

AGENDA DOCUMENT NO. 12-65



FEDERAL ELECTION COMMISSION  
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August 2, 2012

MEMORANDUM

AGENDA ITEM

To: The Commission

For Meeting of 9-20-12

Through: Alec Palmer  
Staff Director *AP*

From: Patricia C. Orrock *PCO*  
Chief Compliance Officer

Tom Hintermister *TH*  
Assistant Staff Director  
Audit Division

Alex Boniewicz *AB*  
Audit Manager

By: Rosa Crussiah *RC*  
Lead Auditor

Subject: Audit Division Recommendation Memorandum on Rightmarch.com PAC,  
Inc. (A09-25)

Pursuant to Commission Directive No. 70 (FEC Directive on Processing Audit Reports), the Audit staff presents its recommendations below and discusses the findings in the attached Draft Final Audit Report (DFAR). The Office of General Counsel has reviewed this memorandum and concurs with the recommendations.

**Finding 1. Misstatement of Financial Activity**

In response to the DFAR, Rightmarch.com PAC, Inc. (RMC) concurred it had misstated its activity and noted it would work with the Audit Division to file amended disclosure reports. To date, no amendments have been filed.

The Audit staff recommends that the Commission find that RMC misstated receipts and disbursements for calendar years 2007 and 2008.

**Finding 2. Extension of Credit by a Commercial Vendor**

In its response to the DFAR, RMC acknowledged that the Audit staff determined the commercial vendor did not make an impermissible extension of credit to RMC. RMC continued to dispute the need to disclose debts arising from the weekly invoices and reiterated that the expenses do not become payable unless certain events occur in the future. The response noted that RMC is not aware of any

instance in which the Commission has held that a committee must report contingent liabilities as debts under 2 U.S.C. §438(b)(8) and 11 CFR §104.11.

The regulations at 11 CFR §104.11 state that “if the exact amount of a debt or obligation is not known, the report shall state that the amount reported is an estimate.” Once the exact amount of the debt is known, a committee should then amend its reports to reflect the correct amount.

The Audit staff recommends that the Commission find that RMC failed to disclose debts totaling \$1,524,657.

**Finding 3. Failure to File Notices and Properly Disclose Independent Expenditures**

In response to the DFAR, RMC stated that it has disputed this issue throughout the audit process, including a request for early consideration by the Commission. RMC objected to this issue being included in the audit report and requested that the audit report be revised to discuss RMC’s alleged failure to report independent expenditures in the “Additional Issues” section at the end of the audit report.

The Audit staff maintains that RMC did not timely file 24/48-hour notices for independent expenditures totaling \$139,067. Further, RMC did not properly disclose independent expenditures totaling \$2,172,135 prior to payment as “memo” entries on Schedule E (Itemized Independent Expenditures) and \$1,892,571 as reportable debt on Schedule D (Debts and Obligations).

The Audit staff recommends that the Commission find that RMC failed to file notices and properly disclose independent expenditures.

RMC did not request an audit hearing.

If this memorandum is approved, a Proposed Final Audit Report will be prepared within 30 days of the Commission’s vote.

In case of an objection, Directive No. 70 states that the Audit Division Recommendation Memorandum will be placed on the next regularly scheduled open session agenda.

Documents related to this audit report can be viewed in the Voting Ballot Matters folder. Should you have any questions, please contact Rosa Crussiah or Alex Boniewicz at 694-1200.

**Attachments:**

- Draft Final Audit Report of the Audit Division on Rightmarch.com PAC, Inc.
- Legal Report Analysis (LRA842) of the Draft Final Audit Report on Rightmarch.com PAC, Inc.

cc: Office of General Counsel



# Draft Final Audit Report of the Audit Division on **RIGHTMARCH.COM PAC INC** (January 1, 2007 - December 31, 2008)

## Why the Audit Was Done

Federal law permits the Commission to conduct audits and field investigations of any political committee that is required to file reports under the Federal Election Campaign Act (the Act). The Commission generally conducts such audits when a committee appears not to have met the threshold requirements for substantial compliance with the Act.<sup>1</sup> The audit determines whether the committee complied with the limitations, prohibitions and disclosure requirements of the Act.

## Future Action

The Commission may initiate an enforcement action, at a later time, with respect to any of the matters discussed in this report.

## About the Committee (p. 2)

RIGHTMARCH.COM PAC INC is a non-connected, multi-candidate committee headquartered in Braselton, Georgia. For more information, see the chart on Committee Organization, p. 2.

## Financial Activity (p. 2)

• Receipts	
○ Contributions from Individuals	\$ 684,675
<b>Total Receipts</b>	<b>\$ 684,675</b>
• Disbursements	
○ Operating Expenditures	\$ 97,888
○ Contributions to Political Committees	14,988
○ Loan Repayments	2,500
○ Independent Expenditures	563,277
<b>Total Disbursements</b>	<b>\$ 678,653</b>

## Findings and Recommendations (p. 3)

- Misstatement of Financial Activity (Finding 1)
- Extension of Credit by a Commercial Vendor (Finding 2)
- Failure to File Notices and Properly Disclose Independent Expenditures (Finding 3)

<sup>1</sup> 2 U.S.C. §438(b).

# **Draft Final Audit Report of the Audit Division on RIGHTMARCH.COM PAC INC**

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(January 1, 2007 - December 31, 2008)

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# Part I

## Background

### Authority for Audit

This report is based on an audit of the RIGHTMARCH.COM PAC INC (RMC), undertaken by the Audit Division of the Federal Election Commission (the Commission) in accordance with the Federal Election Campaign Act of 1971, as amended (the Act). The Audit Division conducted the audit pursuant to 2 U.S.C. §438(b), which permits the Commission to conduct audits and field investigations of any political committee that is required to file a report under 2 U.S.C. §434. Prior to conducting any audit under this subsection, the Commission must perform an internal review of reports filed by selected committees to determine if the reports filed by a particular committee meet the threshold requirements for substantial compliance with the Act, 2 U.S.C. §438(b).

### Scope of Audit

Following Commission-approved procedures, the Audit staff evaluated various risk factors, and as a result, this audit examined:

1. the consistency between reported figures and bank records;
2. the disclosure of individual contributors' occupation and name of employer;
3. the disclosure of independent expenditures; and,
4. other committee operations necessary to the review.

### Request for Early Commission Consideration of Legal Questions

Pursuant to the Policy Statement Establishing a Program for Requesting Consideration of Legal Questions by the Commission, RMC requested early consideration of two legal questions raised during the audit. The first question was whether certain fees represented an extension of credit resulting in in-kind contributions and reportable debt. (See Finding 2.) The second question was whether expenses for fundraising communications should be reported as independent expenditures. (See Finding 3.)

The Commission did not resolve these matters or provide guidance on how to proceed. Therefore, pursuant to the Commission's policy on early consideration of legal questions, the Audit Division included these matters in this report.

## Part II

### Overview of Committee

#### Committee Organization

<b>Important Dates</b>	
• Date of Registration	April 23, 2003
• Audit Coverage	January 1, 2007 - December 31, 2008
<b>Headquarters</b>	
Braselton, Georgia	
<b>Bank Information</b>	
• Bank Depositories	Three
• Bank Accounts	Three checking
<b>Treasurer</b>	
• Treasurer When Audit Was Conducted	William Greene
• Treasurer During Period Covered by Audit	William Greene
<b>Management Information</b>	
• Attended Commission Campaign Finance Seminar	No
• Who Handled Accounting and Recordkeeping Tasks	Paid Staff

#### Overview of Financial Activity (Audited Amounts)

<b>Cash-on-hand @ January 1, 2007</b>	<b>\$ 9,161</b>
<b>Receipts</b>	
○ Contributions from Individuals	684,675
<b>Total Receipts</b>	<b>\$ 684,675</b>
<b>Disbursements</b>	
○ Operating Expenditures	97,888
○ Contributions to Political Committees	14,988
○ Loan Repayments	2,500
○ Independent Expenditures	563,277
<b>Total Disbursements</b>	<b>\$ 678,653</b>
<b>Cash-on-hand @ December 31, 2008</b>	<b>\$ 15,183</b>

## **Part III**

### **Summaries**

#### **Findings and Recommendations**

##### **Finding 1. Misstatement of Financial Activity**

During audit fieldwork, a comparison of RMC's reported financial activity with its bank records revealed misstatements for 2007 and 2008. For 2007, RMC understated reported receipts and ending cash-on-hand by \$23,940 and \$16,750, respectively. For 2008, RMC understated reported disbursements by \$9,889 and ending cash-on-hand by \$6,625. In response to the Interim Audit Report, RMC indicated that it agreed with the Audit staff conclusion and would file amended disclosure reports to correct the misstatements. To date, no amendments have been filed. (For more detail, see p. 4.)

##### **Finding 2. Extension of Credit by a Commercial Vendor**

During audit fieldwork, the Audit staff initially identified one limited liability company that may have extended credit to RMC outside of its normal course of business by allowing invoices to remain outstanding for a considerable length of time. This vendor did not appear to make commercially reasonable attempts to collect \$1,655,327 for services rendered, thereby making an apparent excessive in-kind contribution of \$1,650,327 ( $\$1,655,327 - \$5,000 = \$1,650,327$ ). In response to the Interim Audit Report, RMC demonstrated that the terms of the contract are in the normal course of the vendor's business. (For more detail, see p. 6.)

