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OFFICE OF GENERAL  
COUNSEL

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February 21, 2012

Anthony Herman, Esq.  
General Counsel  
Federal Election Commission  
999 E Street, N.W.  
Washington, D.C. 20463

Re: Advisory Opinion Request: Greenberg Quinlan Rosner Research, Inc.

Dear Mr. Herman:

Pursuant to 2 U.S.C. §437f and the Commission's regulations, 11 C.F.R. §112.1, on behalf of our client, Greenberg Quinlan Rosner Research, Inc. ("GQRR"), we request an advisory opinion confirming that the provisions of New Hampshire Revised Statutes §664:16-a(I), insofar as they purport to require that certain disclaimers be made in the course of telephone surveys that refer only to candidates for federal office, are preempted by the Federal Election Campaign Act of 1971 as amended ("FECA"), pursuant to 2 U.S.C. §453.

1. GQRR

GQRR is a District of Columbia corporation located at 10 G Street, NE, Suite 500, Washington, D.C. 20002. GQRR is one of the nation's leading political research and strategic consulting firms, and is well-known for its survey research. GQRR conducts surveys for a variety of organizations and entities, including nonprofit organizations, authorized committees of federal candidates, labor organizations, political party committees and other political committees and organizations. Its surveys are conducted on a nationwide basis and in numerous states and localities.

2. Proposed Polling in New Hampshire

GQRR plans to conduct telephone survey research, using live operators, of New Hampshire voters, on behalf of certain federal candidates and certain nonprofit organizations. In all cases, the survey research will refer only to candidates for federal office and not to any candidate for state or local office in New Hampshire or in any other state or locality.

GQRR's survey research will typically consist of questions regarding demographics, the respondent's views on various issues, the respondent's impressions of the political parties and

national political figures, the likelihood to vote for particular federal candidate or candidates, and the likelihood of the respondent to vote for a specific federal candidate after hearing various positive and/or negative information about the candidate.

### **3. New Hampshire State Law and Enforcement by Attorney General**

Chapter 664 of the New Hampshire Revised Statutes, which is the campaign finance title of New Hampshire state law, includes the following disclaimer provision:

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

N.H. Rev. Stat. § 664:16-a(I). "Push polling" is defined in section 664:2(XVII) of the New Hampshire Revised Statutes as follows:

"Push polling" means

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

For two reasons, GQRR is concerned that it may be required to comply with these provisions with respect to its proposed polling in New Hampshire, referencing only federal candidates. *First*, the Attorney General of New Hampshire has already enforced these provisions against survey research firms that conducted telephone polls referencing only federal candidates. In one case, in July 2010, Mountain West Research Center had conducted a poll in New Hampshire on behalf of the authorized committee of Paul Hodes, the Democratic nominee for U.S. Senate from New Hampshire in the 2010 general election; the survey questioned respondents about their choice in that federal race. S. Schoenberg, *Settlement reached in Hodes calls*, Concord Monitor, Oct. 16, 2010 (copy attached as Exhibit 1). The Attorney General of New Hampshire charged Mountain West with violation of section 664:16-a(I), and ultimately reached a consent agreement with the firm in which the firm agreed to pay a \$20,000 civil penalty. Press Release, N.H. Dept. of Justice, Office of the Attorney General, Mountain West Research Center to Pay \$20,000 Under Consent Agreement for Push Polling Complaint (Oct. 15, 2010) (copy attached as Exhibit 2).

In a second case, a firm called OnMessage, Inc. conducted telephone survey research in New Hampshire on behalf of Guinta for Congress, the authorized committee of a candidate for U.S. House of Representatives. The Attorney General charged the company with violation of section 664:16-a(I) and ultimately reached a consent agreement with the firm in which the firm agreed to pay a \$15,000 civil penalty. Press Release, N.H. Dept. of Justice, Office of the Attorney General, On Message, Inc. to Pay \$15,000 Under Consent Agreement for Push Polling Complaint (Jan. 18, 2012) (copy attached as Exhibit 3).

