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The State of South Carolina

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Office of the Attorney General

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The Honorable Jackson V. Gregory
Member, House of Representatives
522-C Blatt Building
Columbia, South Carolina 29211

Dear Representative Gregory:

In a letter to this Office you referenced that Section 50-21-610 of the Code adopts certain federal regulations by reference without fully setting out the contents of such regulations. You have questioned the constitutionality of such statute asserting that such appears to be an unlawful delegation of legislative authority.

While this Office cannot predict how a court facing the issue of constitutionality of the statute would resolve the issue, we would note that, generally, an act of the General Assembly is presumed to be constitutional in all respects. Such an act will not be considered void unless its unconstitutionality is clear beyond any reasonable doubt. Thomas v. Macklen, 186 S.C. 290, 195 S.E. 539 (1938); Casey v. Richland County Council, 282 S.C. 387, 320 S.E.2d 443 (1984). All doubts as to constitutionality are typically resolved in favor of constitutionality. Moreover, while this Office may comment upon constitutional problems, it is solely within the province of the courts of this State to declare a statute unconstitutional.

Section 50-21-610 states:

> (1) The Division ... (the Division of Boating of the State Wildlife and Marine Resources Department) ... may promulgate

> regulations which establish boat construction or associated equipment performance or other safety standards
>
> (2) In order that boatmen may pass from jurisdiction to jurisdiction in an unhindered manner:
>
> (a) Regulations promulgated by the Division which establish any boat construction or associated equipment, performance or other safety standard shall be identical to Federal Regulations for enforcement purposes except that regulations requiring the carrying or using of marine safety articles to meet uniquely hazardous conditions or circumstances within this State may be adopted; and if regulations for such safety articles are not disapproved by the United States Coast Guard, regulations shall not be in conflict with Federal requirements;
>
> (b) Operational regulations and other equipment regulations such as for mufflers shall not be in conflict with Federal requirements.

Pursuant to such provision, the State Wildlife and Marine Resources Department has promulgated Regulation 123-1. Such regulation states:

> Those portions of the Federal Boat Safety Act of 1971 (86 STAT. 213; 46 USC 1451, et seq. as amended) concerning boat construction, associated equipment, performance and operation, safety, standard numbering and registration and the Federal Rules and Regulations adopted pursuant thereto and those portions of the Inland Navigation Rules Act (94 STAT. 3415; 33 USC 2001 et seq. as amended); and the International Navigation Rules Act of 1977 (91 STAT. 308; 33 USCS 1601 et seq. as

> amended), concerning required equipment, vessel operation and safety and the Federal Rules and Regulations adopted pursuant thereto are hereby declared to be the law of this State.

It is a clear proposition of law in South Carolina that one South Carolina statute or any provision thereof may be made a part of another South Carolina statute through incorporation by reference of the adopted statute. University of South Carolina v. Mehlmen, 245 S.C. 180, 139 S.E.2d 771 (1964); Welling v. Clinton-Newberry Natural Gas Authority, 221 S.C. 417, 71 S.E.2d 7 (1952). An opinion of this Office dated August 6, 1976 indicated that such a conclusion is also applicable to federal statutes and rules and regulations. In Santee Mills, et al, v. Query, et al., 122 S.C. 158, 115 S.E. 202 (1922) the State Supreme Court rejected an attack on this State's income tax law which asserted an unconstitutional attempt to give the force of statute law to the federal income tax law and certain federal regulations through their adoption by reference into the State act. The Court stated

> (i)n the absence of express constitutional inhibition, therefore, we see no reason why a federal statute and rules and regulations of the United States government having the force and effect of law cannot be made a part of the statute law of this State by adequate reference thereto as fully and effectively as a preexisting statute of the State could be so adopted. 122 S.C. at 167

The General Assembly in enacting Section 50-21-610 was quite specific in authorizing the promulgation of regulations dealing with boating. As quoted above, it was mandated that any such regulation "be identical to Federal Regulations" except where uniquely hazardous conditions or circumstances dictate otherwise. Also, Regulation 123-1, as promulgated, specifically references that relevant portions of the Federal Boat Safety Act of 1971 and the federal rules and regulations adopted thereto, along with certain other specific provisions, are declared to be "the law" of this State.

Admittedly, it is generally stated that

> (a) statute is valid which adopts existing statutes, rules, or regulations of Congress or regulations or determinations of federal administrative agencies, provided no attempt is made to adopt future laws, rules or regulations of the federal government. 16 C.J.S. Constitutional Law, Section 138 pp. 452-453.

However, in several instances, courts have upheld state statutes which authorized the adoption of future federal regulations against challenges that such statutes constituted an improper delegation of legislative power to federal officials. In State of New Jersey v. Hotel Bar Foods, Inc., 112 A.2d 726 (1955), the New Jersey Supreme Court construed a state statute which mandatorily directed a state superintendent to adopt federal regulations dealing with the labeling of packaged food. The Court noted several cases which supported the view that a legislature could provide that certain administrative regulations should be brought into conformity with federal regulations as promulgated and amended from time to time. The Court, in its decision noting a trend toward liberalization of legislators' power to delegate, stated:

> (t)he ultimate and controlling policy decision - as to whether there shall be uniformity of federal-state regulation in the field - rests always with the Legislature and it does not in any vicious sense abdicate its legislative judgment or authority. ... In its effort to achieve uniformity the Legislature may adopt federal laws and regulations then in effect without setting them forth in detail in the same enactment ... But unless the Legislature may also in the same enactment, provide suitably for the State's immediate adoption of amendments to the federal laws and regulations, the State's policy of uniformity would, as a practical matter, soon be defeated.

112 A.2d at 732

In its decision the Court cited with approval the decision of the Michigan Supreme Court in People v. Sell, 17 N.W.2d 193 (1945) which upheld a municipal ordinance tied to federal price regulations, which as described in the dissent, typically could change without previous notice. In Sell, the Court quoted extensively from a Michigan law review article where it was noted that it is a common practice for states to adopt federal regulations in areas where national and state governments have pursued a common goal. The article particularly referenced provisions dealing with migratory birds, drug laws, grain standards, vegetable and fruit grading standards, and aviation. See also: Independent Electricians and Electrical Contractors' Association v. New Jersey Board of Examiners of Electrical Contractors, 256 A.2d 33 (N. J. 1969) (provision in state electrical contractors licensing act requiring performance in accord with the National Electrical Code is not an unconstitutional delegation of legislative authority to a private organization to set standards.)

In Alaska Steamship Co. v. Mullaney, 180 F.2d 805 (7th Cir. 1950) the Alaskan income tax was challenged as invalidly delegating state legislative powers to Congress. The Alaskan act incorporated the federal internal revenue code "as now in effect or hereafter amended". While noting that the right to incorporate by reference provisions of federal law "in effect" could not be questioned, the court acknowledged that some cases hold that attempts by a legislative body to incorporate future acts or amendments by other legislative bodies into its enactment are invalid. However, the court further stated:

> ... where it can be said that the attempt to make local law conform to future changes elsewhere is not a mere labor-saving device for the legislators, but is undertaken in order to attain a uniformity which is in itself an important object of the proposed legislative scheme, there are a number of precedents for an approval of this sort of thing.

180 F.2d at 816.

Referencing the above, this Office cannot conclusively state that a court would hold Section 50-21-610 unconstitutional especially in light of the strong presumption of

constitutionality afforded an act of the General Assembly. Instead, as stated above, only a court could make such conclusion.

With best wishes, I am

Very truly yours,

Charles H. Richardson
Assistant Attorney General

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REVIEWED AND APPROVED BY:

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