##### **Finding 3. Failure to File Notices and Properly Disclose Independent Expenditures**

During audit fieldwork, the Audit staff reviewed independent expenditures and noted the following:

- RMC did not file 24/48-hour notices for up to \$139,067; and
- RMC did not properly disclose independent expenditures totaling \$2,172,135 made (i.e., publicly disseminated) prior to payment as "memo" entries on Schedule E (Itemized Independent Expenditures) and \$1,892,571 as reportable debt on Schedule D (Debts and Obligations).

In its response to the Interim Audit Report, RMC stated that it disagreed with the Audit staff's interpretation of the fundraising scripts. The RMC also stated that because the Commission was unable to reach a conclusion with regard to this question under the early consideration policy, RMC requests that the finding be removed from the Interim Audit Report and that the discussion be moved to an Additional Issues section. Given RMC's objection to the finding, RMC took no action with respect to the Audit staff's recommendations. (For more detail, see p. 12.)



## Part IV

# Findings and Recommendations

### Finding 1. Misstatement of Financial Activity

#### Summary

During audit fieldwork, a comparison of RMC's reported financial activity with its bank records revealed misstatements for 2007 and 2008. For 2007, RMC understated reported receipts and ending cash-on-hand by \$23,940 and \$16,750, respectively. For 2008, RMC understated reported disbursements by \$9,889 and ending cash-on-hand by \$6,625. In response to the Interim Audit Report, RMC indicated that it agreed with the Audit staff conclusion and would file amended disclosure reports to correct the misstatements. To date, no amendments have been filed.

#### Legal Standard

**Contents of Reports.** Each report must disclose:

- The amount of cash-on-hand at the beginning and end of the reporting period;
- The total amount of receipts for the reporting period and for the calendar year;
- The total amount of disbursements for the reporting period and for the calendar year; and
- Certain transactions that require itemization on Schedule A (Itemized Receipts) or Schedule B (Itemized Disbursements). 2 U.S.C. §434(b)(1), (2), (3), (4) and (5).

#### Facts and Analysis

##### A. Facts

During audit fieldwork, the Audit staff reconciled reported financial activity with bank records for calendar years 2007 and 2008. The following charts outline the discrepancies for beginning cash balances, receipts, disbursements and ending cash balances for each year. Succeeding paragraphs address the reasons for the misstatements.

2007 Activity			
	Reported	Bank Records	Discrepancy
Opening Cash Balance @ January 1, 2007	\$11,070	\$9,161	\$1,909 Overstated
Receipts	\$481,887	\$505,827	\$23,940 Understated
Disbursements	\$474,689	\$479,970	\$5,281 Understated
Ending Cash Balance @ December 31, 2007	\$18,268	\$35,018	\$16,750 Understated

The understatement of receipts resulted from the following:

• Receipts deposited to operating account not reported	\$ 22,208
• Unexplained difference	<u>1,732</u>
<b>Understatement of Receipts</b>	<b><u>\$ 23,940</u></b>

The \$16,750 understatement of the ending cash-on-hand resulted from the misstatements described above, as well as discrepancies in opening cash-on-hand and disbursements.

<b>2008 Activity</b>			
	<b>Reported</b>	<b>Bank Records</b>	<b>Discrepancy</b>
Opening Cash Balance @ January 1, 2008	\$18,268	\$35,018	\$16,750 Understated
Receipts	\$179,084	\$178,848	\$236 Overstated
Disbursements	\$188,794	\$198,683	\$9,889 Understated
Ending Cash Balance @ December 31, 2008	\$8,558	\$15,183	\$6,625 Understated

The understatement of disbursements resulted from the following:

• Disbursements not reported	\$ 15,563
• Fundraising fee paid in 2009, reported in 2008	(5,000)
• Fees reported but not supported by check or debit	(826)
• Unexplained difference	<u>152</u>
<b>Net Understatement of Disbursements</b>	<b><u>\$ 9,889</u></b>

The \$6,625 understatement of the ending cash-on-hand resulted from the misstatements described above, as well as discrepancies in opening cash-on-hand and receipts.

### **B. Interim Audit Report & Audit Division Recommendation**

At the exit conference, the Audit staff discussed the misstatements with RMC representatives and provided copies of relevant schedules.

The Interim Audit Report recommended that RMC:

- amend its reports to correct the misstatements noted above; and
  - amend its most recently filed report to correct the cash-on-hand balance with an explanation that the change resulted from a prior period audit adjustment.
- Further, the Audit staff recommended that RMC reconcile the cash balance of its most recent report to identify any subsequent discrepancies that may affect the adjustment recommended by the Audit staff.

### **C. Committee Response to Interim Audit Report**

In its response to the Interim Audit Report, RMC stated that it agreed with the auditors' conclusions regarding the misstatement of financial activity and would comply with the

Audit staff's recommendation to amend its disclosure reports. To date, RMC has not filed any amendments.

## **Finding 2. Extension of Credit by a Commercial Vendor**

### **Summary**

During audit fieldwork, the Audit staff initially identified one limited liability company that may have extended credit to RMC outside of its normal course of business by allowing invoices to remain outstanding for a considerable length of time. This vendor did not appear to make commercially reasonable attempts to collect \$1,655,327 for services rendered, thereby making an apparent excessive in-kind contribution of \$1,650,327 ( $\$1,655,327 - \$5,000 = \$1,650,327$ ). In response to the Interim Audit Report, RMC demonstrated that the terms of the contract are in the normal course of the vendor's business.

### **Legal Standard**

**A. Contribution defined.** A gift, subscription, loan (except when made in accordance with 11 CFR §§ 100.72 and 100.73), advance, or deposit of money or anything of value made by a person for the purpose of influencing any election for Federal office is a contribution. The term "anything of value" includes all in-kind contributions.

The usual and normal charge for a service is the commercially reasonable rate that one would expect to pay at the time the services were rendered.

The provision of services at a charge less than the usual and normal charge results in an in-kind contribution. The value of such a contribution would be the difference between the usual and normal charge for the services and the amount the political committee was billed and paid. 11 CFR § 100.52(a) and (d).

**B. Contributions by a Limited Liability Company.** An LLC that does not elect treatment as a corporation under federal tax law or have publicly-traded shares may make contributions to influence federal elections. Such a contribution will be considered as having been made from a partnership and governed by the rules pertaining to partnerships and thus subject to a single election limit of \$5,000. The contribution is considered a contribution from a single individual if the LLC is a single-member LLC that has not chosen to be treated as a corporation under Internal Revenue Service rules. 11 CFR § 110.1(b)(1) and (g)(2) and (4).

**C. Definition of Commercial Vendor.** A commercial vendor is any person who provides goods or services to a candidate or political committee and whose usual and normal business involves the sale, rental, lease or provision of those goods or services. 11 CFR § 116.1(c).

**D. Extension of Credit by Commercial Vendor.** A commercial vendor, whether or not it is a corporation, may extend credit to a candidate or political committee provided that:

- The credit is extended in the vendor's ordinary course of business (see below); and
- The terms of the credit are similar to the terms the vendor observes when extending a similar amount of credit to a nonpolitical client of similar risk and size of obligation. 11 CFR §116.3(a) and (b).

**E. Definition of Ordinary Course of Business.** In determining whether credit was extended in the ordinary course of business, the Commission will consider whether:

- The commercial vendor followed its established procedures and its past practice in approving the extension of credit;
- The commercial vendor received prompt, full payment if it previously extended credit to the same candidate or political committee; and
- The extension of credit conformed to the usual and normal practice in the commercial vendor's industry or trade. 11 CFR §116.3(c).

**F. Continuous Reporting Required.** A political committee must disclose the amount and nature of outstanding debts and obligations until those debts are extinguished. 2 U.S.C § 434(b)(8) and 11 CFR §§ 104.3(d) and 104.11(a).

**G. Continuous reporting of debts.** Debts and obligations owed by or to a political committee which remain outstanding shall be continuously reported until extinguished. Debts for which the amount is over \$500 shall be reported as of the date on which the debt was incurred. 11 CFR § 104.11.

## **Facts and Analysis**

### **A. Facts**

During audit fieldwork, the Audit staff initially identified a limited liability company that may have extended credit to RMC outside the normal course of business by allowing invoices to remain outstanding for a considerable length of time<sup>2</sup>. The terms of the contract between RMC and this vendor, Political Advertising (PA), states, "the client shall only be obligated to pay the contingency fee stated on Political Advertising's invoice to the extent of the contributions that are actually received by Client as a result of the program. If the funds generated as a result of the program are less than the contingency fee stated on Political Advertising's invoices, then the client shall only be obligated to the extent of the proceeds received from the program."