*Second*, the definition of “push polling” under section 664:2 is sufficiently broad to cover what is considered, in the political community and in the industry, to be normal, legitimate polling rather than “push polling.” “Push polling” is defined, under section 664:2, to include “questions related to opposing candidates for public office which state, imply, or convey information about the candidates character, status, or political stance or record.” Yet, in MUR 5835, Democratic Congressional Campaign Committee, three Commissioners considered a poll asking about “the voter’s likelihood to vote for” a candidate “after hearing several negative statements about that candidate,” and then characterized that poll as “legitimate public opinion telephone polling.” *In re Democratic Congressional Campaign Committee*, MUR 5835 (Statement of Reasons of Vice Chairman Petersen, and Commissioners Hunter and McGahn) 3, 16 (FEC July 1, 2009). Indeed, according to press reports, the survey about candidate Hodes that led the Attorney General to charge the polling firm simply asked the voter if they were less likely to choose the opponent if they knew certain negative information about the opponent’s record. (Concord Monitor, *supra*, Exhibit 1 hereto).

For these reasons, there is clearly reason for GQRR to be concerned that its planned telephone survey research in New Hampshire will trigger an investigation and possible charges if GQRR does not include, in the telephone calls, the disclaimer required by New Hampshire law.

#### 4. Discussion

FECA provides that:

[T]he provisions of this Act, and of rules prescribed under this Act, supersede and preempt any provision of State law with respect to election to federal office.

2 U.S.C. § 453(a). The Commission has explained that the “House committee that drafted this provision intended ‘to make certain that the Federal law is construed to occupy the field with respect to elections to Federal office and that the Federal law will be sole authority under which such elections will be regulated.’” Advisory Opinion 1995-41 (Democratic Congressional Campaign Committee) (quoting H. Rep. No. 93-1239, 93d Cong., 2d Sess. 10 (1974)). The Commission has further explained that, “the central aim of the clause is to provide a comprehensive, uniform Federal scheme that is the sole source of regulation of campaign financing... for election to Federal office.” Advisory Opinion 1988-21 (Wieder).

Where Congress intends to occupy a field, as is the case with FECA, it may be inferred from the federal law that such law “touches a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.” *English v. General Elec. Co.*, 496 U.S. 72, 78 (1990) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). The field occupied by FECA clearly includes disclaimer provisions, which are a core part of FECA’s regulatory scheme.

In Advisory Opinion 1978-24 (Sonneland for Congress Committee), the Commission considered a Washington State statute requiring party designation in all campaign advertising. The Commission, noting that neither FECA nor the Commission’s regulations require such a disclaimer, held that the FECA disclaimer provisions “are an integral part of the scheme prescribed by the Act” and that, “[i]n light of stated Congressional intent that the Act preempt State law as to *required disclosures in conducting political campaigns* for Federal office, the Commission concludes that the [disclaimer provisions of FECA] ... would supersede and preempt the cited Washington statutes requiring designation of party affiliation all campaign advertising.” *Id.* at 2 (emphasis added); *see*, to the same effect, Advisory Opinion 1995-41 (Democratic Congressional Campaign Committee) (state law requiring reporting of contents of polling conducted by federal candidates was preempted by FECA) and Advisory Opinion 1981-27 (Congressman Bill Archer) (local ordinance requiring disclaimer on campaign signs was preempted as to federal campaigns).

Significantly, in this regard, the Commission has held that FECA, 2 U.S.C. §441d, and the Commission’s regulations, do *not* require that *any* disclaimer be included in telephone survey research. *In re Democratic Congressional Campaign Committee*, MUR 5835 (Statement of Reasons of Vice Chairman Petersen, and Commissioners Hunter and McGahn) (FEC July 1, 2009). In fact, the complaint filed in that MUR had alleged that the poll in question was a “push poll.” In a 3-2 vote, the Commission voted to reject the recommendation of the Office of General Counsel to the contrary. The three Commissioners voting against a finding of a disclaimer violation found that the provision of negative information about a candidate “did not transform the calls into ‘push polls’ or ‘advocacy’ calls,” *id.* at 12, and that in any event, usage of the term “push poll” “is of no legal significance here.” *Id.* at 9.

