FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

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MEMORANDUM

TO: The Commission

THROUGH: D. Alec Palmer
Acting Staff Director

FROM: Christopher Hughey
Acting General Counsel

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SUBJECT: Request for Early Commission Consideration of Legal Questions Arising in the Audit of Rightmarch.com PAC, Inc. (LRA 842)

I. INTRODUCTION

The purpose of this memorandum is to address a Request for Early Commission Consideration of Legal Questions by Rightmarch.com PAC, Inc. ("Rightmarch"), and make recommendations about how the Commission should direct the Audit Division to proceed with respect to these questions.

On April 8, 2010, the Commission voted to audit Rightmarch pursuant to 2 U.S.C. § 438(b). The Audit Division concluded its fieldwork and conducted an exit conference with Rightmarch on January 19, 2011. At this point the Audit Division has not prepared the Interim

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Audit Report ("IAR"), but on February 3, 2011, Rightmarch filed a Request for Early Commission Consideration of Legal Questions ("Request") pursuant to the Policy Statement Establishing a Pilot Program for Requesting Consideration of Legal Questions by the Commission, 75 Fed. Reg. 42,088 (July 20, 2010). In its Request, Rightmarch requested thirty additional days to "submit evidence and fully brief the Commission." On February 8, 2011, the Commission granted Rightmarch's Request, and on February 11, 2011, the Commission granted Rightmarch five additional days to file its supplemental request. On February 16, 2011, Rightmarch filed a supplemental Request for Consideration of Legal Questions Arising in the Audit of Rightmarch.com PAC, Inc. ("Supplemental Request"). Rightmarch seeks the Commission's consideration of two legal questions that the auditors have raised in the exit conference.

II. ANALYSIS

A. THE "EVER-CHANGING WEEKLY CONTINGENCY FEES" HERE APPEAR TO RESULT IN IN-KIND CONTRIBUTIONS AND ARE REPORTABLE DEBTS

The first question Rightmarch asks is whether a contract that provides for an "ever-changing weekly contingency fee" with a telemarketing firm constitutes an extension of credit under 11 C.F.R. § 116.3 or results in in-kind contributions by the telemarketing firm under 11 C.F.R. § 100.52.[1] Rightmarch also asks whether an "ever-changing weekly contingency fee" with a telemarketing firm is a debt subject to the reporting requirements of 11 C.F.R. § 104.11.

We conclude that the type of "no risk" or "limited risk" contract at issue here may result in in-kind contributions to Rightmarch from the telemarketing firm, and would result in in-kind contributions in the absence of any additional information. However, at this early stage of the audit process, Rightmarch may yet be able to provide information demonstrating that the contract has not resulted in any in-kind contributions. We also conclude that the type of "no risk" or "limited risk" fees and expenses resulting from such a contract are debts, and therefore must be reported to the Commission accordingly.

Rightmarch, a non-connected political committee, entered into a five year fundraising telemarketing contract with Political Advertising, a division of Political Call Center LLC, on August 20, 2007. Political Advertising charges Rightmarch a "flat contingency fee" of $2.50 per completed call, plus actual costs of associated activity such as sending a response card or accessing a call list. However, depending on developments over the course of the contract, Rightmarch may never be liable for all of these fees and expenses.

Under the contract, Rightmarch is guaranteed a minimum of five percent of the gross proceeds of the fundraising activity. Moreover, Rightmarch is only obligated to pay fees and

[1] Rightmarch did not ask this question in its initial Request, but did ask it in its Supplemental Request. Although the Commission did not formally vote on or grant Rightmarch's Supplemental Request, we are addressing this question as well because it is closely intertwined with the debt question.

expenses to the extent that Political Advertising receives funds in response to its fundraising efforts. If Political Advertising's fundraising efforts are not sufficient to cover a particular week's fees and expenses, Rightmarch still receives five percent of the gross fundraising proceeds, and the remaining proceeds go towards paying off the total amount of outstanding fees and expenses without requiring Rightmarch to pay the remaining balance from its own funds.