On August 20, 2007, RMC entered into a contract for fundraising services with PA. From August 13, 2007 through December 31, 2008, PA invoiced RMC \$2,223,370 for fundraising services such as telephone calls and the printing and mailing of follow-up letters. RMC paid \$568,043 of the total invoiced. As of December 31, 2008, the Audit staff calculated the outstanding balance owed by RMC to be \$1,655,327. Based upon its understanding of the terms of the contract, RMC only reported amounts paid against invoices. RMC did not consider the majority of the outstanding amounts reportable as

<sup>2</sup> PA is a division of Political Call Center, LLC, an Arizona limited-liability company which files its taxes as a partnership.

debt owed because the terms of the contract state that RMC was responsible only up to the amounts raised by the fundraising service<sup>3</sup>. During fieldwork, RMC provided no evidence that this vendor made commercially reasonable attempts to collect this debt. Therefore, during fieldwork, the Audit staff questioned whether \$1,650,327 (\$1,655,327 - \$5,000 = \$1,650,327) should be considered an excessive in-kind contribution. This matter was discussed with the RMC representatives during fieldwork and the Audit staff requested further information.

### **B. Early Commission Consideration of Legal Questions**

Pursuant to the Commission Policy Statement Establishing a Pilot Program (July 20, 2010), RMC filed a Request for Early Commission Consideration of Legal Questions (Request). In its Request, RMC asked the Commission to consider whether the terms of the contract resulted in an extension of credit, an in-kind contribution and reportable debt. Specifically, RMC requested that the Commission consider the following:

- First, RMC contended that the weekly contingency fees do not constitute reportable debt and neither the Act nor the Commission's regulations define the term "debt." Based on Advisory Opinions, the Commission "has long held that State law governs whether an alleged debt in fact exists, what the amount of the debt is and which persons or entities are responsible for paying a debt," RMC wrote. As such, RMC contended that there would be no debt to report until the termination of the contract between RMC and PA.
- Second, RMC mentioned a fundraising contract at issue in MUR 5635<sup>4</sup> (Conservative Leadership PAC) and contended that it was substantially different than the contract between RMC and PA. Specifically, according to RMC, the contract in MUR 5635 was truly "no-risk" since it provided that if sufficient funds were not raised, that committee would not be responsible for the debt. However, Counsel for RMC stated that the contract between RMC and PA provided that RMC would become obligated for all unpaid contingency fees if RMC were to terminate the contract prior to August 15, 2012.
- Third, the request explained that RMC and PA made the contract in the ordinary course of business and that this type of contract is a fairly standard contract in the political industry.

<sup>3</sup> RMC reported debt of \$279,564 to PA and filed Schedules D for this amount from the 2007 Year-End report through the 2008 Year-End report. The 2009 April Quarterly report did not include an outstanding debt balance owed to PA. RMC did not provide documentation to explain how this debt was calculated or why it was not reported after 2008.

<sup>4</sup> The Commission has specifically addressed "no-risk" or "limited risk" fundraising agreements like the one at issue here in enforcement matters and advisory opinions throughout the years. The Commission has consistently applied 11 C.F.R. §§ 100.55 and 116.3 (or their regulatory predecessors) to determine whether such arrangements were extensions of credit that resulted in in-kind contributions.

The Office of General Counsel (OGC) considered RMC's position and in its memorandum to the Commission<sup>5</sup> concluded that the contract at issue is a "no-risk" or "limited risk" contract that may result in in-kind contributions to RMC from PA. OGC also concluded that fees and expenses resulting from such a contract are reportable as debts. However, OGC notes that there is little information at this time about the presence or absence of the safeguards<sup>6</sup> that the Commission has identified in relevant enforcement matters or advisory opinions and that RMC may yet be able to demonstrate that the contract did not result in any in-kind contribution.

The Commission did not resolve or provide guidance on how to proceed with this matter. Therefore, pursuant to the Commission's policy on early consideration of legal questions, the Audit Division included this matter in the Interim Audit Report.

### **C. Interim Audit Report & Audit Division Recommendation**

The Audit staff discussed this issue with RMC representatives at the exit conference. The representatives expressed their disagreement with the Audit staff and subsequently filed the Request noted above.

The Interim Audit Report included the following recommendations.

- RMC should provide documentation, including statements from PA that demonstrate that the credit extended was in the normal course of PA's business and did not represent an excessive in-kind contribution by PA. The information provided was to include examples of other non-political customers and clients of similar size and risk for which similar services were provided and similar billing arrangements were used. Also, the Interim Audit Report staff requested that RMC provide information concerning the presence of safeguards such as billing policies for similar non-political clients and work, advance payments policies, debt collection policies, and billing cycles.
- RMC should amend its reports to reflect all debt owed to PA.

### **D. Committee Response to Interim Audit Report**

In response to the Interim Audit Report, RMC provided an affidavit from the president of PA and fundraising contracts from telemarketing vendors similar to PA.

RMC highlighted three aspects of the contract with PA to demonstrate that the credit extended was in the normal course of PA's business and did not represent an excessive in-kind contribution by PA.

<sup>5</sup> See Request for Early Commission Consideration of Legal Questions Arising in the Audit of Rightmarch.com PAC, Inc. (LRA 842) Memorandum to the Commission dated March 14, 2011, p. 2.

<sup>6</sup> Safeguards proposed by the Commission have included requiring advance deposits by a committee to reimburse vendors for potential shortfalls, limiting the term of the contract, or allowing vendors to terminate the contract early and demand full payment as a result of poor fundraising performance.

- **Profitability**

RMC stated that the agreement with PA was a bona fide commercial transaction undertaken consistent with Commission precedent. According to RMC's response, the contract to date has generated \$1,650,429 in total revenue and a cash profit of \$57,074 for PA. In addition, the affidavit stated that the fundraising program on behalf of RMC also generated 35,089 donor names, 37,845 unfulfilled pledge names and 243,025 survey responder names through December 31, 2010. These names are the property of PA and may be used by PA without restriction in the future. Based upon past figures used by the Commission for calculating the value of such lists, PA estimated a conservative commercial value (\$.10/name) of such names to be \$31,596, although Counsel for RMC stated that the actual value is likely much higher and the estimate reinforces the agreement's profitability to date.

- **Conformity**

The affidavit filed by PA's president stated that PA offered its telemarketing fundraising services to RMC on the same general contract terms that PA offered to its other political and non-political clients, including those non-profit organizations that ultimately chose not to retain PA's services. PA did not give any special discounts or financial incentives to RMC that it did not offer to other clients.

Counsel for RMC also submitted copies of telemarketing contracts from different vendors, many of which contain similar conditions.

- **Security**

PA's agreement with RMC had several safeguards built into it to ensure payment from RMC including the following:

1. Use of a Lockbox to Ensure Timely Payments Under the Contract

The contract with RMC required an independent financial institution to receive and a separate third-party escrow agent to disburse all of the fundraising proceeds that were generated. Both agents were contractually and fiduciary bound to administer the funds in accordance with the explicit terms of this contract. RMC had no power to withhold payment or control over the amount due. The lockbox mechanisms guaranteed that PA received timely and full payment of all amounts due and owed under the contract.

2. Ownership of Intellectual Property Developed During the Fundraising Campaign

As mentioned earlier, the fundraising program on behalf of RMC also generated 35,089 donors' names, 37,845 unfulfilled pledge names, and 243,025 survey responder names through December 31, 2010 that are the

property of PA and may be used by PA without restriction in the future. PA placed a conservative value on this property of \$31,596.

3. Use of Test Calls

Another safeguard that PA had in place was the use of test calls to help estimate the financial returns from the fundraising program. The affidavit stated that the initial returns were positive and indicated that the fundraising program would be profitable. If the calls had not shown positive results, PA could have terminated the fundraising program immediately, pursuant to the RMC contract.

4. The Ability to Monitor Results of the Fundraising Program in Real Time

Counsel for RMC stated that PA was able, due to the live, real-time nature of the telemarketing program, to monitor the program's profitability and that it had sole discretion to stop the effort the moment the results trended toward becoming financially unproductive.

5. RMC's Obligation to Bear Certain Costs Under the Agreement Regardless of the Program's Success

Regardless of whether the program generated any revenues, RMC was always responsible for paying the cost of the paper, envelopes, and other materials that were used in connection with PA's fundraising program. If PA had determined that the best chance of fundraising success was to increase the number of persons contacted by mail, RMC would have assumed the additional risk under the terms of the contract.

RMC further explained that the amounts on the weekly statements from PA were not reportable debts and did not result in an impermissible extension of credit to RMC. RMC suggested that the weekly statements may have been misleading since there was an amount posted as a Principal Balance. However, according to RMC, the amounts listed on financial statements totaling \$1,655,327 represented the maximum possible amounts that PA could earn if the telemarketing campaign were exceptionally successful.

Under its agreement with Rightmarch, PA was entitled to be paid 95% of the funds generated by the telemarketing program, up to the fee cap figure of \$2.50 per call. RMC believes it made timely payments in full to PA for all services.

