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Manager, Mailing Standards
United States Postal Service
1735 N. Lynn Street, Room 3025
Arlington, VA 22209-6038

Re: Comments of the Free Speech Coalition, Inc.
Regarding the Proposed Regulations Relating to
Eligibility Requirements for Certain Nonprofit Standard Mail Matter

Dear Sir:

The Free Speech Coalition, Inc. (“FSC”), now in its tenth year of operation, is a broad nonprofit 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 would like to take this opportunity to comment on the Postal Service’s proposed regulations altering eligibility requirements for certain nonprofit mail — generally known as the “Cooperative Mail Rule.” 68 Fed. Reg. 23937-39 (May 6, 2003). Among all of the associations which work in this area, FSC has been perhaps the strongest critic of the Postal Service’s Cooperative Mail Rule, for the reasons set out below.

PROPOSED REGULATORY CHANGE

The Domestic Mail Manual, DMM 670.5.3, currently provides 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.]

The Postal Service proposes 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. [Emphasis added.]

DIVISION WITHIN NONPROFIT COMMUNITY

The fact that there are spokesmen within the nonprofit community who oppose the Postal Service's efforts to narrow the Cooperative Mail Rule 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.

The Cooperative Mail Rule — as currently enforced to prohibit no-risk and other types of contracts between nonprofits and fundraisers — operates to the disadvantage of smaller and privately-funded nonprofits. It is the position of FSC that there is no statutory authorization whatsoever for the Postal Service to regulate the types of contracts entered into by nonprofit organizations. The Postal Service's motivation may have been well-intentioned, but it has operated unfairly, and has served the interests of certain large nonprofits at the expense of small nonprofits, and is *ultra vires*.

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, even though they may call them “ethical” issues, with compelled governmental standards. If an organization of professionals chooses to adopt voluntary guidelines 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.

FSC-PROPOSED MODIFICATION

Thankfully, the proposed regulations disavow the Postal Service’s prior unsupported assertion of regulatory power, although, as discussed below, they do not go far enough and should be modified in three ways:

1. The proposal excepts only solicitations from the Postal Service’s ban on no-risk contracts with fundraisers. FSC strongly opposes the exclusion of mail not “soliciting monetary donations.” There is no reason that we can identify why every legitimate communication between a nonprofit organization and its contributors/members or prospective contributors/members would need to contain a solicitation in order to be exempt from the reach of the Cooperative Mail Rule. For example, educational mailings should be able to be mailed at nonprofit rates just as properly as solicitation letters, and so should thank-you letters to donors that do not seek further contributions. Clearly, the Postal Service’s exception should be broader.

2. The proposal should exempt mailings with respect to goods or services of nominal value. Otherwise, FSC would not debate the exclusion from the new exemption applying to “promoting or otherwise facilitating the sale or lease of any goods or service,” so long as this prohibition is limited to the genuine sale of products and services of real monetary value.

3. Lastly, the Postal Service should acknowledge that its prior application of the Cooperative Mail Rule has been in error, and that the proposed change now clarifies what the rule should have been, as well as what it will be.

At present, the Postal Service’s interpretation of the Cooperative Mail Rule to prohibit nonprofits using no-risk contracts from mailing at nonprofit rates is nowhere to be found in the U.S. Code¹ or Domestic Mail Manual², which is incorporated by reference into the Code of Federal Regulations at 39 C.F.R. section 3001.68. The only prohibition against no-risk contracts appears in a Postal Service publication that does not have the authority of a law or regulation — Postal Service Publication 417, Nonprofit Standard Mail Eligibility, in Chapter 5, entitled “Cooperative Mailings.”

¹ The **Postal Reorganization Act** expressly defines certain types of mail which cannot be mailed at nonprofit rates. As regards cooperative mailings, the statute provides that the mail of a qualified nonprofit cannot be mailed at nonprofit rates if it is:
mail which advertises, promotes, offers, or, for a fee or consideration, recommends, describes, or announces the availability of ... any product or service ... if ... the mail matter involved is part of a **cooperative mailing** (as defined under regulations of the Postal Service) with any person or organization not authorized to mail [at nonprofit rates].” [39 U.S.C. section 3626(j)(1)(D)(ii) (emphasis added).]

² The **Domestic Mail Manual** defines a “cooperative mailing” as follows:
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. [DMM section E670.5 (emphasis added).]

The Cooperative Mail Rule set forth in Publication 417 currently exceeds, and has always exceeded, the Postal Service's authority to regulate. This rule speaks to the sharing of risks between nonprofit organizations, and, for example, their professional fundraising counsel. Whether a nonprofit organization has entered into a contract with a fundraiser under which the nonprofit is protected from risk should be of no concern to the Postal Service. However, for many years the existence of this type of contract has been said to bar the nonprofit from mailing at nonprofit rates.

Publication 417 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 rendition 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?
- 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?

- 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?

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 represents, “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 investigating past nonprofit mailings? Surely, there are no nonprofits or professional fundraising counsel that the Postal Service, in carrying out its important government functions, should seek to penalize.

FSC-RECOMMENDED LANGUAGE

Accordingly, based on the three suggested modifications set out above, FSC requests that the proposed addition to the DMM be modified, with the following deletion and addition, to read as follows:

Exception: this standard does not apply to prior or future 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~~ of more than nominal value.

CONCLUSION

FSC applauds the Postal Service for its candor in the Request for Comments, recognizing the existing limits on its powers. For example, the Postal Service acknowledges that the subject and scope of the Cooperative Mail Rule is normally beyond its authority to define when it says: “Traditionally, the expansion (or reduction) of eligibility to mail at nonprofit or other preferred rates has been a legislative function.” 68 Fed. Reg. at 23938. Likewise, when certain nonprofits sought to have the Postal Service tailor the Cooperative Mail Rule to address speculative concerns that “some fundraisers might impose financial terms that could take advantage of unsophisticated nonprofits” or that “some fundraisers might seek to create nonprofit organizations of their own, for the purpose of enriching themselves off fundraising mailings rather than to benefit the public,” the Postal Service observed that such concerns “are best addressed elsewhere, such as through federal legislation or the state officials who regulate the relationship between professional fundraisers and nonprofit organizations.” Id.

FSC also 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 proposed regulation evidently arises out of the Postal Service’s concern to provide appropriate relief.

The Postal Service’s proposed amendments to the DMM are an excellent start which, in the opinion of the Free Speech Coalition, needs only the above-described three amendments to properly address the appropriate needs and concerns of the nonprofit community.

Respectfully submitted,

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Legal Co-Counsel

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