limitation was a direct and substantial limitation on activity that could not be sustained unless it served a sufficiently strong, subordinating interest that the Village was entitled to protect. It also agreed that the Village's proffered justifications were inadequate and could not survive scrutiny under the First Amendment. It explained:

The Village urges that the 75-percent requirement is intimately related to substantial governmental interests ‘in protecting the public from fraud, crime and undue annoyance.’ These interests are indeed substantial, but they are only peripherally promoted by the 75-percent requirement and could be sufficiently served by measures less destructive of First Amendment interests.

*Id.* at 636.

The court noted that prevention of fraud was the Village’s principal justification for prohibiting solicitation by charities that spend one-quarter of their receipts on salaries and administrative expenses. “The submission,” in the parlance of the court, is that any charity using more than 25 percent of its receipts on fundraising, salaries, and overhead is not a charitable, but commercial, for-profit enterprise and that to permit it to represent itself as a charity is fraudulent. But, it said that—as the of Court of Appeals had recognized—this cannot be true of organizations that are primarily engaged in research or public education and that use their own paid staff to carry out these functions as well as to solicit financial support. It noted that the Village may serve its legitimate interests, but must do so by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms. *Id.* at 636-37.

The court also applied “substantial relationship” analysis, and concluded: “We also fail to perceive any substantial relationship between the 75-percent requirement and the protection of the public safety or of residential privacy.” It added: “The 75-percent requirement in the village ordinance plainly is insufficiently related to the governmental interests asserted in its support to justify its interference with protected speech. ...We find no reason to disagree with the Court of Appeals’ conclusion that [section] 22-20(g) is unconstitutionally overbroad.” It therefore affirmed the judgment of the lower court. *Id.* at 638-39.

C. *Secretary of State of Md. v. J.H. Munson Co.* (467 U.S. 947)

In *Munson*, three factors that bear on the Commission's examination are present. First, there is a percentage-based limitation on receipt of fundraising proceeds imposed by the State of Maryland. Second, there are other non-monetary conditions or safeguards, such as requirements that contract between a professional fundraiser and the charitable organization be in writing, and that a copy of the contract be filed with the Secretary of State within 10 days after it is entered into and before any solicitations. Third, postage explicitly factors in as an expense that does not count toward the percentage limitation.

As in *Schaumburg*, Maryland law prohibited a charitable organization, in connection with any fundraising activity, from paying or agreeing to pay as expenses more than 25 percent of the amount raised. There was an exception to this limit, however, as other language explicitly excluded from the 25 percent limit any compensation or expenses paid by a charitable organization to professional fundraising counsel for conducting feasibility studies. More specifically, the regulation provided:

For purposes of this section, the total gross income raised or received shall be adjusted so as not to include contributions received equal to the actual cost to the charitable organization of (1) goods, food, entertainment, or drink sold or provided to the public, nor should these costs be included as fund-raising costs; (2) the actual postage paid to the United States Postal Service and printing expense in connection with the soliciting of contributions, nor should these costs be included as fund-raising costs.

467 U.S. 950 (n.2).

However, unlike *Schaumburg*, the Maryland statute authorized waiver of the percentage limitation if the limit would effectively preclude an organization from raising funds. Moreover, in a conscious attempt to minimize or eliminate "prior restraint" as a consideration, drafters of the provision allowed waiver to be invoked after the fact.

Relying on this statute, Maryland's Secretary of State notified Munson that the company would be prosecuted if it refused to comply with the 25 percent limit on

charitable fundraising expenses. Munson challenged the statute, alleging, among other things, that a charitable organization was reluctant to enter into a contract with the company because of the statutory limitation. (Munson's Maryland customers included various chapters of the Fraternal Order of Police.)

*Lower court developments.* The Circuit Court upheld the Maryland statute, and this decision was affirmed by the Maryland Court of Special Appeals. However, Munson pursued the case, and succeeded in having the Maryland Court of Appeals reverse the Court of Special Appeals. The Maryland Court of Appeals concluded, on the merits, that *Schaumburg* required that the Maryland statute be ruled unconstitutional. The State sought a determination by the U.S. Supreme Court.