The Audit staff reviewed the documentation provided in response to the Interim Audit Report. Although contracts from similar vendors were provided, PA did not provide for this review any additional contracts that it had with its other clientele; rather, RMC provided an affidavit from the president of PA attesting to this. As such, the Audit staff cannot confirm that PA's contract with RMC was offered on the same terms as other PA clients, either political or non-political. The contracts provided are similar to PA's agreement with RMC and appear to demonstrate, in differing degrees, no risk or limited risk conditions. In addition, PA's ability to terminate the agreement with one-day notice



and its requirement that the client maintain in place the collection facilities so that all proceeds generated as a result of PA's services during the term of this agreement, and for a period of 180 days after termination, appear to meet some of the necessary safeguards mentioned by the Commission. Because of this, it does appear that these types of contracts may be fairly standard in the industry. Based on the documentation provided, it appears that PA may have extended credit in the ordinary course of business and thus did not contribute an excessive in-kind contribution.

Based on the additional information provided in response to the Interim Audit Report, RMC demonstrated that PA extended credit in the ordinary course of business and thus did not contribute an excessive in-kind contribution. With respect to the reporting of debt, the outstanding fees and expenses listed on the weekly invoices totaling \$1,524,657 are debts subject to the reporting requirement of 11 C.F.R. § 104.11. The Commission has consistently treated such expenses in these types of arrangements as extensions of credit by vendors (See MUR 5635- Conservative Leadership PAC) and as a type of debt. Commission regulations do not base the reporting of debts and obligations on the amount that a committee ultimately will pay to a creditor but rather the approximate amount or value of the debt at the time the report is filed. RMC should report debts to PA for the appropriate reporting periods. At the termination of their contract, RMC may seek to forgive the reported debt following Commission procedures for debt termination.

### **Finding 3. Failure to File Notices and Properly Disclose Independent Expenditures**

#### **Summary**

During audit fieldwork, the Audit staff reviewed independent expenditures and noted the following:

- RMC did not file 24/48-hour notices for up to \$139,067; and
- RMC did not properly disclose independent expenditures totaling \$2,172,135 made (i.e., publicly disseminated) prior to payment as "memo" entries on Schedule E (Itemized Independent Expenditures) and \$1,892,571 as reportable debt on Schedule D (Debts and Obligations).

In its response to the Interim Audit Report, RMC stated that it disagreed with the Audit staff's interpretation of the fundraising scripts. The RMC also stated that because the Commission was unable to reach a conclusion with regard to this question under the early consideration policy, RMC requests that the finding be removed from the Interim Audit Report and that the discussion be moved to an Additional Issues section. Given RMC's objection to the finding, RMC took no action with respect to the Audit staff's recommendations.

#### **Legal Standard**

**A. Definition of Independent Expenditures.** The term "independent expenditure" means expenditure by a person for a communication expressly advocating the election or

defeat of a clearly identified candidate that is not made in coordination with any candidate or authorized committee or agent of a candidate. 11 CFR §100.16.

**B. Disclosure Requirements – General Guidelines.** An independent expenditure shall be reported on Schedule E if, when added to other independent expenditures made to the same payee during the same calendar year, it exceeds \$200. Independent expenditures made (i.e., publicly disseminated) prior to payment should be disclosed as “memo” entries on Schedule E and as a reportable debt on Schedule D. Independent expenditures of \$200 or less do not need to be itemized, though the committee must report the total of those expenditures on line (b) on Schedule E. 11 CFR §§104.3(b)(3)(vii), 104.4(a) and 104.11.

**C. Last-Minute Independent Expenditure Reports (24-Hour Notices).** Any independent expenditures aggregating \$1,000 or more, with respect to any given election, and made after the 20<sup>th</sup> day but more than 24 hours before the day of an election must be reported and the report must be received by the Commission within 24 hours after the expenditure is made. A 24-hour notice is required each time additional independent expenditures aggregate \$1,000 or more. The date that a communication is publicly disseminated serves as the date that the committee must use to determine whether the total amount of independent expenditures has, in the aggregate, reached or exceeded the threshold reporting amount of \$1,000. 11 CFR §§104.4(f) and 104.5(g)(2).

**D. Last-Minute Independent Expenditure Reports (48-Hour Notices).** Any independent expenditure aggregating \$10,000 or more with respect to any given election, at any time during a calendar year, up to and including the 20th day before an election, must be disclosed within 48 hours each time the expenditures aggregate \$10,000 or more. The notices must be filed with the Commission within 48 hours after the expenditure is made. 11 CFR §§104.4(f) and 104.5(g)(1).

## **Facts and Analysis**

### **A. Facts**

RMC disclosed independent expenditures, totaling \$563,277, on Schedule E. These disbursements were for fundraising phone calls and follow-up letters and were disclosed as being in opposition to Hillary Clinton, Hillary Clinton and Barack Obama, or Barack Obama. The Audit staff reviewed these expenditures to determine whether they were properly reported on Schedule E. It should be noted that RMC did file 24/48-hour notices, but the notices were filed based on payment date rather than the date of dissemination. As a result, the notices did not cover amounts invoiced past September 2007. A review of the phone scripts,<sup>7</sup> follow-up letters and invoices for these independent expenditures revealed the following:

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<sup>7</sup> Four scripts were used. Of these, three contained express advocacy. The fourth contained no express advocacy (generic) and per RMC was used after the 2008 General Election.

- RMC did not file 24/48-hour notices for independent expenditures amounting to as much as \$139,067 for the period December 24, 2007 through November 3, 2008; and
- RMC reported independent expenditures when the invoices were paid, either in part or in full. However, RMC made most of these payments weeks or months after the dissemination or phone-call dates. For expenditures totaling \$2,172,135, RMC should have disclosed independent expenditures as memo entries on Schedule E, filed with reports covering the dates when the materials were disseminated, and reported \$1,892,571<sup>8</sup> in corresponding debt on Schedule D.

### **B. Early Commission Consideration of Legal Questions**

In its Request, RMC asked the Commission to consider whether expenses relating to a fundraising program, which identified one or more federal officeholders but did not refer to them as candidates or mention any election, should be reported as independent expenditures rather than operating expenditures.

Counsel for RMC stated that the contract between PA and RMC is a fairly standard fundraising contract in the political industry and that the purpose of the contract is for PA 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 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 RMC.” Counsel for RMC also pointed out that the entire cost structure of the contract is based on the funds raised by the telemarketing and mail program. Counsel for RMC discussed the content of the four telemarketing scripts and indicated that they were typical of fundraising scripts used in the political industry. According to Counsel for RMC, the scripts:

- 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;
- Tell the listener that the Committee is working to defeat politicians like Hillary Clinton and Barak [sic] Obama; and
- Ask the listener to tell their friends to oppose Hillary Clinton and Barak [sic] Obama.

<sup>8</sup> This amount differs because RMC did acknowledge debt of \$279,564 and filed Schedule D for this amount from the 2007 Year-End report until the 2008 Year-End report (\$2,172,135 - \$279,564 = \$1,892,571). As stated in footnote 3, RMC stopped reporting this debt balance starting with the 2009 April Quarterly report. RMC did not provide the Audit staff with documentation to explain how this debt was calculated and why it was excluded from disclosure reports in 2009.

Counsel for RMC further explained that the scripts do not:

- mention any 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;<sup>9</sup>
- make any comparison between candidates; or
- repeat any candidate's slogans or messages.

Counsel for RMC also explained that these scripts were fundraising scripts designed to raise money by touching on hot-button political issues and informing listeners which side of the issues prominent officeholders were taking.

In closing, Counsel for RMC said that RMC had reported some of its fundraising expenses as independent expenditures without the advice of Counsel. To compound the problem, RMC was inconsistent with the classification of expenses on reports as operating expenses or independent expenditures.

OGC considered RMC's position, and in its memorandum to the Commission,<sup>10</sup> concluded that to the extent that these solicitations expressly advocated the election or defeat of a clearly identified candidate, RMC must report them as independent expenditures and file appropriate 24/48-notices. The memorandum noted that the three scripts at issue include the word "defeat" followed by the name of a clearly identified candidate, Hillary Clinton, Barack Obama or both, turning these messages into express advocacy under 11 C.F.R. §100.22(a).

The Commission did not resolve or provide guidance on how to proceed with this matter. Therefore, pursuant to the Commission's policy on early consideration of legal questions, the Audit Division included this matter in this report.

### **C. Interim Audit Report & Audit Division Recommendation**

The Audit staff discussed these issues at the exit conference and provided appropriate schedules to RMC representatives. Concerning the reporting of 24/48-hour notices, Counsel for RMC stated that these independent expenditures were intended for the general election and not for the primary elections. Thus, RMC representatives contended that these notices were not necessary.

The Interim Audit Report recommended that RMC take the following action:

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<sup>9</sup> Counsel for RMC pointed out that, according to RMC's calculations, 93% of the calling scripts were used in 2007, a non-election year.

<sup>10</sup> See Request for Early Commission Consideration of Legal Questions Arising in the Audit of Rightmarch.com PAC, Inc. (LRA 842) Memorandum to the Commission dated March 14, 2011, page 10.

- Provide any documentary evidence that would demonstrate that these disbursements were not independent expenditures and therefore did not require 24/48-hour notices;
- Submit and implement revised procedures for reporting independent expenditures, as well as for tracking dissemination dates for such expenditures to allow for timely filing of 24/48-hour reporting notices; and
- Amend its reports to disclose independent expenditures properly as “memo” entries on Schedule E and report corresponding debt on Schedule D.

