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Reference Number
032567.00001

February 16, 2011

BY HAND DELIVERY

Shawn Woodhead Werth
Secretary
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: Request for Consideration of Legal Questions Arising in the Audit of Rightmarch.com PAC, Inc.

Dear Commissioners:

I. Introduction

On July 20, 2010, the Federal Election Commission ("FEC" or "the Commission") established a pilot program to allow entities to have legal questions considered by the Commission early in the audit process if there is a material dispute on a question of law.[1] On February 3, 2011, we submitted a request under this pilot program asking the Commission to consider two unique and material questions of law that have arisen during the Audit Division's ongoing audit of Rightmarch.com PAC, Inc. ("Rightmarch"). The Commission granted that request and asked us to submit evidence and fully brief the Commission on the legal issues raised by the audit by February 16, 2011.

The Commission voted to undertake an audit of Rightmarch pursuant to 2 U.S.C. § 438(b) on April 8, 2010. Rightmarch subsequently provided the Audit Division with copies of its bank statements, computerized financial data files and other material pursuant to the Audit Division's requests for records. The Audit Division initiated field work on October 18, 2010. On January 19, 2011, the Audit Division concluded the field work with an exit conference summarizing its initial audit conclusions. At that time, Rightmarch was informed that the Audit Division would

[1] Federal Election Commission, Policy Statement Establishing a Pilot Program for Requesting Consideration of Legal Questions by the Commission, 75 Fed. Reg. 42088 (July 20, 2010).

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recommend that Rightmarch take corrective action regarding the reporting of independent expenditures by political committees (2 U.S.C. §§ 434(b)&(g) and 11 C.F.R. § 104.4) and the continuous reporting of debts (2 U.S.C. § 434(b)(8) and 11 C.F.R. § 104.11).

Subsequently, the Audit Division informed Rightmarch that it was considering including in the Interim Audit Report a proposed finding that the contract between Rightmarch and its telemarketing firm, Political Advertising, resulted or may result in an in-kind contribution by Political Advertising if the amount Rightmarch has paid or will pay is less than the value of the services rendered by Political Advertising. 11 C.F.R. §§ 100.52(a) and (d)(1) and (2). Alternatively, the Audit Division informed Rightmarch that it was also considering whether to include in the Interim Audit Report a proposed finding that the fundraising contract constituted an extension of credit by Political Advertising to Rightmarch. 11 C.F.R. § 116.3. See, e.g., MUR 5635 (Conservative Leadership Political Action Committee); MUR 5173 (Republicans for Choice PAC). Finally, the Audit Division informed Rightmarch that its independent expenditures reports did not completely disclose all of the operating expenses it paid to its vendor.

II. Facts

On August 20, 2007, Rightmarch entered into a political advertising agreement with Political Advertising, a division of Political Call Center, LLC, an Arizona limited liability company (attached as Exhibit A).

The political advertising agreement (hereinafter "contract") between Political Advertising and Rightmarch is a fairly standard fundraising contract in the political industry. The wide-ranging purpose of the contract is for Political Advertising to individually contact members of the general public in the name of Rightmarch by telephone and by follow-up mail to identify voters, advocate issues and/or the election or defeat of candidates for federal office, provide political information and "at the same time, combine the function of donor acquisition and/or donor renewal as to advance the goals of" Rightmarch. Exhibit A at ¶ 1.1. As you will see *infra*, the contract's terms are in the ordinary course of business of political fundraising and, despite its purported wide purpose, was really limited to fundraising and did not expressly advocate the election or defeat of any candidate.

In addition, the agreement spelled out the terms under which Rightmarch would pay Political Advertising for its services. The agreement requires Political Advertising to issue a statement of contingency fees (i.e., an invoice) on a weekly basis for Political Advertising's services. Exhibit A at ¶ 5.2. Each week, Rightmarch was only obligated to pay the contingency fee stated on the invoice to the extent of the contributions actually received by Rightmarch as a result of Political Advertising's fundraising services. Id. at ¶ 5.3. If the total funds generated by Political Advertising's fundraising services were less than the contingency fees stated on the invoices,

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then Rightmarch was only obligated to the extent of the proceeds received as a result of Political Advertising's fundraising services until the termination of the contract. Id. at ¶ 5.4.

The agreement stipulated that the contract would terminate on August 15, 2012, but would automatically be renewed under the same terms for one year unless either party notified the other of their intent not to renew. Id. at ¶ 7.1. Both parties had the right to terminate the agreement, with or without cause, with one day's written notice. Id. at ¶ 7.2. If Rightmarch terminated the agreement, paragraphs 5.3 and 5.4 were rendered null and void and Rightmarch would become obligated for the full amount of any unpaid contingency fee, regardless of the proceeds actually received, and that sum would be due within ninety days of the date notice of cancellation was given. Id. at ¶ 7.4.

