

FEDERAL ELECTION
COMMISSION
SECRETARIAT



FEDERAL ELECTION COMMISSION
Washington, DC 20463

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April 25, 2012

AGENDA ITEM

MEMORANDUM

TO: The Commission

For Meeting of 4/26/12

FROM: Anthony Herman *AH*
General Counsel

SUBMITTED LATE

Kevin Deeley *KD/AH*
Acting Associate General Counsel

Amy Rothstein *AR*
Assistant General Counsel

Esther Heiden *EH*
Attorney

Subject: AO 2012-10 (Greenberg Quinlan Rosner Research, Inc.)
(Revised Draft D)

Attached is a proposed draft of the subject advisory opinion. We have been asked to have this draft placed on the Open Session agenda for April 26, 2012.

Attachment

1 ADVISORY OPINION 2012-10

2

3 Joseph E. Sandler, Esq.
4 Elizabeth L. Howard, Esq.
5 Sandler, Reiff, Young & Lamb, P.C.
6 1025 Vermont Avenue, NW
7 Suite 300
8 Washington, DC 20005

REVISED DRAFT D

9

10 Dear Mr. Sandler and Ms. Howard:

11 We are responding to your advisory opinion request on behalf of Greenberg
12 Quinlan Rosner Research, Inc., concerning the possible preemption of New Hampshire
13 State law by the Federal Election Campaign Act of 1971, as amended (the “Act”), and
14 Commission regulations. Because the request does not seek application of the Act or
15 Commission regulations to a specific activity *by the requestor*, the Commission declines
16 to issue an opinion.

17 ***Background***

18 The facts presented in this response are based on your letter received on February
19 21, and your email and letter received on March 5, 2012.

20 Greenberg Quinlan Rosner Research, Inc. (“Greenberg Quinlan”) is a corporation
21 located in the District of Columbia that provides political research and strategic
22 consulting services. These consulting services include surveys, which are conducted on a
23 nationwide basis and in many states and localities. Greenberg Quinlan’s clients include a
24 variety of nonprofit organizations, authorized committees of Federal candidates, labor
25 organizations, political party committees, and other political committees.

26 Greenberg Quinlan plans to conduct telephone surveys, using live operators, of
27 New Hampshire voters. The surveys generally will consist of questions regarding
28 demographics, the respondent’s views on various issues, the respondent’s impressions of

1 the political parties and national political figures, the likelihood of the respondent to vote
2 for a particular Federal candidate or candidates, and the likelihood of the respondent to
3 vote for a specific Federal candidate after hearing various positive and/or negative
4 information about the candidate.

5 These telephone surveys will be paid for either by Federal candidates or by
6 nonprofit organizations. The surveys will refer only to Federal candidates, and will not
7 mention any candidates for State or local office.

8 Greenberg Quinlan believes that its proposed polling in New Hampshire may be
9 subject to New Hampshire's statutory disclaimer requirements. New Hampshire law
10 requires that:

11 Any person who engages in push-polling, as defined in RSA 664:2(XVII), shall
12 inform any person contacted that the telephone call is being made on behalf of, in
13 support of, or in opposition to a particular candidate for public office, identify that
14 candidate by name, and provide a telephone number from where the push polling
15 is conducted.

16

17 N.H. REV. STAT. sec. 664:16-a(I). "Push polling" is defined as:

- 18 (a) Calling voters on behalf of, in support of, or in opposition to, any
19 candidate for public office by telephone; and
20 (b) Asking questions related to opposing candidates for public office
21 which state, imply, or convey information about the candidates[']
22 character, status, or political stance or record; and
23 (c) Conducting such calling in a manner which is likely to be
24 construed by the voter to be a survey or poll to gather statistical
25 data for entities or organizations which are acting independent of
26 any particular political party, candidate, or interest group.

27

28 N.H. REV. STAT. sec. 664:2(XVII).

29

1 Greenberg Quinlan asks the Commission to determine whether the Act and
2 Commission regulations preempt the New Hampshire disclaimer statute insofar as it
3 purports to apply to Greenberg Quinlan’s proposed telephone surveys that refer only to
4 Federal candidates and do not refer to State or local candidates.

5 ***Question Presented***

6 *Is a New Hampshire statute requiring disclaimers on certain telephone calls, New*
7 *Hampshire Revised Statutes section 664:16-a(1), preempted by the Act or Commission*
8 *regulations with respect to the proposed telephone surveys that refer only to candidates*
9 *for Federal office and that are made on behalf of, or are in support of or in opposition to,*
10 *Federal candidates?*

11 ***Legal Analysis and Conclusions***

12 2 U.S.C. 437f(a)(1) directs the Commission to issue advisory opinions in response
13 to “request[s] concerning the application of” the statutes within the Commission’s
14 jurisdiction or the Commission’s regulations “to a specific transaction or activity by the
15 person” submitting the request. “Requests presenting a general question of interpretation,
16 or posing a hypothetical situation, or regarding the activities of third parties, do not
17 qualify as advisory opinion requests.” 11 CFR 112.1(b). 2 U.S.C. 437f(c)(1)(A) entitles
18 the requestor or another person “involved in the specific transaction or activity” that is
19 the subject of a valid request to rely upon the resulting advisory opinion. 2 U.S.C.
20 437f(c)(2) provides that a person entitled to rely on an advisory opinion “who acts in
21 good faith in accordance” with the opinion shall not be liable under the Act or the
22 Commission’s regulations.

