ALAN WILSON
ATTORNEY GENERAL

June 6, 2012

Robert C. Toomey, Director
S.C. Department of Alcohol and Other Drug Abuse Services
P.O. Box 8268
Columbia, SC 29202

Dear Director Toomey:

We received your request for an opinion from this Office regarding the use of underage youth (ages 15 to 17) by the South Carolina Department of Alcohol and Other Drug Abuse Services ("DAODAS") while working with the United States Food and Drug Administration ("FDA") to enforce federal regulations against the sale of tobacco products to individuals under the age of eighteen.

Law/Analysis

On June 22, 2009, the President signed into law the Family Smoking Prevention and Tobacco Control Act ("Tobacco Control Act"). See Pub.L. No. 111-31, 123 Stat. 1776 (2009). The stated purpose of the Tobacco Control Act was to amend the Federal Food, Drug, and Cosmetic Act ("FDCA") to provide authority to the FDA to regulate the manufacture, distribution, and marketing of tobacco products, in order to "address issues of particular concern to public health officials, including the use of tobacco by young people and dependence on tobacco." Id. at §3(2). In particular, the Tobacco Control Act recognizes that virtually all new users of tobacco products are under the age of eighteen (the federal minimum legal age to purchase these products). Because many of these young users will become addicted before they are old enough to understand the risks of tobacco-related diseases, the Tobacco Control Act seeks to, *inter alia*, prevent tobacco use by these young people. See id. at §1. The Tobacco Control Act directs the FDA to issue regulations to restrict cigarette and smokeless tobacco retail sales to youth. Accordingly, the FDA published regulations in 2010 entitled Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents. See 21 C.F.R. pt. 1140 *et seq*. Consistent with the requirements of the Tobacco Control Act, these regulations prohibit the sale of cigarettes and smokeless tobacco to any person younger than eighteen years of age and impose restrictions on marketing, labeling, and advertising of cigarettes and smokeless tobacco. The regulations require retailers to verify a purchaser's age by photographic identification, *i.e.*, face-to-face sales; prohibit free samples of cigarettes and restrict distribution of free samples of smokeless tobacco products through vending machines and self-service displays, except in adult-only facilities; limit the advertising and labeling to which children and adolescents are exposed to a black-and-white, text-only, format; prohibit the sale or distribution of brand-identified promotional non-tobacco items such as hats and tee-shirts; and prohibit sponsorship of sporting and other events, teams, and entries in those events in the brand name of any cigarette or smokeless tobacco product.

The Tobacco Control Act gives the FDA enforcement authority as well as a broad set of sanctions for violations of the law. In addition, the Tobacco Control Act directs the FDA to contract with the states to assist it with retailer inspections. By way of background, you state the following:

> [t]he FDA is in the process of contracting with each state to set up a retail tobacco inspection system for which those hired by the state would be commissioned as FDA inspectors to enforce certain provisions of these regulations. DAODAS, on behalf of the State, responded to the FDA's most recent solicitation and is currently in the process of negotiating the terms of the contract, with the intention of starting to set up the program at the beginning of fiscal year 2013.
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> Two types of inspections will be conducted by the FDA-commissioned inspectors. The type relevant to this opinion is termed "undercover buys" and involves a volunteer youth between the ages of 15 and 17 entering a retail tobacco outlet and attempting to purchase tobacco products with no deception (*i.e.*, truthfully stating his/her age if asked and providing actual ID if asked). No attempt will be made to recruit youth who appear to be older or to ask youth to encourage a sale to take place. They simply will be testing compliance with existing laws against selling a tobacco product to youth under age 18. Under this initiative, we anticipate several thousand of these inspections will take place statewide each year.
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> The inspectors will undergo a thorough federal background check and training program in order to be commissioned. All youth participating in these buys would also be subject to background checks and would go through a thorough training process prior to making any attempted purchases. Any violations by retailers would be reported to the FDA for its sanctioning process. Retail outlets with no violations will be visited systematically; outlets that do not violate will not receive a second inspection until all outlets have been inspected once.

