HENRY MCMASTER
ATTORNEY GENERAL

November 23, 2010

Ms. Marcia S. Adams
Executive Director
SC Department of Motor Vehicles
PO Box 1498
Blythewood, SC 29016

Dear Ms. Adams:

We received your letter requesting an opinion of this Office concerning the South Carolina Department of Motor Vehicles' queuing system. You asked whether it is permissible under the South Carolina Code of Laws of 1976 for the South Carolina Department of Motor Vehicles (SC DMV) to accept updated equipment and service "in exchange for the provider's ability to run commercial advertisements on part of the television screen up to fifty percent of the time. That is queuing information would always be visible, public service announcements (PSAs) would be visible at least half of the time, and commercial advertisements would be visible the other half of the time."

As a way of background, you explained that "DMV staff has seen demonstrations of [these] systems that not only provide queuing capabilities but also allow public information broadcasts and emergency notifications. Most of these systems have been developed to be provided to state agencies at no cost of equipment or maintenance." You also mentioned that it is your "understanding that motor vehicle agencies in at least thirteen states have now entered into such arrangements." You also highlight the fact that in the proposal, the department "reserves the right to assess and refuse particular commercial messages that may be inappropriate."

This opinion will address previous opinions of this Office, relevant statutes and caselaw to determine the legality of SC DMV accepting equipment and service in exchange for commercial advertising time.

Law/Analysis

Ability to Accept Private Funds

S.C. Code § 56-1-5(A) establishes the South Carolina Department of Motor Vehicles as an administrative agency of state government. S.C. Code § 56-1-5(B) explains that "all functions,

powers, duties, responsibilities, and authority statutorily exercised by the Motor Vehicle Division and the Motor Carrier Services unit within the Department of Public Safety are transferred to and devolved upon the Department of Motor Vehicles." The Department of Public Safety is governed by the provisions of Title 23, Chapter 6 of the South Carolina Code of Laws. The duties and powers of this state agency are as follows:

> The department shall have the following duties and powers:
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> (1) carry out highway and other related safety programs;
> (2) engage in driver training and safety activities;
> (3) enforce the traffic, motor vehicle, commercial vehicle, and related laws;
> (4) enforce size, weight, and safety enforcement statutes relating to commercial motor vehicles;
> (5) operate a comprehensive law enforcement personnel training program;
> (6) promulgate such rules and regulations in accordance with the Administrative Procedures Act and Article 7 of this chapter for the administration and enforcement of the powers delegated to the department by law, which shall have the full force and effect of law;
> (7) **operate such programs and disseminate information and material so as to continually improve highway safety;**
> (8) **receive and disburse funds and grants, including any donations, contributions, funds, grants, or gifts from private individuals, foundations, agencies, corporations, or the state or federal governments, for the purpose of carrying out the programs and objectives of this chapter;** and
> (9) do all other functions and responsibilities as required or provided for by law.

S.C. Code § 23-6-30 (emphasis added).

"If a statute's language is plain, unambiguous, and conveys a clear meaning, then the rules of statutory interpretation are not needed and a court has no right to impose another meaning. The words must be given their plain and ordinary meaning without resort to subtle or forced construction which limit or expand the statute's operation." Strickland v. Strickland, 375 S.C. 76, 88-89, 650 S.E.2d 465, 472 (2007).

S.C. Code § 23-6-30(8) plainly states that the department has authority to "receive . . . funds and grants, including any donations, contributions, funds, grants, or gifts from private individuals, foundations, agencies, corporations . . . for the purpose of carrying out the programs and objectives" of the Department of Public Safety. Implicitly, the department could accept a donation from a private company which provides equipment and maintenance for the DMV queuing system. Also, S.C. Code § 23-6-30(7) explains that the department may operate programs to "disseminate information and material so as to continually improve highway safety." One could argue that this subsection gives

the DMV authority to display public service announcements promoting highway safety on the queuing system equipment in DMV offices throughout the state.

In an opinion of this Office dated February 26, 2001 we discussed the authority of the Department of Motor Vehicles as follows:

> The **Department of Public Safety is given broad authority in the provisions above to carry out the duties delegated to it by the General Assembly**. The statute gives no express authority to the Department of Public Safety to further delegate its duties to one of its divisions. However, in the absence of implied or express restricting limitations of public policy or express prohibition of law, a governmental body possesses not only such powers as are conferred upon it by the laws under which it operates but also possesses such powers which must be inferred or implied so as to enable the entity to exercise its express powers effectively. See Beard-Laney, Inc., et al. v. Darby, et al., 213 S.C. 380, 49 S.E.2d 564 (1948). See also, Op. S.C. Atty. Gen., Nov. 9, 1977. Thus, the **Division of Motor Vehicles**, operating under the aegis of the Department of Public Safety, **can exercise the authority of the Department of Public Safety** conferred by Chapter 6 [of Title 23].