1 Greenberg Quinlan states that its request is *not* asking the Commission to address
2 application of the Act or Commission regulations to its proposed activity – i.e. whether
3 the Act or Commission regulations require the planned telephone surveys to include
4 disclaimers. Instead, Greenberg Quinlan asks the Commission to address application of
5 the Act to proposed activity of another entity, the State of New Hampshire, should the
6 New Hampshire Attorney General: 1) determine that Greenberg Quinlan’s proposed
7 activities qualify as “push polling” for purposes of RSA 664:2 (XVII); and 2) attempt to
8 enforce the disclaimer requirement in RSA 664:16-a(I) by commencing an investigation.
9 Greenberg Quinlan asks whether, in the event that this happens, the relevant New
10 Hampshire laws would be preempted by 2 U.S.C. 453.

11 The Commission determines that Greenberg Quinlan’s request is not a valid
12 advisory opinion request. An enforcement action by the New Hampshire Attorney
13 General would be “a specific transaction or activity” by the Attorney General, not
14 Greenberg Quinlan. Greenberg Quinlan would not be entitled to rely on any resulting
15 opinion by the Commission to avoid liability under the Act or Commission regulations.
16 Thus, Greenberg Quinlan has not made a valid request for an advisory opinion under 2
17 U.S.C. 437f(a)(1) as interpreted by 11 C.F.R. 112.1(b).¹

18 In its request, Greenberg Quinlan notes that the Commission responded in 2009 to
19 a similar advisory opinion request to that of Greenberg Quinlan from the West Virginia

¹ In Greenberg Quinlan’s second comment, it urges the Commission to read section 437f broadly to require an advisory opinion any time the Act’s limitations on the activities of third parties (in this case, state authorities) might impact a requestor’s proposed activity, even if only indirectly. *See* Greenberg Quinlan Comment on Draft D, at 2. The Commission declines to adopt this interpretation because it is inconsistent with the express purpose of the advisory opinion process as set forth in the Act, which is to provide requestors and other identically situated parties with assurance that their *own* activities will not subject them to liability under the Act and Commission regulations. *See* 2 U.S.C. 437f(c)(2).

1 Secretary of State. *See* Advisory Opinion 2009-21 (West Virginia Secretary of State);
2 Greenberg Quinlan Request at 5. However, the Commission responded to the Secretary
3 of States’s request because the Secretary of State’s proposed enforcement action was the
4 transaction or activity on which the advisory opinion was sought. As previously
5 discussed, the same cannot be said for Greenberg Quinlan’s request.

6 The Commission acknowledges that, earlier in its history, the Commission did
7 respond to requests by parties similarly situated to Greenberg Quinlan regarding the Act’s
8 preemption of state laws and regulations. *See, e.g.*, Advisory Opinion 1978-24
9 (Sonneland). However, none of these prior opinions appear to have considered the
10 appropriateness of responding in light of the text of section 437f, which makes clear that
11 the purpose of an advisory opinion is to provide guidance to the requestor so that it can
12 determine the legality of its *own* conduct *under the Act and Commission regulations*. *See*
13 2 U.S.C. 437f(c)(1)-(2). The Commission has an obligation to re-evaluate its prior
14 approach if necessary to accurately interpret the Act or Commission regulations, *see, e.g.*,
15 AO 1989-08 (Wagner & Brown), and has determined that doing so is necessary here.

16 Adherence to the Act’s limitations on the use of advisory opinions is especially
17 warranted in the preemption context. Because “the States are independent sovereigns in
18 our federal system,” the Commission should not “cavalierly preempt state law.” *Bates v.*
19 *Dow Agrosciences, LLC*, 544 U.S. 431, 449 (2005) (quoting *Medtronic, Inc. v. Lohr*, 518
20 U.S. 470, 485 (1996)); *see also Karl Rove & Co. v. Thornburgh*, 39 F.3d 1273, 1280 (5th
21 Cir. 1994) (noting “strong presumption” against preemption commonly applied by
22 federal courts) (citation omitted). Routine preemption via advisory opinion is

1 particularly problematic, given that the advisory opinion process affords limited
2 opportunities for public comment or Commission consideration of novel factual and legal
3 questions compared to a rulemaking. Moreover, as noted in your comments, an advisory
4 opinion announcing that a state law is preempted likely will receive only limited judicial
5 review, given the considerable deference to which a preemption determination by the
6 Commission likely would be entitled. *See* Greenberg Quinlan Comment on Drafts A, B
7 & C, at 4; Comment of the Mellman Group, at 2-3.

8 For these reasons, the Commission declines to render an opinion in response to
9 your request.

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On behalf of the Commission,

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Caroline C. Hunter

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Chair

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