



Office of the Secretary

UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION  
WASHINGTON, D.C. 20580

September 23, 2010

**VIA E-MAIL AND EXPRESS MAIL**

Martin L. McCarthy, Esq.  
Copilevitz & Canter, LLC  
310 W. 20th St., Suite 300  
Kansas City, MO 64018

**RE:** *Petition to Limit and/or Quash Civil Investigative Demand Directed to Firefighters Charitable Foundation, Inc., FTC File No. 102 3023*

Dear Mr. McCarthy:

On July 30, 2010, the Federal Trade Commission ("FTC" or "Commission") received your petition to limit or quash a civil investigative demand ("CID") issued by the Commission on July 14, 2010, and directed to your client, Firefighters Charitable Foundation, Inc. ("FCF"). This letter advises you of the Commission's disposition of the petition, effected through the issuance of this ruling by Commissioner Julie Brill, acting as the Commission's delegate. *See* 16 C.F.R. § 2.7(d)(4).

For the reasons explained below, the petition is denied, and the documents required by the CID must now be produced on or before October 8, 2010. FCF has the right to request review of this ruling by the full Commission. 16 C.F.R. § 2.7(f). Any such request must be filed with the Secretary of the Commission within three days after service of this letter ruling.<sup>1</sup> *Id.* The timely filing of a request for review of this ruling by the full Commission shall not stay the return date established by this ruling. *Id.*

**I. The Civil Investigative Demand**

On July 14, 2010, the Commission issued a CID under Section 20 of the FTC Act, 15 U.S.C. § 57b-1, that required FCF to produce several categories of documents and to designate an individual to provide testimony in furtherance of a Commission investigation. The Commission Resolution Directing Use of Compulsory Process in a Nonpublic Investigation of

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<sup>1</sup> This ruling is being delivered by e-mail and express mail. The e-mail copy is provided as a courtesy, and the deadline by which an appeal to the full Commission would have to be filed should be calculated from the date on which you receive the original letter by express mail.

Telemarketers, Sellers, Suppliers, or Others (“Commission Resolution”), which was attached to the CID, identifies the nature and scope of the Commission’s investigation:

To determine whether unnamed telemarketers, sellers, or others assisting them have engaged in or are engaging in: (1) unfair or deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (as amended); and/or (2) deceptive or abusive telemarketing acts or practices in violation of the Commission’s Telemarketing Sales Rule, 16 C.F.R. pt. 310 (as amended), including but not limited to the provision of substantial assistance or support — such as mailing lists, scripts, merchant accounts, and other information, products, or services — to telemarketers engaged in unlawful practices. The investigation is also to determine whether Commission action to obtain redress for injury to consumers or others would be in the public interest.

Among other things, the CID requires to FCF to produce:

3. Budgets or other documents describing actual or anticipated uses of [FCF’s] revenue since January 1, 2008, for programs, administrative expenses, salaries or other compensation of staff, officers or directors, and fundraising expenses.
4. Any documents that describe how, since January 1, 2008, [FCF] has invited potential recipients to request grants or other assistance, determined the qualifications of recipients, and selected the recipients of such assistance.
- .....
6. Any reports summarizing the grants or other assistance that [FCF] has funded since January 1, 2008, including, but not limited to, any financial assistance to victims and firefighters, support of volunteer fire departments, first aid education, outreach programs for fire safety, and grants to other charitable organizations.
- .....
8. Minutes of [FCF’s] Board of Directors for any meetings or actions since January 1, 2008.
9. Documents relating to the review of the compensation of the President [of FCF] at any time since January 1, 2008.
10. Agreements for compensation of officers and staff for any salaries, pension contributions or other benefits paid since January 1, 2008.

## **II. FCF's Petition to Limit and/or Quash the CID**

The FCF petition alleges that the documents requested in specifications 3, 4, 6, 8, 9, and 10 "exceed the scope" of the Commission Resolution because "they are unrelated to unfair or deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act and/or deceptive or abuse telemarketing acts or practices in violation of the Telemarketing Sales Rule." Pet. 1. Without elaboration or argument, the petition simply repeats that, for each specification at issue, the CID should be "limited to items within the jurisdiction of the Federal Trade Commission." Pet. 2-3.

## **III. Analysis**

### **A. The petition is denied because it fails to state that counsel for FCF has attempted in good faith to resolve the matter without Commission action.**

Commission Rule 2.7(d)(2) requires any petition to quash a CID to be "accompanied by a signed statement representing that counsel for the petitioner has conferred with counsel for the Commission in an effort in good faith to resolve by agreement the issues raised by the petition and has been unable to reach such an agreement." 16 C.F.R. § 2.7(d)(2). FCF's petition is not accompanied by any such statement.