#### **D. Committee Response to Interim Audit Report**

In its response to the Interim Audit Report, RMC noted that it had disputed the Audit staff’s interpretation of the fundraising scripts during audit fieldwork and at the exit conference. Also, because the Commission was unable to provide any guidance in relation to this matter, RMC objected to this issue being included in the audit report as a finding of the Commission. Rather, RMC requested that the finding be removed from the Interim Audit Report and moved to an Additional Issues section of the final report approved by the Commission. Given RMC’s objection to the finding, no action was taken with respect to the Audit staff’s recommendations.

DRAFT



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

May 14, 2012

**MEMORANDUM**

**TO:** Patricia Carmona  
Chief Compliance Officer

Tom Hintermister  
Assistant Staff Director  
Audit Division

**FROM:** Christopher Hughey *pch*  
Deputy General Counsel

Lawrence L. Calvert, Jr. *LCC*  
Associate General Counsel  
General Law and Advice

Lorenzo Holloway *LH*  
Assistant General Counsel  
Public Finance and Audit Advice

Margaret J. Forman *mjf*  
Attorney

Allison T. Steinle *ATS*  
Attorney

**SUBJECT:** Draft Final Audit Report on Rightmarch.com PAC, Inc. (LRA 842)

**I. INTRODUCTION**

The Office of General Counsel ("OGC") has reviewed the proposed Draft Final Audit Report ("DFAR") on Rightmarch.com PAC, Inc. ("Rightmarch"), as well as the responses to the Interim Audit Report ("IAR") submitted by Rightmarch and Political Call Center, LLC. We generally concur with the Audit Division's findings in the DFAR. In this memorandum, however, we specifically address the extension of credit by a commercial vendor discussed in Finding 2, and the failure to file notices and properly disclose independent expenditures

discussed in Finding 3. If you have any questions, please contact Margaret J. Forman, the attorney assigned to this audit.

## **II. BACKGROUND**

On February 3, 2011, Rightmarch requested, and the Commission granted, a Request for Early Review of Legal Questions by the Commission, pursuant to the Policy Statement Establishing a Pilot Program for Requesting Consideration of Legal Questions by the Commission, 75 Fed. Reg. 42,088 (July 20, 2010).<sup>1</sup> On February 16, 2011, Rightmarch submitted a supplemental Request for Consideration of Legal Questions by the Commission (“Rightmarch Suppl. Req.”). We submitted a memorandum to the Commission, dated March 14, 2011, in response to this request, which provided legal analysis of two issues: (1) whether the “ever-changing weekly contingency fees” invoiced by Rightmarch’s vendor, Political Advertising, resulted in in-kind contributions and were required to be reported as debts; and (2) whether fundraising communications were independent expenditures. In our analysis of the first issue, we concluded that the fees may have resulted in in-kind contributions, and were reportable debts. We also stated, however, that we needed additional information from Rightmarch to assist the Commission in resolving this issue. Our analysis of the second issue concluded that the fundraising communications constituted express advocacy pursuant to 11 C.F.R. § 100.22(a) and were, therefore, independent expenditures. The Commission, after considering the legal questions, was unable to reach an agreement and issue a response. Pursuant to Commission direction, Rightmarch received a copy of our memorandum in response to their request. Although our memorandum stated that we need additional information from Rightmarch to assist the Commission in resolving these issues, Rightmarch submitted no additional information in response to the memorandum. Accordingly, the Audit Division proceeded by including these issues as findings in the IAR, which was approved by the Commission on October 25, 2011. *See* Policy Statement Regarding a Program for Requesting Consideration of Legal Questions by the Commission, 76 Fed. Reg. 45,798, 45,799 (Aug. 1, 2011). Rightmarch and Political Call Center, LLC both submitted responses to the IAR.

## **III. ANALYSIS**

### **A. Extension of Credit by a Commercial Vendor (Finding 2)**

#### **1. Introduction**

Rightmarch, a non-connected political committee, entered into a five year fundraising telemarketing contract with Political Advertising, a division of Political Call Center LLC, on August 20, 2007. Submission of Political Call Center, LLC in Response to the Interim Audit Report Concerning Rightmarch.com PAC, Inc. at Ex. C (Dec. 12, 2011) (“Political Call Center’s

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<sup>1</sup> The pilot program was in place during the period in which Rightmarch requested consideration of legal questions by the Commission. The Commission subsequently replaced this Pilot Program with a Policy Statement Regarding a Program for Requesting Consideration of Legal Questions by the Commission, 76 Fed. Reg. 45,798-99 (Aug. 1, 2011).

Resp.”). Pursuant to the terms of the contract, Political Advertising charges Rightmarch a “flat contingency fee” of \$2.50 per completed call, plus actual costs of associated activity such as sending a response card or accessing a call list. *Id.* at Ex. C ¶ 5.2. However, depending on developments over the course of the contract, Rightmarch may never be liable for this “flat contingency fee.”

Under the contract, Rightmarch is guaranteed a minimum of five percent of the gross proceeds of the fundraising activity. *Id.* at Ex. C ¶ 6.2. Moreover, Rightmarch is only obligated to pay the “flat contingency fee” to the extent that Political Advertising receives funds in response to its fundraising efforts. *Id.* at Ex. C ¶ 5.3-4. If Political Advertising’s fundraising efforts are not sufficient to cover a particular week’s fees and expenses, Rightmarch still receives five percent of the gross fundraising proceeds, and the remaining proceeds go towards paying off the total amount of outstanding fees and expenses without requiring Rightmarch to pay the remaining balance from its own funds. *Id.*

Pursuant to the terms of the contract, Political Advertising provides Rightmarch with a weekly “Statement of Contingency Fees (INVOICE)” showing the fees and expenses and “flat contingency fees” for its services that week, and the accumulated net balance of fees and expenses and “flat contingency fees” not covered by the proceeds of the fundraising project to date. *Id.* at Ex. C ¶ 5.2. However, Rightmarch can never be liable for any of the “flat contingency fees” unless it terminates the contract prior to its 2012 expiration date, in which case it becomes immediately liable for the full amount of fees and expenses accumulated to date. *Id.* at Ex. C ¶ 7.4. The contract itself refers to this arrangement as a “No Risk Guarantee.” *Id.* at Ex. C ¶ 5.

The IAR included a finding that, as a result of this contract, Rightmarch had an outstanding debt to Political Advertising in the amount of \$1,524,657.35 at the conclusion of the audit period. Rightmarch reported only a small portion of this amount as outstanding debt for this period.<sup>2</sup> The IAR also included a finding that this arrangement may have resulted in in-kind contributions to Rightmarch from Political Advertising.

In response to the IAR, Rightmarch argues that the Audit Division has misunderstood the terms of the contract and the weekly statements provided to Rightmarch by Political Advertising. Rightmarch argues that Political Advertising never extended any credit to Rightmarch, and that the weekly statements were prepared by a third-party escrow company using a standard format designed for real estate transactions, which caused the statements to include a “Principal Balance” even though this amount reflected the “maximum possible amount that [Political Advertising] could have received from Rightmarch if the fundraising program had exceeded expectations.” Submission of Rightmarch.com PAC, Inc. in Response to the Interim Audit Report on Rightmarch.com PAC, Inc. at 3-4 (Dec. 13, 2011) (“Rightmarch’s Resp.”).

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<sup>2</sup> The Audit Division does not know why Rightmarch elected to report only a small portion of the outstanding fees and expenses. Rightmarch stopped reporting any of this amount as debt in 2009. Rightmarch reported the fundraising proceeds as contribution receipts and the amount of proceeds that Political Advertising applied to its outstanding fees and expense as expenditures to third-party vendors.



Rightmarch contends that the weekly statements were not “invoices” because they “did not represent a debt that was due and owing” and that Political Advertising was paid in-full and on-time each week in accordance with the contract. *Id.* at 4.

In a separate response to the IAR, Political Call Center has provided an affidavit from its president attesting that Political Advertising offered its telemarketing fundraising services to Rightmarch on the same general terms that were offered to Political Advertising’s other political and non-political clients, and that no special discounts or financial incentives were offered to Rightmarch that were not offered to other clients. Political Call Center’s Resp. at Ex. B. In addition, Political Call Center has provided 32 telemarketing contracts from other fundraising vendors with political and non-political clients that it claims establish that the contract conformed with “the usual and normal practice in Political Advertising’s industry.” *Id.* at 11, Exs. D-FF. Political Call Center argues that the \$2.50 “flat contingency fee” was, in fact, a “contingency fee cap” or “fee cap provision” that represented the maximum amount Rightmarch could be charged for fundraising services, and the weekly statements did not represent a debt that was due and owing. *Id.* at 3. Political Call Center also states that it made a profit on the contract, and that the contract was entered into in the ordinary course of business and did not result in an in-kind contribution. *Id.* at 6. Political Call Center notes that the contract includes a “lock-box” provision that requires a third-party escrow company to receive and disburse all the fundraising proceeds; allows Political Advertising to retain intellectual property rights to the materials that were developed, including mailing lists that it estimates to have a fair-market value of at least \$31,595; permits Political Advertising to make test-calls before moving forward with a full-scale fundraising program and monitor the telemarketing program’s success in real-time; and requires Rightmarch to pay the costs of the paper, envelopes, and “other materials that were used in connection with Political Advertising’s fundraising program” regardless of whether the program generates any revenues. *Id.* at 12-16.

