




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 - #2
(Greenberg Quintan Rosner Research, Inc.)

Transmitted herewith is a timely submitted comment from Matthew G. Mavrogeorge, Assistant Attorney General, New Hampshire, and Brian W. Buonamano, Attorney.

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

Attachment

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April 11, 2012

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

Dear Secretary Woodhead Werth and Attorney Deeley:

The New Hampshire Department of Justice, Office of the Attorney General, submits the following comments to the Commission's draft advisory opinions responding to the request by Greenberg Quinlan Rosner Research, Inc. ("GQRR") as to whether New Hampshire Revised Statutes ("RSA") 664:16-a is preempted by the Federal Election Campaign Act of 1971 as amended ("FECA").

I. Introduction

The Commission's draft advisory opinions have construed New Hampshire's requirement that a disclaimer be placed in certain telephone surveys as a direct regulation of campaign expenditures subject to the Commission's preemption regulations where the surveys solely reference candidates for federal office. For the reasons set forth below, New Hampshire respectfully requests that the Commission reject this broad conception of what constitutes state regulation of campaign expenditures.

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Office of General Counsel, Attn: Kevin Deeley, Esq.
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II. Regulation of Campaign Expenditures

The Commission has construed state regulation of campaign expenditures in a manner significantly broader than Congress's regulation of campaign expenditures through FECA. This construction expands the scope of FECA's preemptive authority to something greater than Congress's original intent, as expressed through FECA's statutory provisions.

FECA defines "expenditure" as "...any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office; and (ii) a written contract, promise, or agreement to make an expenditure." 2 U.S.C. §271 (b) (3). FECA directly regulates expenditures by placing a direct limit on the dollar amount of certain expenditures, as that term is defined by statute. See §441a (a)-(j). FECA also regulates certain areas through the avenue of expenditures by regulating the substance of certain campaign activity only when a federal committee makes a particular expenditure in that particular area. See e.g. §441d (a) (regulates the content of political advertising when an expenditure is made for that particular advertising).

Unlike the provisions cited above, New Hampshire's regulation of telephone surveys does not regulate campaign expenditures. New Hampshire law does not directly limit campaign spending in the area of telephone surveys. Nor does it indirectly regulate telephone surveys through expenditures made in that particular area. Rather, this is a direct regulation on a transaction outside the area of campaign expenditures. Although New Hampshire does have statutes that address campaign financing, RSA 664:2, XVII and 664:16-a are not contained within those provisions. See RSA 664:4-b; 664:5; 664:5-a-b. RSA 664:16-a is more appropriately described as a direct regulation of telephone surveys through the requirement that a disclaimer be placed in those surveys that meet the statutory definition of a push-poll under RSA 664:2, XVII. Moreover, AO 2009-21 was different from New Hampshire's statute in that the polling regulation was imbedded in a direct regulation of expenditures. The West Virginia statute sought to permit a certain amount of election expenses, "including, among others, 'conducting public opinion poll or polls.'"

New Hampshire's disclaimer requirement does not prevent or impede the ability of a federal candidate to pay for a telephone survey. The existence of a disclaimer and the payment for the survey where that disclaimer is required are two distinct transactions. While a direct limitation on how much a candidate may spend on a survey might arguably be preempted, regulations that address the content or conduct of the telephone poll do not involve payment considerations. While the disclaimer requirement may have an effect on a federal candidate or committee's decision to pursue telephonic polling, this is far too attenuated to constitute a regulation of expenditures in the same fashion that FECA regulates expenditures.

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Under the analysis suggested by GQRR and the Commission's draft opinions, virtually any state laws that seek to regulate transactions that touch upon federal candidates or campaigns would be preempted. Indeed, this conclusion is compelled by the suggestion that New Hampshire's regulation is preempted because it would prevent payment for a poll "unless" it contained the disclaimer provision. This analysis would serve to preempt state regulations that this Commission has previously held as outside of FECA's preemptive scope. For example, in AO 2001-19, the Commission did not find preemption of state regulation of bingo fundraisers that would require a federal campaign or committee to receive a bingo license before conducting the fundraiser. This regulation, arguably, would prevent payment for a fundraiser "unless" the required license was obtained. Similarly in AO 1981-27, the commission held that "...state or local regulations and statutes that apply to the placement and location of campaign advertisements [are] outside the purview of 2 U.S.C. 453...since [they]...are not integral to the disclosure purpose that undergirds 2 U.S.C. 441d." Thus, that regulation would prevent payment for campaign advertising "unless" state regulations regarding placement and location of campaign advertisements are followed. New Hampshire's regulation of telephone polling is no different than the regulation from AO 1981-27 regarding how and where political advertising signs are placed. It is a substantive regulation of conduct in an area not addressed by FECA's provisions, and it has nothing to do with expenditures.

III. Conclusion

New Hampshire's regulation of telephonic polling is not a regulation of campaign expenditures. It is a substantive regulation that applies to all elections that take place in the state of New Hampshire. These regulations are designed to respond to the unique concerns of New Hampshire citizens. This area of New Hampshire law does not infringe upon the legitimate scope of Federal Authority, as defined by FECA's regulations. The Commission should not, therefore, find that RSA §664:16-a is preempted by 2 U.S.C. §453.

Sincerely,



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