



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

RECEIVED
FEDERAL ELECTION
COMMISSION
SECRETARIAT

1 2013 FEB 14 A 10: 15

February 14, 2013

MEMORANDUM

AGENDA ITEM

To: The Commission

Through: Alec Palmer *AP*
Staff Director

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

For Meeting of 2-14-13

SUBMITTED LATE

Tom Hintermister *TH*
Assistant Staff Director
Audit Division

Alex R. Boniewicz *AB*
Audit Manager

Marty Favin *MLF*
Audit Manager

By: Rhonda Gillingwater *Ryby*
Lead Auditor

Subject: Proposed Final Audit Report on Rightmarch.com PAC, Inc. (A09-25)

Attached for your approval is the subject report with Commission edits.

Attachment:
Proposed Final Audit Report on Rightmarch.com PAC, Inc.



Proposed Final Audit Report 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.¹ 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 matter 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 chart on Committee Organization, p. 2.

Financial Activity (p. 2)

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

Commission Finding (p. 3)

- Misstatement of Financial Activity

Additional Issues (p.3)

- Extension of Credit by a Commercial Vendor (Issue 1)
- Reporting Payments for Communications (Issue 2)

¹ 2 U.S.C. §438(b).

Proposed Final Audit Report on RIGHTMARCH.COM PAC INC

(January 1, 2007 - December 31, 2008)



Table of Contents

| | Page |
|---|-------------|
| Part I. Background | |
| Authority for Audit | 1 |
| Scope of Audit | 1 |
| Request for Early Commission Consideration of Legal Questions | 1 |
| Audit Hearing | 1 |
| Part II. Overview of Committee | |
| Committee Organization | 2 |
| Overview of Financial Activity | 2 |
| Part III. Summaries | |
| Commission Finding | 3 |
| Additional Issues | 3 |
| Part IV. Commission Finding | |
| Misstatement of Financial Activity | 4 |
| Part V. Additional Issues | |
| Issue 1. Extension of Credit by a Commercial Vendor | 6 |
| Issue 2. Reporting Payments for Communications | 14 |

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 whether 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. First, RMC questioned whether certain fees represented an extension of credit resulting in in-kind contributions and reportable debt. (See Finding 2.) Second, RMC questioned 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, the Audit staff included these matters in this report.

Audit Hearing

RMC declined the opportunity for an audit hearing before the Commission.

Part II

Overview of Committee

Committee Organization

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

Overview of Financial Activity (Audited Amounts)

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

Part III Summary

Commission Finding

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 its 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.

In its response to the Draft Final Audit Report, RMC concurred that it had misstated its activity and noted it would work with the Audit staff to file amended disclosure reports. To date, no amendments have been filed.

The Commission approved the finding that RMC misstated receipts and disbursements for calendar years 2007 and 2008. (For more detail, see p. 4.)

Additional Issues

Issue 1. Extension of Credit by a Commercial Vendor

The Audit staff initially identified a vendor appearing to have extended credit to RMC outside of its normal course of business and not making commercially reasonable attempts to collect \$1,655,327 for services rendered. After audit fieldwork, the Audit staff concluded that RMC had demonstrated that it had not received an impermissible extension of credit but recommended that RMC report debts relating to the agreement. The Commission could not reach consensus on whether RMC demonstrated that the terms of the contract are in the normal course of the vendor's business or if weekly statements received from the vendor reflected debt. Thus, the Commission did not approve, by the required four votes, the Audit staff's conclusion that RMC had demonstrated that the terms of the vendor contract were in the normal course of business or the recommendation that the disclosure of debts of \$1,655,327 was required.

Pursuant to Commission Directive 70,² matters not approved by the required four votes are discussed in the "Additional Issues" section.
(For more detail, see p. 6.)

Issue 2. Reporting Payments for Communications

With respect to the expenditures, totaling \$2,172,135, identified by the Audit staff as appearing to meet the definition of an independent expenditure, the Commission could

² Available at http://www.fec.gov/directives/directive_70.pdf.

not reach a consensus on whether these communications contained express advocacy and should be reported as independent expenditures. Thus, the Commission did not approve, by the required four votes, the Audit staff's recommendation that payments for these communications required reporting as independent expenditures. (For more detail, see p.14.)

