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December 12, 2011

Tom Hintermister
Assistant Staff Director, Audit Division
Federal Election Commission
999 E Street, NW
Washington, D.C. 20463

Re: Submission of Political Call Center, LLC in Response to the Interim Audit Report Concerning Rightmarch.com PAC, Inc.

Dear Mr. Hintermister:

On October 25, 2011, the Audit Division of the Federal Election Commission ("FEC" or "Commission") issued an Interim Audit Report ("IAR") concerning Rightmarch.com PAC, Inc. ("Rightmarch"). In the IAR, the Audit Division contends that an August 20, 2007 fundraising contract between Rightmarch and our client Political Call Center, LLC (d.b.a. "Political Advertising") resulted in an impermissible extension of credit and an excessive in-kind contribution by Political Advertising to Rightmarch. The Audit Division expressed concern that Political Advertising "allow[ed] invoices to remain outstanding for a considerable length of time" and "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 $1,653,027." IAR at 6.

In issuing the IAR and in related documents, however, the Audit Division and the Office of General Counsel acknowledged that their initial assessment was based on "very little information" about Political Advertising's business and the fundraising contract between Political Advertising and Rightmarch. *See* Memorandum from Christopher Hughey, Acting General Counsel to the Commission, *Request for Early Commission Consideration of Legal Questions Arising in the Audit of Rightmarch.com PAC, Inc. (LRA 842)* 5 & n.5 (Mar. 14, 2011) ("*Audit Division Memorandum*"). In fact, the Audit Division noted that it would welcome "a record by Political Advertising or similar companies of the implementation of a program of similar structure and size in the ordinary course of business" as that contained in Political Advertising's August 20, 2007 fundraising contract with Rightmarch. *Id.*; *see also* IAR at 6, 9. This submission provides just such a record to the Audit Division.

As we detail below, Political Advertising's August 20, 2007 fundraising contract with Rightmarch is a percentage and performance-based agreement that, in accordance with the principles underlying many state fundraising laws, caps the amount of compensation that Political Advertising may receive for its services. The Rightmarch contract is consistent not only with Political Advertising's past practices and established norms in the fundraising industry, but also with prior Commission precedent permitting such contractual arrangements.

Furthermore, unlike other similar contracts previously scrutinized by the Commission, Political Advertising has actually made a profit on its contract with Rightmarch to date, with over $57,000 in profit coming from direct revenues and over $30,000 in estimated profit derived from the intellectual property acquired by Political Advertising in connection with the contract.

In addition, attached to this submission are 32 separate telemarketing fundraising contracts from many different vendors for both political and non-political clients. While the language and processes for calculating vendor compensation vary from contract to contract, each of these 32 agreements ultimately establishes a fee cap and contractually guarantees that vendor compensation will not exceed the proceeds that are generated by the telemarketing fundraising program. These 32 fundraising contracts clearly demonstrate that Political Advertising's contract with Rightmarch conformed to the usual and normal practice in Political Advertising's industry.

As is detailed below, contrary to the Audit Division's preliminary determination, Political Advertising did not impermissibly extend credit to Rightmarch during the course of the contract or allow invoices to remain outstanding for a commercially unreasonable length of time. Accordingly, the Audit Division should revise the IAR to remove its preliminary finding that Political Advertising made an impermissible extension of credit and excessive in-kind contribution to Rightmarch.

FACTUAL BACKGROUND

Established in September 2001, Political Advertising is an Arizona limited liability company that elects to be treated as a disregarded entity for federal tax purposes. *See* Ex. A (August 16, 2011 letter from Political Advertising's statutory

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agent, Michael H. Bate). Political Advertising provides telemarketing and follow-up direct mail services to help conservative organizations acquire new donors and raise funds to support their activities. At the same time, Political Advertising's fundraising programs enable organizations to cultivate lists of like-minded individuals and supporters who can be targeted for future voter education and outreach activities.