Political Advertising provides Rightmarch with a weekly invoice showing the fees and expenses for its services that week and the accumulated net balance of fees and expenses not covered by the proceeds of the fundraising project to date. However, under the terms of the contract, Rightmarch can *never be liable* for any of these unpaid fees or expenses unless it terminates the contract prior to its 2012 expiration date, in which case it becomes immediately liable for the full amount of fees and expenses accumulated to date. The contract itself refers to this arrangement as a "No Risk Guarantee."

As a result of this arrangement, the auditors have informed Rightmarch that they intend to include a finding in the IAR that Rightmarch had an outstanding debt to Political Advertising in the amount of $1,524,657.35 at the conclusion of the audit period. Rightmarch reported only a small portion of this amount as outstanding debt for this period.[2] The auditors have also informed Rightmarch that they may include a finding in the IAR that this arrangement resulted in in-kind contributions to Rightmarch from Political Advertising.

The Act defines a contribution as "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(8)(A)(i). Commission regulations further provide that an extension of credit to a political committee by a commercial vendor is a contribution unless the credit is extended in the ordinary course of business and on the same terms as extensions of credit to non-political debtors of similar risk and for an obligation of similar size. 11 C.F.R. §§ 100.55, 116.3(b). In determining whether an extension of credit was in the ordinary course of business, the Commission considers whether the vendor followed established procedures and past practices, whether the vendor received prompt payment in full for previous extensions of credit, and whether the extension of credit conformed to the usual and normal practice in the industry. 11 C.F.R. § 116.3(c). If a vendor extends credit and fails to make a commercially reasonable attempt to obtain repayment, a contribution will result. 11 C.F.R. §§ 100.55, 116.4(b)(2).

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. *See, e.g.*, MUR 5635 (Conservative Leadership PAC)

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

(addressing a "no risk" fundraising contract where the committee was not responsible for the costs of fundraising in excess of the money raised); AO 1991-18 (New York State Democratic Committee) (addressing a "limited risk" fundraising contract where the committee's full payment of the vendor's commissions was tied to the prospect that the fundraising would pay for itself over several years); AO 1979-36 (Committee for Fauntroy) (addressing a "limited risk" fundraising contract where the committee was only required to pay three-fourths of the total amount of contributions received irrespective of the actual amount of fees and expenses).[3] In doing so, the Commission has required committees to have safeguards in place to ensure that committees in fact pay for all of the costs of the fundraising programs. *See* MUR 5635 (Conservative Leadership PAC); AO 1991-18 (New York State Democratic Committee); AO 1979-36 (Committee for Fauntroy). Specifically, the Commission has focused on whether a committee would receive anything of value without timely and proper compensation first being paid to the fundraising firm and any third-party vendors. *See id.* Safeguards proposed by the Commission have included requiring advance deposits by a committee to reimburse vendors for potential shortfalls, limiting the term of the contract, or allowing vendors to terminate the contract early and demand full payment as a result of poor fundraising performance. *See id.*

For example, in MUR 5635 (Conservative Leadership PAC), the committee entered into a "no risk" contact with a fundraising firm. The arrangement provided that the committee would be responsible for the costs of fundraising only up to the amount of funds raised. The fundraising program was not sufficient to cover the vendors' expenses, and the fundraising firm made several disbursements to the committee directly out of the fundraising proceeds before the vendors' expenses were fully paid. Accordingly, the Commission concluded that this arrangement was not in the ordinary course of business and resulted in in-kind contributions from the fundraising firm and its third-party vendors.

Likewise, in AO 1991-18 (New York State Democratic Party), the committee proposed entering into a "Prospecting Program" where the costs of fundraising would be paid out of fundraising proceeds and the committee would be responsible for the costs of fundraising only up to the amount of funds raised. Moreover, under the first year of the program, the vendor would provide the committee with net revenues even when the vendor had not yet been fully paid for an earlier round of solicitations. The Commission disapproved of the program because "regardless of the degree of success of the effort to raise funds, the committee would retain contribution proceeds while giving up little, or the committee would assume little to no risk with the vendor bearing all, or nearly all, the risk." The Commission noted that, absent further evidence that the arrangement was made in the ordinary course of business and on the same terms as extensions of credit to non-political debtors of similar risk and for an obligation of

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

similar size, or absent an advance deposit by the committee sufficient to cover the expenses of the program, the program did not have sufficient safeguards to ensure it would not result in in-kind contributions to the committee from the fundraising firm.