The agreement stipulates that it shall be interpreted and enforced in accordance with the substantive laws of Arizona. Id. at ¶ 12.5.

Rightmarch was not represented by counsel when it negotiated the contract with Political Advertising and did not retain counsel until after it received the Commission's April 9, 2010 letter informing Rightmarch of the audit. Rightmarch relied on Political Advertising's experience and expertise as a political fundraiser to assist Rightmarch in preparing the reports it filed with the Commission. In particular, Rightmarch relied on Political Advertising's categorization of certain payments to Political Advertising as independent expenditures and Political Advertising's categorization of certain contingency fees as debts.

III. Unresolved Questions of Law

1. Rightmarch has a multi-year fundraising contract with a telemarketing firm that gives the committee the first 5% of any money raised and then requires the weekly calculation of the vendor's operating expenses versus the revenue generated while the contract is in force. Any shortfall is called a "contingency fee" and is constantly being re-calculated on a weekly basis as new receipts come in to offset prior operating expenses. The contract also requires the calculation of any "debt" owed by the political committee to the vendor *at the termination of the contract.* The contract is governed by the laws of Arizona. While it is clear that any debt owed at the conclusion of the contract is a reportable debt under the Commission's regulations, is an ever-changing weekly contingency fee a "debt" subject to the reporting requirements of 11 C.F.R. § 104.11? Do the terms of the contract constitute an extension of credit under 11 C.F.R. § 116.3? Alternatively, do the terms of the contract result in an in-kind contribution by the telemarketing firm to the political committee under 11 C.F.R. §§ 100.52(a) and (d)(1) and (2)?

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2. Rightmarch has a multi-year fundraising contract with a telemarketing firm to make individual fundraising solicitations to a nationwide audience. The scripts identify one or more federal officeholders, but do not refer to them as candidates or mention any election. The overwhelming majority of the calls (93%) are made in a non-election year. The scripts are primarily related to opposing the officeholders' positions on particular issues, such as immigration, in order to raise money for Rightmarch. All the expenses for those solicitations are being reported as operating expenses under the Commission's regulations. Must they also be reported as independent expenditures under 2 U.S.C. § 431(17)?

IV. Legal Arguments

A. Weekly Contingency Fees Do Not Constitute a Reportable Debt

Federal law requires a nonconnected political committee to report the nature and amount of outstanding debts owed by the committee. 2 U.S.C. § 434(b)(8) and 11 C.F.R. §104.11. Neither the Federal Election Campaign Act of 1971 ("FECA" or "the Act"), as amended, 2 U.S.C. §§ 431 through 455, nor the Commission's regulations define the term "debt" for purposes of the Act. Instead, "[t]he Commission has long held that State law governs whether an alleged debt in fact exits, what the amount of the debt is and which persons or entities are responsible for paying a debt." Advisory Opinion 1989-2 at 2. See also Advisory Opinions 1995-7, 1988-44, 1981-42, 1979-1, 1975-102 and Karl Rove & Co. v. Thornburgh, 39 F.3d 1273, 1280-81 (5th Cir. 1994)(citing Advisory Opinion 1989-2 for the proposition that state law supplies the answer to the question of who may be liable for campaign committee debts).

The Supreme Court of Arizona held nearly a century ago that the existence of a debt is dependent upon the intent of the parties to a contract and that the parties may agree that the existence of a debt may be contingent upon a future event. Carrick v. Stuntevant, 28 Ariz. 5, 234 P. 1080 (1925). Accordingly, under Arizona law, the contract between Rightmarch and Political Advertising does not result in the creation of a debt unless and until the contract is terminated. Exhibit A at ¶ 7.4. Rightmarch, therefore, was not required to continuously report weekly contingency fees as "debts" pursuant to U.S.C. § 434(b)(8) and 11 C.F.R. § 104.11.

B. The Terms of the Contract Do Not Constitute Either an Extension of Credit or an In-Kind Contribution

The Audit Division's tentative legal conclusion that the terms of the contract between Rightmarch and Political Advertising, as a matter of law, constitute an illegal extension of credit (11 C.F.R. § 116.3) resulting in an illegal in-kind contribution (11 C.F.R. § 100.52) appear to be based on prior Commission enforcement cases arising out of referrals from the Audit Division. Those cases have material factual differences from this case and a different legal conclusion is mandated here.

