FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: The Commission
Staff Director
General Counsel
Press Office
Public Disclosure

FROM: Commission Secretary

DATE: April 11, 2012

SUBJECT: Comment on Draft AO 2012-10
(Greenberg Quinlan Rosner Research, Inc.)

Transmitted herewith is a timely submitted comment from Joseph E. Sandler, Esq. and Elizabeth L. Howard, Esq.

Draft Advisory Opinion 2012-10 is on the agenda for April 12, 2012.

Attachment

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

April 11, 2012

Via Facsimile

The Honorable Shawn Woodhead Werth
Commission Secretary
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: Advisory Opinion 2012-10 Drafts – Agenda Document 12-22
Comments of Requestor Greenberg Quinlan Rosner Research

Dear Madame Secretary:

These comments are submitted on behalf of Greenberg Quinlan Rosner Research ("GQRR") on Agenda Document 12-22, containing Drafts A, B and C of Advisory Opinion 2012-10 submitted by the Office of General Counsel for consideration by the Commission at its Open Session on April 12, 2012. (We plan to submit comments on Draft D, provided to us last night by OGC, by the 5:00 p.m. deadline today).

GQRR urges the Commission to adopt Draft A. As explained below, Draft B misapprehends the scope of the field preemption established by the express language of the Federal Election Campaign Act of 1971 as amended ("FECA"), 2 U.S.C. §453(a), as that scope has been interpreted by the courts and the Commission itself. Draft C, in taking the position that the issue of whether the state law is preempted by the Act is not an appropriate subject for an advisory opinion, flies in the face of decades of Commission precedent and court rulings.

1. Draft B Misconstrues the Scope of the Field Preempted

Draft B would find that the New Hampshire statute is preempted with respect to polls conducted on behalf of federal candidates, but not with respect to polls referencing only federal candidates, but sponsored by nonprofit organizations. None of the points made in Draft B supports such a conclusion.

First, Draft B invokes the general presumption against preemption—that "assumption that the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." Draft B at 8 (quoting *Bates v. Dow Agrosciences* LLC, 544 U.S. 431, 449 (2005) (internal quotation omitted)). Regulating communications about or discussing federal candidates, however, is hardly one of the "historical police powers" of the States. To the contrary, the entire field of spending on activities referencing federal candidates, including disclaimers related to such spending, has been

regulated by the federal government for more than a century. beginning with the Tillman Act of 1907. An "'assumption' of nonpre-emption is not triggered when the State regulates in an area where there has been a history of significant federal presence." *United States v. Locke*, 529 U.S. 89, 108 (2000).

Second, Draft B suggests that section 453 "has been interpreted narrowly by the courts." Draft B at 8. The scope of that section has not, however, been "narrowly" interpreted with respect to the field that is the subject of the preemption. "Congress explicitly stated in 2 U.S.C. § 453 its intent that FECA preempt state law. Therefore, our task is only to 'identify the domain expressly pre-empted by [this section].'" *Weber v. Heaney*, 995 F.2d 872, 875 (8th Cir. 1993) (quoting *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517 (1992)). "[E]xpress preemption via the FECA preemption clause and field preemption are no different in practice. The FECA preemption clause means that FEC occupies the field 'with respect to election to federal office.' 2 U.S.C. §453. The only real issue is the effective reach of this phrase." *Teper v. Miller*, 82 F.3d 989, n. 5 (11th Cir. 1996). That "effective reach" clearly includes disclosures relating to spending on communications referencing federal candidates. *See, e.g.*, Advisory Opinion 1978-24 (Sonneland).

Disclosure of the source of spending on a communication—even by an entity *other* than a federal political committee—that references and discusses a federal candidate in the context of a political campaign, is clearly within the field preempted by FECA. Forbidding a nonprofit organization from conducting a poll about a federal candidate unless certain disclosures are made is a "[l]imitation on... expenditures *regarding* Federal candidates," that is within the scope of the preempted field. 11 C.F.R. §108.7(b)(3) (emphasis added). Such disclosure is *not* akin to any of the subject areas that the Commission has defined as being outside the scope of the preempted field—namely, ballot qualification; dates and places of elections; voter registration, prohibition of false registration, voting fraud, theft of ballots and similar offenses; and candidate's personal financial disclosure. 11 C.F.R. §108.7(c). Indeed, the New Hampshire statute at issue, N.H. Rev. Stat. §664:16-a, is a campaign finance and disclosure statute, contained within Chapter 664, the "Political Expenditures and Contributions" chapter of the Elections Title (Title LXIII).