Thus, the Commission has specifically found that no disclaimer is required by FECA in a telephone survey referencing federal candidates in precisely the way the New Hampshire statute characterizes as a “push poll” and which survey would, therefore, under New Hampshire law, require the special disclaimer prescribed by the state law. Even though the Commission was divided on the question of whether FECA requires that telephone surveys include the disclaimer prescribed by FECA and the Commission’s regulations, it is clear that, regardless of the answer to that question, the obligation to include any disclaimer and the nature of that disclaimer are governed exclusively by federal law.

That conclusion follows as to polling exclusively referencing federal candidates that is conducted by nonprofit organizations, as well as to polling conducted by federal political committees. FECA and the Commission’s regulations, of course, regulate and require disclaimers on certain forms of communication, referencing federal candidates, paid for by

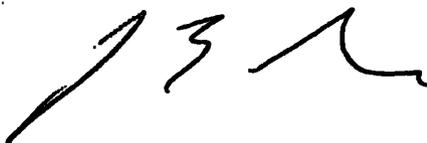
entities other than federal political committees—namely, electioneering communications and independent expenditures. 2 U.S.C. § 441d(a); 11 C.F.R. §§ 110.11(a)(2), (a)(4) (disclaimer requirements applicable to “any person”).

Further, to the extent that the New Hampshire statute prevents a federal candidate in New Hampshire from conducting a survey that would constitute a “push poll” under the broad definition set forth in state law unless the state-prescribed disclaimer is included, the state law serves to limit and regulate the expenditures of federal candidates. For that reason also, the state law would be preempted by FECA. For example, a West Virginia statute prohibits candidates from conducting any poll “calculated to influence any person or persons polled to vote for or against any candidate...” W. Va. Code § 3-1-2. The West Virginia Secretary of State received a complaint from a citizen about a telephone poll conducted by a federal candidate allegedly in violation of that statute, and sought an advisory opinion from the Commission as to whether the state statute was preempted. In Advisory Opinion 2009-21 (W. Va. Secretary of State), the Commission ruled that it was, holding that, “the West Virginia statute, if applied to Federal candidates, would impede those candidates’ ability to make payment of polling expenses that are governed by the Act and Commission regulations. Under the Act’s preemption clause, only Federal law could limit the ability of a Federal candidate to make expenditures for polling.” *Id.* at 4. *See*, to the same effect, *Bunning v. Commonwealth of Kentucky*, 42 F.3d 1008, 1012 (6<sup>th</sup> Cir. 1994) (FECA preempted state law limiting scope of poll conducted by federal candidate). Here, too, only Federal law could limit the ability of a Federal candidate to pay for a poll deemed to be a “push poll” under New Hampshire law without the required state-prescribed disclaimer.

### CONCLUSION

For the reasons set forth above, the Commission should issue an advisory opinion holding that, to the extent New Hampshire Revised Statute 664:16-a(I) purports to apply to telephone survey research solely referencing federal candidates, that statutory provision is preempted by FECA.

Sincerely yours,



Joseph E. Sandler  
Elizabeth L. Howard  
Counsel for Greenberg Quinlan Rosner  
Research, Inc.  
1025 Vermont Avenue, N.W., Suite 300  
Washington, D.C. 20005

# CONCORD MONITOR

Published on *Concord Monitor* (<http://www.concordmonitor.com>)

Attachment 1

[Home](#) > Settlement reached in Hodes calls

## Settlement reached in Hodes calls

Firm accused of illegal push polling

By [Shira Schoenberg](#) / [Monitor staff](#)

October 16, 2010

An Idaho-based research center has paid \$20,000 to settle a case regarding a push poll it performed on behalf of New Hampshire Senate candidate Paul Hodes.

The settlement with Mountain West Research Center was announced yesterday by the New Hampshire attorney general's office. According to the attorney general, Mountain West contacted 529 New Hampshire households between July 19 and July 21. It stopped making the calls voluntarily July 21, after learning that questions were raised regarding the polls.

The New Hampshire Republican Party filed the original complaint against Mountain West. Party spokesman Ryan Williams said the party applauds the attorney general for taking action. "This company was clearly conducting illegal and unethical push poll calls on behalf of Congressman Paul Hodes and his campaign," Williams said. "Congressman Hodes is a Washington politician who has repeatedly used disgusting gutter politics to smear his opponents."

The Hodes campaign said Mountain West Research Center is no longer working for the campaign as a vendor or a subcontractor.

