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ALCOHOLIC Beverage

The State of South Carolina

Office of the Attorney General

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Honorable Isadore E. Lourie
Member of the Senate
601 Gressette Building
Columbia, South Carolina 29201

Dear Senator Lourie:

You have asked the opinion of this Office whether R7-5D, Alcoholic Beverage Control Commission Regulation, 1/ is violative of either the State or Federal Constitutions. Particularly, you have suggested that the regulation, insofar as it restricts advertisements to the general public by certain nonprofit organizations licensed for the sale and consumption of alcoholic beverages [mini-bottles], may be

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1/ R7-5D provides in pertinent part that:

> Nonprofit organizations, not being open to the general public, are hereby prohibited from advertising to the general public by means of television, radio, newspapers, billboards, magazines or other periodicals, handbills, flyers and mail addressed to "resident" or "occupant" or any other advertising medium with regard to the name of the club, its location, food or beverage served, entertainment, dates of specific events, prizes, membership fees or dues. Advertising in the yellow pages of telephone directories shall be limited to the club name, address and phone number and must include the phrase "For Members Only."

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violative of the equal protection provisions of the State and Federal Constitutions and the First Amendment of the U.S. Constitution.

To understand South Carolina's regulatory scheme relative to alcoholic beverages, a brief review of its modern day history is in order. Article VIII-A of the South Carolina Constitution provides certain authority to the General Assembly related to the sale and consumption of alcoholic liquors

> Provided, further, that licenses may be granted to sell and consume alcoholic liquors and beverages in sealed containers of two ounces or less in businesses which engage primarily and substantially in the preparation and serving of meals or furnishing of lodging or on premises of certain nonprofit organizations with limited membership not open to the general public, during such hours as the General Assembly may provide.

This 1972 proviso authorized the General Assembly to enact a liquor regulatory scheme that allowed the sale of liquor by the drink in South Carolina for the first time since the beginning of prohibition. The citizenry was cautious in 1972, however, and permitted liquor by the drink [mini-bottles] to be sold and consumed only in accordance with this restrictive proviso and thus the people avoided the sale of mini-bottles in traditional saloons and bars. The General Assembly in its effort to implement this constitutional proviso enacted what is now known as the Mini-bottle Act. [Presently codified in Title 61, Chapter 5 of the South Carolina Code, 1976, as amended].

Both the constitutional amendment and the implementing legislation create three categories of mini-bottle outlets, where mini-bottles may be sold and consumed. The Alcoholic Beverage Control Commission may issue mini-bottle licenses to (1) restaurants engaged primarily and substantially in the preparation of service of meals; and (2) places that "furnish lodging" as that term is defined in § 61-5-10(2).2/ A mini-bottle license issued to either a restaurant or

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2/ See §§ 61-5-10 and 61-5-20, Code of Laws of South Carolina, 1976, as amended.

facility furnishing lodging authorizes the sale and consumption of mini-bottles by the general public at that premise. The third category of mini-bottle outlets authorized by the constitutional provision and the implementing legislation is that of "nonprofit organizations with limited membership, not open to the general public established for social, benevolent, patriotic, recreational or fraternal purposes... ." Section 61-5-20(3). Outlets licensed pursuant to this third category are authorized to sell mini-bottles only to "members or guest of such members of the organization." Id. For emphasis, I reiterate that for a nonprofit organization to be licensed pursuant to § 61-5-20(3), the organization may not be open to the general public.

R7-5D was promulgated by the Commission pursuant to § 61-1-70. This type of regulation is commonly known as a "legislative rule" as opposed to an "interpretive rule", and thus has the force of law and becomes an integral part of alcoholic beverage control statutes. See, Faile v. S.C. Employment Security Comm., 267 S.C. 536, 230 S.E.2d 219 (1976). The regulation in question prohibits most forms of advertisements by licensed private nonprofit organizations directed to the general public. I note that advertisements directed by mail to members of the organization are permitted, and in addition, the organization may advertise in a limited manner in the telephone directory and through designated avenues on its premises.