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Commission regulations specify that a vendor's extension of credit to a political committee will not be considered a contribution to the political committee as long the credit is extended in the ordinary course of the vendor's business and the terms are substantially similar to extensions of credit to nonpolitical debtors that are of similar risk and size of obligation. 11 C.F.R. § 116.3(a). In determining whether the extension of credit was made in the ordinary course of business, the Commission considers several factors, including whether the vendor followed its established procedures and its past practices in approving the extension of credit and whether the extension of credit conformed to the usual and normal practice in the vendor's trade or industry. 11 C.F.R. § 116.3(c). The Commission has been highly deferential to a vendor's determination of what constitutes the usual and normal practice in the vendor's trade or industry. See, e.g., MUR 5676 (Steptoe & Johnson)(law firm's failure to take any steps to collect an unpaid debt of $15,000 for legal fees for more than two years was not unusual for clients with similar outstanding balances).

Indeed, the Commission has generally only found an extension of credit to have resulted in an illegal in-kind contribution in cases where vendors forgave, in whole or in part, outstanding debts after they had already been incurred. In MUR 5635 (Conservative Leadership Political Action Committee), a number of related direct mail and telemarketing firms agreed to pay a substantial civil penalty after the Commission found probable cause to believe that they had violated 2 U.S.C. § 441b(a) and 11 C.F.R. §116.3 by *forgiving* substantial debts owed by a nonconnected committee. Similarly, in MUR 5173 (Republicans for Choice PAC), a direct marketing firm agreed to pay a significant civil penalty and cease operations after the Commission found probable cause to believe that the direct marketing firm had knowingly and willingly violated 2 U.S.C. § 441b(a) and 11 C.F.R. §116.3 by *forgiving* or settling a debt owed by a nonconnected committee for less than the amount owed. The facts and legal reasoning in these MURs simply does not apply to the contract between Rightmarch and Political Advertising.

First, as discussed *supra*, the contingency fees incurred by Rightmarch do not and will not constitute "debts" until the termination of the contract between Rightmarch and Political Advertising.

Second, the fundraising contract in MUR 5635 was substantively different than the contract between Rightmarch and Political Advertising. The contract in MUR 5635 was truly a "no-risk" contract that provided that if the fundraising program did not generate sufficient funds to pay the program's costs, the nonconnected committee would not be responsible for the shortfall and the vendors would have no recourse against the nonconnected committee.[2] The contract between Rightmarch and Political Advertising, in contrast, provides specifically that if the contract is terminated, Rightmarch then becomes obligated for the full amount of any unpaid contingency

[2] MUR 5635 (Conservative Leadership PAC), General Counsel's Report #2 at 2, 6-9.

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fee, regardless of the proceeds actually received. Exhibit A at ¶ 7.4.[3] Only if Rightmarch were to fail to pay such a debt, Political Advertising would have recourse in the state courts of Arizona to collect the debt. Exhibit A at ¶ 12.5.

Third, there is no reason to believe that the contract between Rightmarch and Political Advertising was made in anything other than the ordinary course of business and that its payment terms are, in fact, the usual and normal practice in the political fundraising industry. Indeed, the fact that the contract between Rightmarch and Political Advertising is substantively different than the "no-risk" contract in MUR 5635 may be due to the political fundraising industry changing its practices after the FEC publicized the conciliation agreement in MUR 5635.[4]

Finally, both MURs 5635 and 5173 involved cases where fundraising vendors had forgiven substantial debts owed to the vendors by the nonconnected committees. The Audit Division's preliminary legal conclusions that, at some future point, Rightmarch may fail to pay any amounts then owed to Political Advertising is pure speculation – speculation that is belied by Rightmarch's continued payments to Political Advertising during the most recent election cycle.

The Audit Division's audit of Rightmarch covers the 2007-2008 election cycle. The reports that Rightmarch filed with the Commission during the 2009-2010 election cycle, however, show that Rightmarch has since paid Political Advertising a total of $985,612.21, thereby continually paying down the remaining contingency fees incurred by Rightmarch during the audit period. See, e.g., Rightmarch 2009 Year-End Report attached hereto as Exhibit B.

The Audit Division should not be allowed to proceed with an Interim Audit Report that includes a proposed finding that Rightmarch violated either 11 C.F.R. § 100.52 or 11 C.F.R. §116.3 when that finding is based on inapplicable precedents and speculation about events that appear to be unlikely to occur.

C. Fundraising Solicitations that Merely Mention the Names of Federal Officeholders Do Not Constitute Independent Expenditures

The contract between Political Advertising and Rightmarch is a fairly standard fundraising contract in the political industry. See Exhibit A. The purpose of the contract is for Political Advertising to individually contact members of the general public by telephone and follow-up mail to identify voters, advocate issues and/or the election or defeat of candidates for federal

[3] This section specifically makes null and avoid the contract's provision that Rightmarch is only obligated to pay the vendor to the extent of the fundraising process.