Consistent with its past and current practices, Political Advertising offered its telemarketing fundraising services to Rightmarch pursuant to the same general contract terms that the company has offered to each of its political and nonpolitical customers since Political Advertising's founding ten years ago. *See* Ex. B ¶ 3 (affidavit of Margaret DeMello, President of Political Call Center, LLC). On August 20, 2007, Rightmarch and Political Advertising entered into a contract for the provision of telemarketing and fundraising services; a copy of the contract between the parties is attached hereto as Exhibit C.

The contract specified that Political Advertising would send a weekly statement to Rightmarch for its services. Ex. C ¶ 5.2. On each statement, Political Advertising multiplied the number of completed calls by $2.50 to establish a total dollar figure for the covered period. *Id.* This amount was known as the "contingency fee cap" or the "fee cap provision."[1] *Id.* ¶ 5.2. Apart from this

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1 The contract described this figure as a "flat contingency fee rate." Ex. C ¶ 5.2. Regardless of the specific terminology used, the $2.50 figure was a fee cap. The actual amount owed by Rightmarch was a percentage-based amount. The contract stipulated that Political Advertising was to be paid 95% of the funds generated by the telemarketing program, up to the fee cap figure of $2.50 per call.

This $2.50 fee cap served as an important contractual safeguard for both Political Advertising and Rightmarch. On the one hand, the $2.50 figure functioned as a "cost-plus-plus" mechanism to protect Political Advertising. In the event that the client prematurely terminated the fundraising program, the contract stipulated that Rightmarch would owe an amount equal to the full fee cap, regardless of how much money the telemarketing program raised. On the other hand, the $2.50 figure protected Rightmarch by establishing a maximum ceiling that Rightmarch could be charged for fundraising services – i.e., a fee cap. If the fundraising program had been especially successful, Rightmarch would have reaped more financial benefits from that success than if the agreement called for Political Advertising to receive a flat, uncapped percentage of all revenues raised.

Hereinafter, this submission will refer to the value calculated using the $2.50 figure and disclosed on the weekly statements as the "fee cap."

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December 13, 2011

BY HAND DELIVERY

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Re: Response to Interim Audit Report of the Audit Division on Rightmarch.com PAC, Inc.

Dear Mr. Hintermister:

On October 25, 2011, the Audit Division of the Federal Election Commission ("FEC" or "Commission") issued an Interim Audit Report ("IAR") on Rightmarch.com PAC, Inc. ("Rightmarch") covering the period from January 1, 2007 through December 31, 2008. The Commission requested that Rightmarch respond to the IAR by November 28, 2011. On November 10, 2011, Rightmarch requested and the Commission granted a fifteen-day extension until December 13, 2011 so Rightmarch could consult with the committee's vendors in order to prepare a comprehensive response to the findings and recommendations of the IAR.

The Audit Division made three findings and recommendations with regard to Rightmarch. First, the Audit Division found that Rightmarch misstated its financial activity in both 2007 and 2008. IAR at 4-5. Second, the Audit Division questioned whether a campaign vendor had extended credit to Rightmarch outside the normal course of business by allowing invoices to remain outstanding for a considerable period of time. The Audit Division recommended that Rightmarch provide documentation from the vendor to demonstrate that the credit was extended in the normal course of the vendor's business. The Audit Division also recommended that Rightmarch amend its disclosure reports to reflect all debt owed to the vendor. IAR at 6-9. Finally, the Audit Division found that Rightmarch did not properly disclose independent expenditures during the audit period. IAR at 9-12.

Rightmarch concurs with the Audit Division's finding that Rightmarch misstated its financial activity in 2007 and 2008 and will comply with the Audit Division's recommendation to amend its disclosure reports to correct the misstatements.

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Rightmarch's principal vendor, Political Call Center, LLC ("PCC"), has filed a separate response to the IAR demonstrating conclusively that it did not extend credit to Rightmarch outside the normal course of business by allowing invoices to remain outstanding for an unreasonable length of time. The PCC response demonstrates that the Audit Division seriously misconstrued both the contract between Rightmarch and PPC and the weekly statements from PCC to Rightmarch. In fact, Rightmarch never incurred <u>any</u> debt to PCC. Rightmarch paid PCC in full and on time for all of the services provided to Rightmarch. Accordingly, Rightmarch requests that the IAR be revised to delete the findings that RCC made an impermissible extension of credit to Rightmarch and that Rightmarch failed to report debt owed to PCC.

