

1983 WL 182087 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

September 7, 1983

\*1 Mr. Stanley V. Lewis  
Deputy Securities Commissioner  
816 Keenan Building  
Columbia, South Carolina 29201

Dear Stan:

You have asked for an informal opinion as to whether an offer in South Carolina to license a marketing program, trademark, trade name, etc. (commonly referred to as the sale of a franchise) is exempt from registration under our Business Opportunity Sales Act [Section 39-57-10, et seq., Code of Laws of South Carolina](#) (1976 as amended). An offer of such programs is not automatically exempt from registration. The facts of each situation must be examined in order to know whether the program is exempt.

Pursuant to Section 39-57-50, if the offer falls within Section 39-57-20 (1), (2), or (3), then it must be registered. If it does not fall within those sections, it most likely will fall under Section 39-57-20(4) which requires registration of a sale of a program for starting a business where the seller represents that for more than \$50.00 he will provide the buyer with a marketing program which will enable the buyer to make a profit. Section 39-57-20(4) does not apply to the offer of a marketing program made in conjunction with the licensing of a registered trademark or service mark.

While one would assume this exemption would apply to most franchises, it would not necessarily apply to all. Even if a particular company is licensing the use of its trademark, the question remains as to what is meant by registered trademark. Unless the registration gives enforceable rights to exclusive use of the trademark, the licensing would be of little effect. Thus, the registration would have to be by an authority with enforceable jurisdiction in South Carolina. The only such authorities are the State of South Carolina and the United States of America. Registration by other states would not be sufficient. *See*, 87 C.J.S. Trademarks Section 132, p.421, 'A state registration act has no extraterritorial effect', citing [United Drug Company vs. Theodore Rectanus Co., 248 U.S. 90 \(1918\)](#). Furthermore, enforceable rights to a trademark under the common law does not constitute registration as required for an exemption. It is reasonable to assume that the Legislature made a determination that while a fly-by-night operation would not likely go to the trouble and expense of obtaining a registration, the fact that a company would go to such trouble and expense is evidence of stability.

In conclusion, there are several different fact situations which would require that the offer of a 'franchise' in South Carolina be registered under the Business Opportunity Sales Act.

Sincerely,

C. Richard Kelly  
Assistant Attorney General

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