FDA regulations apply only to those persons who manufacture, sell, distribute, or advertise tobacco products. Significantly, these regulations do not provide for sanctions against those younger than eighteen years of age who purchase or attempt to buy these products. However, we note that §16-17-500(E) specifically provides as follows:

> (1) A minor under the age of eighteen years must not purchase, attempt to purchase, possess, or attempt to possess a tobacco product, or present or offer proof of age that is false or fraudulent for the purpose of purchasing or possessing a tobacco product.
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> (2) A minor who knowingly violates a provision of subsection (E) (1) in person, by agent, or in any other way commits a noncriminal offense and is subject to a civil fine of twenty-five dollars. The civil fine is subject to all applicable court costs, assessments, and surcharges.

(3) In lieu of the civil fine, the court may require a minor to successfully complete a Department of Health and Environmental Control approved smoking cessation or tobacco prevention program, or to perform not more than five hours of community service for a charitable institution.

(4) If a minor fails to pay the civil fine, successfully complete a smoking cessation or tobacco prevention program, or perform the required hours of community service as ordered by the court, the court may restrict the minor's driving privileges to driving only to and from school, work, and church, or as the court considers appropriate for a period of ninety days beginning from the date provided by the court. If the minor does not have a driver's license or permit, the court may delay the issuance of the minor's driver's license or permit for a period of ninety days beginning from the date the minor applies for a driver's license or permit. Upon restricting or delaying the issuance of the minor's driver's license or permit, the court must complete and remit to the Department of Motor Vehicles any required forms or documentation. The minor is not required to submit his driver's license or permit to the court or the Department of Motor Vehicles. The Department of Motor Vehicles must clearly indicate on the minor's driving record that the restriction or delayed issuance of the minor's driver's license or permit is not a traffic violation or a driver's license suspension. The Department of Motor Vehicles must notify the minor's parent, guardian, or custodian of the restriction or delayed issuance of the minor's driver's license or permit. At the completion of the ninety-day period, the Department of Motor Vehicles must remove the restriction or allow for the issuance of the minor's license or permit. No record may be maintained by the Department of Motor Vehicles of the restriction or delayed issuance of the minor's driver's license or permit after the ninety-day period. The restriction or delayed issuance of the minor's driver's license or permit must not be considered by any insurance company for automobile insurance purposes or result in any automobile insurance penalty, including any penalty under the Merit Rating Plan promulgated by the Department of Insurance.

(5) A violation of this subsection is not a criminal or delinquent offense and no criminal or delinquent record may be maintained. A minor may not be detained, taken into custody, arrested, placed in jail or in any other secure facility, committed to the custody of the Department of Juvenile Justice, or found to be in contempt of court for a violation of this subsection or for the failure to pay a fine, successfully complete a smoking cessation or tobacco prevention program, or perform community service.

(6) A violation of this subsection is not grounds for denying, suspending, or revoking an individual's participation in a state college or university financial assistance program including, but not limited to, a Life Scholarship, a Palmetto Fellows Scholarship, or a need-based grant.

> (7) The uniform traffic ticket, established pursuant to Section 56-7-10, may be used by law enforcement officers for a violation of this subsection. A law enforcement officer issuing a uniform traffic ticket pursuant to this subsection must immediately seize the tobacco product. The law enforcement officer also must notify a minor's parent, guardian, or custodian of the minor's offense, if reasonable, within ten days of the issuance of the uniform traffic ticket.

In your letter, you reference §16-17-500 (F), which provides that:

> [§16-17-500] does not apply to the possession of a tobacco product by a minor . . . participating within the course and scope of an authorized inspection or compliance check.

You ask us, therefore, whether underage youth working with DAODAS FDA-commissioned inspectors to enforce federal law have legal immunity in South Carolina from being charged with possession, purchasing, or attempting to purchase tobacco products under State law.