## **2. Contributions, Extensions of Credit, and “No Risk” Contracts**

The Act defines a contribution as “any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office.” 2 U.S.C. § 431(8)(A)(i). Under the Commission’s regulations, the term “anything of value” includes all in-kind contributions, and unless specifically exempted, the provision of goods and services for no charge or at a charge that is less than the usual and normal charge. 11 C.F.R. § 100.52(d)(1).

An extension of credit to a political committee by a commercial vendor is a contribution unless the credit is extended in the ordinary course of business and on the same terms as extensions of credit to non-political debtors of similar risk and for an obligation of similar size. 11 C.F.R. §§ 100.55, 116.3(b). An extension of credit occurs when there is an agreement between a creditor and a political committee that full payment is not due until after the creditor provides goods or services to the political committee. 11 C.F.R. § 116.1(e)(1). In determining whether an extension of credit was in the ordinary course of business, the Commission considers whether the vendor followed established procedures and past practices, whether the vendor received prompt payment in full for previous extensions of credit, and whether the extension of

credit conformed to the usual and normal practice in the industry. 11 C.F.R. § 116.3(c). If a vendor extends credit and fails to make a commercially reasonable attempt to obtain repayment, a contribution will result. 11 C.F.R. §§ 100.55, 116.4(b)(2).

When addressing fundraising programs that compensate vendors using fundraising proceeds, the Commission has expressed concern that “regardless of the degree of success of the effort to raise funds, the committee would retain contribution proceeds while giving up little, or the committee would assume little to no risk with the vendor bearing all, or nearly all, the risk.” Advisory Opinion 1991-18 (New York State Democratic Committee). “No-risk” or “limited risk” contracts similar to the one at issue here may result in in-kind contributions from vendors in two ways. First, they may result in a vendor rendering services for the committee for essentially no charge, or for what at the end of a series of transactions will wind up being less than the usual and customary charge. *See* 11 C.F.R. § 100.52(d)(1). Second, because these arrangements almost by definition involve the provision of services by the vendor before payment is received, they involve extensions of credit, and must meet all of the requirements set forth in the regulations for extensions of credit not to be contributions. *See* 11 C.F.R. §§ 100.55, 116.3-4.

The Commission has consistently applied its regulations to determine whether such arrangements resulted in in-kind contributions. *See, e.g.*, MUR 5635 (Conservative Leadership PAC) (addressing a “no risk” fundraising contract where the committee was not responsible for the costs of fundraising in excess of the money raised); Advisory Opinion 1991-18 (addressing a “limited risk” fundraising contract where the committee’s full payment of the vendor’s commissions was tied to the prospect that the fundraising would pay for itself over several years); Advisory Opinion 1979-36 (Committee for Fauntroy) (addressing a “limited risk” fundraising contract where the committee was only required to pay three-fourths of the total amount of contributions received irrespective of the actual amount of fees and expenses).<sup>3</sup> In doing so, the Commission has required committees to have safeguards in place to ensure that committees in fact pay for the costs of the fundraising programs. *See* MUR 5635; Advisory Opinion 1991-18; Advisory Opinion 1979-36. Specifically, the Commission has focused on whether a committee would receive anything of value without timely and proper compensation first being paid to the fundraising firm and any third-party vendors. *See* MUR 5635; Advisory Opinion 1991-18; Advisory Opinion 1979-36. Safeguards proposed by the Commission have included requiring advance deposits by a committee to reimburse vendors for potential shortfalls, limiting the term of the contract, or allowing vendors to terminate the contract early and demand full payment as a result of poor fundraising performance. *See* MUR 5635; Advisory Opinion 1991-18; Advisory Opinion 1979-36.

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<sup>3</sup> The Commission also has addressed contracts and dealings in contexts other than fundraising in which committees assumed no risk or limited risk. *See, e.g.*, MURs 5069 and 5132 (Comite Acevedo Vila Comisionado 2000) (determining that no contribution resulted when a Puerto Rico advertising agency bought television time on behalf of a candidate without first receiving payment based on evidence of common industry practice in Puerto Rico); MUR 4742 (Juan Vargas for Congress) (finding a reportable extension of credit, but no contribution, resulting from a “deferred compensation” contract with a candidate’s general consultant where the consultant’s retainer was only to be paid if the vendor and the committee agreed that the committee could afford to pay it without harm to campaign’s viability).

For example, in MUR 5635, the committee entered into a “no risk” contract with a fundraising firm. The arrangement provided that the committee would be responsible for the costs of fundraising only up to the amount of funds raised. The fundraising program was not sufficient to cover the vendors’ expenses, and the fundraising firm made several disbursements to the committee before the vendors’ expenses were fully paid. Accordingly, the Commission concluded that this arrangement resulted in contributions from the fundraising firm because the arrangement was not in the ordinary course of business given the size of the disbursements and short-term nature of the program, and even if it was, the fundraising firm had forgiven the debt, resulting in a contribution under 11 C.F.R. § 100.55(d)(1). *See* General Counsel’s Report #2, MUR 5635, at 5-6.

Likewise, in Advisory Opinion 1991-18, the committee proposed entering into a “Prospecting Program” where the costs of fundraising would be paid out of fundraising proceeds and the committee would be responsible for the costs of fundraising only up to the amount of funds raised. Moreover, under the first year of the program, the vendor would provide the committee with net revenues even when the vendor had not yet been fully paid for an earlier round of solicitations. Because of the “inherently speculative” nature of the prospecting effort, including the likelihood that the vendor would not receive the full contract price for more than one year, the Commission determined that it could not approve the program “in the absence of a record by [the vendor] or similar companies of the implementation of a program of similar structure and size in the ordinary course of business.” Alternatively, the Commission suggested safeguards that would prevent the program from resulting in in-kind contributions, including using short, defined periods of time in which the committee and the vendor would settle accounts.

### **3. Analysis: Political Advertising Extended Credit in Ordinary Course of Business**

The DFAR concludes that Political Advertising has demonstrated that it extended credit in the ordinary course of business and thus did not make an in-kind contribution to Rightmarch. The DFAR also concludes that outstanding fees and expenses and “flat contingency fees” listed on the weekly statements are debts subject to the reporting requirement of 11 C.F.R. § 104.11. We agree for the reasons discussed below.

Here, similar to the fundraising programs in MUR 5635 and Advisory Opinion 1991-18, the contract specifies that Rightmarch can never be liable for any of the “flat contingency fees” unless it terminates the contract prior to its 2012 expiration date. Indeed, the contract itself refers to this provision as a “No Risk Guarantee.” Political Call Center’s Resp. at Ex. C ¶ 5. And similar to the programs in MUR 5635 and Advisory Opinion 1991-18, the contract provides that Rightmarch receives five percent of the gross fundraising profits regardless of whether Political Advertising is paid in full for its services. Thus, the arrangement here is similar to the “no risk” contracts that the Commission found resulted in in-kind contributions in MUR 5635 and Advisory Opinion 1991-18.

A significant difference in this case, however, is that Rightmarch and Political Advertising have provided the “record by [the vendor] or similar companies of the implementation of a program of similar structure and size in the ordinary course of business” that was missing in Advisory Opinion 1991-18. As noted above, Political Call Center has provided an affidavit from its president attesting that Political Advertising offered its telemarketing fundraising services to Rightmarch on the same general terms that were offered to Political Advertising’s other political and non-political clients, and that no special discounts or financial incentives were offered to Rightmarch that were not offered to other clients. *See* Political Call Center’s Resp. at Ex. B ¶¶ 3-5. Political Call Center also has provided 32 telemarketing contracts from other fundraising vendors with political and non-political clients that include similar “no risk” fundraising agreements. *Id.* at 11, Exs. D-FF.

Moreover, based on Political Call Center’s submission, it appears that several other clients were offered a percentage of the gross fundraising profits. Political Call Center asserts that this provision is required by certain states when dealing with non-profit organizations, but it cites no state laws to this effect.<sup>4</sup> *See* Political Call Center’s Resp. at Ex. B ¶¶ 3-4. The important point, however, is that Political Call Center has provided documentation indicating that the provision of a percentage of gross fundraising profits to non-profit clients is not unusual in the telemarketing fundraising industry. *Id.* at 11, Exs. D-FF.

The contract also appears to have contained two important safeguards identified in the Commission’s previous matters: Political Advertising was permitted to make test calls before moving forward with a full-scale fundraising program, and had the ability to terminate the arrangement in the event of early poor performance. It also was permitted to slow the rate of fundraising or make other adjustments to ensure the program’s profitability based on its monitoring of the program’s performance. Political Call Center’s Resp. at 14-15, 18, Ex. B ¶ 6, Ex. C ¶¶ 5.5, 7.2. Implementation of an initial test period was one of the safeguards that led the Commission to approve the arrangement in Advisory Opinion 1979-36, and was suggested in Advisory Opinions 1995-34, 1991-18, and 1990-14.