Pursuant to Commission Directive 70, matters not approved by the required four votes are discussed in the "Additional Issues" section.

Part IV

Commission Finding

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 its 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.)

In its response to the Draft Final Audit Report, RMC concurred that it had misstated its activity and noted it would work with the Audit staff to file amended disclosure reports. To date, no amendments have been filed.

The Commission approved the finding that RMC misstated receipts and disbursements for calendar years 2007 and 2008.

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> |
| Understatement of Receipts | <u>\$ 23,940</u> |

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.

| 2008 Activity | | | |
|--|-----------------|---------------------|-------------------------|
| | Reported | Bank Records | Discrepancy |
| 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> |
| Net Understatement of Disbursements | <u>\$ 9,889</u> |

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 Audit staff 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, RMC should 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 with regards to 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.

D. Draft Final Audit Report

The Draft Final Audit Report noted that RMC had not amended its reports to correct the misstatements.

E. Committee Response to the Draft Final Audit Report

In response to the Draft Final Audit Report, RMC concurred that it had misstated its activity and noted it would work with the Audit staff to file amended disclosure reports. To date, RMC has not filed any amendments.

Commission Conclusion

On October 18, 2012, the Commission considered the Audit Division Recommendation Memorandum in which the Audit staff recommended that the Commission adopt a finding that RMC misstated its financial activity for calendar years 2007 and 2008.

The Commission approved the Audit staff's recommendation.

Part V Additional Issues

Issue 1. Extension of Credit by a Commercial Vendor

Summary

The Audit staff initially identified a vendor appearing to have extended credit to RMC outside of its normal course of business and not making commercially reasonable attempts to collect \$1,655,327 for services rendered. After audit fieldwork, the Audit

staff concluded that RMC had demonstrated that it had not received an impermissible extension of credit but recommended that RMC report debts relating to the agreement. The Commission could not reach consensus on whether RMC demonstrated that the terms of the contract are in the normal course of the vendor's business or if weekly statements received from the vendor reflected debt. Thus, the Commission did not approve, by the required four votes, the Audit staff's conclusion that RMC had demonstrated that the terms of the vendor contract were in the normal course of business or the recommendation that the disclosure of debts of \$1,655,327 was required.

Pursuant to Commission Directive 70, this matter is discussed in the "Additional Issues" section.

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 paid. 11 CFR §100.52(a) and (d).

B. Contributions by a Limited Liability Company (LLC). An LLC not electing treatment as corporation under federal tax law or not having 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 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 IRS 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 that are owed by or to a political committee and remain outstanding shall be reported continuously 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 an LLC that may have extended credit to RMC outside the normal course of business by allowing invoices to remain outstanding for a considerable length of time³. The terms of the contract between RMC and this vendor, Political Advertising (PA), stated, "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 reported only amounts paid against invoices. RMC did not consider the majority of the outstanding amounts reportable as debt owed because the terms of the contract state that RMC was responsible only up to the amounts raised by the fundraising service⁴. During fieldwork, the Audit staff

³ PA is a division of Political Call Center, LLC; an Arizona limited liability company that files taxes as a partnership.

⁴ 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

questioned whether \$1,650,327 (\$1,655,327 - \$5,000 = \$1,650,327) should be considered an excessive in-kind contribution. Audit staff noted that, during fieldwork, RMC provided no evidence that PA made commercially reasonable attempts to collect this amount. Audit staff discussed this matter with the RMC representatives during fieldwork and 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 “an ever-changing weekly contingency fee” constituted reportable debt, whether the terms of the contract resulted in an extension of credit, or, alternatively, whether the terms of the contract resulted in an in-kind contribution. Specifically, RMC requested that the Commission consider the following:

- First, that the weekly contingency fees do not constitute reportable debt. RMC asserted that neither the Act nor the Commission’s regulations define the term “debt.” RMC asserted that, in prior 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.” As such, RMC believed 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 5635⁵ (Conservative Leadership PAC) and contends 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 terminated the contract prior to August 15, 2012.
- Third, the Request asserted that the contract between RMC and PA was made in the ordinary course of business and that this type of contract is a fairly standard contract in the political industry.

