



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

August 26, 2011

MEMORANDUM

TO: Patricia Carmona
Chief Compliance Officer

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Audit Division

FROM: Christopher Hughey *CH*
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SUBJECT: Interim Audit Report on Rightmarch.com PAC, Inc. (LRA 842)

I. INTRODUCTION

The Office of General Counsel ("OGC") has reviewed the Interim Audit Report ("Proposed Report") on Rightmarch.com PAC, Inc. ("Rightmarch"). We generally concur with the findings in the Proposed Report. In its cover memorandum, the Audit Division directs our attention to the extension of credit by a commercial vendor discussed in Finding 2, and the disclosure of independent expenditures issue discussed in Finding 3 (Failure to File Notices and Properly Disclose Independent Expenditures). We analyze the third Finding as explained

below.¹ If you have any questions, please contact Margaret J. Forman, the attorney assigned to this audit.

II. BACKGROUND

Rightmarch requested, and the Commission granted, a Request for Early Review of Legal Questions by the Commission, pursuant to the Policy Statement Establishing a Pilot Program for Requesting Consideration of Legal Questions by the Commission, 75 Fed. Reg. 42,088 (July 20, 2010). We submitted a memorandum to the Commission, dated March 14, 2011, which provided legal analysis of two issues: (1) whether the "over-changing weekly contingency fees" invoiced by Rightmarch's vendor, Political Advertising, resulted in in-kind contributions and were required to be reported as debts; and (2) whether fundraising communications were independent expenditures. In our analysis of the first issue, we concluded that the fees were reportable debts, and may have resulted in in-kind contributions. We also stated that we needed additional information from Rightmarch to assist the Commission with resolving the issue. Our analysis of the second issue concluded that the fundraising communications constituted express advocacy pursuant to 11 C.F.R. 100.22(a) and were, therefore, independent expenditures. The Commission, after considering the legal questions, was unable to reach an agreement and issue a response. Pursuant to Commission direction, Rightmarch received a copy of our memorandum in response to their request. Although our memorandum stated that we need additional information from Rightmarch to assist the Commission with resolving these issues, Rightmarch has submitted no additional information on either of the issues addressed in our memorandum. The Audit Division has proceeded in this matter by including the issues as findings in the Proposed Report. Policy Statement Establishing a Pilot Program for Requesting Consideration of Legal Questions by the Commission, 75 Fed. Reg. 42,088 (July 20, 2010).

III. ANALYSIS

Our comments here will supplement our memorandum dated March 14, 2011. We recommend that the Audit Division attach a copy of our memorandum dated March 14, 2011 to its Interim Audit Report submitted to the Commission. Given that the Proposed Report now includes the same issues that we addressed in our memorandum and Rightmarch has submitted no additional information on either of the issues addressed in that memorandum, our analysis of those issues has not changed. In this memorandum we address only an issue with respect to determining the particular election in connection with which Rightmarch's independent expenditures should have been reported.

¹ The Office of General Counsel recommends that the Commission consider this document in Executive Session because the Commission may eventually decide to pursue an investigation of matters contained in the Proposed Report. 11 C.F.R. §§ 2.4(a) and (b)(6).

A. Communications Disseminated Prior to the Primary Election May Be Reported as Independent Expenditures for the General Election.

The Audit Division directs our attention to the disclosure of independent expenditures in Finding 3 (Failure to File Notices and Properly Disclose Independent Expenditures). Rightmarch made independent expenditures for fundraising solicitations that expressly advocated the defeat of Barack Obama, Hillary Clinton, or both Barack Obama and Hillary Clinton.² Rightmarch originally reported the expenditures for these fundraising solicitations as being for the Presidential primary elections. The Reports Analysis Division advised Rightmarch to use the next scheduled federal election in a particular state after the Committee stated it did not have an election in mind when it disseminated these communications. Rightmarch's counsel now states, however, that those solicitations really were geared towards the Presidential general election. The categorization of these independent expenditures as related to either the primary election or the general election is important because the Audit Division expects that this change could affect Rightmarch's reporting of independent expenditures. By categorizing the expenditures from multiple primary elections to the general election, Rightmarch would aggregate \$10,000 in independent expenditures more often, potentially requiring a greater number of 48-hour independent expenditure notices filings, and possibly a larger monetary amount of 48-hour independent expenditures. 11 C.F.R. § 104.4(b)(2).

Essentially, the Audit Division is raising the issue of whether an independent expenditure may be reported as expressly advocating the election or defeat of an individual in the general election, when that individual has not yet been nominated by his or her party. We conclude, as a legal matter, that so long as the definition of independent expenditure is met, the communication may be for a future election, including a general election when the primary election has not occurred. An independent expenditure is "an expenditure by a person for a communication expressly advocating the election or defeat of a clearly identified candidate," and that is not coordinated. 11 C.F.R. § 100.16. We conclude that Rightmarch made expenditures that expressly advocated the defeat of Hillary Clinton, Barack Obama, or both Hillary Clinton and Barack Obama. See OGC Memorandum to the Commission on Rightmarch.com PAC, Inc., LRA 842 (March 14, 2011) at 7-10. While neither candidate was the nominee of the Democratic Party at the time Rightmarch made the independent expenditures, Hillary Clinton and Barack Obama were both candidates for the primary and general elections for purposes of the Federal Election Campaign Act. Both Hillary Clinton and Barack Obama were seeking the nomination for election, or election to federal office, and both of them had received contributions aggregating in excess of \$5,000, for both the primary and general elections, at the time of the independent expenditures. 11 C.F.R. § 100.3(a). Furthermore, we have no information indicating that the scripts at issue should be reported for the primary election over the general election. Nothing in the three scripts at issue suggests that they expressly advocate the defeat of Hillary Clinton, Barack Obama, or Hillary Clinton and Barack Obama in the primary election.

²These fundraising solicitations involved three scripts developed for use in telemarketing calls. See OGC's Memorandum to the Commission, Rightmarch.com PAC, Inc. (LRA 842), Request for Early Commission Consideration of Legal Questions, March 14, 2011.

We, therefore, conclude that Rightmarch may, as a legal matter, amend its reports to disclose the independent expenditures as being for the Presidential general election.

Our conclusion here is consistent with our analysis in a previous audit. In The Legacy Committee PAC (A09-22), the Committee reported all of its independent expenditures from fundraising letters as being made for the general election. The Audit Division's and the Reports Analysis Division's aggregation of the independent expenditures also were based on a general election timeframe. Some of the independent expenditures, however, occasionally referenced the Republican National Convention, as well as Barack Obama and Hillary Clinton, both candidates for the Democratic presidential nomination. This Office concluded that the approach of the Legacy Committee PAC, the Audit Division and the Reports Analysis Division of aggregating and reporting the independent expenditures based on the general election was correct.³ We concluded that the letters constituting independent expenditures were primarily focused on voting John McCain into the office of President for the General Election. *See* 2 U.S.C. § 434(g); 11 C.F.R. § 104.4(b); AO 2003-40 (aggregation of independent expenditures for 48-hour notices are with respect to a given election). We noted that some of these letters specifically advocate the reader to "stop Hillary," but concluded that even these letters, in context, appeared to be focused on stopping Hillary and other Democrats from winning the presidency in the general election, not their party's nomination.

³ Interim Audit Report of the Audit Division on The Legacy Committee PAC (A09-22) (LRA 815), OGC Memorandum to Patricia Carmona, May 4, 2011, pp. 8-9.