"We expect all of our vendors to follow applicable New Hampshire laws and would fire any vendor from our campaign that does not," said Hodes spokesman Mark Bergman.

Jesse Reinhold, director of the Mountain West Research Center, said, "Negotiating this settlement was purely a business decision. Mountain West Research conformed with all industry standards and best practices in conducting this study."

According to New Hampshire law, push polling involves an organization working in support of or on behalf of one candidate, asking voters questions about an opposing candidate in a way that gives information about the opposing candidate, while implying that the caller is from an independent organization.

Push polling is legal under New Hampshire law, but the law requires pollsters to state that the call is being made in support of or in opposition to a particular candidate, to identify the candidate, and to provide a phone number from where the polling is being conducted.

Associate Attorney General Richard Head said the Mountain West poll met the definition of a push poll under New Hampshire law, but the company did not provide any of the three required

disclosures.

Under state law, there can be both criminal and civil penalties for violating the push poll statute. The maximum civil penalty is \$1,000 per violation - and every call is considered a violation. Head said in this case, Mountain West had no prior history of violations in New Hampshire. The company voluntarily stopped its polls as soon as it learned that there were compliance problems, and it cooperated with the investigation. "Those were all factors relative to type of penalty and size of penalty," Head said.

Head confirmed that Mountain West Research Center was working for the Anzalone Liszt Research Company, which has offices in Alabama and Washington, D.C. Anzalone Liszt was hired by the Hodes campaign. Hodes spokesman Matt House said the Hodes campaign still employs Anzalone Liszt. On April 2, the Hodes campaign paid \$44,500 to Anzalone Liszt, according to the campaign's financial reporting forms.

Head did not say whether there would be charges brought against any other organizations. "Where we are today, the only penalty that we have issued is the one (against Mountain West)," Head said.

The Republican Party complained to the attorney general in response to a story in the Union Leader detailing the push poll. According to the Union Leader, the caller would ask a voter who his choice was in the Senate primary. If the voter said Ayotte, the caller asked if they would be less likely to choose Ayotte if they knew that Ayotte did not pursue the Financial Resources Mortgage Ponzi scheme; that she destroyed her e-mails; that she set up a task force on mortgage fraud and did nothing; or that she had no experience creating jobs.

The Hodes campaign yesterday continued to deny that the poll was a push poll. "As we have previously said, all of our polling is only done for statistical market research purposes. Our campaign does not engage in push polling," Bergman said.

When the complaint was filed in July, Bergman told the Associated Press that the complaint was frivolous and "trying to score cheap political points."

The Ayotte campaign yesterday accused Hodes of basing his campaign on "launching vicious, false attacks against Kelly Ayotte."

"It's reprehensible that Hodes's campaign first tried to blame Republicans before ultimately accepting responsibility for this disgusting smear campaign against Kelly," said Ayotte spokesman Jeff Grappone. "By admitting his connection to this illegal push poll, Hodes confirms that he'll do anything - even violate election law - to win this race."

***(Shira Schoenberg can be reached at 369-3319 or [sschoenberg@cmonitor.com](mailto:sschoenberg@cmonitor.com).)***

**Source URL:** <http://www.concordmonitor.com/article/220603/settlement-reached-in-hodes-calls>

NEW HAMPSHIRE

**Department of Justice**  
**Office of the Attorney General**

Attachment 2

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News Release

**For Immediate Release**

October 15, 2010

**Contact:**Richard W. Head, Associate Attorney General  
(603) 271-1248**Mountain West Research Center to Pay \$20,000 Under Consent Agreement For Push Polling Complaint**

Attorney General Michael Delaney announced today his Office has reached a settlement agreement with Mountain West Research Center following complaints that the company was engaged in push polling in a manner that violated New Hampshire's push polling law. Under the terms of the Consent Agreement, Mountain West will pay the State \$20,000 to settle the dispute.

Under New Hampshire law, push polling is defined as

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

**RSA 664:2, XVII.**

While push polling is legal in New Hampshire, any person who engages in push polling must include the following information at some point during the call:

- (a) that the telephone call is being made on behalf of, in support of, or in opposition to a particular candidate for public office;
- (b) identify that candidate by name; and
- (c) provide a telephone number from where the push polling is conducted.

