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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

February 18, 1998

Carmen M. Tevis, Staff Counsel
Labor, Commerce and Industry Committee
South Carolina House of Representatives
Post Office Box 11867
Columbia, South Carolina 29211

Dear Ms. Tevis:

On behalf of Representative Becky Meacham, you have asked for an opinion "on House Bill 4408 which makes it an unfair or deceptive act to fail to honor a recipient's request to cease mailing brochures, leaflets, flyers etc. and to require direct mailers to include a clear and conspicuous statement explaining how to request the mailings stop." You have noted that "[s]ome concerns include defining these actions 'unfair' or 'deceptive' under Unfair Trade Practices Act and Interstate Commerce concerns as well as enforcement by the Attorney General's office."

Law / Analysis

House Bill 4408 provides as follows:

> Section 39-5-25. (A) A person who mails a merchandise catalogue or a brochure, leaflet, flyer, or other item of mail which advertises or promotes a product or service or in any manner solicits or invites the recipient to purchase or contract for any goods or services or to participate in any event shall provide with the catalogue, brochure, leaflet, flyer, or other item of mail a clear and conspicuous statement explaining how the recipient can request that the mailer cease sending the catalogue, brochure, leaflet, flyer or other item of

Request Letter

> mail to the recipient. The mailer shall honor the request if made by the recipient.
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> (B) Violation of this section constitutes an unfair or deceptive act or practice in the conduct of trade or commerce under Section 39-5-20 and subjects the violator to the provisions of this article.
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> (C) Upon a finding by the Attorney General of South Carolina that subsection (A) of this section has been violated, the Attorney General may issue an explicit written warning to the violator to cease an desist. Upon a finding by the Attorney General that subsection (A) has been violated a second time, the Attorney General may take action to enforce this article.

Of course, in considering the constitutionality of legislation which is enacted by the General Assembly, we must presume that the act is constitutional in all respects. Moreover, 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 (1937); Townsend v. Richland County, 190 S.C. 270, 2 S.E.2d 777 (1939). All doubts are resolved in favor of constitutionality. While this Office may comment upon potential constitutional problems, it is solely within the province of the courts of this State to declare an act unconstitutional.

Article I, Sec. 8 of the United States Constitution reserves to Congress the power to "regulate commerce ... among the several states ...." This Office, in an Opinion dated November 3, 1989, recognized the following criteria for determining the validity of state statutes which affect interstate commerce:

> [t]he general rule enunciated in Pike v. Bruce Church, Inc., 397 U.S. 137, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970), sets forth the criteria [in judging whether state statutes violate the Commerce Clause. As the Court in Pike stated,]
>
> > [w]here the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive

> in relation to the putative local benefits .... If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities ....

Id., 397 U.S. at 142, 25 L.Ed.2d at 178.

Summarizing the general rule, the four points to be examined are:

1. Whether a legitimate local public interest is involved.

2. Whether the proposed statute would regulate evenhandedly to effectuate that legitimate local purpose.

3. Whether the effects on interstate commerce are incidental or are greater.

4. Whether there is an excessive burden imposed on interstate commerce in relation to benefits at the local level.

As a general matter, it should also be recognized that courts distinguish between revenue and regulation in determining the leeway to be given a state under the Commerce Clause. As was stated by the Florida Supreme Court recently in Dept. of Banking and Finance, State of Fla. v. Credicorp. Corp., 684 So.2d 746 (Fla. 1996),

> [t]his stringent standard for appraising tax measures, however does not strictly apply if the statute at issue qualifies as a regulatory measure. "General revenue taxes are state taxes levied against interstate commerce to raise general revenue." Center for Auto Safety, Inc. v. Athey, 37 F.3d 139, 142 (4th Cir. 1994). Where a regulation is not essentially economic in purpose and effect, however, but is a social regulation

designed to protect local interests, different considerations apply. Beard v. City of Alexandria, 341 U.S. 622, 638-39, 71 S.Ct. 920, 930-31, 95 L.Ed. 1233, 1246-47 (1951). In fact, the Supreme Court has recognized:

> [T]here are matters of local concern, the regulation of which unavoidably involves some regulation of interstate commerce, but which because of their local character and their number and diversity may never be adequately dealt with by Congress. Because of their local character, also, there is wide scope for local regulation without impairing the uniformity of control of the national commerce in matters of national concern and without materially obstructing the free flow of commerce which were the principal objects sought to be secured by the Commerce Clause. Notwithstanding the Commerce Clause, such regulation in the absence of Congressional action has, for the most part, been left to the states by the decisions of this Court....
>
> [California v.] Thompson, 313 U.S. [109] at 113, 61 S.Ct. [930] at 932. "As long as a State does not needlessly obstruct interstate trade or attempt to 'place itself in a position of economic isolation,' it retains broad regulatory authority to protect the health and safety of its citizens...." Maine v. Taylor, 477 U.S. 131, 151, 106 S.Ct. 2440, 2454, 91 L.Ed.2d 110 (1986) (citations omitted).