[4] Federal Election Commission, PAC and Fundraisers Penalized for Illegal Practices (Jan. 4, 2006) (available at http://www.fec.gov/press/press2006/20060104mur.html).

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office, provide political information and "at the same time, combine the function of donor acquisition and/or donor renewal as to advance the goals of" Rightmarch. Exhibit A at ¶ 1.1. As you will see *infra*, the contract's execution really only involved fundraising and did not expressly advocate the election or defeat of any candidate.

For example, the contract repeatedly makes mention of "a solicitation for funds" and "follow-up mail fulfillment services to donors." Exhibit A at ¶ 2.2. The contract even provides for the maintenance of a *donor* support voicemail hotline." Exhibit A at ¶ 2.3.9 (emphasis added).

In fact, the entire cost structure of the contract to Rightmarch is based on the funds raised by the telemarketing and mail program. Rightmarch is obligated to pay Political Advertising's contingency fee invoice "to the extent of the contributions that are actually received." Exhibit A at ¶¶ 5.3, 5.4. To emphasize this is a fundraising contract (rather than an express advocacy or get-out-the vote contract, for example), the parties "understand an essential program goal is to cover the cost of the program through *revenues generated* as a result of the program. Exhibit A at ¶ 5.5 (emphasis added).

Next, an important part of the contract details the intricate processing and disbursement of the funds raised under the contract. The contract focuses on how "all contributions" received from the program are processed, that the first 5% of the funds are disbursed to the client, how outstanding invoices are paid, and how *donor* response information will be given to Rightmarch. Exhibit A at ¶ 6.

Lastly, the contract provides that the vendor shall have the exclusive right for "telemarketing donors" and to "re-contact donors" as "a good and valuable consideration and a material inducement to POLITICAL ADVERTISING to enter into this Agreement." Exhibit A at ¶ 10.2. Rightmarch, however, also has the ability to "solicit those donors who make contributions of $500 or more" through a list sharing mechanism. Exhibit A at ¶ 10.3. As the Commission knows, this is a standard practice in developing a donor list (as opposed to a voter list) between a fundraising firm and a political committee: it's how the expenses of prospecting are recouped and how "house files" are created and shared. Simply put: this is a fundraising contract.

The contract's telemarketing scripts are also typical of fundraising scripts used in the political industry (attached as Exhibits C through F). The scripts essentially do four things:

- Ask the listener to express an opinion on a public issue (in this case, the seriousness of illegal immigration);
- Repeatedly ask the listener to donate money to a campaign to stop illegal immigration;

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- Tell the listener that the Committee is working to defeat politicians like Hillary Clinton and Barak Obama; and

- Asks the listener to tell their friends to oppose Hillary Clinton and Barak Obama.

Importantly, here is what the scripts do not do:

- Mention my candidacy, party affiliation, public office, voting or any election;

- Refer to anyone's character or fitness to hold office;

- Run in close proximity to any election or were targeted to any particular state;[5]

- Make any comparison between candidates; or

- Repeat any candidate's slogans or messages.

Instead, the scripts do what fundraising scripts are designed to do: raise money for a political committee by touching upon hot-button political issues and telling listeners which side of the issue prominent officeholders are taking. Regardless of what anyone may think of this fundraising technique, it certainly can be said that these scripts may be reasonably interpreted as something other than an unmistakable, unambiguous exhortation to vote for or against a candidate at an election. Simply put: The scripts do not contain express advocacy under any interpretation of 11 C.F.R. § 100.22.

Unfortunately, and not on the advice of counsel, the committee chose to report some of its fundraising expenses as independent expenditures as well. To compound the problem, the committee was inconsistent in making this reporting error: some operating expenses were additionally reported as independent expenditures and some were not. The Audit Division would recommend all these expenses be reported as independent expenditures. Actually the opposite should occur: the committee should amend its reports to remove any unnecessary reporting of independent expenditures that are actually fundraising expenses.

The only reporting of independent expenditures that was required is when the committee, itself, used the proceeds of the fundraising to make express advocacy communications, such as in a broadcast communication. But the expenses incurred in raising that money, person by person,

[5] According to our calculations, 93% of the calling scripts were used in 2007, a non-election year.

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are just typical operating expenses. If the Commission were to hold otherwise, it would be calling into question how direct mail and telemarketing solicitations have been reported for decades.

Sincerely,

Craig Engle

Brett G. Kappel