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 - #3
(Greenberg Quinlan Rosner Research, Inc.)

Transmitted herewith is a timely submitted comment from Marc E. Elias, Brian G. Svoboda, and Ezra W. Reese on behalf of The Mellman Group.

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

Attachment

Perkins Coie

700 Thirteenth Street, N.W., Suite 600
Washington, D.C. 20005-3960
PHONE: 202.654.6200
FAX: 202.654.6211
www.perkinscoie.com

Marc Erik Elias
PHONE: (202) 434-1609
FAX: (202) 654-9126
EMAIL: MElias@perkinscoie.com

April 11, 2012

Shawn Woodhead Werth
Secretary and Clerk
Federal Election Commission
999 E Street NW
Washington, DC 20463

Re: Advisory Opinion No. 2012-12

Dear Ms. Werth:

We write on behalf of The Mellman Group, an opinion polling firm. For over thirty years, The Mellman Group has provided opinion research and strategic advice to federal and state candidates; political party committees; other political committees; and nonprofit organizations. We wish to provide comment on the advisory opinion request of Greenberg Quinlan Rosner Research, Inc., and the four draft Advisory Opinions marked 2012-10 A, B, C, and D.

A. Introduction

The state law at issue, N.H. Rev. Stat. § 644:16-a, purports to regulate "push polling." A push poll is a phone call masked as a survey but that is actually designed to persuade voters, not to determine their opinions. In short, a "push poll" is not a poll at all. In 1995, the Ethics Committee of the American Association of Political Consultants agreed unanimously that push polls violate its Code of Professional Ethics.

As the comments of the Marketing Research Association noted, the state of New Hampshire takes the position that the law actually regulates bona fide research polling as well as push polls. The Attorney General has, under this law, also pursued legitimate research polls that include information about candidates. These are not, under any common definition, "push polls"; to describe them thus defames the polling profession. While The Mellman Group does not engage in "push polling," it does engage in scientifically-based opinion surveys that, if conducted in

New Hampshire, could trigger the disclaimer requirements of the law as the state is now enforcing it.

N.H. Rev. Stat. § 644:16-a is not unusual in applying on its face to communications about federal as well as state and local candidates. Many state laws are so constructed, and state enforcement agencies correctly take the view that they do not apply to federal elections. Unusually, however, the Attorney General of New Hampshire has not only refused to cede ground to the Federal Election Commission's jurisdiction; it has aggressively targeted polling specifically in federal elections and extracted large fines. The result has been a chilling effect on polling in the state of New Hampshire in federal elections, creating great risk and uncertainty as polling firms and their clients who are engaged in polling in federal elections are unsure what is required of them under the law.

Congress entrusted the Commission with "sole authority" to regulate the conduct of federal elections. H.R. Rep. No. 93-1239, 93rd Cong., 2d Sess. 10 (1974). The Commission should not cede that authority here. Whether communications made in connection with federal elections should bear sponsorship statements – and if so, what those statements must say – are decisions reserved for Congress and for the Commission.

If the Commission chooses not to act, or to define its jurisdiction sparingly, it leaves firms like The Mellman Group open to a myriad of state and local laws, regulations, and agency decisions that provide alternative answers to questions that Congress and the Commission have already visited. That was not Congress's intent when it enacted the Federal Election Campaign Act of 1971, as amended (FECA). Congress expected all federal campaign activity to be conducted on the same playing field. The Commission has every right to demarcate the boundaries of its powers, and make clear that federal elections will be governed solely by federal law.

B. The Commission Should Issue a Decision on Preemption

Since its creation, the Commission has issued numerous advisory opinions ruling on requests to determine whether FECA preempts a state or local law. Drafts C and D would, for the first time, hold that the Commission may not address a straightforward case of preemption.

The request for an advisory opinion by Greenberg Quinlan Rosner Research, Inc. meets the Commission's regulatory requirements. It is a request for an "opinion concerning the applicability of [FECA]." 11 C.F.R. § 112.1(a). Within 60 days of that request, the Commission is obligated to issue an opinion. *See* 2 U.S.C. § 437f(a)(1). This request does not set forth a hypothetical or present a general question of interpretation, *see* 11 C.F.R. § 112.1(b); it presents a real situation that now threatens the requestor and the entire polling community and asks the Commission whether FECA applies. The Commission has no clear right to remain silent.

Moreover, a Commission opinion in this matter would serve a necessary and important function. It is true that an opinion only gives absolute protection against sanctions under FECA or chapters 95 or 96 of title 26 of the United States Code. The Commission may not be able to guarantee that the requestor, or those similarly situated, would not face state enforcement action. But it nevertheless remains true that a federal agency's decision to preempt a state's regulation in the agency's are of jurisdiction is given great weight by the courts if it "represents a reasonable accommodation of conflicting policies." *United States v. Shimer*, 367 U.S. 374, 383 (1961). "[I]n proper circumstances [a federal] agency may determine that its authority is exclusive and preempts any state efforts to regulate in the forbidden area." *See City of New York v. FCC*, 486 U.S. 57, 64 (1988). And courts have, in practice, deferred to the Commission's judgment in these matters. *See Teper v. Miller*, 82 F.3d 989, 996-97 (11th Cir. 1996).

