

ACTION: Proposed rule.

SUMMARY: This proposed rule would amend the Domestic Mail Manual standards for mail matter eligible to be sent at the Nonprofit Standard Mail rates. Specifically, it would exempt certain matter soliciting monetary donations from application of the cooperative mail rule.

DATES: Written comments must be received on or before June 5, 2003.

ADDRESSES: Written comments should be mailed or delivered to the Manager, Mailing Standards, U.S. Postal Service, 1735 N. Lynn Street, Room 3025, Arlington, VA 22209-6038. Copies of all written comments will be available for inspection and photocopying at USPS Headquarters Library, 475 L'Enfant Plaza SW, 11th Floor N, Washington DC between 9 a.m. and 4 p.m., Monday through Friday. Comments may not be submitted via fax or email.

FOR FURTHER INFORMATION CONTACT: Jerome M. Lease, Mailing Standards, United States Postal Service, at (703)292-4184.

SUPPLEMENTARY INFORMATION: Organizations authorized to mail at Nonprofit Standard Mail rates are entitled to mail at significantly lower rates than postal customers that use the commercial Standard Mail rates. In order to prevent the abuse of these privileges, there are certain eligibility restrictions on the use of the nonprofit rates. The oldest restriction is commonly known as the cooperative mail rule. This standard is set forth in the Postal Service's Domestic Mail Manual.

The cooperative mail rule is based upon the principle that the nonprofit rates were solely intended for the benefit of organizations authorized to mail at nonprofit rates, and not for entities that have not been authorized to mail at those rates. The nonprofit rates may not be used for matter sent for or on behalf of unauthorized organizations, nor may the rates be used for mailings supporting a cooperative enterprise between nonprofit and unauthorized organizations. The cooperative mail rule does not prevent a nonprofit organization from retaining an agent to help it prepare mailings or assist with a venture that will be supported by mailings sent at the nonprofit rates. Nevertheless, if the parties' relationship exceeds a principal-agent arrangement, eligibility for nonprofit rates may be impacted.

A number of federal courts have considered the cooperative mail rule. In each case, the validity of the rule and its application in the specific case have

been upheld. This includes a recent case involving fundraising mailings produced pursuant to arrangements between a for-profit professional fundraising organization and its nonprofit clients.

Over the last several years, some nonprofit organizations have made the Postal Service aware of concerns that the application of the cooperative mail rule 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 current economic climate faced by many in the nonprofit sector. The organizations of most concern include those that, because they are new, of small size, or other reasons, have to seek the assistance of professional fundraising organizations in seeking donations, rather than conduct their fundraising campaigns in-house. 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.

Although the Postal Service is sensitive to the plight of these nonprofit organizations, it has been reluctant to propose an administrative solution.

Traditionally, the expansion (or reduction) of eligibility to mail at nonprofit or other preferred rates has been a legislative function. By statute, the Postal Service is not permitted to discriminate between its customers, except where specifically authorized by law. Accordingly, it is not permitted to charge nonprofit rates to one customer while charging another the commercial rates for substantially similar material unless Congress has enacted laws directing that outcome. Moreover, since the postage on mail sent at the nonprofit rates does not bear the same share of postal overhead costs as mail sent at commercial rates, an expansion of nonprofit eligibility can transfer those overhead costs to other postal customers through higher rates. And finally, since there is a significant difference between the nonprofit and commercial rates, expansion of eligibility for the nonprofit rates can create a significant competitive advantage for the newly eligible nonprofit mailer, vis-à-vis those still mailing at the commercial rate.

Some members of the nonprofit industry also made the Postal Service aware of a separate concern that might

arise if fundraising mailings were exempted from application of the cooperative mail rule. Specifically, they were concerned that, if the contractual terms between nonprofits and fundraisers were no longer a postal concern, some fundraisers might impose financial terms that could take advantage of unsophisticated nonprofits. At the same time, these parties warned 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. These are, of course, serious issues. Nevertheless, they appear primarily to raise consumer protection, rather than postal, concerns. In the Postal Service's view, these social policy concerns are best addressed elsewhere, such as through federal legislation or the state officials who regulate the relationship between professional fundraisers and nonprofit organizations.

Bills to address concerns regarding application of the cooperative mail rule to fundraising mail were introduced last session in both houses of Congress. Although there appeared to be general agreement between Congressional members, the nonprofit sector, professional fundraisers, and the Postal Service concerning the utility of such legislation, issues regarding the precise wording and application of the legislation prevented its passage at that time. And, although a revised version of the bill has been proposed in the current session, the Postal Service also understands that, in view of the same questions as well as other pressing Congressional business, there is no guarantee that the legislation will be passed in the foreseeable future.

Accordingly, although it is reluctant to tread in an area historically addressed through legislation, the Postal Service has determined to propose a rule to eliminate the application of the cooperative mail rule on mailings by authorized nonprofit organizations seeking monetary donations. There appears to be bipartisan Congressional agreement that this is a worthwhile goal and that it can be accomplished most efficiently through administrative action. Additionally, representatives of the nonprofit community and the professional fundraisers that serve them appear to concur on the urgent need for this relief. It will 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.