We believe there remains a question, however, as to whether Rightmarch has, in fact, borne a sufficient amount of the cost or risk of the program to avoid receiving an in-kind contribution. “With respect to the payment or non-payment of an extension of credit, the Commission has made plain that in political committee fundraising, ‘none of the costs of the program [may] be left unpaid by the Committee.’” General Counsel’s Report #2, MUR 5635, at 8 (quoting Advisory Opinion 1990-14). As Political Call Center’s submission points out, the

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<sup>4</sup> It appears that most states only require professional solicitation contracts to state the fundraiser’s compensation or the gross percentage that the organization will receive and do not specify a minimum amount. *See, e.g.,* Ariz. Code § 44-6554(E) (requiring a professional solicitation contract with charitable organizations to clearly state the compensation of the contracted fundraiser); Ind. Code § 23-7-8-2(d) (requiring professional solicitation contracts with charitable organizations to specify the percentage of gross revenue that the organization will receive or the terms on which a determination can be made about the gross revenue from the solicitation campaign that the organization will receive, expressed as a fixed percentage of the gross revenue or a reasonable estimate of the percentage of the gross revenue).

contract requires Rightmarch to pay the costs of the paper, envelopes, and “other materials that were used in connection with Political Advertising’s fundraising program” regardless of whether the program generates any revenues. Political Call Center’s Resp. at 5, Ex. C. ¶ 5.2-3. But this does not appear to include other overhead costs, such as labor, that Political Advertising presumably would pay from the \$2.50 “flat contingency fee.” And while the contract permits Political Advertising to retain the mailing lists generated as the result of the program, Political Call Center’s response estimates the fair-market value of the list to be \$31,595.<sup>5</sup> *Id.* at 14, Ex. B ¶ 10. This amount is considerably less than the \$1,524,657.35 in fees and expenses and “flat contingency fees” listed on the weekly statements at the end of the audit period.

Nevertheless, Political Call Center claims that the program resulted in \$1,650,429 in total revenue and \$57,073 in cash profit for Political Advertising between August 20, 2007 and December 31, 2010.<sup>6</sup> Political Call Center’s Resp. at Ex. B ¶ 8. Assuming this is true, the existence of profit indicates that costs of the program were ultimately paid by its revenues.

Accordingly, we concur with the Audit Division’s finding that Political Advertising has demonstrated that it extended credit in the ordinary course of business and thus did not make an in-kind contribution to Rightmarch.

#### **4. Analysis: Rightmarch Was Required to Report Debt**

Although Political Advertising has demonstrated that the contract did not result in in-kind contributions to Rightmarch, \$1,524,657.35 in fees and expenses and “flat contingency fees” remained outstanding at the end of the audit period. Therefore, with respect to the debt reporting question, we maintain that all \$1,524,657.35 in fees and expenses and “flat contingency fees” listed on the weekly statements are debts subject to the reporting requirements of 11 C.F.R. § 104.11. As discussed above, in analyzing whether these types of arrangements result in in-kind contributions, the Commission has consistently treated them as extensions of credit by vendors. *See* MURs 5069 and 5132 (Comite Acevedo Vila Comisionado 2000) (finding a reportable extension of credit, but no contribution, resulting from a “deferred compensation” contract with a candidate’s general consultant where the consultant’s retainer was only to be paid if the vendor and the committee agreed that the committee could afford to pay it without harm to campaign’s viability); *see also* MUR 5635; MUR 4742 (Juan Vargas for Congress); Advisory Opinion 1991-18; Advisory Opinion 1979-36 (Committee for Fauntroy). Commission regulations treat extensions of credit as a type of debt. *See* 11 C.F.R. §§ 100.52, 100.55, 116.3; Advisory Opinion 1991-18 (concluding that extensions of credit made by a vendor would result in debt). Political committees are required to continuously report all debts and obligations until they are extinguished. 11 C.F.R. § 104.11(a). Commission regulations do not base the reporting of debts

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<sup>5</sup> Political Call Center relies on the formula articulated in MUR 5682 (Bachmann for Congress) to estimate the commercial value of the 35,089 donor names, 37,845 unfulfilled pledge names, and 243,025 survey responder names that it claims have been generated by the program to date. It has not, however, provided any documentation to verify this claim.

<sup>6</sup> It is unclear whether this number reflects net or gross profit.

and obligations on the amount that a committee will ultimately pay to a creditor, but rather on the approximate amount or value of the debt at the time the report is filed. *See* 11 C.F.R. § 104.11(b) (requiring committees to estimate the amount of a debt or obligation where the exact amount is unknown and report that figure); 11 C.F.R. § 116.10 (requiring committees to report debt even if it is disputed); 11 C.F.R. § 116.10(a) (permitting committees to note in their reports that the disclosure of debt does not constitute an admission of liability or a waiver of any claims the committee may have against the creditor); *see also* Advisory Opinion 1999-38 (Calvert for Congress) (noting that a committee was correct in reporting disputed debts even where the vendors no longer existed or were legally barred from collecting that debt).

### **B. Failure to File Notices and Properly Disclose Independent Expenditures (Finding 3)**

Our March 14, 2011 memorandum analyzed the recommended finding on the failure to file notices and the proper disclosure of independent expenditures. We analyze the independent expenditures again below. Additionally, we concur with the Audit staff's finding in the Proposed Report, but address Rightmarch's response to the IAR.

#### **1. Fundraising Communications as Independent Expenditures**

In its Request for Early Review of Legal Questions by the Commission, Rightmarch asked whether the expenses for fundraising solicitations must also be reported as independent expenditures. We concluded that, to the extent these solicitations expressly advocated the election or defeat of a clearly identified candidate, they must be reported as independent expenditures. *See* 2 U.S.C. § 434(b)(4)(H)(iii); 11 C.F.R. § 104.4(a). We further concluded that appropriate 24/48-hour notices must be disclosed as required. *See* 2 U.S.C. § 434(g); 11 C.F.R. §§ 104.4(b)(2), 104.4(c).

Rightmarch submitted to the Audit Division four scripts that were developed for use by Political Advertising in telemarketing phone calls.<sup>7</sup> After an introduction, screening questions ask whether the listener considers illegal immigration a serious problem. Rightmarch Suppl. Req. at Ex. C-F. Calls to those who did not were terminated. Those who did hear additional content. In one of the scripts, the additional content contains no language advocating the election or defeat of any candidate; it is therefore not reportable as an independent expenditure. *Id.* at Ex. F. Three of the four scripts contain language advocating the defeat of Hillary Clinton, Barack Obama, or both Hillary Clinton and Barack Obama. *Id.* at Ex. C-E. Specifically, the other scripts state "we're working to defeat politicians like [Barack Obama/Hillary

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<sup>7</sup> Rightmarch provided the scripts and the contract to the Audit Division early in the audit process; however, citations to the contract will be to the materials submitted by Political Call Center in its response to the IAR, consistent with other citations in this memorandum.

The contract between Political Advertising and Rightmarch specifies that "[a]ll written materials, including scripts, fulfillment packages, emails and websites shall either be created by the CLIENT [Rightmarch], or be subject to the CLIENT'S [Rightmarch's] final approval." Political Call Center's Resp. at Ex. C. ¶ 4.1.

Clinton/Barack Obama and Hillary Clinton], who support AMNESTY for illegal aliens!” as well as “and please tell your friends to **OPPOSE** [Barack Obama/Hillary Clinton/Barack Obama and Hillary Clinton].” *Id.*

The communications in the three scripts at issue here are required to be reported as independent expenditures because they expressly advocate the election or defeat of a clearly identified candidate pursuant to section 100.22(a). An independent expenditure is a non-coordinated expenditure for a communication that expressly advocates the election or defeat of a clearly identified candidate.<sup>8</sup> 2 U.S.C. § 431(17); 11 C.F.R. § 100.16(a). A communication that “expressly advocates” includes language such as “vote for the President,” “re-elect your Congressman,” “defeat,” or other words, which in context, can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidates. 11 C.F.R. § 100.22(a); *see Buckley v. Valeo*, 424 U.S. 1, 44 n.52 (1976). Rightmarch’s communications in the three scripts at issue are required to be reported as independent expenditures because they include the word “defeat” followed by the name of the clearly identified candidate: Hillary Clinton, Barack Obama, or both.<sup>9</sup> Rightmarch Suppl. Req. at Ex. C-E.

Rightmarch argues that no matter their text, the scripts do not contain express advocacy—and thus cannot be independent expenditures—because they are part of a fundraising effort. Rightmarch contends that, in context, any communication whose principal message can be distilled to a request for funds “may be reasonably interpreted as something other than an unmistakable, unambiguous exhortation to vote for or against a candidate at an election.” *See* Rightmarch Suppl. Req. at 8. Although Rightmarch does not include a citation, this sentence applies the standard of 11 C.F.R. § 100.22(b).