A number of authorities can be referenced to uphold the constitutionality of the proposed legislation. These authorities conclude that similar legislation neither is violative of the First Amendment or the Commerce Clause, nor is preempted by federal law. See, Rowan v. United States Post Office Dept., 397 U.S. 728, 90 S.Ct. 1484, 25 L.Ed.2d 736 (1970); Syndicated Publications Inc. v. Montgomery County, Md., 921 F.Supp. 1442 (D. Md. 1996); Curtis v. Thompson, 840 F.2d 1291 (7th Cir. 1987); State of W. Va. v. Imperial Marketing, 196 W.Va. 346, 472 S.E.2d 792 (1996); Winshare Club of Canada v. Dept. of Legal Affairs, 542 So.2d 974 (Fla. 1989); Conte and Company, Inc. v. Stephan, (D. Kan. 1989); Op. Atty. Gen., (S.C.) April 25, 1996; Op. Atty. Gen., (Tex.),

Op. No. JM-555 (October 8, 1996); Op. Atty. Gen., (Tenn.) Op. No. 86-132 (July 29, 1986). The referenced cases and opinions find that an even-handed regulation of mailing activities and solicitations is not precluded by federal law.

In the April 25, 1996 Opinion, this Office addressed the constitutionality of a proposed Bill which required the "written consent of the recipient" before any person could send through the mail any material which "contains nudity, violence, sexually explicit conduct or vulgar or profane language." The Opinion referenced the United States Supreme Court decision of Rowan v. United States Post Office, supra which, we noted, had "commented at considerable length regarding the protection of the privacy of a person's home in the context of the individual being able to resist unwanted information sent to him at his dwelling." We quoted the Court in Rowan as observing that

> "[i]n today's complex society we are inescapably captive audiences for many purposes, but a sufficient measure of individual autonomy must survive to permit every householder to exercise control over unwanted mail. To make the householder the exclusive and final judge of what will cross his threshold undoubtedly has the effect of impeding the flow of ideas, information and arguments that, ideally, he should receive and consider. Today's merchandising methods, the plethora of mass mailings subsidized by low postal rates and the growth of the sale of large mailing lists as in industry in itself have changed the mailman from a carrier of primarily private communications, as he was in a more leisurely day, and have made him an adjunct of the mass mailer who sends unsolicited and often unwanted mail into every home. It places no strain on the doctrine of judicial notice to observe that whether measured by pieces or pounds, everyman's mail today is made up overwhelmingly of material he did not seek from persons he does not know. And all too often it is matter he finds offensive.

25 L.Ed.2d at 743. Upholding as constitutional under First Amendment a federal statute which provided that a person could require the removal of his name from all mailing lists and stop all future mailing to the householder, the Court in Rowan summarized as follows:

> [t]o hold less would tend to license a form of trespass and would make hardly more sense than to say that a radio or television viewer not twist the dial to cut off an offensive or

> boring communication and thus bar its entering his home. Nothing in the Constitution compels us to listen to or view any unwanted communication, whatever its merit; we see no basis for according the printed word or pictures a different or more preferred status because they are sent by mail. The ancient concept that a man's [or woman's] home is his [or her] castle" into which "not even the king may enter" has lost none of its vitality and none of the recognized exceptions includes any right to communicate offensively with another.

Id.

Similarly, in the Conte case, the Court rejected the idea that application of the Kansas Consumer Protection Act to direct mail business violated the First Amendment or was preempted by Congress' constitutional power to establish post offices pursuant to Article I, § 8, clause 7 of the federal Constitution. The Court saw no conflict between the clear power of Congress to regulate the mail and the right of the State to "prevent unfair trade practices within its boundaries." 713 F.Supp. at 1386. Neither was there any First Amendment infringement, concluded the Court. Through the Kansas Consumer Protection Act,

> ... the State of Kansas has attempted to deal with deceptive and misleading practices. The statutes adopted by the state clearly and directly advance the governmental interest of the protection of consumers from fraud and deception. The KCPA as applied to plaintiff does not overreach. The law does no more than necessary to protect consumers from fraud.

713 F.Supp. at 1387-1388.

Relying upon Rowan, the Seventh Circuit, in Curtis v. Thompson, supra concluded an Illinois statute prohibiting solicitation of sale of residential real estate once the property owner had given notice that he or she did not desire to sell the property does not violate the First Amendment. The Court found that "[t]he similarity of the instant case to Rowan makes out a powerful argument in favor of upholding the Illinois statute ..." because "[i]n both situations, the right of privacy in the home override the mailer's right to communicate once the homeowner notified that particular mailer that he wishes no further mailings." 840 F.2d at 1301.

With regard to the Commerce Clause, several cases in analogous situations reinforce the State's right to evenhandedly apply regulations to the mailing of unwanted literature or mailings. In Winshare Club of Canada, etc. v. Dept. of Legal Affairs, 542 So.2d 974 (Fla. 1989), the Supreme Court of Florida concluded that the Commerce Clause of the federal Constitution did not prevent the State of Florida from interfering with the sale of out-of-state lottery tickets within its borders. The regulation of gambling was deemed a matter "of peculiarly local concern that traditionally has been left to the regulation of the states." 542 So.2d at 975.

