BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Inquiry into Cooperative Mail	)	
Rule Exception	)	Docket No. PI2008-4

FREE SPEECH COALITION, INC.,
FREE SPEECH DEFENSE AND EDUCATION FUND, INC., *ET AL.*
REPLY COMMENTS REGARDING
COOPERATIVE MAIL RULE
(July 24, 2008)

BACKGROUND

On April 22, 2008, the Commission issued Order No. 72, Notice and Order Requesting Comments on Cooperative Mail Rule Exception, requesting comments on an examination the Commission is required to conduct pursuant to a directive of the Postal Accountability and Enhancement Act ("PAEA"), Pub. L. 109-435, section 711. Order No. 72 set June 24, 2008 as the deadline for initial comments, and July 24, 2008 as the deadline for reply comments.

Initial comments were filed by American Target Advertising, Inc. ("ATA"); Alliance of Nonprofit Mailers ("ANM"); The Association of Direct Response Fundraising Counsel ("ADRFC") (in the form of a letter); the Public Representative ("PR"); and Free Speech Coalition, Inc., Free Speech Defense and Education Fund, *et al*. (representing a total of 33 for-profit corporations and nonprofit organizations) ("FSC/FSDEF").

ADDITIONAL CO-COMMENTERS

Since the filing of those initial comments, FSC/FSDEF has been asked to notify the Commission that the following nonprofit organizations and for-profit corporations wish to join the FSC/FSDEF comments:

- American Association for Health Freedom
- American Family Association
- Buckeye Institute for Public Policy Solutions
- Commonwealth Foundation for Public Policy Alternatives
- Freedom Alliance
- Harbinger Communications Co.
- Health Freedom Foundation
- Media Research Center
- Miracle Flights for Kids
- National Taxpayers Union
- The Richard Norman Company
- The Senior Citizens League
- United States Justice Foundation
- 60 Plus Association

This brings the total number of nonprofit organizations and for-profit corporations organizations co-sponsoring FSC/FSDEF comments in this docket to 47.

As stated in its initial comments, FSC/FSDEF, *et al.*, support the Postal Service's current cooperative mail rule ("CMR"), and after reviewing all initial comments that were

filed, believe that those commenters who have in this docket "revived" their old proposal "from five years past and offer it, slightly modified"[1] have failed to demonstrate that it is any better an idea in 2008 than it was in 2003 when it was rejected by the Postal Service.

REPLY COMMENTS

I. ANM and PR Comments Contain Unsupported Negative Comments about Nonprofit Fundraising, Unrelated to the Cooperative Mail Rule.

ANM initial comments regaled the Commission with second-hand reports of "allegations of abusive practices" relating to the financial management and overall fundraising practices of one nonprofit organization that arose in the course of a recent Congressional hearing, as well as vague information that some charities "divert" expend the majority of contributions received on professional staff, fundraising consultants, and overhead. ANM Initial Comments, p. 3. (It is not clear why it is a "diversion" of nonprofit funds to pay staff, fundraising costs, and overhead, as even ANM must incur such expenses.) In circular fashion, the PR quoted from "serious concerns" raised by ANM in a statement to the House Committee on Oversight and Government Reform, Subcommittee on Federal Workforce, Postal Service, and the District of Columbia. PR Initial Comments, p. 2. 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.

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[1] ADRFC letter, p. 1.

The PR also provided statistical information on nonprofits' use of professional fundraisers, although the information does not specify whether the information is specific to direct mail fundraisers. PR Comments, pp. 2-6. ADRFC provided no information whatsoever supporting a change in the CMR except to allege that ADFRC was supported "broadly and deeply throughout the nonprofit mailing and fundraising community, on whose behalf I submit the proposal." ADRFC letter, p. 1. (Given the sizeable number of members of the nonprofit mailing and fundraising community co-sponsoring the FSC/FSDEF comments opposing modification of the existing CMR, and the fact that the "significant majority" of comments filed with the Postal Service in 2003 were against the ANM/ADRFC position (68 *Fed. Reg.* 58,274, Oct. 9, 2003), the representation in the ADRFC letter appears to be an exaggeration.)[2]