The scripts tell listeners that “we are working to defeat politicians like Barack Obama” and that they should “tell their friends to **OPPOSE** Hillary Clinton,” and the use of the words “defeat” and “oppose,” in reference to a clearly identified candidate, turns the message of the calls into simple express advocacy under 11 C.F.R. § 100.22(a). *See id.* at Ex. C-E. The Commission has found that fundraising solicitations containing express advocacy should be reported as independent expenditures. In MUR 5809, the Christian Voter Project (“CVP”) failed to file independent expenditure notices for the costs of fundraising letters that expressly advocated the election/defeat of candidates. The Commission found reason to believe that CVP’s failure to file independent expenditure notices violated the Act, and accepted a conciliation agreement with the committee based on that violation. In MUR 5518 (Hawaii Democratic Party), a party communication contained at least three messages: an invitation to precinct meetings, express advocacy of the defeat of a clearly identified Federal candidate, and a fundraising appeal. The Office of General Counsel concluded the communication should have

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<sup>8</sup> We have no information that the communications were coordinated with any candidate.

<sup>9</sup> The contract between Political Advertising and Rightmarch identifies one of the purposes of the agreement is to “advocate issues and/or the election and defeat of candidates for federal office.” Political Call Center’s Resp. at Ex. C ¶ 1.1.

been reported either as an independent expenditure or as federal election activity, and recommended reason to believe findings. The Commission rejected our recommendation, *not* on the grounds that solicitations could not be independent expenditures but on the grounds that invitations to precinct meetings permitted treatment as a federal/non-federal allocated administrative expense under the exception to the definition of federal election activity for costs of local political conventions, 2 U.S.C. § 431(20)(B)(iii)). In particular, Commissioners von Spakovsky and Weintraub stated in their Statement of Reasons that “had this invitation been mailed more broadly than it was, and in sufficient numbers to raise questions about whether it was a bona fide invitation, or if it was really just a fundraising or advocacy piece masquerading as an invitation, this would be a different case.” MUR 5518 (Hawaii Democratic Party), Statement of Reasons of Commissioners Hans A. von Spakovsky and Ellen L. Weintraub, at 3 (Feb. 23, 2007); *cf.* MURs 5511 and 5525 (Swift Boat Veterans for Truth) (fundraising solicitations containing express advocacy were expenditures that counted towards organization’s threshold for political committee status).

Additionally, Rightmarch asserts that these communications do not contain express advocacy under any meaning of section 100.22 because they do not “[m]ention any candidacy, party affiliation, public office, voting or any election;/[r]efer to anyone’s character or fitness to hold office;/[r]un in close proximity to any election or targeted to any particular state;/[m]ake any comparison between candidates; or/[r]epeat any candidates’ slogans or messages.” Rightmarch Suppl. Req. at 8. However, the three communications at issue here fall squarely within the meaning of express advocacy pursuant to section 100.22(a). The three communications specifically state that Rightmarch is “working to defeat politicians like Hillary Clinton,” “working to defeat politicians like Barack Obama,” and “working to defeat politicians like Hillary Clinton and Barack Obama.” *Id.* at Ex. C-E. Again, however, whatever may be the utility of the presence or absence of these facts in analyzing the communication under section 100.22(b), no such analysis is necessary here because the scripts contain express advocacy as defined in section 100.22(a).

Rightmarch also asserts that 93 percent of these communications occurred in 2007, the year before the 2008 election. *Id.* at 4, 8 n.5. Nothing in section 100.22(a) states that the communication must occur in the same year as the election. A communication that expressly advocates the election or defeat of a clearly identified candidate can be made in a year other than an election year. In fact, both Hillary Clinton and Barack Obama were candidates during the time that Rightmarch’s three scripts at issue here were used. Hillary Clinton filed her statement of candidacy seeking the office of President on January 22, 2007.<sup>10</sup> Barack Obama filed his statement of candidacy seeking the office of President on February 12, 2007. According to information provided to the Audit Division by Rightmarch, the script that states that Rightmarch is “working to defeat politicians like Hillary Clinton” was used by the vendor from August 16, 2007 through February 15, 2008.<sup>11</sup> The script that states that Rightmarch is “working to defeat

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<sup>10</sup> Hillary Clinton’s campaign states that she ceased being a presidential candidate on June 29, 2008, though she was still a candidate for reelection to the U.S. Senate for 2012.

<sup>11</sup> The vendor invoiced Rightmarch \$2,109,465 for calls during this period.



politicians like Hillary Clinton and Barack Obama” was used from February 16, 2008 through May 31, 2008.<sup>12</sup> The script that states that Rightmarch is “working to defeat politicians like Barack Obama” was used from June 1, 2008 through November 3, 2008.<sup>13</sup> Election Day was November 4, 2008.

Simply put, Rightmarch’s arguments about express advocacy advance one proposition: that communications by a political committee that explicitly exhort the listener to tell their friends to oppose named candidates for President nevertheless are not express advocacy if their principal purpose is to raise money. We are aware of no authority for this proposition.

We therefore conclude that the solicitations made in connection with two of these three scripts expressly advocate the defeat of a clearly identified candidate. 11 C.F.R. § 100.22(a). We further conclude that the solicitations made in connection with the third script expressly advocate the defeat of two clearly identified candidates (Hillary Clinton and Barack Obama). Costs associated with these solicitations must be reported as independent expenditures.<sup>14</sup> 2 U.S.C. § 434(b)(4)(H)(iii); 11 C.F.R. § 104.4(a). Additionally, appropriate 24/48-hour notices must be disclosed as required. 2 U.S.C. § 434(g); 11 C.F.R. §§ 104.4(b)(2) and 104.4(c).

## **2. Placement of Independent Expenditures Finding in the IAR**

In the IAR, the Audit staff recommended that Rightmarch provide evidence to support the conclusion that the expenditures did not require reporting as independent expenditures or 24/48-hour notices, or amend the reports to disclose the independent expenditures correctly. Additionally, the Audit staff recommended that Rightmarch submit and implement revised procedures for reporting independent expenditures.

In Rightmarch’s response to the IAR, counsel for Rightmarch requested that the IAR be revised to delete this finding. Rightmarch’s Resp. at 4-5. Counsel for Rightmarch asserts that Commission Directive 70 requires the finding to be moved to the “Additional Issues” section of the IAR because the Commission “deadlocked” when it considered its legal question submitted pursuant to the Commission’s Policy Statement Establishing a Pilot Program for Requesting Consideration of Legal Questions by the Commission, 75 Fed. Reg. 42,088-89 (July 20, 2010). *Id.*

Commission Directive 70 does not require, or even authorize, the recommended finding at the IAR stage to be moved to the “Additional Issues” section of the IAR. Rather, Commission

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<sup>12</sup> The vendor invoiced Rightmarch \$49,497.50 for calls during this period.

<sup>13</sup> The vendor invoiced Rightmarch \$57,410 for calls during this period.

<sup>14</sup> In fact, Rightmarch reported approximately \$563,000 in fundraising solicitations as independent expenditures during the 2007-2008 election cycle. We understand, however, that there may be factual and practical issues in determining the costs associated with the solicitations that constitute independent expenditures, due in part to the state of Rightmarch’s records.

Directive 70 requires that after the Commission has voted on the Draft Final Audit Report, “[f]or any recommended finding that does not receive four or more votes either approving or rejecting the recommendations, the Audit Division will move the discussion [in the Proposed Final Audit Report] to an ‘Additional Issues’ section.”<sup>15</sup> Furthermore, the Commission’s procedures enabling persons and entities to Request Consideration of Legal Questions by the Commission specifically provides that “if within 60 business days of the filing of a request for consideration, the Commission has not resolved the issue or provided guidance on how to proceed with the matter by the affirmative vote of four or more Commissioners, the [“Office of Compliance,” which includes the Audit Division] may proceed with the matter.” 75 Fed. Reg. at 42,089.<sup>16</sup>

After the Commission was unable to resolve the issue or provide guidance pursuant to its Policy, the Audit Division proceeded. *Id.* The Audit Division drafted an IAR that included the recommended finding pertaining to the independent expenditures, and consistent with our memorandum to the Commission, dated March 14, 2011. The Commission approved the IAR, including this recommended finding. This finding is included again in the DFAR, pursuant to the procedures in Commission Directive 70. The Commission will have the opportunity to vote on this recommended finding again when the Audit Division submits the ADRM to the Commission. Commission Directive 70.

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<sup>15</sup> Audit Reports are drafted at different stages and in chronological order as the Interim Audit Report, the Draft Final Audit Report, the Proposed Final Audit Report, and the Final Audit Report. Commission Directive 70. Additionally, a person or entity may seek Commission consideration of a legal question earlier in the audit process under the Commission’s Program for Requesting Consideration of Legal Questions. Policy Statement Regarding a Program for Requesting Consideration of Legal Questions by the Commission, 76 Fed. Reg. 45,798-99 (Aug. 1, 2011).

<sup>16</sup> The new program is identical on this point, allowing the Office of Compliance to proceed when the Commission has not, within 60 business days, resolved or provided guidance by four or more affirmative votes of Commissioners. Policy Statement Regarding a Program for Requesting Consideration of Legal Questions by the Commission, 76 Fed. Reg. 45,798, 45,799 (Aug. 1, 2011).