Here, like in MUR 5635 and AO 1991-18, the terms of the agreement provide that Rightmarch receives five percent of the gross fundraising profits regardless of whether Political Advertising is paid in full for its services. Moreover, Rightmarch has paid only a small fraction of the total $1,524,657.35 in outstanding fees and expenses listed on the weekly invoices, and by the terms of the agreement will never have to pay any of this amount, or any additional fees and expenses that may accrue in the future, if the fundraising venture does not pay for itself. In the absence of any other information, these facts strongly suggest that the arrangement between Rightmarch and Political Advertising is one in which "the committee would retain contribution proceeds while giving up little, or assume little to no risk with the vendor bearing all, or nearly all the risk." *See* AO 1991-18 (New York State Democratic Party). Without appropriate safeguards, such arrangements would result in in-kind contributions to Rightmarch from Political Advertising.

We have very little information at this time about the presence or absence of the "safeguards" that the Commission has identified in relevant enforcement matters or advisory opinions. However, Rightmarch may yet be able to provide information demonstrating that the contract has not resulted in any in-kind contributions. For example, Rightmarch could provide 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.[4] *See* 11 C.F.R. §§ 100.55, 116.3(b); MUR 5635 (Conservative Leadership PAC); AO 1991-18 (New York State Democratic Committee); AO 1979-36 (Committee for Fauntroy). Alternatively, Rightmarch could provide evidence that it, in practice, utilized certain safeguards to ensure its fees and expenses were paid, such as paying an advance deposit to Political Advertising or ensuring that the fair market value of donor lists Political Advertising obtained as a result of the fundraising program were sufficient to cover the costs of its fees and expenses.[5] *See* AO 1991-18 (New York State Democratic Committee). Rightmarch did not address this issue at length in its Request or Supplemental Request, but could do so in response to the IAR.

In its request, Rightmarch argues that the "no risk" contract at issue in MUR 5635 is distinguishable from the agreement here because the agreement contains a clause that allows Rightmarch to terminate, causing the "No Risk Guarantee" clause to become null and void and obligating Rightmarch to pay the full amount of fees and expenses owed. *See* Supplemental

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[4] In its Supplemental Request, Rightmarch states that the contract was made in "the usual and normal practice in the political fundraising industry." The Commission's treatment of these types of "no risk" fundraising agreements, however, would suggest otherwise, and Rightmarch has not provided any documentation or examples supporting this claim.

[5] Under the terms of the contract, Political Advertising has a right to the donor lists acquired through the program on behalf of Rightmarch as "good and valuable consideration and a material inducement to Political Advertising" to enter into the contract. We have no information at this time, however, about the value of any list developed.

Request at 5. This clause, however, does not appear to create any additional "risk" for Rightmarch or provide a safeguard to ensure that Rightmarch pays for all of the costs of the fundraising programs. To the contrary, the clause disincentivizes Rightmarch from terminating the contract before its five year term has expired by requiring it to pay the full amount of fees and expenses accrued if it does terminate. This in turn ensures that Rightmarch will not be required to pay the full amount of fees and expenses listed on the weekly invoice over an extended period of time. The termination clause provides no mechanism through which Political Advertising can ensure that it is paid for the advanced costs of fundraising services. Although Political Advertising also has the ability to terminate the contract, it cannot unilaterally demand full payment of its fees and expenses as a result of poor fundraising performance.

Rightmarch also argues that the Commission has only found a fundraising agreement to result in in-kind contributions where the vendor "forgave, in whole or in part, outstanding debts after they had already been incurred," and because the Contract does not create any debt under State law, there is no such "debt forgiveness" by Political Advertising. *See* Supplemental Request at 5 (citing MUR 5635 (Conservative Leadership PAC) and MUR 5173 (Republicans for Choice PAC)). The two enforcement matters Rightmarch cites, however, do not stand for this proposition. MUR 5635 involved a number of transactions both by the principal vendor, American Target Advertising, and third-party vendors. While debt forgiveness by American Target and the third-party vendors accounted for some of the in-kind contributions at issue in that case, others resulted from the "no-risk" nature of the contract between American Target and Conservative Leadership. And MUR 5173 principally involved multiple renegotiations, and eventual forgiveness, of debt owed to a third-party lender, but did not address the issue of "no risk" fundraising contracts or dealings. Nothing in either MURs 5635 and 5173 or AO 1991-18 indicates that there *must* be an affirmative act of "debt forgiveness" by a vendor before a "no risk" or "limited risk" arrangement can result in a contribution.