**RSA 664:16-a, I.**

Mountain West contacted 529 New Hampshire households during the period July 19-21, 2010. Mountain West did not provide the disclosures described in the statute. The company voluntarily stopped making the calls on July 21, 2010 upon learning that questions had been raised regarding its polling activity. Mountain West also cooperated with the Attorney General's investigation. Mountain West's voluntary cessation of its polling activities and its cooperation were factors considered by the Attorney General in determining an appropriate penalty.

Attorney General Delaney said: "An essential element of our democracy is vigilant enforcement of New Hampshire's election laws. My Office will continue to vigorously investigate election related complaints, and initiate civil or criminal

**enforcement actions against those who violate New Hampshire's election laws."**

More information about filing elections related complaints can be found on the Attorney General's Web site at <http://doj.nh.gov/elections/>.

New Hampshire Department of Justice | 33 Capitol Street | Concord, NH | 03301  
Telephone: 603-271-3658

NEW HAMPSHIRE

**Department of Justice**  
**Office of the Attorney General**

Attachment 3

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News Release

**For Immediate Release**

January 18, 2012

**Contact:**

Matthew G. Mavrogeorge, Assistant Attorney General  
(603) 271-1222

**OnMessage, Inc. to Pay \$15,000 Under Consent Agreement For Push Polling Complaint**

Attorney General Michael Delaney announced today his Office has reached a settlement agreement with OnMessage, Inc. ("OnMessage") following complaints that the company was engaged in push polling in a manner that violated New Hampshire's push polling law. Under the terms of the Consent Agreement, OnMessage will pay the State \$15,000 to settle the dispute.

The State has alleged that OnMessage was hired by the 2010 Guinta for Congress campaign and wrote the push poll script used in the 400 calls that were made to New Hampshire residents in September 2010. OnMessage's script failed to disclose the telephone number used to conduct the push poll, in violation of New Hampshire law. In addition, OnMessage's script did not inform the recipient of the calls the name of the candidate on whose behalf the push polling was being made. Rather, the script contained instructions to disclose the candidate's name only if a New Hampshire citizen affirmatively asked for that information at a certain point towards the end of the phone call. Under New Hampshire law, the person placing a push poll phone call must disclose the candidate's name and the phone number being used to make the call at some point during a push poll call regardless of whether the recipient of the call ever asks for such information. As a result, the State alleged that OnMessage engaged in push polling in violation of New Hampshire law. OnMessage has cooperated with the Attorney General's Office.

Attorney General Delaney said: "An essential element of our democracy is vigilant enforcement of New Hampshire's election laws. My office will continue to vigorously investigate election related complaints, and initiate civil or criminal enforcement actions against those who violate New Hampshire's election laws."

Below is a link to a copy of the settlement agreement.

Under New Hampshire law, push polling is defined as

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

RSA 664:2, XVII

While push polling is legal in New Hampshire, any person who engages in push polling must include the following information at some point during the call:

- (a) that the telephone call is being made on behalf of, in support of, or in opposition to a particular candidate for

public office;

(b) identify that candidate by name; and

(c) provide a telephone number from where the push polling is conducted.

RSA 664:16-a, I.

More information about filing elections related complaints can be found on the Attorney General's website at [www.doj.nh.gov/site-map/voters](http://www.doj.nh.gov/site-map/voters).

Settlement Agreement with OnMessage, Inc.

Adobe Acrobat Reader format. You can download a free reader from [Adobe](http://adobe.com).

New Hampshire Department of Justice | 33 Capitol Street | Concord, NH | 03301  
Telephone: 603-271-3658



"Joseph E. Sandler"  
<sandler@sandlerreiff.com>  
03/05/2012 04:15 PM

To "EHeiden@fec.gov" <EHeiden@fec.gov>, Liz Howard  
<Howard@sandlerreiff.com>  
cc "ARothstein@fec.gov" <ARothstein@fec.gov>  
Subject RE: Additional Information for preAOR on behalf of  
Greenberg Quinlan Rosner Research

Ms. Heiden:

Attached please find our response to your email below.

If you have any further questions or need any additional information, please let us know.