To address your question, a number of fundamental principles of statutory construction must be considered. The cardinal rule of statutory construction is to ascertain and effectuate the Legislature's intent. State v. Smith, 330 S.C. 237, 498 S.E.2d 648 (Ct. App. 1998). In construing a statute, words must be given their plain and ordinary meaning, without resort to subtle or forced construction to limit or expand the statute's operation. Id. If a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and a court will not look for or impose another meaning. South Carolina Coastal Conservation League v. South Carolina Dep't of Health and Environmental Control, 390 S.C. 418, 702 S.E.2d 246 (2010). Where a statute is complete and unambiguous, legislative intent must be determined from the plain language of the statute. Id. Penal statutes are to be construed strictly against the State and in favor of the defendant. State v. Burton, 301 S.C. 305, 391 S.E.2d 583 (1990).

In an opinion of this Office dated March 24, 2008, we recognized the propriety of the use by law enforcement officers of minor informants to arrange and make a purchase of a controlled substance. In reaching our conclusion, we cited an opinion the Connecticut Attorney General dated July 31, 1998, which dealt with the question of whether a state agency could use minors in unannounced tobacco law enforcement checks. That opinion stated:

> [t]he use of decoys, informers and undercover operators in the detection and apprehension of criminals has long been recognized and approved as a law enforcement tool. Thus, it is universally recognized that law enforcement officials and those who help them may present an opportunity for the commission of crime by feigning complicity in the act or assistance in its commission . . . Specifically, in the context of liquor control laws prohibiting certain conduct by minors, it has been held that such provisions are inapplicable to minors in decoy programs supervised by law enforcement agencies. Provigo v. Alcoholic Bev. Control App. Bd., 869 P.2d 1163, 1166 (Cal. 1994). Analogous cases make it clear that law enforcement involvement in criminal activity for the purpose of investigating violators is permissible even if

> technical violations of law occur. See, *e.g.*, United States v. Russell, 411 U.S. 423 (1973) (drug law violations); United States v. Bowling, 666 F.2d 1052, 1054 (6th Cir. 1981), cert. denied, 455 U.S. 960 (1982) (informant participating in illegal activity); People v. Superior Court (Orecchia), 65 Cal. App.3d 842, 846, 134 Cal. Rptr. 361 (1976) (decoy drug purchase).

In addition, our 2008 opinion referenced the decision of the Ohio court in State v. Suchy, 31 Ohio Misc. 265, 277 N.E.2d 459, 463-464 (1971), which determined that:

> [t]he Court's holding today applies to the use of juveniles as well as adults. As discussed above, a person (juvenile or adult) who purchases or possesses a hallucinogen under the direction of the law enforcement officer, as an aid in the apprehension and prosecution of a dealer or seller, violates no narcotics law, since the requisite criminal intent is lacking. The Court can conceive of no reason, statutory, moral or otherwise, why a juvenile should not be used in a manner such as the juvenile-agent was used in the case at Bar. In the Court's opinion, the only restrictions on such use would be that the law enforcement agency owes a duty to the juvenile to take all reasonable precautions for his safety. This was done in the instant case. In today's society when the evil specter of the drug traffic has spread across all class, social, racial and economic lines, when even our youngest school-age children are subjected to the temptations and dangers of drugs of all types, it is inconceivable that our law enforcement agencies should be deprived, by legislation or Court decision, of the invaluable assistance of the juvenile-agent. It is essential, if the drug traffic among our younger, school-age population is ever to be controlled and stopped, that our law enforcement agencies be able to use young people, such as might be expected to participate in the drug traffic, as either sellers or buyer-users, to infiltrate the ranks of the drug sellers and to serve as informers or even as police agents to make pre-arranged purchases of the drug itself. There is no law, statutory or Court made, preventing this use.

Id., 277 N.E.2d at 463-64. The Suchy Court further stated that:

> [h]owever, in line with our reasoning above, the Court holds that the juvenile's possession, use or control, such as to subject him to being declared a delinquent, must be done with the requisite criminal intent. A juvenile who aids the police in the manner of the instant case commits no crime and cannot be adjudged a delinquent. . . .

Id., 277 N.E.2d at 464.