*U.S. Supreme Court disposition.* The Supreme Court accepted the case on two grounds, one being the lower court's determination that the statute was unconstitutional on its face. This discussion pursues this point.

Justice Blackmun, writing for the majority, noted that *Munson* presented a slightly different factual context than *Schaumburg*, as it involved a like percentage limitation, but had provisions that rendered the statute "more flexible." He observed that the Court of Appeals of Maryland concluded that, even with this increased flexibility, the percentage restriction on charitable solicitations was an unconstitutional limitation on protected First Amendment solicitation activity. *Id.* at 950.

The court observed that the constitutional question was whether the distinctions between the *Schaumburg* ordinance and the Maryland statute were sufficient to render the statute constitutionally acceptable. To answer this question, the court reexamined the bases for the conclusion reached in *Schaumburg*. It noted that in that case, the court had determined that charitable solicitations are so intertwined with speech that they are entitled to the protections of the First Amendment, explaining:

Prior authorities, therefore, clearly establish that charitable appeals for funds, on the street or door to door, involve a variety of speech interests—communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes—that are within the protection of the First Amendment. Soliciting financial support is undoubtedly subject to reasonable regulation but the latter must be undertaken with due regard for the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or particular views on economic, political, or social issues, and for the reality that without solicitation the flow of such information and advocacy would likely cease.

*Id.* at 959, citing U.S. 444 at 632.

It then observed that the *Schaumburg* decision had concluded that because the percentage limitation restricted the ways in which charities might engage in solicitation activity, it was a direct and substantial limitation on protected activity that cannot be sustained unless it serves a sufficiently strong, subordinating interest that the Village is entitled to protect. In addition, to be valid, the limitation would have to be a narrowly drawn regulation designed to serve the interest, without unnecessarily interfering with First Amendment freedoms. *Id.* at 960-61.

The court said that although the *Schaumburg* decision recognized that the Village had legitimate interests in protecting the public from fraud, crime, and undue annoyance, it had rejected the limitation because it was not a precisely tailored means of accommodating those interests. Instead, the Village's asserted interests were only peripherally promoted by the limitation and could be served by measures less intrusive than a direct prohibition on solicitation. In particular, although the Village's primary interest was in preventing fraud, the limitation was found to be simply too imprecise an instrument to accomplish that purpose: it reflected an assumption that any organization using more than 25 percent of its receipts on fundraising, salaries, and overhead was not charitable, but was a commercial, for-profit enterprise, and that any such enterprise that represented itself as a charity was thus fraudulent. *Id.* at 961.

The court found that the Maryland statute operated on the fundamentally mistaken premise that high solicitation costs are an accurate measure of fraud. It said the percentage limitation imposed by Maryland on fundraising expenses of charities was too imprecise a tool to achieve the legislative purpose of preventing mismanagement, and the statute was thus overbroad because of its effects on First Amendment rights of charities. *Id.* at 966-67. It also observed that a prior restraint was not involved, as it was in *Schaumburg*, because organizations could register without first demonstrating that they comply with the statute. *Id.* at 968-69.

D. *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 108 S.Ct. 2667 (June 29, 1988)

In *Riley*, a North Carolina statute regulating charitable solicitations was in issue. This statute defined the *prima facie* “reasonable fee” that a professional fundraiser may charge in terms of a three-tier schedule. Under this schedule, a fee up to 20 percent of receipts was deemed reasonable; a fee between 20 percent and 35 percent was deemed unreasonable if there was a showing that the solicitation did not involve dissemination of information, discussion, or advocacy related to public issues as directed by the charitable organization benefiting from the solicitation. A fee exceeding 35 percent was presumed unreasonable, but the fundraiser could choose to rebut this presumption by showing that the fee was necessary *either* because the solicitation involved dissemination of information or advocacy on public issues directed by the charity, *or* because the charity’s ability to raise money or communicate would otherwise be significantly diminished. 487 U.S. 784-85.