Finally, Rightmarch continues to dispute the Audit Division's finding that it did not properly disclose independent expenditures during the audit period. The Audit Division's finding is dependent entirely on the legal question of whether or not telemarketing calls made by PCC to raise funds for Rightmarch constituted independent expenditures. As the Audit Division noted, this issue was the basis of a request by Rightmarch for early Commission consideration of a legal question. IAR at 11-12. The Commission, however, was unable to reach a conclusion with regard to this legal issue by the requisite four votes. Accordingly, Rightmarch requests that the IAR be revised to delete the finding that Rightmarch failed to adequately report independent expenditures during the audit period. Instead, in accordance with Directive 70, the discussion regarding Rightmarch's alleged failure to report independent expenditures should be moved to an Additional Issues section at the end of the IAR.

Rightmarch's response to each of the Audit Division's findings and recommendations appears in greater detail below.

Finding 1 – Misstatement of Financial Activity

The Audit Division reconciled Rightmarch's disclosure reports with bank records for calendar years 2007 and 2008. The Audit Division found that in calendar year 2007 Rightmarch understated receipts by $23,940. The failure to disclose these receipts also caused Rightmarch to understate its year-end cash-on-hand by $16,750. The Audit Division also found that in 2008 Rightmarch understated disbursements by $9,889, which also caused Rightmarch to understate its year-end cash-on-hand by $6,625. IAR at 4-5.

The Audit Division recommended that Rightmarch amend its reports to correct these misstatements 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. IAR at 5.

Rightmarch concurs with the Audit Division's findings and will comply with the Audit Division's recommendations.

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Finding 2 – Extension of Credit by a Commercial Vendor

The Audit Division included in the IAR a preliminary finding that PCC may have extended credit to Rightmarch outside the normal course of business by allowing invoices to remain outstanding for a considerable period of time resulting in an alleged excessive in-kind contribution of $1,655,327. IAR at 6. This preliminary finding appears to be based entirely on the Audit Division's misunderstanding of the fundraising contract between Rightmarch and PCC and the weekly statements provided to Rightmarch by PCC. IAR at 7.

Rightmarch disputed the Audit Division's interpretation of the contract and the weekly statements with Audit Division staff during audit fieldwork and at the exit conference. Following the exit conference, Rightmarch filed a Request for Early Consideration of Legal Questions pursuant to the Commission's Policy Statement Establishing a Pilot Program for Requesting Consideration of Legal Questions by the Commission, 75 Fed. Reg. 42088 (July 20, 2010). Rightmarch asked the Commission to determine whether the weekly contingency fee reflected on weekly statements sent by PCC to Rightmarch constituted a debt subject to the reporting requirements of 11 C.F.R. § 104.11. Rightmarch also asked whether the contract constituted an extension of credit under 11 C.F.R. § 116.3 or an in-kind contribution by PCC to Rightmarch under 11 C.F.R. § 100.52. Unfortunately, after considering the recommendations of the Office of General Counsel, the Commission was unable to reach a conclusion with regard to any of these questions by the requisite four votes.

In light of the failure of the Commission to resolve these outstanding legal questions, the Audit Division recommended that Rightmarch provide documentation from PCC demonstrating that no credit was extended other than in the normal course of PCC's business and did not represent an excessive in-kind contribution by PCC to Rightmarch. IAR at 9. Rightmarch did request such documentation and PCC has filed a twenty-page response to Finding 2, supported by an affidavit from Margaret DeMello, President of PCC, and thirty-four additional exhibits. *See* Submission of Political Call Center, LLC in Response to the Interim Audit Report Concerning Rightmarch.com PAC, Inc. (December 12, 2011)("PCC Submission").

