

United States Senate
Committee on Governmental Affairs

Hearings on Postal Reform

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The Free Speech Coalition, Inc. (“FSC”), now in its tenth year of operation, is a broad alliance of nonprofit organizations and for-profit companies which help nonprofits raise funds and carry out their programs. FSC is particularly concerned with the preservation of the rights of nonprofit advocacy organizations. This diverse group came together in 1993 to defend the interests of Americans who want to participate fully in the formation of public policy in this country without undue governmental interference and restriction.

FSC is concerned that some of the loudest voices and largest organizations within the nonprofit community will try to use postal reform to advance their own narrow interests and will invoke the powerful yet baseless charge of “fraud” to urge this Committee to reverse the Postal Service’s recent improvements in its Cooperative Mail Rule. This testimony will help explain why the attack on the Postal Service’s changes to the Cooperative Mail Rule is not truly based on wrongdoing, but rather the self-interest of those who invoke that epithet.

USPS COOPERATIVE MAIL RULE

Before the recent modification, the Domestic Mail Manual, DMM 670.5.3, provided that:

A **cooperative mailing** may be made at the Nonprofit Standard Mail rates only when **each** of the cooperating organizations is **individually authorized** to mail at the Nonprofit Standard Mail rates 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 rates at the post office where the mailing is deposited must be paid at the applicable Regular or Enhanced Carrier Route Standard Mail rates. The mailer may appeal the decision under G020. [Emphasis added.]

On May 6, 2003, the Postal Service proposed adding the following language to this section of the DMM:

Exception: this standard 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. [68 Fed. Reg. 23937-39.]

In the final regulations published October 9, 2003, the following language was added:

Exception: effective November 13, 2003, this standard 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 Fed. Reg. 58273.]

DIVERSE INTERESTS WITHIN NONPROFIT COMMUNITY

FSC would have preferred the original language proposed by the Postal Service with changes it recommended in Comments filed with the Postal Service, but supports the Postal Service's final regulations. The Cooperative Mail Rule — as previously enforced to prohibit “no-risk” and other types of contracts between nonprofits and fundraisers — operates to the disadvantage of smaller nonprofits and those that do not receive taxpayer financing. The Postal Service's motivation may have been well-intentioned, but it operated unfairly, and has served the interests of certain large nonprofits at the expense of small nonprofits. It has now been fixed

“No-risk” contracts are generally contracts between nonprofits and professional direct mail agencies which have expertise in marketing, and which have confidence from their experience that they can help the nonprofit can raise money through direct mail. Because of this experience and confidence, they are willing to help protect the nonprofit from adverse financial effects if their judgment is wrong and adequate funds are not raised.

The fact that there are spokesmen within the nonprofit community who oppose the Postal Service's efforts to narrow the Cooperative Mail Rule and permit “no-risk” contracts may seem surprising, in that the proposed change would impose fewer restrictions on the ability of nonprofits to mail at nonprofit rates. Why would any nonprofit, or any spokesman for nonprofits, oppose a government agency's acknowledgment that nonprofit organizations should have greater rights? The answer is not that difficult to understand when one understands that there are different economic interests within the nonprofit community.

FSC's nonprofit members are generally smaller, depending on the use of nonprofit mail rates to facilitate their communication of a vision and to demonstrate a program of effective action, to both their current and prospective contributors and members. The ability to enter into no-risk contracts helps start-up and small nonprofits. The availability of no-risk contracts provides alternatives which the boards of directors and officers of nonprofits can consider when they seek professional assistance with their fundraising. The only apparent justification for the Postal Service's intrusion into this regulatory arena is the belief that the nonprofit organizations are incompetent, and in need of protection from a wise and beneficent government.

On the other side of the nonprofit community, some large nonprofits derive the bulk of their operating income from federal, state, or local governmental sources, or are heavily funded by private foundations and corporations. These large nonprofits often point to the fact that they have low fundraising cost ratios, neglecting to mention that the favorable ratios come as a result of their acceptance of government funds where large grants can be obtained for the price of filling out an application. These large nonprofits frequently have sufficient resources to retain in-house fundraising staff and do not need to use outside agencies. These large nonprofits often seek changes in the law, or even accounting regulations, to make it more difficult to start up new nonprofits, which they view as potential competitors in the areas that they have "staked out" and believe that they own. These large nonprofits often work hand in glove with some regulatory agencies, willing to speak and sometimes testify in Congressional and administrative hearings against smaller, upstart nonprofit organizations for committing alleged accusations of impropriety. When the government agencies are able, such as through

press releases, joint press conferences, etc., they reward these favored nonprofits for their “public-minded” ways. Associations representing these large nonprofits can be expected to be supportive of a broad Cooperative Mail Rule, which is in their narrow self-interest. Their narrow self-interest needs to be seen for what it is, and the value of their comments reduced accordingly.