Finally, with respect to the debt question, based on the above analysis, we conclude that all $1,524,657.35 in outstanding fees and expenses listed on the weekly invoices are debts subject to the reporting requirements of 11 C.F.R. § 104.11. As discussed above, in analyzing whether these types of arrangement result in in-kind contributions, the Commission has consistently treated them as extensions of credit by vendors. *See, e.g.*, MUR 5635 (Conservative Leadership PAC); MURs 5069 and 5132 (Comite Acevedo Vila Comisionado 2000); MUR 4742 (Juan Vargas for Congress); AO 1991-18 (New York State Democratic Committee); AO 1979-36 (Committee for Fauntroy). Commission regulations treat extensions of credit as a type of debt. *See* 11 C.F.R. §§ 100.52, 100.55, 116.3; AO 1991-18 (New York State Democratic Committee) (concluding that extensions of credit made by a vendor would result in debt). Political committees are required to continuously report all debts and obligations until they are extinguished. 11 C.F.R. § 104.11(a). Commission regulations do not base the reporting of debts and obligations on the amount that a committee will ultimately pay to a creditor, but rather the approximate amount or value of the debt at the time the report is filed. *See* 11 C.F.R. § 104.11(b) (requiring committees to estimate the amount of a debt or obligation where the exact amount is unknown and report that figure); 11 C.F.R. § 116.10 (requiring committees to report debt even if it is disputed); 11 C.F.R. § 116.10(a) (permitting committees to note in their reports that the disclosure of debt does not constitute an admission of liability or a waiver of any claims

the committee may have against the creditor); *see also* AO 1999-38 (Calvert for Congress) (noting that a committee was correct in reporting disputed debts even where the vendors no longer existed or were legally barred from collecting that debt).

In its request, Rightmarch cites to several advisory opinions and a Fifth Circuit case for the proposition that "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 are responsible for paying a debt." *See* Request at 4. Rightmarch argues that under Arizona State law, the Contract does not result in a debt until the Contract is terminated. *See id.* (citing *Carrick v. Sturtevant*, 234 P. 1080 (Ariz.1925)). The advisory opinions and caselaw that Rightmarch cites for this proposition, however, do not address the issue of whether an alleged debt exists for the purposes of the Commission's reporting requirements. Rather, they simply stand for the proposition that the Act does not preempt or bar the application of State law with respect to any claims of liability for a campaign debt in private litigation. *See* AO 1995-7 (Key Bank of Alaska) (concluding that the Act's debt settlement provisions do not preempt a bank lender's claim against a candidate or his campaign under State law); AO 1989-2 (Baker for Congress) (concluding that the Act and Commission regulations do not affect whether a committee is required to pay a judgment under State law); AO 1988-44 (Bonner for Congress) (concluding that the running of a State statute of limitation on a debt does not affect a committee's ability to terminate); AO 1981-42 (Consulting Associates) (declining to determine the obligations and rights between two parties under a disputed contract); AO 1979-1 (Friends of Otterbacher) (declining to address a hypothetical judgment under State law); AO 1975-102 (Monahan for Congress) (concluding that the Act would not affect a committee's obligations to settle debts in bankruptcy); *Karl Rove & Co. v. Thornburgh*, 39 F.3d 1273, 180-81 (5th Cir. 1994) (concluding that the Act does not preempt a claim against a candidate or his campaign under State law). Therefore, the rule of law cited by Rightmarch is not applicable to the issue presented in this case. In fact, the cited advisory opinions and caselaw support the proposition that the parties' actual liability under State law does not affect the application of the Act or Commission regulations with respect to Rightmarch's reporting requirements.