The Office of General Counsel (OGC) considered RMC’s position and in its memorandum to the Commission⁶ concluded that the contract at issue was a “no risk” or “limited risk” contract that may result in in-kind contributions to RMC from PA. OGC

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.

⁵ The Commission has specifically addressed “no risk” or “limited risk” fundraising agreements like the one at issue here in enforcement matters and advisory opinions through 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.

⁶ 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.

also concluded that fees and expenses resulting from such a contract were reportable as debts. However, OGC noted that there was little information at that time about the presence or absence of the safeguards⁷ 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 staff 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 recommended that RMC provide documentation, to include statements from PA that demonstrated 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, RMC was requested to 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. The Interim Audit Report also recommended that RMC 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 a response from PA and fundraising contracts from telemarketing vendors similar to PA.

This submission highlighted three aspects of the contract with RMC 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.

- **Profitability**

The submission 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 \$1,650,429.27 in total revenue and a cash profit of \$57,073.43 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 (\$0.10/name) of such names to be \$31,596.90, although PA's Counsel

⁷ 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.

stated that the actual value is likely much higher and the estimate reinforces the agreement's profitability to date.

- **Conformity**

The submission filed by PA stated that PA offered its telemarketing fundraising services to RMC on the same general contract terms that were offered to PA's 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 PA clients.

Counsel for PA 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 fiduciarily 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, which are the property of PA and may be used by PA without restriction in the future. PA placed a conservative value of \$31,595.90 on this property.

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 submission 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 PA stated that PA was able, due to the live, real-time nature of the telemarketing program, to monitor the program's profitability, and that

PA had sole discretion to stop the effort the moment the results veered 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 percent 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 it provided contracts from similar vendors, PA did not provide, for this review, any additional contracts that it had with its other clients; rather, RMC provided an affidavit from the president of PA attesting it offered similar terms to its other clients. 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. However, 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 the agreement, and for a period of 180 days after termination, appear to provide some of the necessary safeguards mentioned by the Commission. Based on the documentation provided, it does appear that these types of contracts may be fairly standard in the industry.

Based on the additional information provided in response to the Interim Audit Report, the Audit staff concluded that RMC demonstrated that PA extended credit in the ordinary course of business and thus did not make an excessive in-kind contribution.

The Audit staff further concluded that the outstanding fees and expenses listed on the weekly invoices totaling \$1,524,657 were debts subject to the reporting requirement of 11 C.F.R § 104.11. The Audit staff opined that the Commission has consistently treated such expenses in these types of arrangements as extensions of credit by vendors and as a

type of debt, citing MUR 5635 (Conservative Leadership Fund). According to Audit staff, 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. The Audit staff noted that, at the termination of the contract, RM could seek to forgive the reported debt following Commission procedures for debt termination.

E. Draft Final Audit Report

The Draft Final Audit Report noted the various reasons RMC provided to dispute the extension of credit finding. It also noted that in the view of the Audit staff the commercial vendor did not make an impermissible extension of credit to RMC; the Audit staff stated, however, that RMC should have disclosed debts arising from the weekly invoices.

F. Committee Response to the Draft Final Audit Report

In its response to the Draft Final Audit Report, RMC acknowledged that in the view of the Audit staff, 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.

Commission Conclusion

On October 4, 2012, October 18, 2012, and November 18, 2012, the Commission considered the Audit Division Recommendation Memorandum in which the Audit staff concluded that there was not an impermissible extension of credit by the vendor and recommended that the Commission adopt a finding that RMC failed to disclose debts totaling \$1,524,657. The Commission did not approve the recommended finding by the required four votes. Three Commissioners voted to approve the finding. Three Commissioners did not vote to approve the finding. These Commissioners indicated that the “invoices” at issue were properly viewed as status reports that did not reflect reportable debt, and expressed concerns that if the debt was contingent, it may not require disclosure.