Other organizations expressing concern about nonprofit organizations being unregulated confuse the private guidelines of nonprofit organizations with compelled governmental standards. If an organization of professionals chooses to adopt voluntary guidelines (even if they characterize them as “ethical” rules) for their own behavior, that may be a commendable exercise. If that same organization would seek to use the might of the federal government to impose those so-called ethical standards on other organizations, that is not a commendable exercise. There are many prior illustrations of this principle in other areas. For example, when state bar associations chose to define the unauthorized practice of law as including real estate settlements, that permitted them to use their so-called “ethical” standards to put out of business settlement firms which did excellent work for customers at a reasonable price. Ethical rules have been used for anti-competitive purposes by trade associations for years. The problem continues within the nonprofit community.

ANALYSIS

The Postal Service’s interpretation of the previous Cooperative Mail Rule to prohibit nonprofits using no-risk contracts from mailing at nonprofit rates was set out in Postal Service Publication 417, Nonprofit Standard Mail Eligibility, in Chapter 5, entitled “Cooperative Mailings.” It provides that:

A cooperative mailing is a mailing produced by an authorized organization that "cooperates" with one or more organizations to **share the cost, risk, or benefit** of the mailing." [Publication 417, Section 5-1 (emphasis added).]

Publication 417 goes on to explain this statement:

For determining whether a mailing is eligible for the Nonprofit Standard Mail rates, the Postal Service evaluates the answers to these questions:

- Who **devised, designed**, and paid for the mailpiece?
- Who paid the postage on the mailing, either directly or indirectly?
- How are the profits and revenues divided from the mailing or an enterprise it supports?
- What risks are entailed with the mailing or with an enterprise it supports and **who bears these risks**?
- Who makes managerial decisions about the content of the mailing or the enterprise it supports?
- What are the participants' intentions and interests?
[Publication 417, Section 5-2.1 (emphasis added).]

This prior interpretation of the Cooperative Mail Rule is ill-conceived, having no bearing on the issue of whether a nonprofit is sending its own mail, as opposed to being used as a subterfuge to send the mail of a commercial entity. Consider the following questions:

- If a small mailer does not have the in-house capability to "devise" or "design" a mailpiece, why should that mailer be penalized vis-a-vis a larger mailer with a large in-house fundraising staff? What salutary public policy would be served?
- If a start-up or other small nonprofit organization wants to test the concept of direct mail fundraising, without having a substantial nest egg to advance postage, printing, and other costs, and a direct mail agency wants to attempt to prove to the board of directors of the nonprofit organization that the public will support its nonprofit program if asked, and offers to do a few, or many mailings, on a no-loss, no-risk basis, why should the start-up organization be prohibited from using nonprofit rates? What salutary public policy would be served?
- If an established nonprofit organization wants to "try out" a new professional fundraising counsel with a test mailing or two, in which the nonprofit is

immunized from losing money, why should it not be able to mail at nonprofit rates? What salutary public policy would be served?

In each of these cases, why should the Postal Service's broad, general rule against no-risk contracts override the collective judgment of those directors of a nonprofit organization in whom the law vests the duty to manage, and the actions of those directors and officers who have a statutory responsibility to be fiduciaries for that nonprofit organization, when they choose to enter into a no-risk contract?

On the other hand, if a large nonprofit which is substantially government-funded, and which has plenty of money in the bank, wants to engage in direct mail fundraising, why is it somehow more deserving of the use of nonprofit mail rates than a nonprofit organization that has a policy against accepting such government funds?

If, as the Postal Service admitted, "the application of the cooperative mail rule was having a serious effect on [nonprofits'] ability to solicit donations and, in some cases, might threaten the existence of many nonprofit organizations" (68 Fed. Reg. at 23938), what merit is there in such a rule? Surely, the Postal Service, in carrying out its important government functions, should not seek to penalize small charities. The salutary public policy that led to the recent modification of the Cooperative Mail Rule demands that the government get out of the business of deciding to support certain nonprofit organizations and penalizing their perceived competitors.

CONCLUSION

FSC applauds the Postal Service for its recognition that relief is needed to “help ensure that nonprofit organizations, particularly those who cannot implement fundraising campaigns in-house, can obtain the professional assistance needed to obtain the donations necessary to fund their vital programs.” Id. In fact, the recent modification of the Cooperative Mail Rule evidently arises out of the Postal Service’s concern to provide appropriate relief.

FSC urges the Committee to resist pressure from certain large nonprofits and allow these improvements in the Cooperative Mail Rule to stand to the benefit of diversity among nonprofits.