Tellingly, the Office of the Attorney General of the state of New Hampshire, in its comments to the Commission, has not requested that the Commission decline to rule. Instead, its comments cite to prior preemption decisions by the Commission and request a definitive ruling in its favor. A refusal to issue a decision does the Office of the Attorney General no favors, as it withholds valuable guidance that would help it to determine where its jurisdiction ends and the Commission's begins.

While the issuance of a Commission opinion in this matter may not prevent the state of New Hampshire from seeking to encroach on its jurisdiction, it would still provide needed guidance to the regulated community and the judiciary. The Commission cannot stay on the sidelines.

C. The Commission Should Include Nonprofits in its Preemption Finding

Proposed Draft B correctly finds that N.H. Rev. Stat. § 644:16-a is preempted by federal law as applied to telephone surveys paid for by federal candidates. However, it unnecessarily cedes the Commission's jurisdiction over other organizations that engage in activity with respect to federal elections. Were the Commission to adopt such a sparing view of FECA, it would require nonprofit organizations to contend with state law when engaging in activity in direct support of express advocacy or electioneering communications.

FECA originally contained a clause explicitly preserving state laws, except where compliance would violate FECA or prohibit conduct permitted by FECA. *See* Federal Election Campaign Act of 1971, Pub. L. No. 92-225. The 1974 amendments added the preemption provision that FECA and its promulgated rules "supersede and preempt any provision of State law with respect to election to Federal office." 2 U.S.C. § 453(a).

Express preemption is not the only avenue for authority in this case; field preemption also applies. Field preemption occurs "[w]hen Congress intends federal law to occupy the field" in a given area. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000). The legislative

history of § 453 makes clear that Congress meant FECA to preempt state law in the field of federal elections. The 1974 preemption provision was designed "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 the sole authority under which such elections will be regulated." H.R. Rep. 93-1239 at 10.

Draft B concludes that FECA does not preempt N.H. Rev. Stat. § 644:16-a with regard to surveys paid for by nonprofit organizations that are not federal political committees, unless the surveys include a solicitation of contributions or a statement expressly advocating the election or defeat of a clearly identified candidate. The draft opinion bases this conclusion on the fact that the Commission's disclaimer requirements do not apply to such communications. That argument is specious: preemption, and in particular field preemption, does not depend on the existence of a federal regulation directly on point.

The Commission's express and field preemption authority extend beyond activity that is directly regulated by FECA or the Commission's regulations. "[A] federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left unregulated." *Ark. Elec. Co-op. Corp. v. Ark. Public Service Comm'n*, 461 U.S. 375, 385 (1983). The thrust of field preemption is that Congress and the Commission – and they alone – have the power to determine what federal election communications require a disclaimer. If a state attempts to regulate federal elections communications that Congress or the Commission has decided affirmatively not to regulate, it is usurping the authority to make these determinations.

The proper preemption test in this case is instead whether a state law applies "with respect to election to Federal office." 2 U.S.C. § 453(a); *see also* H.R. Rep. 93-1239 at 10. While 11 C.F.R. § 108.7 does provide some examples of what is and is not preempted, it provides no guidance for those subjects that do not fall into either category. And in any case, the regulation was meant merely to follow the statute. *See Explanation and Justification*, House Document No. 95-44, at 51.

Nonprofit polling in connection with federal elections surely meets the definition of activity "with respect to election to Federal office." First, the law does not apply any time a federal candidate is mentioned. Setting aside polls that mention state or local candidates, the statute only applies when polling is done "on behalf of, in support of, or in opposition to" candidates for federal office. Its application to polls referencing federal candidates therefore claims to be co-extensive with FECA's regulation of expenditures "for the purpose of influencing any election for Federal office." *See* 2 U.S.C. § 431(9)(A)(i). This is squarely within the Commission's jurisdictional authority.

Second, while the telephone surveys themselves may not contain solicitations of funds or express advocacy, and while they do not themselves constitute electioneering communications, this

polling is often done to support one of those actions. If the Commission has the authority to regulate communications that expressly advocate the election or defeat of federal candidates, and to regulate electioneering communications, then it also has jurisdiction over expenses in support of those activities.

Third, in the case of N.H. Rev. Stat. § 644:16-a, the statute's authority over, and interest in, polling that references federal candidates is tied to its connection to federal elections. Setting aside surveys about state or local candidates (where FECA preemption is not relevant) the regulation only purports to apply when a survey includes questions about candidates for federal office. The purpose of the statute in this instance can only be to regulate federal elections, and the state's only interest is to limit or regulate them. After the passage of FECA, that is no longer a legitimate regulatory interest of the state of New Hampshire.

D. Conclusion

The Commission should make clear that under the clear language of section 453 and Congress's expectation that FECA occupy this field, states may not affirmatively attempt to regulate the conduct of federal elections. The Commission should adopt Draft A, and affirm that FECA preempts N.H. Rev. Stat. § 644:16-a if a polling survey refers solely to candidates for federal office.

Very truly yours,

Marc E. Elias
Brian G. Svoboda
Ezra W. Reese