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 - #4
(Greenberg Quinlan Rosner Research, Inc.)

Transmitted herewith is a timely submitted comment on Draft D from Joseph E. Sandler and Elizabeth Howard, counsel for Greenberg Quinlan Rosner Research, Inc.

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

Attachment

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

April 10, 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 Draft D– Agenda Document 12-22-A
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-A, containing Draft D 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. GQRR requested this Advisory Opinion.

Draft D represents a radical and sudden departure, with no explanation whatsoever, from more than thirty years of Commission precedent, issuing advisory opinions to private entities—not state governments—that face enforcement of state laws the requestor claimed were preempted by the Federal Election Campaign Act of 1971, as amended ("FECA"). The Commission should not and indeed, legally cannot, adopt Draft D.

FECA provides that if the Commission "receives from a person a complete written request concerning the application of this Act...with respect to a specific transaction or activity by the person, the Commission *shall render* a written advisory opinion..." 2 U.S.C. §437f(a)(1) (emphasis added). In this case, GQRR has submitted a request concerning application of the FECA—specifically, 2 U.S.C. §453—with respect to a proposed specific activity, namely, the conducting of telephone polls, in the State of New Hampshire, which polls reference only federal candidates in the context of a political campaign. GQRR is a polling firm and, as noted in the AOR, the Attorney General of New Hampshire has already enforced the New Hampshire statute against polling firms that conducted telephone polls referencing only federal candidates.

Draft D would hold that the Commission should not issue an advisory opinion in this situation because the requestor "is not asking the Commission to address application of the Act to its proposed activity" but rather "to address application of the Act to proposed activity of another entity, the State of New Hampshire, should it attempt to enforce its law." Draft D at 3.

GQRR is asking whether it can proceed with the proposed activity without complying with the disclaimer requirement imposed by state law, because the FECA preemption provision applies. This is clearly a question of application of FECA "with respect to a specific transaction or activity by" the requestor. Section 437f does not say advisory opinions are limited to determining whether a proposed activity of the requestor would *violate* the Act. Its language is much broader—"application of this Act....with respect to a specific transaction or activity" of the requestor. The Commission's refusal to issue an advisory opinion in this case would be in direct defiance of the agency's obligations under this statute.

The position in Draft D is that no one can request an advisory opinion as to whether FECA preempts a particular state law except the *state government* that plans to enforce the law. Adoption of that position would represent a complete departure from thirty years of Commission precedent: the agency has issued approximately 80 advisory opinions on preemption of state laws in response to requests by private individuals, companies or committees who *planned to engage in an activity that would be covered by the state law* and wanted to know whether they had to comply with that state law or rather, whether FECA preempted that state law. In one of the earliest examples, Advisory Opinion 1978-24 (Sonneland), a congressional campaign that planned to engage in political advertising asked whether a Washington State statute that required party designation on all campaign advertising would be "superseded and preempted by the Act and Commission regulations" under section 453. The Commission answered in the affirmative, and noted that, "This response constitutes an advisory opinion concerning application of a general rule of law stated in the Act or prescribed by Commission regulation to the specific factual situation set forth in your request."

Since 1978, the Commission has repeatedly issued advisory opinions to requestors who planned to engage in an activity that would trigger some requirement under state law, and who asked the Commission whether the state law was preempted by the FECA under section 453. *See, e.g.*, Advisory Opinion 2002-02 (Gally) (concluding that state law was preempted in response to request from lobbyist who stated that "[s]taff counsel for the Maryland State Ethics Commission has interpreted this law to mean that regulated lobbyists may not actively fundraise on behalf of a candidate for U.S. Congress IF that candidate happens to be a sitting member of the General Assembly"); Advisory Opinion 1999-12 (Campaign for Working Families) (concluding that the "Act [preempts] the application of the registration, reporting and disclaimer provisions of Pennsylvania's Solicitation of Funds for Charitable Purposes Act to CWF, in response to CWF's AOR prompted by action taken by the Bureau of Charitable Organizations of the Pennsylvania Department of State); Advisory Opinion 1995-41 (Maloney) (concluding that the Act preempted state law in response to a federal candidate's request prompted by the fact that the New York State Board of Elections believed that the state polling disclosure law applied to federal candidates and "communicated this position to [a federal] candidate"); Advisory Opinion

1986-11 (Mueller) (concluding that an Ohio statute was preempted by the Act): Advisory Opinion 1981-27 (Archer) (concluding, in response to a candidate that planned to put up signs, that a City of Houston ordinance requiring an anti-littering disclaimer on signs was preempted by the Act).

Draft D does not in any way explain why the Commission would suddenly ignore and deviate from thirty years of precedent. The agency may not, of course, "'depart from a prior policy *sub silentio*....'" *NetCoalition v. Securities and Exchange Comm'n*, 615 F.3d 525, 536 (D.C. Cir. 2010) (quoting *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009)). "Agencies are under an obligation to follow their own regulations, procedures, and precedents, or provide a rational explanation for their departures." *National Conservative Political Action Committee v. FEC*, 626 F.2d 953, 959 (D.C. Cir. 1980). Adoption of Draft D would, in itself, represent agency action that is arbitrary, capricious and contrary to law.

For the reasons set forth above, the Commission should reject Draft D of Advisory Opinion 2012-10.

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