Thanks very much,

Joe Sandler

Joseph E. Sandler  
Sandler, Reiff, Young & Lamb, P.C.  
1025 Vermont Avenue, N.W. Suite 300  
Washington, D.C. 20005  
Tel: (202) 479-1111  
Fax: (202) 479-1115  
Cell: (202) 607-0700

**From:** EHeiden@fec.gov [mailto:EHeiden@fec.gov]  
**Sent:** Thursday, February 23, 2012 5:41 PM  
**To:** Joseph E. Sandler; Liz Howard  
**Subject:** Additional Information for preAOR on behalf of Greenberg Quinlan Rosner Research

Dear Mr. Sandler and Ms. Howard,

In our telephone conversation earlier today, you provided us with additional information regarding the advisory opinion request submitted on behalf of Greenberg Quinlan Rosner Research, Inc. ("GQRR"). We have set out below our understanding of certain issues covered during the conversation. Please either confirm the accuracy of these statements or correct any misperceptions.

1. GQRR is not asking the Commission to determine whether the telephone surveys described in the advisory opinion request would require a disclaimer under the Federal Election Campaign Act (the "Act") and Commission regulations.
2. GQRR is asking about two types of telephone surveys: those paid for by Federal candidates and those paid for by non-profit organizations that clearly identify Federal candidates.
3. The telephone surveys that GQRR plans to conduct on behalf of Federal candidates and non-profit organizations would not expressly advocate the election or defeat of a clearly identified Federal candidate.
4. The telephone surveys would meet the regulatory definition of "telephone bank" at 11 CFR 100.28.

We would appreciate your response by email. Your response may be treated as a supplement to the advisory opinion request and, as such, may be placed on the public record.

Thank you,

Esther

Esther Heiden  
Office of General Counsel, Policy Division  
Federal Election Commission  
999 E Street, NW  
Washington, DC 20463



Office: (202) 694-1650 GQRR ADR NH Disclosure Law Response to FEC OGC 3-5-2012.pdf

# SANDLER, REIFF, YOUNG & LAMB, P.C.

March 5, 2012

Via E-Mail and First Class Mail

Esther Heiden, Esq.  
Office of the General Counsel  
Federal Election Commission  
999 E Street, N.W.  
Washington, D.C. 20463

**Re: Pre-AOR On Behalf of Greenberg Quinlan Rosner Research**

Dear Ms. Heiden:

This will respond to your e-mail of February 23, 2012, following our telephone conversation with you and Amy Rothstein. You have asked us to confirm, or address any inaccuracies in, the following statements:

1. "GQRR is not asking the Commission to determine whether the telephone surveys described in the advisory opinion request would require a disclaimer under the Federal Election Campaign Act (the "Act") and Commission regulations." That is correct. Greenberg Quinlan Rosner Research ("GQRR") is *not* asking the Commission to revisit the question—addressed in its consideration of MUR 5835 (Democratic Congressional Campaign Committee)—of whether 2 U.S.C. §441d requires that survey research (opinion polls) conducted by telephone include a disclaimer. Further, it is clearly *not* necessary for the Commission to address that question in order to answer the question that GQRR is raising in its advisory opinion request: whether a state law purporting to require disclaimers in polls referencing only federal candidates is preempted by the Act.

"Congress explicitly stated in 2 U.S.C. § 453 its intent that FECA preempt state law." *Weber v. Heaney*, 995 F.2d 872, 876 (8<sup>th</sup> Cir. 1993). In that regard, the key point is that the preemption of state law by the Act is a case of *express field preemption*: the Act "is construed to *occupy the field* with respect to elections to Federal office and... the Federal law will be the sole authority under which such elections will be regulated." Advisory Opinion 1995-41 at 2 (quoting H. Rep. No. 93-1239, 93d Cong., 2d Sess. 10 (1974) (emphasis added)). See *Bunning v. Commonwealth of Kentucky*, 42 F.3d 1008, 1012 (6<sup>th</sup> Cir. 1994) ("Federal law occupies the field with respect to reporting and disclosure....") (internal citation omitted). "When Congress intends federal law to 'occupy the field,' state law *in that area* is preempted." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000)(emphasis added).