The ANM and PR initial comments express general concern about nonprofit organizations, without establishing any legal or logical nexus between those concerns and any proposed modifications to the CMR. The only nexus is political — as supposed "horror" stories presented by ANM provided it with the opportunity to pull off the shelf its laundry list of reforms written in 2003 that has sat dormant for five years awaiting an excuse to be pushed on policymakers. The fact that there is no nexus between the supposed horror stories now cited by ANM and ADRFC and their CMR agenda is overlooked by them, presumably hoping that the Commission also will overlook it. ANM and ADRFC appear to believe that, if any problem can be identified, their proposed solution should be accepted. This is an invitation to error which should not be accepted.

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[2] ANM describes itself as "reputable" (ANM comments, p. 1), but those who disagree with its views are mere "interest groups" (*id.,* p. 2).

As FSC/FSDEF explained more fully in their initial comments, the Commission's job, as set forth in PAEA section 711, is to examine whether the entire CMR protects against "(A) abuses of rates for nonprofit mail; and (B) deception of consumers."

Despite broad and sweeping allegations, no party has presented hard information or evidence of either: (1) the abuse of nonprofit rates, *i.e.*, ineligible matter being mailed at nonprofit rates; or (2) consumer deception arising from what is actually for-profit matter being mailed at nonprofit rates. If such misconduct were occurring on a significant or widespread basis, this evidence would have been introduced by proponents of a CMR change, but this has not been done.

II. Changing the CMR Would Not Eliminate Fraud, and Indeed, Elimination of Fraud Is Not the Specific Goal of the Cooperative Mail Rule or PAEA.

Both ANM and the PR initial comments propose specific changes to the CMR. ANM Initial Comments, p. 2; PR Initial Comments, p. 6. The common objective for their recommendations appears to be the prevention of fraud — always a beneficial goal. However, a sufficient system of civil and criminal laws exists to deal with fraud in the mailstream, without putting the CMR on steriods to solve unrelated problems, and do a job it never was designed to do.

The prohibition, prevention, detection, and punishment of fraud are primarily law enforcement functions. Principal responsibility to regulate fraudulent practices is vested in state and local law enforcement. The federal government is a government of limited powers, not plenary powers, as are the states. Some 41 states have laws regulating charitable

solicitations. All states are said to have authority to regulate charitable organizations. As a principle of federalism, every problem in the society should not be federalized, with some new form of federal regulation. Indeed, such an approach can be harmful to state and local law enforcement. *See generally,* American Bar Assn., The Federalization of Criminal Law (1998).

Moreover, there is a federal framework already in place to deal with fraud committed through the mails. First, there is a federal statute prohibiting mail fraud and providing for severe penalties, including up to 30 years in prison, $1,000,000 in fines, or both (penalties that would appear to be a more significant deterrent than being required to pay the commercial rate). *See* 18 U.S.C. § 1341. A scheme or device of obtaining money or property by means of false pretenses is considered nonmailable — even at commercial rates. 39 U.S.C. § 3005. (Implementing regulations regarding such nonmailable matter are set forth in Domestic Mail Manual sections 601.12.1-2.)

Furthermore, fraud can disqualify a nonprofit organization from federal income tax exempt status. *See, e.g.,* Rev. Rul. 97-21, 1997-1 C.B. 121; Synanon Church v. United States, 820 F.2d 421 (D.C. Cir 1987). In turn, this would lead to the organization being ineligible for nonprofit postage rates.

If actual fraud were to be found, there exist proper mechanisms to deal with it at the local, state, and federal levels, without tinkering with the CMR. *See* discussion of constitutional principles applicable to fraud actions in Section IV, *infra*.

III. The ANM Proposal Does Not Withstand Scrutiny.

ANM's initial comments are primarily a slightly edited form of a statement submitted to a Congressional committee in April 2008 by the organization's executive director along with a proposal for a change to the CMR. *Compare* ANM Initial Comments with Testimony of Anthony W. Conway, Executive Director, Alliance of Nonprofit Mailers, Before the Subcommittee on Federal Workforce, Postal Service, and the District of Columbia of the House Committee on Oversight and Government Reform (http://federalworkforce.oversight.house.gov/documents/20080424175021.pdf).