Op. S.C. Atty. Gen., February 26, 2001.

In another opinion of this Office dated August 30, 2010, we again discussed the South Carolina Supreme Court case, Beard-Laney, Inc., explaining the authority of state agencies as follows:

> [T]he South Carolina Supreme Court stated that **a governmental body of limited power is not in a straight jacket in the administration of the laws under which it operates because it also possesses powers which may be inferred or implied in order to effectively exercise the expressed powers** possessed by it. Beard-Laney, Inc., et al. v. Darby, et al., 213 S.C. 380, 49 S.E.2d 564 (1948).

Ops. S.C. Atty. Gen., August 30, 2010; February15, 1978 (emphasis added).

This Office is not a fact-finding entity; investigations and determinations of fact are best resolved by a court. Ops. S.C. Atty. Gen., September 14, 2006; April 6, 2006. However, considering the nature of the project, this Office will assume that the proposal or contract is for fifteen hundred dollars or more. Therefore, the department is required by Part II, § 18 of Act No. 1137 of 1974 to invite bids from "at least three qualified sources." 1974 Act No. 1137. The department must first determine which companies are qualified to do the job to be contracted for. Then bids must be extended to three or more qualified companies.

Freedom of Speech v. Restrictions on Advertisements

Commercial Speech

The request letter explains that while the private vendor will be responsible for selling advertising space to private commercial companies, the DMV has the authority to "refuse particular commercial messages that may be inappropriate."

The First Amendment of the US Constitution ensures freedom of speech. Generally, content-based regulations of speech must meet strict scrutiny and content-neutral regulations must meet intermediate scrutiny. However, commercial speech[1] is an exception to the general rule because justification for regulating such speech outweighs the value of expression. Central Hudson Gas & Electric Corp. V. Public Service Commission of New York, 447 U.S. 557, 562, 100 S.Ct. 2343, 2349 (1980) ("Constitution therefore accords a lesser protection to commercial speech than to other constitutionally guaranteed expression"). The US Supreme Court explained that commercial speech is within the protection of the First Amendment because it is useful to the public to have adequate information when making economic choices. Virginia State Board of Pharmacy v. Virginia Citizens Council, 425 U.S. 748, 98 S.Ct. 1817 (1976). However, this form of speech is less protected and the government has been allowed to maintain oversight with regard business practices to help prevent fraud. The Court held that the state can insure "that the stream of commercial information flow[s] cleanly as well as freely." Virginia State Board of Pharmacy, 425 U.S. 748, 772.

Under Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York, 447 U.S. 557, 100 S.Ct. 2342 (1980), the US Supreme Court explains that restrictions on commercial speech are constitutional if the speech advertises illegal activities or consists of false or deceptive advertisements, there is a substantial government interest, the restriction directly advances the government interest and the restriction is narrowly tailored to the government interest. "The protection available for particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation." Central Hudson, 447 U.S. 557, 563.

The South Carolina Supreme Court applied the Central Hudson test in Video Gaming Consultants, Inc. v. South Carolina Dept. of Revenue, 342 S.C. 34, 535 S.E.2d 642 (2000) to determine when regulation is appropriate. The court explained as follows:

> When a State regulates commercial messages to protect consumers from misleading, deceptive, or aggressive sales practices, or requires the disclosure of beneficial consumer information, the purpose of its regulation is consistent with the reasons for according

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[1] Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 103 S.Ct. 2875 (1983) established factors to evaluate to determine whether speech is commercial or not. There is no hardline test, but factors such as whether the speech 1) is an advertisement, 2) references a specific product, or 3) is motivated by an economic purpose. Bolger, 463 U.S. 60, 103 S.Ct. 2875, 2877.

> constitutional protection to commercial speech and therefore justifies less than strict review. However, when a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands. 44 Liquormart, Inc., v. Rhode Island, 517 U.S. 484, 507, 116 S.Ct. 1495, 1507 (1996).
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> Sound reasons justify reviewing the latter type of commercial speech regulation more carefully. Most obviously, **complete speech bans, unlike content-neutral restrictions on time, place, or manner of expression, are particularly dangerous** because they all but foreclose alternative means of disseminating certain information. Id. The Court also held "[s]peech prohibitions of this type rarely survive constitutional review." 44 Liquormart, 517 U.S. 484, 504.

Video Gaming Consultants, 342 S.C. 34, 40 (emphasis added).