The statute further provided that a professional fundraiser must disclose to potential donors the average percentage of gross receipts actually turned over to charities by the fundraiser for all charitable solicitations conducted in the State within the previous 12 months. Other terms prohibited professional fundraisers from solicitation without an approved license, but allowed volunteer fundraisers may solicit immediately upon submitting a license application. *Id.* at 786.

Riley was the leader of a coalition (which included professional fundraisers and charitable organizations) that brought suit against government officials charged with the enforcement of the North Carolina statute. The District Court ruled that the challenged provisions on their face unconstitutionally infringed upon freedom of speech and enjoined enforcement, and the Court of Appeals for the Fourth Circuit affirmed. The State of North Carolina pursued its case, and the Supreme Court agreed to hear it.

The Supreme Court, with Justice Brennan writing the opinion, held that:

- The North Carolina statute was subject to review under the “strict scrutiny” standard;
- The state’s definition of “reasonable fee,” using percentages, was not narrowly tailored to States’ interest in preventing fraud;
- The requirement that professional fundraisers disclose a potential donor’s percentage of charitable contributions collected during previous campaigns actually turned over to charity was unduly burdensome and unconstitutional; and
- A licensing requirement for professional fundraisers was unconstitutional.<sup>1</sup>

Moreover, the court held that North Carolina could not meaningfully distinguish its statute from those previously held invalid in *Schaumburg* and *Munson* on the ground that it has a motivating interest to ensure that the maximum amount of funds reach the charity or to guarantee that the fee charged charities is not unreasonable. *Id.* at 789-90.

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<sup>1</sup> Justice Scalia filed an opinion concurring in part and concurring in judgment. Justice Stevens filed an opinion concurring in part and dissenting in part. Chief Justice Rehnquist filed a dissenting opinion. Justice O’Connor joined in his dissent.

The court emphasized that the North Carolina statute was not merely an economic regulation, with no First Amendment implication, to be tested only for rationality; instead, it must be considered as a provision burdening speech. It also said that North Carolina's asserted justification that charities' speech must be regulated for the charities' own benefit was unsound, observing that the First Amendment mandates the presumption that speakers, not the government, know best both what they want to say and how they say it. It also held that while a State's interest in protecting charities and the public from fraud is a sufficiently substantial interest to justify a narrowly tailored regulation, the North Carolina statute, even with its flexibility, was not sufficiently tailored to such interest. *Id.* at 790-91.

As for the advance disclosure requirement, the court easily found it unconstitutional on grounds that it was a content-based regulation because mandating speech that a speaker would not otherwise make necessarily alters the speech's content. Moreover, it said that even assuming that the mandated speech, in the abstract, is merely "commercial," it does not retain its commercial character when it is inextricably intertwined with the otherwise fully protected speech involved in charitable solicitations, and thus the mandated speech is subject to the test for fully protected expression. *Id.* at 795-96.

E. *Illinois ex rel. Madigan, Attorney General of Illinois v. Telemarketing Associates, Inc., et al.* 538 U.S. 600 (2003)

The *Madigan* decision stems from a complaint filed in State court by the Illinois attorney general against commercial fundraisers (referred to here as the "Telemarketers"). The facts involve fundraising by the Telemarketers pursuant to a contract with VietNow National Headquarters (VietNow), a charitable nonprofit corporation to conduct fundraising campaigns. The terms of the contract designated a 15/85 split of the proceeds, with the larger share going to the Telemarketers. They also allowed the Telemarketers to keep donor lists developed for the fundraising effort under

their sole and exclusive control and to broker agreements with out-of-state fundraisers on VietNow's behalf, and retain an even larger split of the proceeds of these efforts.

The gravamen of the attorney general's complaint was that the Telemarketers represented to donors that a significant amount of each dollar donated would be turned over to VietNow for specific charity endeavors, and that such representations were knowingly deceptive and materially false, constituted a fraud, and were made for the Telemarketers' private pecuniary benefit.