The obligation imposed upon a CID recipient to meet and confer with Commission counsel regarding the merits of any objection to a CID is neither a *pro forma* requirement nor one that can or should easily be waived. That affirmative duty supplies a mechanism for discussing adjustment and scheduling issues and resolving disputes in an efficient manner. Requiring reasonable efforts to resolve avoidable compliance issues serves the salutary purpose of facilitating Commission investigations without unduly intruding into incidental matters.

FCF's failure to prove that it has satisfied the meet-and-confer requirement constitutes an adequate and independent reason to deny FCF's petition, and Commissioner Brill has determined to deny the petition on that basis.

### **B. The petition is denied because the Commission possesses the authority to require FCF to produce the documents covered by the CID, and because the documents covered by the CID are relevant to the investigation at issue.**

Even if FCF had satisfied the meet-and-confer requirement in Commission Rule 2.7(d)(2), the petition should be denied because it provides no basis for FCF to refuse to produce the documents required by the CID. It is unclear from the petition whether FCF challenges the FTC's legal authority to issue the CID, *see* Pet. 2-3 ("The request should therefore be limited to items within the jurisdiction of the Federal Trade Commission."), or whether FCF challenges the relevance of the requested documents, *see* Pet. 1 ("The documents . . . are unrelated to unfair or deceptive acts or practices in or effecting commerce."). This letter ruling therefore addresses both issues.

**1. The FTC possesses the authority to order FCF to produce relevant documents.**

Section 20(c)(1) of the FTC Act provides that:

Whenever the Commission has reason to believe that any person may be in possession, custody, or control of any documentary material . . . relevant to unfair or deceptive acts or practices in or affecting commerce (within the meaning of section 45(a)(1) of this title) . . . the Commission may . . . issue . . . a civil investigative demand requiring such person to produce such documentary material for inspection and copying or reproduction.

15 U.S.C. § 57b-1(c)(1). FCF is a “person” for purposes of Section 20. *See id.* § 57b-1(a) (“The term ‘person’ means any natural person, partnership, corporation, association, or other legal entity, including any person acting under color or authority of State law.”). The Commission therefore can require FCF to produce any document relevant to a Commission investigation to determine whether any person has engaged or is engaged in the use of unfair or deceptive acts or practices.

As indicated above, the Commission Resolution attached to the CID authorizes the use of compulsory process in Commission investigations to determine whether telemarketers, sellers, or others assisting them have engaged or are engaged in (1) unfair or deceptive acts or practices that violate Section 5 of the FTC Act, 15 U.S.C. § 45(a), or (2) deceptive or abusive telemarketing acts or practices that violate the Telemarketing Sales Rule (“TSR”), 16 C.F.R. Part 310. In the investigation at issue here, Commission staff is investigating whether a number of different individuals and entities have engaged in deceptive or abusive acts or practices while soliciting contributions for FCF during telemarketing campaigns. As part of the investigation, staff is examining representations made to consumers regarding FCF’s status as a nonprofit organization and its use of revenues for grants and other assistance. Misrepresentations concerning such matters would violate both Section 5 of the FTC Act and the TSR. The Commission investigation therefore plainly falls within the scope of the Commission Resolution.

To the extent that FCF may be claiming that it is not subject to Commission jurisdiction because it is a nonprofit entity, such a claim provides no basis for quashing or limiting the CID. The Commission can require production of material from an entity that is *not* subject to the Commission’s enforcement authority if that material furthers the Commission’s investigation of possibly illegal conduct by entities that *are* subject to the agency’s jurisdiction, such as for-profit telefundraisers making calls on FCF’s behalf. *See, e.g., United States v. Morton Salt*, 338 U.S. 632, 652 (1950) (“[I]t is sufficient if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant.”).

Moreover, the Commission also possesses the authority to investigate whether its jurisdiction extends to FCF. Just as a court has the power to determine whether it possesses jurisdiction to address and resolve any given case, the FTC has the power to determine whether it possesses jurisdiction over a given matter or entity. *See, e.g., Weinberger v. Hyson, Westcott*

& *Dunning, Inc.*, 412 U.S. 609, 627 (1973); *Endicott Johnson Corp., v. Perkins*, 317 U.S. 501, 509 (1943). Administrative agencies have “wide latitude in asserting their power to investigate by subpoena,” *FTC v. Ken Roberts Co.*, 276 F.3d 583, 586 (D.C. Cir. 2001), and “an individual may not normally resist an administrative subpoena on the ground that the agency lacks regulatory jurisdiction if the subpoena is issued at the investigational stage of the proceeding.” *FTC v. Ernstthal*, 607 F.2d 488, 490 (D.C. Cir. 1979). “[E]nforcement of an agency’s investigatory subpoena will be denied only when there is ‘a patent lack of jurisdiction’ in an agency to regulate or to investigate.” *Ken Roberts*, 276 F.3d at 587.