Obscenity

One should note that obscenity is less protected speech. However, there must be a compelling reason for preventing such expression. For example, the US Supreme Court explained in FCC v. Pacifica, 438 U.S. 726, 748 -49, 98 S.Ct. 3026 (1978), that the broadcast media is an inherently intrusive media and is uniquely accessible to children. Therefore, the government has a special interest in regulating traditional broadcast media and has a role of assisting parents. FCC v. Pacifica Foundation, 438 U.S. 726, 748 - 49. A similar argument could be made for citizens bringing children into the DMV with them where the children would be exposed to whatever advertisement is being shown on the monitors when they enter the office.

Advertising and Government Property: *Lehman v. City of Shaker Heights*

In 1974, the US Supreme Court heard the case of Lehman v. City of Shaker Heights where the question was posed as to "whether a city which operates a public rapid transit system and sells advertising space for car cards on its vehicles is required by the First and Fourteenth Amendments to accept paid political advertising on behalf of a candidate for public office." Lehman v. City of Shaker Heights, 418 U.S. 298, 299, 94 S.Ct. 2714, 2715 (1974). This case is very comparable to the situation at hand. Just as the transit system sold advertisement space for the car cards, the DMV is allowing the private company to sell advertisement space for the queuing system monitors.

The court explained that "[t]hese situations are different from the traditional settings where the First Amendment values inalterably prevail . . . open spaces and public places differ very much in their character, and before you could say whether a certain thing could be done in a certain place you would have to know the history of the particular place. . . . [T]he nature of the forum and the conflicting interests involved have remained important in determining the degree of protection afforded by the Amendment to the speech in question." Lehman , 418 U.S. 298, 302 - 303.

The court found that the city was "engaged in commerce" and that "[n]o First Amendment forum[2] is here to be found." Lehman , 418 U.S. at 303 - 304. Justice Blackmun concluded that **the city transit system "has discretion to develop and make reasonable choices concerning the type of advertising that may be displayed."** Id. at 303 (emphasis added). However, the court emphasized that because state action exists, "the polices and practices governing access to the . . . advertising space **must not be arbitrary, capricious, or invidious**." Id. (emphasis added). The court held that there was no First or Fourteenth Amendment violation for refusing the political advertisement.

Justice Blackmun eloquently stated as follows:

> Were we to hold to the contrary, display cases in public hospitals, libraries, office buildings, military compounds, and other public facilities immediately would become Hyde Parks open to every would-be pamphleteer and politician. This the Constitution does not require.

Id. at 304.

Conclusion

It is the opinion of this Office that a court would likely find that the South Carolina Department of Motor Vehicles' acceptance of equipment and service from a private commercial entity in exchange for commercial advertising time is legally authorized.[3] S.C. Code § 23-6-30 plainly states that the Department of Public Safety, and in turn, the Department of Motor Vehicles, has authority to "receive . . . funds and grants, including any donations, contributions, funds, grants, or gifts from private individuals, foundations, agencies, corporations . . . for the purpose of carrying out the programs and objectives" of the Department of Public Safety. State agencies are given broad authority to carry out the duties delegated to it by the General Assembly. Beard-Laney v. Darby, 213 S.C. 380. The Division of Motor Vehicles, operating under the aegis of the Department of Public Safety, can exercise the authority of the Department of Public Safety conferred by Title 23, Chapter 6 of the South Carolina Code of Laws of 1976. Even though commercial advertising on the queuing

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[2] In Justice Powell's dissenting opinion, he explained that "the city created a forum for the dissemination of information and expression of ideas when it accepted and displayed commercial and public service advertisements on its rapid transit vehicles. Having opened a forum for communication, the city is barred by the First and Fourteenth Amendments from discriminating among forum users solely on the basis of message content." Lehman, 418 U.S. 298, 310.

[3] As explained above, the Department of Motor Vehicles should be aware that "pursuant to Part II, § 18 of Act No. 1137 of 1974, '. . . all State agencies and departments, before contracting for fifteen hundred dollars or more with private individuals or companies for products or services, shall invite bids on such contracts from at least three qualified sources.'" Op. S.C. Atty. Gen., November 17, 1975 (quoting 1974 Act No. 1137).

system is not specifically addressed in our code of laws, a court would likely find that authority to take such action is implied from the express powers given.

Moreover, it is our opinion that, pursuant to Lehman v. City of Shaker Heights, a court would likely conclude that the Department of Motor Vehicles Offices are not a public forum for First Amendment purposes. Therefore, restrictions on advertisements are acceptable, so long as the restrictions are not "arbitrary, capricious or invidious." Lehman, 418 U.S. 298, 303.

Sincerely,

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