The regulation of the sale of tobacco products to minors is subject to the broad police powers of the State to promote and protect the public welfare of minors. See Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 564 (2001) ("[t]he State's interest in preventing underage tobacco use is substantial, and even

compelling"); cf. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 161 (2000) [recognizing that "tobacco use, particularly among children and adolescents, poses perhaps the single most significant threat to public health in the United States"]. These intrinsic powers include the enforcement of all applicable State laws enacted for the purpose of preventing and discouraging the sale of tobacco products to minors.[1] Clearly, the use of minors by law enforcement agents in their undercover operations is an effective manner of regulating and enforcing the laws prohibiting the sale of tobacco products to minors. Very often, effective enforcement can realistically be achieved only by using minors as decoys. In fact, §16-17-500 (F) specifically contemplates such use of a person under eighteen years of age to purchase or attempt to purchase tobacco products. Clearly, minors employed by FDA-commissioned inspectors, who are authorized to purchase and possess tobacco products for the express purpose of an authorized inspection or compliance check with the purpose of uncovering evidence of illegal sales to minors, are not in violation of State law pursuant to subsection (F).[2]

In addition to the provision above, we note it is well-recognized that state law must yield pursuant to the Supremacy Clause of the Federal Constitution. See U.S. Const. art VI, cl. 2. Soon after the creation of our federal system, the United States Supreme Court explained that the Supremacy Clause was designed to ensure that states do not "retard, impede, burden, or in any manner control" the execution of federal law. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819). Effective federal law enforcement, including efforts by the United States to uncover, investigate and prosecute violations of federal law, unquestionably is a unique federal interest. Rovario v. United States, 353 U.S. 53, 59 (1957); cf. Boyle v. United Techs. Corp., 487 U.S. 500, 504 (1988) [holding that there are areas of unique federal interest that are "so committed by the Constitution and laws of the United States to federal control that state law is preempted and replaced, where necessary, by federal law of a content prescribed ... by the courts"]. State peace officers and federal officers derive their power from the authority of different and independent governments. See Printz v. United States, 521 U.S. 898, 929 & n.14. (1997).

The Supremacy Clause would thus serve to prevent state law or state law officials from interfering with or otherwise impeding federal officers as they perform their lawful duties. See Tennessee v. Davis, 100 U.S. 257, 263 (1880) ("No state government can exclude [the federal government] from the exercise of any authority conferred upon it by the Constitution [or] obstruct its authorized officers against its will ..."); Baucom v. Martin, 677 F.2d 1346, 1351 (11th Cir. 1982) ("[s]ufficient urgency [justifying preemption of state law] exists in avoiding state interference with an on-going federal criminal investigation"). The United States Supreme Court explained this principle in In re Neagle, 135 U.S. 1 (1890), where California sought to prosecute a United States deputy marshal assigned to protect a state Justice during his circuit assignment after the marshal shot and killed an angry litigant. In Neagle, the Court held that the marshal was immune from state prosecution: "[I]f the prisoner is held in the state court

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[1]We note that the Tobacco Control Act does not affect state laws relating to access to tobacco products that are in addition to or more stringent than the access provisions in the Tobacco Control Act. See U.S. Smokeless Tobacco Manufacturing Co., LLC v. City of New York, 703 F.Supp.3d 329 (S.D. N.Y. 2010). For example, a state may establish nineteen years of age or older as the minimum age for purchasing tobacco products in that state. See, *e.g.*, N.J. Stat. Ann. §2C:33-13.1.

[2]Similarly, §61-4-100 provides that a minor must also be charged with a violation of the unlawful purchase or possession of beer or wine if a person is charged with the unlawful sale of beer or wine to the minor. However, subsection (D) provides that a minor recruited to test compliance with laws prohibiting the illegal sale of beer or wine to a minor need not be charged with a violation.

to answer for an act which he was authorized to do by the law of the United States, which it was his duty to do as marshal of the United States, and if, in doing that act, he did no more than what was necessary and proper for him to do, he cannot be guilty of a crime under the law of the state of California." Id. at 75. The Court explained that under the Constitution, the United States "may, by means of physical force, exercised through its official agents, execute ... the powers and functions that belong to it" free from the interference of state law. Id. at 60-61; see Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 395 (1971) ["just as state law may not authorize federal agents to violate the Fourth Amendment ... neither may state law undertake to limit the extent to which federal authority can be exercised"]; Davis, 100 U.S. at 262 [noting that the government can act only through its officers and agents, who must act within the States' territories, and allowing state law to interfere with government officers would paralyze governmental functions]; Martin v. Hunter's, 14 U.S. (1 Wheat. 363) 304, 363 (1816) (Johnson, J., concurring) ("[T]he general government must cease to exist whenever it loses the power of protecting itself in the exercise of its constitutional powers. Force ... or judicial process . . . are the only means to which governments can resort in the exercise of their authority").