In initial legal steps, the Telemarketers filed a motion to dismiss the attorney general's fraud claims on First Amendment grounds, and the trial court granted their motion. The Illinois Appellate Court and Supreme Court each affirmed, citing *Schaumburg, Munson, and Riley*. The Illinois Supreme Court's reasoning for affirming the trial court's dismissal was that the Telemarketers' statements invoked by the attorney general as grounds for the complaint were alleged to be false only because the split between Telemarketers and the charity was, by contract, 15/85 of gross receipts, and this information had not been disclosed to donors. It concluded that the attorney general's complaint was an attempt to regulate the Telemarketers' ability to engage in a protected activity based upon a percentage rate limitation, and that this was the same regulatory principle that had been rejected in *Schaumburg, Munson, and Riley*.

*Supreme Court decision.* The court characterized the threshold question as whether the allegations in the attorney general's complaint state a claim for relief that can survive a motion to dismiss, and observed that the Illinois Supreme Court had considered itself compelled to dismiss the complaint based on the earlier trilogy of cases. 538 U.S. 606. However, the decision noted that the reasoning in those cases did not rule out, in terms of support for a fraud claim against fundraisers, "any and all reliance on the percentage of charitable donations fundraisers retain for themselves." *Id.* Instead, it said that while bare failure to disclose that information directly to potential donors does not suffice to establish fraud, when nondisclosure is accompanied by intentionally misleading statements designed to deceive the listener, the First Amendment leaves room for a fraud claim.

Expanding on this point, the court explained that on the facts presented, the complaint described misrepresentations that Supreme Court precedent does not place under First Amendment protection. It identified one of these misrepresentations as the Telemarketers' claim VietNow would receive a "significant amount" of the proceeds for specific charitable purposes, although they knew that the charity would receive only 15 cents per dollar raised. It identified another as pertaining to application of funds, which the Telemarketers asserted would be used for several of VietNow's specific charitable purposes, although most of the funds went to the Telemarketers. The court characterizes this aspect of the attorney general's complaint as essentially alleging that the charitable solicitation was a façade, with the money turned over to the charity incidental to the fundraising effort.

The court noted that fraud actions tailored in this fashion, which target misleading affirmative representations about how donations will be used, are plainly distinguishable from the measures invalidated in *Schaumburg*, *Munson*, and *Riley*. It added that so long as the emphasis is on what the fundraisers misleadingly convey, and not on percentage limitations on solicitors' fees, *per se*, such actions need not impermissibly chill protected speech. *Id.* at 619.

The court further observed that in this case, it is of prime importance that the State bears the full burden of proof in a fraud action; false statement alone does not subject a fundraiser to fraud liability. Instead, to prove a defendant liable for fraud, the complainant must show, by clear and convincing evidence, that the defendant made a false representation of a material fact knowing that the representation was false, that the representation was made with the intent to mislead the listener, and that the defendant succeeded in misleading the listener. It noted that "exacting proof requirements" of this type have been held to provide "sufficient breathing room for protected speech," and emphasized that the First Amendment and case law do not require "a blanket exemption from fraud liability for a fundraiser who intentionally misleads in calls for donations." *Id.* at 620-21.

The court stated that its decisions have repeatedly recognized the legitimacy of government efforts to enable donors to make informed choices about their charitable contributions. Toward that end, it said that *Schaumburg* found it proper to require disclosure of the finances of charitable organizations; *Munson* reiterated that point, and *Riley* extended disclosure requirements to professional fundraisers. *Id.* at 623-24. Moreover, the court noted that even as government may seek to inform the public and prevent fraud through such disclosure requirements, it also may vigorously enforce antifraud laws to prohibit professional fundraisers from obtaining money on false pretenses or by making false statements. *Id.* at 623-24 (citing *Riley*).

Summarizing the court's reasoning, it said that high fundraising costs, without more, do not establish fraud, and that mere failure to volunteer the fundraiser's fee when contacting potential donors, without more, is insufficient to state a claim for fraud; however, these limitations did not disarm states from assuring that their residents are positioned to make informed choices about their charitable giving. Thus, it concludes that consistent with its precedent and the First Amendment, States may maintain fraud actions when fundraisers make false or misleading representations designed to deceive donors about how their donations will be used. *Id.* at 624.