

FEC Preempts New Hampshire "Push-Polling" Law

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On April 27, 2012, the Federal Election Commission (FEC) adopted Advisory Opinion 2012-10, which held that federal campaign finance laws preempt New Hampshire's "push-polling" statute with respect to telephone surveys referencing only federal candidates and paid for by federal candidates and federal political committees. The FEC was unable to reach a conclusion on whether the Federal Election Campaign Act (FECA) and FEC regulations preempted similar telephone surveys paid for by nonprofit organizations that are not federal political committees.

New Hampshire's statute requires that all "push-polling" telephone calls include a disclaimer identifying on whose behalf the call is made, whether the call is made in support of, or opposition to, a particular candidate and a telephone number from where the call is being conducted.

"Push-polling" is defined as:

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

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In its advisory opinion request, Greenberg Quinlin Rosner Research, Inc., a political research and strategic consulting company, stated that it intended to conduct telephone surveys-using live operators-on behalf of its federal candidate, political committee and nonprofit organization clients in New Hampshire. The survey calls would not expressly advocate the election or defeat of a clearly identified federal candidate.

Greenberg Quinlin Rosner was concerned because the New Hampshire attorney general had previously enforced the "push-polling" statute against two other survey research companies that had conducted telephone surveys on behalf of federal candidates. Greenberg Quinlin Rosner also noted that as recently as 2009, the FEC held that telephone surveys did not require the public communications disclaimer of the federal campaign finance laws.

The FEC explained that the regulation of expenditures by federal candidates, their campaign committees and other federal political committees is an area to be regulated only by federal law and that both FECA and FEC regulations already regulate this conduct, including expenditures for polling expenses. The FEC was unable to determine whether FECA and FEC regulations preempt similar telephone surveys conducted on behalf of nonprofit organizations that are not federal political committees.