Neagle has broader applications to your question, standing for the proposition that an officer of the United States cannot be held in violation of state law while simultaneously executing his duties as prescribed by federal law. An act cannot simultaneously be necessary to the execution of a duty under the laws of the United States and an offense to the laws of a state. To the contrary, the obligations imposed by federal law are supreme, and where any supposed right or claim under state law would impede an officer from performing his duties, it must relent. See Johnson v. Maryland, 254 U.S. 51, 56-57 (1920) (Holmes, J.) ("[E]ven the most unquestionable and most universally applicable of state laws, such as those concerning murder, will not be allowed to control the conduct of a marshal of the United States acting under and in pursuance of the laws of the United States"); Ohio v. Thomas, 173 U.S. 276, 283 (1899) ("When discharging [their] duties under [F]ederal authority pursuant to and by virtue of valid Federal laws, [Federal officers] are not subject to arrest or other liability under the laws of the State in which their duties are performed").

In fact, we observe that courts have almost universally invoked Supremacy Clause immunity to protect the operations of the federal government and persons acting under its direction. See, *e.g.*, Hunter v. Wood, 209 U.S. 205 (1908) [railroad official acting under a federal injunction who was charged under state law with overcharging for a railroad ticket]; Boske v. Comingore, 177 U.S. 459 (1900) [Treasury official who, pursuant to federal regulations, refused to produce records to state officials]; West Virginia v. Laing, 133 F. 887 (4th Cir. 1904) [two citizens enlisted by federal marshals as a posse comitatus to help serve a federal arrest warrant shot and killed the subject of the warrant]; Brown v. Nationsbank, 188 F.3d 579 (5th Cir. 1991) [private defendants acting under FBI direction are shielded from state law claims]; Kentucky v. Long, 837 F.2d 727, 745 (6th Cir.1988) [FBI agent who allegedly committed a burglary as part of an undercover operation; "a mistake in judgment or a 'botched operation,' so to speak, will not of itself subject a federal agent to state court prosecution"]; Clifton v. Cox, 549 F.2d 722 (9th Cir. 1977) [federal narcotics agent immune to state murder prosecution for shooting fleeing felon]; Baucom, 677 F.2d at 1350-51 [FBI agent who bribed a state prosecutor in an undercover operation]; Ex Parte Beach, 259 F. 956 (S.D. Cal. 1919) [customs agent who fired shots at the roadster of a suspected opium smuggler]; Connecticut v. Marra, 528 F. Supp. 381, 386 (D. Conn. 1981) [Federal Informant who, in an "error resulting from confusion or nervousness or bad judgment," exceeded his authority and attempted to bribe a police officer]; In re Turner, 119 F. 231, 235 (S.D. Iowa 1902) [federal officer constructing sewer pipe to army base against prosecution for violation of a state injunction; "an officer of the United States ...

acting in obedience to commands ... is not subject to arrest on a warrant or order of a state court"]; In re McShane's Petition, 235 F. Supp. 262 (N.D. Miss. 1964) [United States marshals used tear gas to disperse large crowd challenging integration at state university; state charged United States Marshal with breach of peace and felonious use of force]; United States *ex rel.* Flynn v. Fuellhart, 106 F. 911 (W.D. Pa. 1901) [Secret Service agents charged with assault and battery for arresting a counterfeiter]; United States *ex rel.* McSweeney v. Fullhart, 47 F. 802 (W.D. Pa. 1891) [United States marshals drew their guns at state constables while escorting a federal arrestee into custody]; Texas v. Carley, 885 F. Supp. 940 (W.D. Tex. 1994) [Fish and Wildlife officer charged with criminal trespass while making National Wetlands Inventory]; Lima v. Lawler, 63 F. Supp. 446 (E.D. Va. 1945) [naval shore patrolman charged with assault for striking city policeman who interfered with arrest of a serviceman]; In re Lewis, 83 F. 159, 160 (D. Wash. 1897) [Treasury agents who, with "bad judgment," executed an illegal search warrant].

