



FEDERAL ELECTION COMMISSION
Washington, DC 20463

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COMMISSION
SECRETARIAT

2012 APR 10 P 5:17

April 10, 2012

MEMORANDUM

AGENDA ITEM

For Meeting of 4/12/12

SUBMITTED LATE

TO: The Commission

FROM: Anthony Herman *AH*
General Counsel

Kevin Deeley *KD*
Acting Associate General Counsel

Amy Rothstein *AR*
Assistant General Counsel

Esther Heiden *AR for EH*
Attorney

Subject: AO 2012-10 (Greenberg Quinlan Rosner Research, Inc.) (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 12, 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

DRAFT D

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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).
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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(I), 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. The requestor states that its request is *not* asking the
16 Commission to address application of the Act to its proposed activity. Instead it asks the
17 Commission to address application of the Act to proposed activity of another entity, the
18 State of New Hampshire, should it attempt to enforce its law.

19 Greenberg Quinlan acknowledges that it is not asking the Commission to
20 determine whether its planned telephone surveys would require a disclaimer under the
21 Act and Commission regulations. Rather, the request asks generally whether a specific
22 State statute purportedly covering at least some of its planned telephone surveys is

1 preempted by the Act. Greenberg Quinlan expresses concern that, if it conducts such
2 telephone surveys without disclaimers required by New Hampshire law, it may be the
3 subject of an investigation by New Hampshire’s Attorney General. Such an enforcement
4 action would be “a specific transaction or activity” by the New Hampshire Attorney
5 General, not Greenberg Quinlan. Requests “regarding the activities of third parties . . . do
6 not qualify as advisory opinion requests.”¹ 11 C.F.R. 112.1(b). Because Greenberg
7 Quinlan does not seek an opinion regarding application of the Act to its planned activities
8 the Commission declines to render an opinion on such a request.

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On behalf of the Commission,

Caroline C. Hunter
Chair

¹ Your request notes that the Commission rendered an advisory opinion in 2009 to the West Virginia Secretary of State regarding application of the Act’s preemption provision to a West Virginia State statute. The Commission responded to that request because the Secretary of State’s proposed enforcement action was the transaction or activity on which the advisory opinion was sought. *See* Advisory Opinion 2009-21 (West Virginia Secretary of State).