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

Why the Audit Was Done
Federal law permits the Commission to conduct audits and field investigations of any political committee that is required to file reports under the Federal Election Campaign Act (the Act). The Commission generally conducts such audits when a committee appears not to have met the threshold requirements for substantial compliance with the Act.[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 of the matters discussed in this report.

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

Financial Activity (p. 2)

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

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

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[1] 2 U.S.C. §438(b).

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Part I
Background

Authority for Audit

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

Scope of Audit

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

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

Request for Early Commission Consideration of Legal Questions

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

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

Part II
Overview of Committee

Committee Organization

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	
o Contributions from Individuals	684,675
Total Receipts	**$ 684,675**
Disbursements	
o Operating Expenditures	97,888
o Contributions to Political Committees	14,988
o Loan Repayments	2,500
o Independent Expenditures	563,277
Total Disbursements	**$ 678,653**
Cash-on-hand @ December 31, 2008	**$ 15,183**

Part III
Summaries

Findings and Recommendations

Finding 1. Misstatement of Financial Activity

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

Finding 2. Extension of Credit by a Commercial Vendor

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

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

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

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

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

Part IV
Findings and Recommendations

Finding 1. Misstatement of Financial Activity

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

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

Facts and Analysis

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

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

The understatement of receipts resulted from the following:

• Receipts deposited to operating account not reported	$ 22,208
• Unexplained difference	1,732
Understatement of Receipts	$ 23,940

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	152
Net Understatement of Disbursements	$ 9,889

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

B. Interim Audit Report & Audit Division Recommendation

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

The Interim Audit Report recommended that RMC:

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

C. Committee Response to Interim Audit Report

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

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

Finding 2. Extension of Credit by a Commercial Vendor

Summary

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

Legal Standard

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

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

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

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

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

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

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

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

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

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

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

Facts and Analysis

A. Facts

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

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

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[2] PA is a division of Political Call Center, LLC, an Arizona limited-liability company which files it taxes as a partnership.

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

B. Early Commission Consideration of Legal Questions

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

- First, RMC contended that the weekly contingency fees do not constitute reportable debt and neither the Act nor the Commission's regulations define the term "debt." Based on Advisory Opinions, the Commission "has long held that State law governs whether an alleged debt in fact exists, what the amount of the debt is and which persons or entities are responsible for paying a debt," RMC wrote. As such, RMC contended that there would be no debt to report until the termination of the contract between RMC and PA.

- Second, RMC mentioned a fundraising contract at issue in MUR 5635[4] (Conservative Leadership PAC) and contended that it was substantially different than the contract between RMC and PA. Specifically, according to RMC, the contract in MUR 5635 was truly "no-risk" since it provided that if sufficient funds were not raised, the committee would not be responsible for the debt. However, Counsel for RMC stated that the contract between RMC and PA provided that RMC would become obligated for all unpaid contingency fees if RMC were to terminate the contract prior to August 15, 2012.

- Third, the request explained that RMC and PA made the contract in the ordinary course of business and that this type of contract is a fairly standard contract in the political industry.

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

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

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

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

C. Interim Audit Report & Audit Division Recommendation

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

The Interim Audit Report included the following recommendations.

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

D. Committee Response to Interim Audit Report

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

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

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[5] 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.

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

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

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

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

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

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

  2. <u>Ownership of Intellectual Property Developed During the Fundraising Campaign</u>
     As mentioned earlier, the fundraising program on behalf of RMC also generated 35,089 donors' names, 37,845 unfulfilled pledge names, and 243,025 survey responder names through December 31, 2010 that are the

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

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

4. The Ability to Monitor Results of the Fundraising Program in Real Time
Counsel for RMC stated that PA was able, due to the live, real-time nature of the telemarketing program, to monitor the program's profitability and that it had sole discretion to stop the effort the moment the results trended toward becoming financially unproductive.

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

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

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

The Audit staff reviewed the documentation provided in response to the Interim Audit Report. Although contracts from similar vendors were provided, PA did not provide for this review any additional contracts that it had with its other clientele; rather, RMC provided an affidavit from the president of PA attesting to this. As such, the Audit staff cannot confirm that PA's contract with RMC was offered on the same terms as other PA clients, either political or non-political. The contracts provided are similar to PA's agreement with RMC and appear to demonstrate, in differing degrees, no risk or limited risk conditions. In addition, PA's ability to terminate the agreement with one-day notice and its requirement that the client maintain in place the collection facilities so that all proceeds generated as a result of PA's services during the term of this agreement, and for a period of 180 days after termination, appear to meet some of the necessary safeguards mentioned by the Commission. Because of this, it does appear that these types of contracts may be fairly standard in the industry. Based on the documentation provided, it appears that PA may have extended credit in the ordinary course of business and thus did not contribute an excessive in-kind contribution.

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

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

Summary

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

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

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

Legal Standard

A. Definition of Independent Expenditures. The term "independent expenditure" means expenditure by a person for a communication expressly advocating the election or defeat of a clearly identified candidate that is not made in coordination with any candidate or authorized committee or agent of a candidate. 11 CFR §100.16.

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

C. Last-Minute Independent Expenditure Reports (24-Hour Notices). Any independent expenditures aggregating $1,000 or more, with respect to any given election, and made after the 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(b) and 104.5(g)(1).

Facts and Analysis

A. Facts

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

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

- RMC did not file 24/48-hour notices for independent expenditures amounting to as much as $139,067 for the period December 24, 2007 through November 3, 2008; and

- RMC reported independent expenditures when the invoices were paid, either in part or in full. However, RMC made most of these payments weeks or months after the dissemination or phone-call dates. For expenditures totaling $2,172,135, RMC should have disclosed independent expenditures as memo entries on Schedule E, filed with reports covering the dates when the materials were disseminated, and reported $1,892,571[8] in corresponding debt on Schedule D.

B. Early Commission Consideration of Legal Questions

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

Counsel for RMC stated that the contract between PA and RMC is a fairly standard fundraising contract in the political industry and that the purpose of the contract is for PA to individually contact members of the general public by telephone and follow-up mail to identify voters, advocate issues and/or the election or defeat of candidates for federal office, provide political information and "at the same time, combine the function of donor acquisition and/or donor renewal as to advance the goals of RMC." Counsel for RMC also pointed out that the entire cost structure of the contract is based on the funds raised by the telemarketing and mail program. Counsel for RMC discussed the content of the four telemarketing scripts and indicated that they were typical of fundraising scripts used in the political industry. According to Counsel for RMC, the scripts:

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

- Repeatedly ask the listener to donate money to a campaign to stop illegal immigration;

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

- Ask the listener to tell their friends to oppose Hillary Clinton and Barak [sic] Obama.

[8]. This amount differs because RMC did acknowledge debt of $279,564 and filed Schedule D for this amount from the 2007 Year-End report until the 2008 Year-End report ($2,172,135 - $279,564 = $1,891,571). As stated in footnote 3, RMC stopped reporting this debt balance starting with the 2009 April Quarterly report. RMC did not provide the Audit staff with documentation to explain how this debt was calculated and why it was excluded from disclosure reports in 2009.

Counsel for RMC further explained that the scripts do not:

- mention any candidacy, party affiliation, public office, voting or any election;
- refer to anyone's character or fitness to hold office;
- run in close proximity to any election or were targeted to any particular state;[9]
- make any comparison between candidates; or
- repeat any candidate's slogans or messages.

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

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

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

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

C. Interim Audit Report & Audit Division Recommendation

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

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

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[9] Counsel for RMC pointed out that, according to RMC's calculations, 93% 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, page 10.

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

D. Committee Response to Interim Audit Report

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