Consistent with the Court's Neagle decision, the courts have held that federal agents are immune from state prosecution even when their conduct violated internal agency regulations or exceeded their express authority, so long as the agents did not act out of malice or with criminal intent. For example, the court in Long affirmed the federal district court's dismissal of a burglary indictment against an FBI agent who had violated internal FBI regulations regarding the documentation of contacts with informants, based on the district court's findings that the agent had no motive other than to discharge his duty under the circumstances as they appeared to him, and that he had an honest and reasonable belief that what he did was necessary to the performance of his duty. Id., 837 F.2d at 740, 752; see also Baucom, 677 F.2d at 1350 [federal agent who used undercover operations in connection with investigation of possible federal crimes held immune under Supremacy Clause from state prosecution for attempted bribery when he did not act out of "any personal interest, malice, actual criminal intent, or for any other reason than to do his duty as he saw it"]; Marra, 528 F. Supp. at 387 [affirming dismissal of bribery prosecution on Supremacy Clause grounds where defendant had exceeded his authorization but acted without criminal intent and honestly believed his actions were necessary to his assigned mission]. Even when courts have questioned the legality of the mission in connection with which the federal officer was acting, the officer has not been held subject to state prosecution as long as he had an honest and reasonable belief that what he did was necessary in the performance of his duty.

In In re Lewis, the court granted a writ of habeas corpus for a federal marshal who wrongfully seized some private papers while executing a search warrant. The court stated:

> ... the warrant itself was improvidently and erroneously issued, and the proceedings were all ill-advised, and conducted with bad judgment. But where an officer, from excess of zeal or misinformation, or lack of good judgment in the performance of what he conceives to be his duties as an officer, in fact transcends his authority, and invades the rights of individuals, he is answerable to the government or power under whose appointment he is acting, and may also lay himself liable to answer to a private individual who is injured or oppressed by his action; yet where there is no criminal intent on his part he does not become liable to answer to the criminal process of a different government.

Id., 83 F. at 160; see also In re Fair, 100 F. 149 (D. Neb. 1900) [a state could not prosecute an infantry soldier who, following orders, shot and killed escaping prisoner when an order to halt was not obeyed, even though the orders to shoot were questionable in light of Infantry Regulations].

Conclusion

The recent Tobacco Control Act authorizes the FDA to regulate the manufacture, distribution, and marketing of tobacco products. The FDA regulations, among other things, prohibit the sale of cigarettes and smokeless tobacco to any person younger than eighteen years of age, and impose restrictions on marketing, labeling, and advertising of cigarettes and smokeless tobacco. The regulations impose sanctions for violations of federal law. The FDA is further authorized to contract with the states to assist it with retailer inspections to enforce the federal law.

DAODAS inspectors commissioned by the FDA intend to employ minors as undercover agents in enforcement of the prohibition against selling tobacco products to minors pursuant to the Tobacco Control Act. Generally, §16-17-500 prohibits any person in South Carolina from selling, furnishing or distributing to, or purchasing for, minors under the age of eighteen any tobacco products. In addition, a minor may not lawfully purchase or possess any tobacco product. Section 16-17-500(F), however, expressly provides that the prohibition against possession of tobacco products by a minor shall not apply to his/her possession of tobacco products while "participating within the course and scope of an authorized inspection or compliance check." Accordingly, it is the opinion of this Office that the use of undercover minors to assist FDA-commissioned inspectors to enforce Tobacco Control Act is clearly within the authorization contained in §16-17-500(F). Further, under the Supremacy Clause, state law cannot operate to impede individuals who have federal authority to enforce federal laws or act as necessary and proper within that federal authority. If federal inspectors are to perform their duties vigorously, they cannot be unduly restrained or undermined by fear of state prosecutions.

If you have any further questions, please advise.

Very truly yours,

N. Mark Rapoport
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Deputy Attorney General