



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

May 14, 2012

MEMORANDUM

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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.ccm 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).¹ 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

¹ 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 ¶ 3.3-4. 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.² 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.”).

² 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).³ 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.

³ 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.⁴ 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

⁴ 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 \$31,595.⁵ *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, 2010.⁶ 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

⁵ 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.

⁶ 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.⁷ 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

⁷ 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.⁸ 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.⁹ 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

⁸ We have no information that the communications were coordinated with any candidate.

⁹ 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 fail 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, 2007.¹⁰ 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, 2008.¹¹ The script that states that Rightmarch is “working to defeat

¹⁰ 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.

¹¹ The vendor invoiced Rightmarch \$2,109,463 for calls during this period.

politicians like Hillary Clinton and Barack Obama” was used from February 16, 2008 through May 31, 2008.¹² The script that states that Rightmarch is “working to defeat politicians like Barack Obama” was used from June 1, 2008 through November 3, 2008.¹³ 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.¹⁴ 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

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

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

¹⁴ 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.”¹⁵ 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 42,089.¹⁶

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.

¹⁵ 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).

¹⁶ 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).