FCF states that it is a “non-profit non-commercial organization that is recognized to be exempt from taxation by the Internal Revenue Service.” Pet. 1. However, the fact that FCF may have registered with the IRS as a nonprofit entity does not preclude a finding that FCF is organized to “carry on business for its own profit or that of its members,” 15 U.S.C. § 44, and therefore subject to the FTC’s jurisdiction.<sup>2</sup> Nor would it preclude an alternative finding that FCF constitutes a “person” subject to the prohibitions of Section 5 of the FTC Act.<sup>3</sup> *Id.* § 5. For these reasons as well, Commissioner Brill has determined to deny FCF’s petition.

## **2. The requested documents are relevant to the Commission’s investigation.**

To the extent that FCF’s objection is to the relevance of the requested documents, specifications 3, 4, 6, 8, 9, and 10 of the CID seek records that will assist the Commission in determining whether representations made in soliciting contributions for FCF are deceptive. For example, FCF’s budget documents and financial statements will shed light on how contributions are used, and whether the organization operates as a true nonprofit that provides charitable assistance, or instead exists solely to “carry on business for its own profit or that of its members.” 15 U.S.C. § 44. Likewise, documents relating to the operation and governance of FCF — such as records demonstrating how FCF’s directors and officers are compensated, and any guidelines for the distribution of charitable assistance — will help the Commission determine whether the representations made in FCF’s telefunding calls are misleading. Hence, all of the documents identified in specifications 3, 4, 6, 8, 9, and 10 are “relevant to unfair or deceptive acts or practices in or affecting commerce” and therefore must be produced in response to the CID. *Id.* § 57b-1(c)(1).

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<sup>2</sup> See, e.g., *California Dental Ass’n v. FTC*, 526 U.S. 756, 765-69 & n.6 (1999); *In re Ohio Christian College*, 80 F.T.C. 815, 949-50 (1972); *In re Nat’l Secretaries Ass’n*, 40 F.T.C. 352, 358-59 (1945).

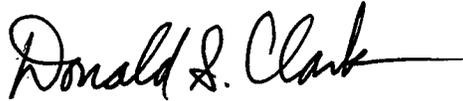
<sup>3</sup> The Commission has previously maintained that its jurisdiction over “persons” under Section 5 of the FTC Act extends to state-chartered nonprofit municipal corporations such as the City of New Orleans and the City of Minneapolis. See Federal Trade Commission, *Prohibitions on Market Manipulation and False Information in Subtitle B of Title VIII of The Energy Independence and Security Act of 2007: Notice of Proposed Rulemaking and Request for Public Comment*, 73 Fed. Reg. 48317, 48324 & n. 86 (Aug. 19, 2008) (citing *In re City of New Orleans*, 105 F.T.C. 1, 1-2 (1985); *In re City of Minneapolis*, 105 F.T.C. 304, 305 (1985)).

**IV. Conclusion and Order**

For the foregoing reasons, **IT IS HEREBY ORDERED THAT** FCF's Petition to Limit or Quash the CID be, and it hereby is, **DENIED**; and

**IT IS FURTHER ORDERED THAT** the documents required by the CID must now be produced on or before October 8, 2010.

By direction of the Commission.

A handwritten signature in black ink that reads "Donald S. Clark" with a long horizontal flourish extending to the right.

Donald S. Clark  
Secretary

# COPILEVITZ & CANTER, LLC

ATTORNEYS AT LAW

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[mlm@cckc-law.com](mailto:mlm@cckc-law.com)

VIA UNITED PARCEL SERVICE

July 29, 2010

Donald S. Clark  
Secretary  
Federal Trade Commission  
600 Pennsylvania Ave. NW, H-159  
Washington, DC 20580

FEDERAL TRADE COMMISSION  
2010 SEP -2 PM 2:39  
MINUTES SECTION

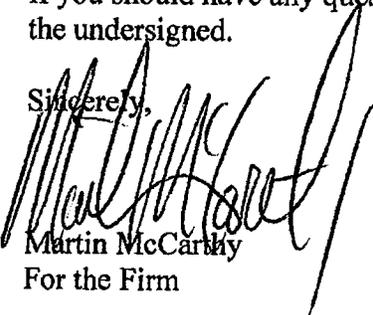
Re: Firefighters Charitable Foundation, Inc.  
Petition to Limit and/or Quash Civil Investigative Demand

Dear Secretary Clark:

Enclosed please find one original and twelve copies of the Petition to Limit and/or Quash Civil Investigative Demand submitted on behalf of Firefighters Charitable Foundation, Inc.

If you should have any questions concerning this filing, please do not hesitate to contact the undersigned.