ANM initial comments present several issues that purport to indicate a problem with the fundraising exception contained in the CMR. It claims that the exception, which it incorrectly refers to as "deregulation," "would open the door to fraud and abuse," and it quotes a letter from several Congressmen quoting ANM as saying that the "'"anything-goes exemption will open the floodgates to abuse…."'" ANM Initial Comments, p. 2. ANM then seems to try to explain that abuses have not become apparent because ANM lacks subpoena authority. *Id.*, p. 3.

FSC/FSDEF agrees with ANM that misconduct such as fraud should be taken seriously. However, this is not only an inappropriate **forum** for dealing with such problems; it also is an inappropriate **proceeding** to impose new administrative burdens on newer and smaller nonprofit orgnanizations.

Some of the examples of nonprofit abuse that ANM proffered, even if proven, were not caused by the CMR, and would not have been prevented by eliminating the so-called fundraising exception — and ANM's proposed "fix" would not actually prevent them in the

future. Certainly, if an organization is currently engaged in wrongful behavior, it seems conceivable that nothing would prevent such an organization from making the ANM's proposed certifications to the satisfaction of ANM and yet be certifying falsely. This would not necessarily be detected by the Postal Service, ANM, or by the recipients of such a scheme. Such activity would still be wrong, but the ANM reform would not severely limit the wrongdoers.

As is typical of such ill-advised regulatory schemes, the most significant aspect would be the imposition of serious and severe regulatory compliance burdens on legitimate nonprofit organizations and fundraising counsel. Such costs not only increase overhead costs — and thus reduce the amount of funds going to exempt function activities, the very problem complained of by ANM and the PR — but also impose a barrier of entry to direct mail fundraising by newer nonprofit organization.

IV. The ANM and PR Recommendations Would Create an Unconstitutional CMR.

The Public Representative states:

> If … the Commission finds that fundraising abuses with regard to the cooperative mail rule's fundraising exception are **widespread** and **not sufficiently addressed by Federal and state authorities**, the Commission could recommend abolishing the fundraising exception altogether, or recommend to add additional safegaurds to the fundraising exception. [*Id.*, p. 6 (emphasis added).]

As set forth in Section I, *supra*, the initial comments presented in this docket do not provide any basis for the Commission to make a finding of widespread abuses "with regard to the cooperative mail rule" and never even address whether they are "sufficiently addressed by

Federal and state authorities" and therefore there is no predicate for recommending so-called safeguards. Nevertheless, the PR has suggested several "possible solutions." The first is for the Commission to recommend abolishing the CMR fundraising exception. The second is requiring the use of fundraising benchmarks. Finally, the PR suggests a list of eight requirements that would act as possible safeguards. *Id.*, pp. 6-10.

As to the PR's first recommendation, the so-called fundraising exception should not be abolished. FSC/FSDEF initial comments explained how, prior to the 2003 addition of the fundraising exception, the Postal Service was enforcing the CMR in an arbitrary manner. The addition of the fundraising exception was in response to Congressional concern that such improper enforcement was harming nonprofit organizations. *See* H.R. 1169, 107th Congress and S. 1562, 107th Congress. Abolishing the fundraising exception would not be warranted without evidence of widespread abuse of the CMR and the fundraising exception.

As to the PR's second recommendation, in the June 24, 2008 submission, the PR suggested that the Postal Service could (a) "require that a set percentage of funds raised by commercial fundraisers on behalf of a nonprofit must be paid to the nonprofit entity;" or (b) require a charity "to show that it spends a certain minimum percentage of its total funds on actual program expenses." PR Comments, p. 7.

Likewise, ANM proposes that each and every nonprofit mailing contain a certification of eight new factors to be accepted. ANM Comments, Attachment.

Both ANM and PR's proposed new standards would lead the Commission and Postal Service into actions that inevitably would lead to litigation, and would be struck down as

unconstitutional. Citing Madigan v. Telemarketing Assoc. Inc., 538 U.S. 600 (2003)[3], the PR acknowledges that "setting such benchmarks for lower nonprofit postage rates **could** raise First Amendment concerns." *Id.* (Emphasis added.) In fact, such minimum percentage benchmarks **would not only** raise First Amendment concerns, but **would violate** the First Amendment.