In State of W. Va. v. Imperial Marketing, supra, the State Attorney General of West Virginia brought an action against a direct mail seller, alleging acts and practices under the Consumer Credit and Protection Act and the Prizes and Gifts Act. The Attorney General sought an injunction against the deceptive and misleading methods used by the company to sell its products by "convincing West Virginia consumers that they had won a prize or gift when, in reality, the award of the prize or gift was an illusion and nothing more than an elaborate ruse to sell SCI's product."

The Court rejected SCI's challenge to the injunction both on First Amendment and Commerce Clause grounds. With respect to the First Amendment contention, the Court applied the 4-pronged test of Central Hudson Gas and Elec. Corp. v.Pub. Serv. Comm. of N.Y., 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980),[1] rejecting the company's arguments based upon commercial speech. In addition, the Court rebuffed the argument that "the temporary injunction restraining SCI from specified business practices in violation of the Prizes and Gifts Act, is interfering with interstate commerce." 472 S.E.2d at 808. The Court explained its reasoning as follows:

> [t]he modern dormant Commerce Clause analysis examines State action within the context of impacting interstate commerce on two levels. First is a per se rule of invalidity which considers any State law which has the effect of placing the State in a position of "economic isolation." "Thus, where simple economic protectionism is effected by state legislation,

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[1] The four steps in Central Hudson to determine the constitutionality of any restriction or regulation of commercial speech are as follows: (1) The speech must concern lawful activity and not be misleading; (2) Whether the State has a substantial interest in restricting the speech; (3) Does the restriction directly advance the State's interest? (4) Is there a reasonable fit between the regulation and the State's interest?

> a virtually per se rule of invalidity has been erected." City of Philadelphia v. New Jersey, 437 U.S. at 624, 98 S.Ct. at 2535.
>
> The second level of judicial review recognizes that when a State acts to safeguard the health, safety, and welfare of its citizens, then, inevitably, there will be incidental burdens on interstate commerce which may be unavoidable. In these situations, the Court has adopted a more flexible approach by framing a balancing test which is best described in Pike v. Bruce Church, Inc., 397 U.S. 137, 142, 90 S.Ct. 844, 847, 25 L.Ed.2d 174 (1970) as:
>
> > Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits ... . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Applying the Pike test, the Court upheld the injunction, concluding that "the only conduct which is restrained by the temporary injunction is conduct which violates the Act." The Court continued:

> [t]here is nothing within the four corners of the temporary injunction which prevents SCI from engaging in mail solicitation in a manner that does not violate the Act. The only burden imposed upon SCI by the temporary injunction is to avoid engaging in unlawful conduct. That is not a burden imposed on interstate commerce which exceeds the benefits of the Act, it is a burden that is totally contemplated by the Act.

472 S.E.2d at 808.

Other authorities are in accord. For example, in Syndicated Publications, Inc. v. Montgomery Co. Md., supra, the Court held that application of the deceptive trade practices provisions of the county code to the publisher of a job opportunity newspaper's practice of sending mail solicitations resembling invoices to recipients who had placed advertisements in other newspapers did not violate the Commerce Clause or First Amendment. The Court held that Montgomery County had not violated the Commerce Clause "because the County Code does not discriminate against interstate commerce" and [a]ny effect on interstate commerce is incidental and is outweighed by the local benefit of consumer protection against deceptive trade practices." No First Amendment infringement occurred because "SPI's solicitation is not entitled to First Amendment protection because it is deceptive and misleading commercial speech." 921 F.Supp. at 1452. Likewise, the Texas Attorney General has concluded that the regulation by the state of out-of-state mail order pharmacies does not violate the Commerce Clause. Similarly, the Wisconsin Attorney General has concluded that licensure and regulation by Wisconsin of nonresident collection agencies and solicitors that conduct business with Wisconsin residents solely by mail or telephone would not impermissibly burden interstate commerce. OAG (Wis.) No. 19-92 (July 23, 1992). See also Tenn. Op. Atty. Gen., Op. No. 86-132 (July 29, 1986) [regulation of out-of-state pharmacies and pharmacists by the Tennessee Board of Pharmacy does not unconstitutionally burden interstate commerce].

In conclusion, while I express no opinion as to the policy considerations underlying the proposed legislation, based upon the foregoing authorities, as well as the presumption of validity which must be given the legislation if enacted, it is my opinion that a court would likely uphold the statute. No discrimination against interstate commerce is apparent. Indeed, the Bill would treat all mailings similarly regardless of whether in interstate commerce or not. Courts have held that it is per se an unfair trade practice to send illegal materials through the mail. State v. Reader's Digest Assn., 501 P.2d 290 (Wash. 1972). (Where lottery is illegal under state Constitution and state statutes, it is per se an unfair trade practice to solicit via the mails to participate in a lottery.) Here, the State's interest in protecting the sanctity of the resident from unwanted mailings or literature, as well as the State's interest in the health and well-being of its residents, would, in my judgment, be deemed by a court to be paramount. See, Rowan, supra.

This letter is an informal opinion only. It has been written by a designated Assistant Deputy Attorney General and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kind regards, I am

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General

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