B. FUNDRAISING COMMUNICATIONS AS INDEPENDENT EXPENDITURES

The second question Rightmarch asks is whether the expenses for fundraising solicitations must also be reported as independent expenditures. We conclude 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. *See* 2 U.S.C. § 434(b)(4)(H)(iii); 11 C.F.R. § 104.4(a). We further conclude that appropriate 24/48-hour notices must be disclosed as required. *See* 2 U.S.C. § 434(g); 11 C.F.R. §§ 104.4(b)(2), 104.4(c).

Rightmarch submitted to the Audit Division four scripts that were developed for use by Political Advertising in telemarketing phone calls.[6] After an introduction, screening questions ask whether the listener considers illegal immigration a serious problem. Calls to those who did not were terminated. Those who did heard additional content. In one of the scripts, the additional content contains no language advocating the election or defeat of any candidate; it is therefore not reportable as an independent expenditure. Three of the four scripts contain language advocating the defeat of Hillary Clinton, Barack Obama, or both Hillary Clinton and Barack Obama. Specifically, the other scripts state "we're working to defeat politicians like [Barack Obama/Hillary Clinton/Barack Obama and Hillary Clinton], who support AMNESTY for illegal aliens!" as well as "and please tell your friends to **OPPOSE** [Barack Obama/Hillary Clinton/Barack Obama and Hillary Clinton]."

The communications in the three scripts at issue here are required to be reported as independent expenditures because they expressly advocate the election or defeat of a clearly identified candidate pursuant to section 100.22(a). An independent expenditure is a non-coordinated expenditure for a communication that expressly advocates the election or defeat of a clearly identified candidate.[7] 2 U.S.C. § 431(17); 11 C.F.R. § 100.16(a). A communication that "expressly advocates" includes language such as "vote for the President," "re-elect your Congressman," "defeat," or other words, which in context, can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidates. 11 C.F.R § 100.22(a); *see Buckley v. Valeo*, 424 U.S. 1, 44 n.52 (1976). Rightmarch's communications in the three scripts at issue are required to be reported as independent expenditures because they include the word "defeat" followed by the name of the clearly identified candidate: Hillary Clinton, Barack Obama, or both.[8]

Principally, Rightmarch appears to argue that no matter their text, the scripts do not contain express advocacy—and thus cannot be independent expenditures—because they are part of a fundraising effort. In essence, Rightmarch's argument is that, in context, any communication whose principal message can be distilled to a request for funds "may be reasonably interpreted as something other than an unmistakable, unambiguous exhortation to vote for or against a candidate at an election." *See* Supplemental Request at 8. Although Rightmarch does not include a citation, this sentence essentially applies the standard of 11 C.F.R. § 100.22(b). While Rightmarch acknowledges that the scripts tell listeners that "we are working to defeat politicians like Barack Obama" and that they should "tell their friends to **OPPOSE** Hillary Clinton," it does not acknowledge that the use of the words "defeat" and "oppose," in

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

[7] We have no information that the communications were coordinated with any candidate.

[8] The contract between Political Advertising and Rightmarch identifies one of the purposes of the agreement is to "advocate issues and or the election and defeat of candidates for federal office."

reference to a clearly identified candidate, turn the message of the calls into simple express advocacy under 11 C.F.R. § 100.22(a).

In addition, the Commission has found that fundraising solicitations containing express advocacy should be reported as independent expenditures. In MUR 5809, the Christian Voter Project ("CVP") failed to file independent expenditure notices for the costs of fundraising letters that expressly advocated the election/defeat of candidates. The Commission found reason to believe that CVP's failure to file independent expenditure notices violated the Act, and accepted a conciliation agreement with the committee based on that violation. In MUR 5518 (Hawaii Democratic Party), a party communication contained at least three messages: an invitation to precinct meetings, express advocacy of the defeat of a clearly identified Federal candidate, and a fundraising appeal. The Office of General Counsel concluded the communication should have been reported either as an independent expenditure or as federal election activity, and recommended reason to believe findings. The Commission rejected our recommendation, *not* on grounds that solicitations could not be independent expenditures but on grounds that invitations to precinct meetings permitted treatment as a federal/non-federal allocated administrative expense under the exception to the definition of federal election activity for costs of local political conventions, 2 U.S.C. § 431(20)(B)(iii)). In particular, Commissioners von Spakovsky and Weintraub stated in their Statement of Reasons that "had this invitation been mailed more broadly than it was, and in sufficient numbers to raise questions about whether it was a bona fide invitation, or if it was really just a fundraising or advocacy piece masquerading as an invitation, this would be a different case." MUR 5518 (Hawaii Democratic Party), Statement of Reasons of Commissioners Hans A. von Spakovsky and Ellen L. Weintraub, at 3 (Feb. 23, 2007); *cf.* MURs 5511 and 5525 (Swift Boat Veterans for Truth) (fundraising solicitations containing express advocacy were expenditures that counted towards organization's threshold for political committee status).