Sincerely,

  
Martin McCarthy  
For the Firm

MLM/cb

Enclosures

c: Mr. Michael Tankersley (via electronic mail and regular mail)

**In the matter of:**

**Firefighters Charitable Foundation, Inc.**  
One West Street  
Farmingdale, NY 11735

before the,

**Federal Trade Commission**  
600 Pennsylvania Ave., NW, H-238  
Washington, DC 20580

**PETITION TO LIMIT AND/OR QUASH CIVIL INVESTIGATIVE DEMAND**

COMES NOW Firefighters Charitable Foundation, by and through counsel, and hereby files this Petition to Limit and/or Quash the Civil Investigative Demand issued to it on July 14, 2010.

The documents requested in Items IV of that Civil Investigative Demand exceed the scope of the resolution adopted by the Federal Trade Commission (file # 0123145) in that they are unrelated to unfair or deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, and/or deceptive or abusive telemarketing acts or practices in violation of the Telemarketing Sales Rule.

Specifically, the following items should be limited and/or quashed:

**IV. SPECIFICATIONS FOR PRODUCTION OF DOCUMENTS**

Item 3. Firefighters Charitable Foundation is a non-profit non-commercial organization that is recognized to be exempt from taxation by the Internal Revenue Service. The request for budgets or other documents regarding Firefighters Charitable Foundation's actual or anticipated use of revenue exceeds the scope of the

Telemarketing Sales Rule and/or any abusive or deceptive acts or practices prohibited by that rule or the FTC Act.

The request should therefore be limited to items within the jurisdiction of the Federal Trade Commission.

Item 4. The request for documents regarding how Firefighters Charitable Foundation receives and processes requests for assistance exceeds the scope of the Telemarketing Sales Rule and/or any abusive or deceptive acts or practices prohibited by that rule or the FTC Act.

The request should therefore be limited to items within the jurisdiction of the Federal Trade Commission.

Item 6. The request for documents regarding Firefighters Charitable Foundation's use of program service revenue exceeds the scope of the Telemarketing Sales Rule and/or any abusive or deceptive acts or practices prohibited by that rule or the FTC Act.

The request should therefore be limited to items within the jurisdiction of the Federal Trade Commission.

Item 8. The request for minutes of the organization's Board of Directors meetings exceeds the scope of the Telemarketing Sales Rule and/or any abusive or deceptive acts or practices prohibited by that rule or the FTC Act.

The request should therefore be limited to items within the jurisdiction of the Federal Trade Commission.

Item 9. The request for documents regarding compensation Firefighters

Charitable Foundation's president exceeds the scope of the Telemarketing Sales Rule and/or any abusive or deceptive acts or practices prohibited by that rule or the FTC Act.

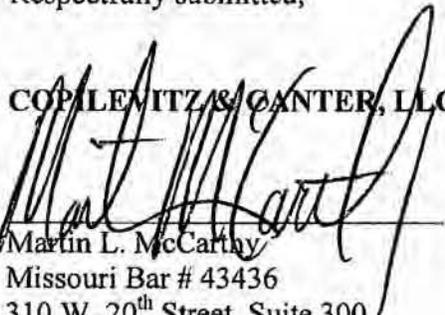
The request should therefore be limited to items within the jurisdiction of the Federal Trade Commission.

Item 10. The request for agreements regarding compensation of Firefighters Charitable Foundation's president exceeds the scope of the Telemarketing Sales Rule and/or any abusive or deceptive acts or practices prohibited by that rule or the FTC Act.

The request should therefore be limited to items within the jurisdiction of the Federal Trade Commission.

DATED this 29<sup>th</sup> day of July, 2010.

Respectfully submitted,

  
COPILEMITZ & CANTER, LLC

Martin L. McCarthy

Missouri Bar # 43436

310 W. 20<sup>th</sup> Street, Suite 300

Kansas City, Missouri 64018

816-472-9000

816-472-5000 (Facsimile)

**ATTORNEY FOR FIREFIGHTERS  
CHARITABLE FOUNDATION**

**CERTIFICATE OF SERVICE**

On the date below written, the undersigned hereby certifies that 1 original and twelve (12) copies were sent via overnight mail with all postage prepaid to:

Donald S. Clark, Secretary  
Federal Trade Commission  
600 Pennsylvania Avenue, NW, Room H-159  
Washington, DC 20580

On the date below written, the undersigned hereby certifies that a true and correct copy of the foregoing was mailed with all postage pre-paid to:

Michael Tankersley  
Federal Trade Commission  
Division of Marketing Practices  
600 Pennsylvania Ave., NW, H-238  
Washington, DC 20580

DATED this 29<sup>th</sup> day of July, 2010.

A handwritten signature in black ink, appearing to read "Michael Tankersley", written over a horizontal line.