The PCC Submission makes it abundantly clear that PCC never extended <u>any</u> credit to Rightmarch. PCC Submission at 8-9. The Audit Division's preliminary finding appears to be based on a misreading of the weekly statements sent by PCC to Rightmarch. The weekly statements were prepared by a third-party escrow company, Canyon State Servicing Co., LLC, using a standard format designed for real estate transactions. The $1,655,327 figure identified by the Audit Division as a possible excessive contribution from PCC to Rightmarch is, in fact, the maximum possible amount that PCC could have received from Rightmarch if the fundraising program had exceeded expectations. Unfortunately, this figure appears on the escrow company form under the heading "Principal Balance." The Audit Division apparently considered these

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weekly statements to be invoices and misinterpreted the "Principle Balance" heading to mean that this figure constituted a debt owed to PCC by Rightmarch. "The weekly statements from Political Advertising to Rightmarch were not 'invoices' because they did not represent a debt that was due and owing. Rather, these statements specified the maximum possible amount that Political Advertising could receive from Rightmarch for its services if the fundraising program was particularly successful. Under its agreement with Rightmarch, Political Advertising 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. In accordance with the terms of the contract, this is exactly what happened. . . .Political Advertising was paid in-full, on-time, every time for all of its services, in accordance with the contract." PCC Submission at 9.

In light of the PCC Submission, Rightmarch respectfully requests that the IAR be revised to delete the findings that PCC made an impermissible extension of credit to Rightmarch and that Rightmarch failed to report debt owed to PCC.

Finding 3 – Failure to File Notices and Properly Disclose Independent Expenditures

The Audit Division found that Rightmarch did not file 24- or 48-hour notices for independent expenditures totaling up to $139,067 and did not properly disclose independent expenditures totaling $2,172,135 on Schedule E. IAR at 9-11. The Audit Division's finding appears to be based on the Audit Division's determination that the scripts used in telemarketing calls to raise funds for Rightmarch constituted independent expenditures because they contained the words "defeat" and "oppose" and referred to one or more federal officeholders by name. IAR at 10.

Rightmarch disputed the Audit Division's interpretation of the fundraising scripts with Audit Division staff during audit fieldwork and at the exit conference. Following the exit conference, Rightmarch filed a Request for Early Consideration of Legal Questions pursuant to the Commission's Policy Statement Establishing a Pilot Program for Requesting Consideration of Legal Questions by the Commission, 75 Fed. Reg. 42088 (July 20, 2010). Rightmarch asked the Commission to determine whether the fundraising scripts that are primarily related to opposing the officeholders' positions on particular issues, such as immigration, in order to raise money for Rightmarch were required to be reported as independent expenditures under 2 U.S.C. § 431(17). Unfortunately, after considering the recommendations of the Office of General Counsel, the Commission was unable to reach a conclusion with regard to this question by the requisite four votes.

Given that the Commission appears to be deadlocked on this issue and there has been no change in the law since the Commission responded to Rightmarch's request for early consideration of legal questions on April 5, 2011, Rightmarch objects to this issue being included in the Audit Report as a finding of the Commission. Directive 70 states that for "any

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recommended finding that does not receive four or more votes either approving or rejecting the recommendation, the Audit Division will move the discussion to an 'Additional Issues' section. Each 'Additional Issue' will contain a brief summary of the facts, any applicable legal standards, a brief recitation of the Audit Division's recommendation, and a recitation of the vote on the recommended finding." FEC Directive on Processing Audit Reports at 4 (April 26, 2011). *See, e.g.*, Final Audit Report of the Commission on SEIU COPE at 4-5 (October 31, 2011)(discussing the Commission's failure to adopt a recommendation regarding the reporting of independent expenditures in the form of payments to individuals for door-to-door voter ID and get-out-the-vote efforts).

Accordingly, Rightmarch requests that the IAR be revised to delete the finding that Rightmarch failed to adequately report independent expenditures during the audit period. Instead, the discussion regarding Rightmarch's alleged failure to report independent expenditures should be moved to an Additional Issues section at the end of the IAR.

Sincerely,

Craig Engle

Brett G. Kappel