When there is such field preemption, it does not matter that Congress has not regulated a particular aspect of the preempted field. Rather, “[w]hen Congress has enacted a preemption which provides a reliable indicium of congressional intent with respect to state authority, the court need only ‘identify the domain expressly pre-empted.’” *Runnig*, 42 F.3d at 1012 (quoting *Cipolline v. Liggett Group, Inc.*, 505 U.S. 504, 517 (1992)). If Congress, within that domain, decides not to impose regulation on a particular activity, the field preemption doctrine still precludes the states from regulating. “A federal decision to forgo regulation in a given area may imply an authoritative federal determination is best left *unregulated*, and in that effect would have as much preemptive force as a decision to regulate.” *Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Bd. of Miss.*, 474 U.S. 409, 422 (1986) (quoting *Arkansas Elec. Coop. Corp. v. Arkansas Public Service Comm’n*, 461 U.S. 375, 384 (1983) (emphasis in original)).

The Act, of course, contains an express preemption clause: 2 U.S.C. §453 provides that the provisions of the Act “supersede and preempt any provision of State law with respect to election to Federal office.” The only question put before the Commission by GQRR’s advisory opinion request is whether the disclosure of the source of funding of a telephone survey mentioning, and/or providing information about, federal candidates, falls within the “domain” described in section 453. If the answer is yes, New Hampshire’s law is preempted. It is irrelevant whether an affirmative federal disclaimer requirement applies instead.

As the three Commissioners who voted against OGC’s recommendation in MUR 5835 stated, “Certainly, Congress was keenly aware that campaigns conduct opinion polls via telephone, and certainly *could have* included them in section 441d....” (MUR 5835, Statement of Reasons of Vice Chair Matthew S. Petersen and Commissioners Caroline C. Hmar and Donald F. McGahn & (July 1, 2009)). Those three Commissioners determined that Congress had *not* included telephone polls in section 441d. The other three Commissioners implicitly concluded that Congress *had* included telephone polls in section 441d. Regardless of the answer to that question, however—which GQRR is *not* asking here-- the proposition that Congress *could have* included such polls in section 441d seems to us be indisputable—and conclusive. Such polls are within the “domain” described in section 453. New Hampshire’s law is clearly preempted.

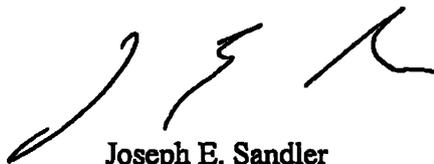
2. “GQRR is asking about two types of telephone surveys: those paid for by Federal candidates and those paid for by nonprofit organizations that clearly identify Federal candidates.” That is correct, with the clarification that in both cases, the polls mention only federal candidates, not any candidates for state or local office. Thus, as to both types of surveys, the issue is whether the state can regulate the disclosure of funding of communications that refer *only* to federal candidates. For the reasons stated in the advisory opinion request and above, the answer is clearly no.

3. "The telephone surveys that GQRR plans to conduct on behalf of Federal candidates and non-profit organizations would not expressly advocate the election or defeat of a clearly identified Federal candidate." This statement is correct.

4. "The telephone surveys would meet the regulatory definition of 'telephone bank' at 11 C.F.R. §100.28." GQRR is not requesting that the commission determine whether the proposed GQRR surveys in New Hampshire meet the regulatory definition of a "telephone bank." That question is simply not relevant to the issue of whether Congress has preempted the field including the proposed activity. To be sure, the number of telephone surveys about federal candidates conducted in New Hampshire will in some cases, for particular surveys, exceed 500. The applicability of the federal disclaimer requirement (2 USC §441d; 11 CFR §110.11) would then turn on whether a telephone survey is a "public communication" within the meaning of section 100.26 of the Commission's rules. Again, the answer to that question is immaterial to the question being raised in GQRR's advisory opinion request. The question is not whether the New Hampshire disclaimer requirement conflicts with a different FEC requirement; the question is whether disclosure of the funding of communications mentioning only federal candidates can be regulated by state law at all given that Congress has occupied this field.

Thank you for your consideration of this request, and for the staff's time and attention to this request. If you have any further questions or need any clarification of the above, please contact us.

Sincerely yours,



Joseph E. Sandler  
Elizabeth L. Howard  
Counsel to Greenberg Quinlan Rosner  
Research, Inc.