By the same token, none of the cases cited by Draft B involved any activity remotely analogous to compelled disclosures for communications referencing federal candidates, and none stands for the proposition that the scope of the preemption provision is limited to state laws regulating federal candidate committees or political committees. *Karl Rove & Co. v. Thornburgh*, 39 F.3d 1273 (5th Cir. 1994) addressed the liability of a candidate for the debts of an unincorporated campaign committee—an issue as to which the FEC itself had ruled state law governs, and an issue clearly outside the scope of the preempted field since "nowhere in the text of FECA or accompanying regulations is the personal liability of a candidate addressed." *Id.* at 1281. By contrast, disclosures and disclaimers pertaining to communications referencing federal

candidates is extensively regulated by the FECA and the Commission's rules. E.g., 11 C.F.R. §110.11.

Similarly, *Reeder v. Kansas City Board of Police Commissioners*, 733 F.2d 543 (8th Cir. 1984), involved a state statute regulating contributions by municipal employees. While the Court suggested that section 453 "*can* also be read to refer primarily to the behavior of candidates," 733 F.2d at 545, the Court's decision was based on the fact that activity of municipal employees was an area Congress indicated, in the legislative history of section 453, specifically carved out of the preempted field. "'it is the intent of conferees that any State law regulating the political activities of State and local officers and employees is not preempted....'" *Reeder*, 733 F.2d at 545 (quoting S. Conf. Rep. No. 93-1237, 93d Cong., 2d Sess (1993)).

In any event, it is clear that the field preempted under section 453 is not limited to the activity of candidates and political committees. For example, it cannot be the case that a state law could compel certain disclaimers by nonprofit organizations making "electioneering communications" as defined in the FECA and Commission rules, or making independent expenditures. Such disclaimer requirements are certainly within the scope of the preempted field.

In that regard, it is not relevant that, as Draft B states, telephone surveys conducted by nonprofit organizations as described in the AOR "do not fall within the scope of the definition of electioneering communication, nor do they solicit contributions or expressly advocate the election or defeat of a clearly identified federal candidate." Draft B at 9. To be sure, for those reasons, the New Hampshire statute does not conflict with FECA or the Commission's rules. But, "'[n]othing in the language' of §453 suggests that FECA's 'pre-emption is limited to *inconsistent* state regulation.'" *Weber v. Heaney*, 995 F.2d at 876 n. 4 (quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 386 (1992) (emphasis in original)). Rather, the issue is whether the type of disclosure/disclaimer requirement imposed by the New Hampshire statutes falls within the preempted domain.

As explained in our earlier response to OGC's questions, 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. Hunter and Donald F. McGahn 8 (July 1, 2009)). The other three Commissioners implicitly concluded that Congress *had* included telephone polls in section 441d. Regardless of the answer to that question, however, the proposition that Congress *could have* included such polls in section 441d seems indisputable—and conclusive.

Such polls, referencing only federal candidates in the context of a political campaign, are within the domain of the FECA—namely, disclaimers/disclosures of spending for

communications referencing federal candidates. 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 *un*regulated, 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)).

For these reasons, the Commission should reject Draft B.

2. Draft C Is Inconsistent with Commission Precedent and the Scope of the Commission's Authority

Draft C would reach the correct conclusions with respect to the scope of preemption, but would hold that the "Commission is not the appropriate body to decide" the question of whether the New Hampshire statute is preempted by the FECA. While it is literally true that the Commission has no authority to enjoin enforcement of a state statute, it is certainly not the case that the Commission is not the appropriate body to decide the question of whether FECA preempts a state law.

Indeed, the courts have held that they should defer to the Commission's Advisory Opinions in determining whether a particular state law is preempted under section 453. "Determining the scope of preemption appears to fall within the competence of the commission in light of its administrative responsibilities." *Weber v. Heaney*, 793 F. Supp. 1438, 1455 (D. Minn. 1992), *aff'd*, 995 F.2d 872 (8th Cir. 1993). Similarly, in *Teper v. Miller, supra*, the Court deferred to the Commission's interpretation of the scope of section 453, holding that, "I believe we are obliged to take the FEC's interpretation as more than merely convincing." *Teper*, 82 F.3d at 997. "An agency like the FEC, to which Congress has delegated broad discretion in interpreting and administering a complex federal regulatory regime, is entitled to significant latitude when acting within its statutory authority, even in its decision as to the scope of preemption of state law." *Id.* at 998. *See FEC v. National Rifle Ass'n*, 254 F.3d 173, 184-86 (D.C. Cir. 2001) (*Chevron* deference due to FEC Advisory Opinions).

Since its creation, the Commission has rendered more than eighty advisory opinions as to whether state statutes are preempted by the FECA. It makes no sense for the Commission suddenly to conclude that it lacks authority to issue an advisory opinion addressing the issue before it in this AOR.

CONCLUSION

For the reasons set forth above, the Commission should reject Draft B and Draft C, and should adopt Draft A.

We thank the Commission for its consideration of this request and these comments.

Sincerely yours,

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

cc: Amy Rothstein, Esq.—Office of General Counsel
Esther Heiden, Esq.- Office of General Counsel