As the PR conceded, in Madigan the Court "reaffirmed" its prior holdings "that certain regulations of charitable solicitation barring fees in excess of a prescribed level effectively imposed prior restraints on fundraising, and were therefore incompatible with the First Amendment." Madigan, 538 U.S. at 606, 611-617. As Justice Scalia pointed out in his concurring opinion, "since there is such wide disparity in the legitimate expenses borne by charities, it is not possible to establish a maximum percentage that is reasonable." *Id.,* 538 U.S. at 625. And as the majority opinion in Madigan stressed, "[t]his Court has consistently recognized that small or unpopular charities would be hindered by limitations on the portion of receipts they could devote to subscription building." *Id.*, 538 U.S. at 622, n.12. Indeed, what any proposed set of percentage benchmarks does is to artificially separate out the charity's money solicitation from the charity's "dissemination and propagation of views and ideas, and the advocacy of causes that are within the protection of the First Amendment," a practice that has been consistently held to be constitutionally illegitimate. *See* Schaumburg v. Citizens for a

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[3] The Madigan decision stands for the principle that fraud actions must be based on individual and specific actions against fundraisers. However, as discussed *supra*, neither the PR nor ANM have provided the Commission with specific examples of CMR-related fraud, much less widespread abuses.

Better Environment, 444 U.S. 620, 632 (1980); Riley v. National Federation of Blind of N.C., Inc., 487 U.S. 781, 788-89 (1988).

The PR would have the Commission believe that these firmly-established First Amendment principles may not "raise the same First Amendment concerns as the state and local laws addressed by the Supreme Court." PR Comments, pp. 7-8. This suggestion flies in the face of a long line of precedents dating back as far as 1917 when the esteemed federal District Judge, Learned Hand, went to great lengths to narrowly construe a federal statute upon which the Postmaster General was relying to deny access to the mails. *See* Masses Publishing Co. v. Patten, 244 F. 535 (S.D.N.Y. 1917). Judge Hand's cautionary approach is equally applicable here, in that one should not construe Congress's mandate in PAEA to study whether the cooperative mail rule "contains adequate safeguards to protect against … deception of consumers," to conduct that study without taking care not to abridge First Amendment rights.

As then Justice Rehnquist observed in 1983, "[t]he right to use the mails is undoubtedly protected by the First Amendment." Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 76 (1983) (Rehnquist, J., concurring). Indeed, as Justice Rehnquist recalled in Bolger, the Postal Service may not justify a regulation on the ground that a person affected by that regulation "can communicate with the public otherwise than through the mail" (*id.* at p. 79):

> A prohibition on the use of the mails is a significant restriction of First Amendment rights. We have noted that "[t]he United States may give up the Post Office when it sees fit, but while it carries it on the use of the mails is almost as much a part of free speech as the right to use our tongues." Blount v. Rizzi, 400 U.S. at 416 …, quoting Milwaukee Social Democratic Publishing Co. v. Burleson, 255 U.S. 407, 437 … (1921) (Holmes, J., dissenting). [*Id.*, 463 U.S. at pp. 79-80.]

Hence, in its application of First Amendment principles to the Postal Service regulations, the Supreme Court has consistently relied upon its precedents, applying the same principles to the Postal Service as it applies to state and local law. *See, e.g., id.*, 463 U.S. at 64-75, 76-80. As was the case in Bolger, in which the Court applied its ordinary rules protecting commercial speech, so here in the case of charitable solicitations, the rules — including those governing the city of Schaumburg, Illinois, and the state laws of Maryland and North Carolina, as applied in the Schaumburg, Munson, and Riley cases — apply with equal force to any cooperative mail rule that this Commission might recommend. Thus, any effort to impose some kind of percentage benchmark would clearly be an unconstitutional abridgment of a nonprofit organization's First Amendment rights. *See* Madigan, 538 U.S. at 612.

Respectfully submitted,

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