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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY MCMASTER
ATTORNEY GENERAL

December 23, 2003

The Honorable Bill Cotty
Member, House of Representatives
9890 Windsor Lake Boulevard
Columbia, South Carolina 29223

Dear Representative Cotty:

In a letter to this office you questioned whether in light of the provisions of S.C. Code Ann. Section 30-4-165(c) (Supp. 2003) may banks take and retain a copy of a customer's driver's license record for internal identification purposes. Section 30-4-165 states:

> (A) The Department of Motor Vehicles may not sell, provide, or furnish to a private party a person's height, weight, race, social security number, photograph, or signature in any form that has been compiled for the purpose of issuing the person a driver's license or special identification card. The department shall not release to a private party any part of the record of a person under fifteen years of age who has applied for or has been issued a special identification card.
>
> (B) A person's height, weight, race, photograph, signature, and digitized image contained in his driver's license or special identification card record are not public records.
>
> (C) Notwithstanding another provision of law, a private person or private entity shall not use an electronically-stored version of a person's photograph, social security number, height, weight, race, or signature for any purpose, when the electronically-stored information was obtained from a driver's license record.

(emphasis added).

According to the letter from Mr. Moore accompanying your letter, a customer identification procedure for banks has been required by provisions of the U.S. Patriot Act. As part of anti-money laundering programs passed by Congress, banks are required to ensure customer identification. See: 31 C.F.R. Section 103.121. One means to verify the identity of a bank customer is by means of a driver's license. Id. In order to prove compliance, banks would prefer to retain copies of driver's license information so as to prove that the proper identification was made. Therefore, the question

is raised by you as to whether the retention of such driver's license information by banks for their own internal identification purposes conflicts with the provisions of Section 30-4-165.

Your question involves the question of whether Section 30-4-165 is preempted by federal regulation. As referenced in a prior opinion of this office dated June 4, 2002, the preemption doctrine has its roots in the second clause of Article VI of the United States Constitution (the Supremacy Clause). The Supremacy Clause provides, in pertinent part, that "... the Laws of the United States... shall be the supreme Law of the Land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding." In determining whether federal laws preempt state laws, congressional intent must be examined.

In Fidelity Federal Savings and Loan Association v. de la Cuesta, 458 U.S. 141 (1982), the United States Supreme Court in analyzing the preemption issue stated:

> Pre-emption may be either express or implied, and "is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose".... Absent explicit preemptive language, Congress' intent to supersede state law altogether may be inferred because "[t]he scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it", because "the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject", or because "the object sought to be obtained by federal law and the character of obligations imposed by it may reveal the same purpose".... Even where Congress has not completely displaced state regulation in a specific area, state law is nullified to the extent that it actually conflicts with federal law. Such a conflict arises when "compliance with both federal and state regulations is a physical impossibility"... or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

458 U.S. at 152-153 (Citations and internal quotations omitted).

As referenced in the June 4 opinion, preemption has been held to occur when it is physically impossible to comply with both federal and state regulation, the nature of the subject matter requires federal supremacy and uniformity or if the Congress has clearly intended to displace state legislation. Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963).
Federal regulations preempt state law to the same extent as federal statutes. Fidelity Federal Savings and Loan Association v. de la Cuesta, 458 U.S. at 153.

It may reasonably be concluded that Congress has expressed the intention to preempt state regulation with regard to the issue addressed in your letter. As set forth in Fidelity Federal Savings and Loan Association, supra, Congress can express an intent to preempt state regulation by explicit

language or by enacting a "... scheme of federal regulation... so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." With passage of the federal legislation referenced by you, arguably Congress has indicated its intent to preempt in that area and has expressed such intent through extensive regulation of the field by federal authorities. As expressed in the June 4 opinion, when such an intent is evident, the authorities seem to indicate that state regulation in the area is preempted entirely. Such an interpretation of the referenced federal legislation results in the conclusion that Section 30-4-165 is probably preempted in its entirety as to the requirements of 31 C.F.R. 103.121

Regardless, even without Congress' express intention to preempt, state law is nullified to the extent that it actually conflicts with federal law. As noted previously in Fidelity Federal Savings and Loan Association, supra, "[s]uch a conflict arises when 'compliance with both federal and state regulations is a physical impossibility'... or when state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" 458 U.S. at 153.

While Section 30-4-165 prohibits use by a private person or private entity of information obtained from a driver's license record, provisions of Section 103.121 allow the use of driver's license information in implementing a customer identification program. Such inconsistency could lead a reviewing court to find that Section 30-4-165 is in conflict with the federal legislation and, therefore, preempted. Moreover, in examining your question, it does not appear that any assertion may be made by the State with regard to any claim that the federal legislation violates the principles of federalism set forth in the Tenth Amendment. Reno v. Condon, 528 U.S. 141 (2000).

In summary, it appears that Section 103.121 supplants Section 30-4-165. However, to avoid any question, consideration could be given to amending Section 30-4-165 to specifically authorize driver's license information to be used by banks for identification purposes consistent with federal law.

With kind regards, I am,

Very truly yours,

Charles H. Richardson
Senior Assistant Attorney General

cc: John T. Moore, Esquire
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