

FEDERAL ELECTION
COMMISSION
SECRETARIAT



FEDERAL ELECTION COMMISSION
Washington, DC 20463

2012 APR 25 P 5: 26

April 25, 2012

MEMORANDUM

AGENDA ITEM

TO: The Commission

For Meeting of 4/26/12

FROM: Anthony Herman *AH*
General Counsel

SUBMITTED LATE

Kevin Deeley
Acting Associate General Counsel *KD/AH*

Amy Rothstein *AR*
Assistant General Counsel

Esther Heiden *EH*
Attorney

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

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

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

Draft E

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. The Commission concludes that the provision of the New
15 Hampshire campaign finance statute requiring disclaimers on certain campaign-related
16 telephone surveys made on behalf of Federal candidates, their authorized campaign
17 committees, or other Federal political committees is preempted by the Act and
18 Commission regulations. The Commission could not reach a conclusion by the required
19 four affirmative votes as to whether the New Hampshire statute is preempted with
20 respect to telephone surveys made on behalf of nonprofit organizations (other than
21 Federal candidates’ authorized campaign committees, or other Federal political
22 committees) where the surveys do not contain express advocacy.

23 ***Background***

24 The facts presented in this advisory opinion are based on your letter received on
25 February 21 and your email and letter received on March 5, 2012.

26 Greenberg Quinlan Rosner Research, Inc. (“Greenberg Quinlan”) is a corporation
27 located in the District of Columbia that provides political research and strategic

1 consulting services. These consulting services include surveys, which are conducted on a
2 nationwide basis and in many states and localities.

3 Greenberg Quinlan plans to conduct telephone surveys, using live operators, of
4 New Hampshire voters. The surveys generally will consist of questions regarding
5 demographics, the respondent's views on various issues, the respondent's impressions of
6 the political parties and national political figures, the likelihood of the respondent to vote
7 for a particular Federal candidate or candidates, and the likelihood of the respondent to
8 vote for a specific Federal candidate after hearing various positive and/or negative
9 information about the candidate. The telephone surveys will not expressly advocate the
10 election or defeat of a clearly identified Federal candidate.

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

14 Greenberg Quinlan believes that its proposed polling in New Hampshire may be
15 subject to New Hampshire's statutory disclaimer requirements. New Hampshire law
16 requires that:

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

22
23 N.H. REV. STAT. sec. 664:16-a(I). "Push polling" is defined as:

24 (a) Calling voters on behalf of, in support of, or in opposition to, any
25 candidate for public office by telephone; and

- 1 (b) Asking questions related to opposing candidates for public office
2 which state, imply, or convey information about the candidates[']
3 character, status, or political stance or record; and
4 (c) Conducting such calling in a manner which is likely to be
5 construed by the voter to be a survey or poll to gather statistical
6 data for entities or organizations which are acting independent of
7 any particular political party, candidate, or interest group.
8

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

10
11 Greenberg Quinlan asks the Commission to determine whether the Act and
12 Commission regulations preempt the New Hampshire disclaimer statute insofar as it
13 purports to apply to Greenberg Quinlan's proposed telephone surveys that refer only to
14 Federal candidates and do not refer to State or local candidates.

15 ***Questions Presented***

16 1. *Is a New Hampshire statute requiring disclaimers on certain telephone*
17 *calls, New Hampshire Revised Statutes section 664:16-a(I), preempted by the Act or*
18 *Commission regulations with respect to the proposed telephone surveys made on behalf*
19 *of Federal candidates, their authorized committees, or other Federal political committees*
20 *that refer only to candidates for Federal office?*

21 2. *Is a New Hampshire statute requiring disclaimers on certain telephone*
22 *calls, New Hampshire Revised Statutes section 664:16-a(I), preempted by the Act or*
23 *Commission regulations with respect to the proposed telephone surveys made on behalf*
24 *of nonprofit organizations (other than Federal political committees) that refer only to*
25 *candidates for Federal office and that are in support of or in opposition to Federal*
26 *candidates, but do not expressly advocate the election or defeat of a Federal candidate?*

1 ***Legal Analysis and Conclusions***

2 1. *Is a New Hampshire statute requiring disclaimers on certain telephone*
3 *calls, New Hampshire Revised Statutes section 664:16-a(I), preempted by the Act or*
4 *Commission regulations with respect to the proposed telephone surveys made on behalf*
5 *of Federal candidates, their authorized committees, or other Federal political committees*
6 *that refer only to candidates for Federal office?*

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

12 The provisions of the Act and the Commission regulations promulgated
13 thereunder “supersede and preempt any provision of State law with respect to election to
14 Federal office.” 2 U.S.C. 453; *see also* 11 CFR 108.7(a). The legislative history of the
15 Act makes clear that Congress intended “to make certain that the Federal law is construed
16 to occupy the field with respect to elections to Federal office and that the Federal law will
17 be the sole authority under which such elections will be regulated.” H.R. REP. NO. 93-
18 1239, 93d Cong., 2d Sess. 10 (1974). According to the Conference Committee Report on
19 the 1974 Amendments to the Act, “Federal law occupies the field with respect to criminal
20 sanctions relating to limitations on campaign expenditures, the sources of campaign funds
21 used in Federal races, the conduct of Federal campaigns, and similar offenses, but does
22 not affect the States’ rights” as to other areas such as voter fraud and ballot theft. H.R.