A Commissioner subsequently moved to approve a finding solely that there was not an impermissible extension of credit by the vendor. The Commission did not approve this finding by the required four votes. Some Commissioners voted to approve the finding. Other Commissioners did not vote to approve the finding because they did not view this issue as severable from the issue of whether RMC failed to disclose reportable debt.

Pursuant to Commission Directive 70, this matter is discussed in the “Additional Issues” section.

Issue 2. Reporting Payments for Communications

Summary

With respect to the expenditures, totaling \$2,172,135, identified by the Audit staff as appearing to meet the definition of an independent expenditure, the Commission could not reach a consensus on whether these communications contained express advocacy and should be reported as independent expenditures. Thus, the Commission did not approve, by the required four votes, the Audit staff's recommendation that payments for these communications required reporting as independent expenditures.

Pursuant to Commission Directive 70, this matter is discussed in the "Additional Issues" section.

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 20th 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. RMC did file 24/48-hour notices, but the notices were filed based on payment date rather than on the date of dissemination. As a result, the notices did not cover amounts invoiced past September 2007. A review of the phone scripts, follow-up letters and invoices for these independent expenditures revealed the following:

- 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 \$1,892,571⁸ 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 purpose of the contract between PA and RMC was for PA to contact members of the general public individually 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." RMC's Counsel also pointed out that the entire cost structure of the contract to RMC was based on the funds raised by the telemarketing and mail program. RMC's Counsel discussed the content of the four telemarketing scripts and indicated they were typical of fundraising scripts used in the political industry. According to RMC's Counsel, the scripts:

- Ask the listener to express an opinion on a public issue (in this case, the seriousness of illegal immigration);

⁸ This amount differs from the preceding figure 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 documentation to Audit staff to explain how it calculated this debt and why it was excluded from disclosure reports in 2009.

- 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.

RMC's Counsel 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;⁹
- Make any comparison between candidates; or
- Repeat any candidate's slogans or messages.

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

In closing, RMC's Counsel 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,¹⁰ concluded that to the extent that these solicitations expressly advocated the election or defeat of a clearly identified candidate, they must be reported as independent expenditures and that appropriate 24/48-notices must be disclosed. 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.

⁹ RMC's Counsel points out that, according to RMC's calculations, 93 percent of the calling scripts were used in 2007, a non-election year.

¹⁰ 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. 10.

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 indicated that these notices were not necessary.

The Audit staff recommended that RMC take the following action:

- 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 Issue section of the final audit report approved by the Commission. Given RMC’s objection to the finding, no action was taken with respect to the Audit staff’s recommendations.

E. Draft Final Audit Report

The Draft Final Audit Report noted the various reasons RMC provided to dispute this issue and its request that this finding be moved to the Additional Issue section of the audit report.

F. Committee Response to the Draft Final Audit Report

In response to the Draft Final Audit Report, RMC stated that it had disputed this issue throughout the audit process, including through 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 Issue” section at the end of the audit report.

Commission Conclusion

On October 4, 2012 and again on October 18, 2012, the Commission considered the Audit Division Recommendation Memorandum in which the Audit staff recommended that the Commission adopt a finding that RMC failed to file notices and properly disclose independent expenditures.

With respect to the expenditures, totaling \$2,172,135, identified by the Audit staff as appearing to meet the definition of an independent expenditure, the Commission could not reach a consensus on whether these communications contained express advocacy and should be reported as independent expenditures. The Commission did not approve, by the required four votes, the Audit staff's recommended finding that payments for these communications required reporting as independent expenditures. Some Commissioners voted to approve the finding. Other Commissioners did not approve the finding. One of these Commissioners noted that these scripts could be viewed as supporting or opposing issues rather than candidates.

Pursuant to Commission Directive 70, this matter is discussed in the "Additional Issues" section.