Rightmarch also asserts that these communications do not contain express advocacy under any meaning of section 100.22 because they do not include a list of items which Rightmarch apparently believes would make the communications constitute express advocacy: "[m]ention any candidacy, party affiliation, public office, voting or any election;/[r]efer to anyone's character or fitness to hold office;/[r]un in close proximity to any election or targeted to any particular state;/[m]ake any comparison between candidates; or/[r]epeat any candidates' slogans or messages." However, the three communications at issue here fall squarely within the meaning of express advocacy pursuant to section 100.22(a). The three communications specifically state that Rightmarch is "working to defeat politicians like Hillary Clinton," "working to defeat politicians like Barack Obama," and "working to defeat politicians like Hillary Clinton and Barack Obama." Again, however, whatever may be the utility of the presence or absence of these facts in analyzing the communication under section 100.22(b), no such analysis is necessary here because the scripts contain express advocacy as defined in section 100.22(a).

Rightmarch also asserts that 93 percent of these communications occurred in 2007, the year before the 2008 election. Nothing in section 100.22(a) states that the communication must occur in the same year as the election. A communication that expressly advocates the election or

defeat of a clearly identified candidate can be made in a year other than an election year. In fact, both Hillary Clinton and Barack Obama were candidates during the time that Rightmarch's three scripts at issue here were used. Hillary Clinton filed her statement of candidacy seeking the office of President on January 22, 2007.[9] Barack Obama filed his statement of candidacy seeking the office of President on February 12, 2007. According to Rightmarch, the script that states that Rightmarch is "working to defeat politicians like Hillary Clinton" was used by the vendor from August 16, 2007 through February 15, 2008.[10] The script that states that Rightmarch is "working to defeat politicians like Hillary Clinton and Barack Obama" was used from February 16, 2008 through May 31, 2008.[11] The script that states that Rightmarch is "working to defeat politicians like Barack Obama" was used from June 1, 2008 through November 3, 2008.[12] Election Day was November 4, 2008.

Simply put, Rightmarch's arguments about express advocacy advance one proposition: that communications by a political committee that explicitly exhort the listener to tell their friends to oppose named candidates for President cannot in context be considered express advocacy. We are aware of no authority for this proposition.

We therefore conclude that the solicitations made in connection with two of these three scripts expressly advocate the defeat of a clearly identified candidate. 11 C.F.R. § 100.22(a). We further conclude that the solicitations made in connection with the third script expressly advocates the defeat of two clearly identified candidates (Hillary Clinton and Barack Obama). Costs associated with these solicitations must be reported as independent expenditures.[13] 2 U.S.C. § 434(b)(4)(H)(iii); 11 C.F.R. § 104.4(a). Additionally, appropriate 24/48-hour notices must be disclosed as required. 2 U.S.C. § 434(g); 11 C.F.R. §§ 104.4(b)(2) and 104.4(c).

III. RECOMMENDATION

The Office of General Counsel recommends that the Commission direct the Audit Division to answer the Committee's questions in accordance with the analysis above.

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[9] Hillary Clinton's campaign states that she ceased being a presidential candidate on June 29, 2008, though she was still a candidate for reelection to the U.S. Senate for 2012.

[10] The vendor invoiced Rightmarch $2,109,465 for calls during this period.

[11] The vendor invoiced Rightmarch $49,497.50 for calls during this period.

[12] The vendor invoiced Rightmarch $57,410 for calls during this period.

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