1 REP. NO. 93-1438, 93d Cong., 2d Sess. 69 (1974). The Conference Committee Report
2 also states that Federal law occupies the field with respect to reporting and disclosure of
3 political contributions to, and expenditures by, Federal candidates and political
4 committees, but does not affect State laws as to the manner of qualifying as a candidate,
5 or the dates and places of elections. *Id.* at 100-01.

6 Consistent with congressional intent, Commission regulations provide that “[t]he
7 provisions of the Federal Election Campaign Act of 1971, as amended, and rules and
8 regulations issued thereunder, supersede and preempt any provision of State law with
9 respect to election to Federal office.” 11 CFR 108.7(a). Specifically, “Federal law
10 supersedes State law concerning the . . . [l]imitation[s] on contributions and expenditures
11 . . . regarding Federal candidates and political committees,” but does not supersede State
12 laws relating to the manner of qualifying as a candidate or political party organization,
13 dates and places of elections, voter registration, voting fraud, ballot theft, candidates’
14 personal financial disclosures, or funds used for the purchase or construction of State or
15 local party office buildings. 11 CFR 108.7(c), 108.7(b)(3).

16 In promulgating 11 CFR 108.7, the Commission stated that Federal law
17 supersedes State law with respect to the organization and registration of political
18 committees supporting Federal candidates, disclosure of receipts and expenditures by
19 Federal candidates and political committees, and the limitations on contributions and
20 expenditures regarding Federal candidates and political committees. Explanation and
21 Justification of the Disclosure Regulations, House Doc. No. 95-44, at 51 (1977). “[T]he
22 central aim of the [Act’s preemption] clause is to provide a comprehensive, uniform

1 Federal scheme that is the sole source of regulation of campaign financing . . . for
2 election to Federal office.” Advisory Opinion 1988-21 (Wieder).

3 The New Hampshire statute at issue here is preempted to the extent that it
4 purports to regulate Greenberg Quinlan’s telephone surveys paid for by Federal
5 candidates, their authorized campaign committees, and other Federal political
6 committees. Under the Act and Commission regulations, the regulation of expenditures
7 by Federal candidates, their authorized campaign committees, and other Federal political
8 campaign committees is an area to be regulated only by Federal law, and both the Act
9 and Commission regulations regulate this area, including expenditures for polling
10 expenses. *See, e.g.*, 2 U.S.C. 431(9), 439a, 441a(j); 11 CFR 100.111, 106.4, pt. 113.

11 In Advisory Opinion 2009-21 (West Virginia Secretary of State), the Commission
12 determined that the Act and Commission regulations preempted a State law that
13 prohibited “deceptively design[ing] or intentionally conduct[ing] [polls] in a manner
14 calculated to advocate the election or defeat of any candidate or group of candidates or
15 calculated to influence any person or persons so polled to vote for or against any
16 candidate, group of candidates, proposition or other matter to be voted on by the public at
17 any election.” W. VA. CODE sec. 3-8-9(a)(10). The Commission reasoned that the State
18 statute, “if applied to Federal candidates, would impede those candidates’ ability to make
19 payment[s] of polling expenses that are governed by the Act and Commission
20 regulations.” Advisory Opinion 2009-21 (West Virginia Secretary of State).

21 Here, the New Hampshire statute, if applied to Federal candidates who wish to
22 pay for the telephone surveys described in the request, would impose an additional

1 disclaimer requirement on those expenditures. Under the Act's preemption clause, only
2 Federal law may require disclosure regarding expenditures by Federal candidates. 2
3 U.S.C. 453; 11 CFR 108.7(b)(2). The Commission concludes, therefore, that New
4 Hampshire Revised Statute section 664:16-a(I) is preempted insofar as it purports to
5 apply to the proposed telephone polls paid for by Federal candidates. *See* 2 U.S.C. 453,
6 431(9), 439a.

7 2. *Is a New Hampshire statute requiring disclaimers on certain telephone*
8 *calls, New Hampshire Revised Statutes section 664:16-a(I), preempted by the Act or*
9 *Commission regulations with respect to the proposed telephone surveys made on behalf*
10 *of nonprofit organizations (other than Federal political committees) that refer only to*
11 *candidates for Federal office, but do not expressly advocate the election or defeat of a*
12 *clearly identified Federal candidate?*

13 The Commission was unable to approve a response by the required four
14 affirmative votes as to whether the New Hampshire statute requiring disclaimers on
15 certain telephone calls is preempted by the Act or Commission regulations with respect to
16 the proposed telephone surveys that will be made on behalf of nonprofit organizations
17 that are not Federal political committees, and that will refer only to candidates for Federal
18 office, but will not expressly advocate the election or defeat of a clearly identified
19 Federal candidate.

20 This response constitutes an advisory opinion concerning the application of the
21 Act and Commission regulations to the specific transaction or activity set forth in your
22 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any

1 of the facts or assumptions presented, and such facts or assumptions are material to a
2 conclusion presented in this advisory opinion, then the requestor may not rely on that
3 conclusion as support for its proposed activity. Any person involved in any specific
4 transaction or activity which is indistinguishable in all its material aspects from the
5 transaction or activity with respect to which this advisory opinion is rendered may rely on
6 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note that the analysis or
7 conclusions in this advisory opinion may be affected by subsequent developments in the
8 law including, but not limited to, statutes, regulations, advisory opinions, and case law.
9 The cited advisory opinions are available on the Commission's website, or directly from
10 the Commission's Advisory Opinion searchable database at <http://www.fec.gov/searchao>.

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On behalf of the Commission,

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Caroline C. Hunter
Chair

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