With regard to whether the proscriptive provisions of the regulation violate the First Amendment is most admittedly a troublesome question. Courts have generally upheld a state's right to enact legislation concerning all aspects of the manufacture, sale, distribution and advertising of intoxicating liquors within its borders. 45 Am.Jur.2d "Intoxicating Liquors", § 42; Anno. 20 ALR 4th, p. 600 "Liquor Advertising". Specifically, with regard to advertising by liquor outlets, it has been said that,

> the broad sweep of the Twenty-first Amendment to the Constitution of the United States gives the states near absolute power to regulate the liquor industry as long as they do not act in a discriminatory manner. Wide latitude as

> to choice of the means to accomplish regulation is accorded the state regulatory agency. This latitude may include some regulation of rights granted by other portions of the United States Constitution most notably here, first amendment freedom of speech. Certainly commercial speech is afforded some first amendment protection. Historically, however, a state has greater powers to regulate speech in the form of commercial advertisement than any other form. This includes time, place and manner of the advertisement, provided such regulation serves a significant government interest. This, coupled with the broad grant of power vested in the states by the twenty-first amendment, leaves no doubt Board has the power to allow advertisement or forbid it entirely if it concerns the sale of alcoholic beverages.

Oklahoma v. Burris, (Ok.) 626 P.2d 1316, 1317-18, 20 ALR 4th 593, 596 (1980). Several other cases are illustrative of this interface between the state's right pursuant to the Twenty-first Amendment to regulate liquor advertisements and the First Amendment protection afforded commercial speech, and in practically every situation the prohibition or restraint upon the liquor advertisement has been upheld.

Perhaps the most significant case is Queensgate Investment Co. v. Liquor Control Comm., 69 Ohio St.2d 361, 433 N.E.2d 138 (1982), aff'd. ___ U.S. ___, 103 S.Ct. 31, 74 L.Ed.2d 45 (1982). In Queensgate, the Ohio Supreme Court concluded that the State's restriction of off-premises advertisement of the price of alcoholic beverages was constitutionally permissible. The Court scrutinized the validity of the regulation pursuant to a four-prong test enumerated in Central Hudson Gas & Elec. Corp. v. Public Service Comm., 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980). While finding the liquor advertisement in question, lawful and not misleading and thus protected "commercial speech", the Court found that the State had a substantial interest in promoting temperance and in protecting public

health, safety and welfare by the regulation of the sale and consumption of alcoholic beverages. The Court further reasoned that a regulatory restraint addressed to advertisement of liquor directly advanced the State's financial interest in this area. Additionally, the Court determined that the prohibition upon price restriction was not necessarily expansive to accomplish the state's purpose. This case is particularly significant in that it was affirmed by the U.S. Supreme Court, and the appeal was dismissed for lack of a substantial federal question. This summary affirmance by the U.S. Supreme Court is entitled to precedential weight on the Twenty-first Amendment issue presented for review. Cf. Hicks v. Miranda, 422 U.S. 332, 95 S.Ct. 2281, 45 L.Ed.2d 233 (1975).

Two Federal Courts of Appeal have likewise upheld advertising restrictions applicable to alcoholic liquors and beverages. The Fifth Circuit in an en banc decision upheld Mississippi's prohibition upon liquor advertisements that originated instate. Dunagin v. City of Oxford, 718 F.2d 738 (5th Cir. 1983). In Dunagin the Court initially analyzed the Twenty-first Amendment and concluded that where the First Amendment is involved, a greater deference to the State is permitted pursuant to the Twenty-first Amendment. In reliance upon California v. Larue, 409 U.S. 109, 93 S.Ct. 390, 34 L.Ed.2d 342 (1972) and New York State Liquor Authority v. Ballanca, 452 U.S. 714, 101 S.Ct. 2599, 69 L.Ed.2d 357 (1981), the Court determined that the Twenty-first Amendment created "a restructuring of the constitutional scheme as it relates" to liquor. Further, the Court noted that there is a presumption of validity of legislation enacted pursuant to the Twenty-first Amendment and that such legislation, even if it affects rights guaranteed under the First Amendment, will be sustained if the legislation represents a "reasonable or rational means of reaching a permissible end." Id. at 744.

Independent of its analysis of the State's authority under the Twenty-first Amendment, the Dunagin court applied the Central Hudson standards for review of a state's restraint of commercial speech. The Court concluded that prohibiting all liquor advertisements that originated instate met this four-prong standard.

Similar conclusions were reached in Oklahoma Telecasters Assoc. v. Crisp, 699 F.2d 490 (10th Cir. 1983), rev. other gr'ds; Capital Cities Cable, Inc. v. Crisp, 467 U.S. ___, 104 S.Ct. ___, 81 L.Ed.2d 580 (1984). In Crisp, the Tenth Circuit upheld Oklahoma's prohibition upon television advertisements of all alcoholic beverages. This restriction required cable tv companies whose programming and advertisements originated out-of-state to block wine advertisements. The Court recognized that "the broad scope of the Twenty-first Amendment has been recognized as conferring something more than normal state authority over public health, safety and welfare [cite omitted]". Id. at 498. The Court, much like the Court in Dunigan, went beyond its finding that Oklahoma was authorized under the Twenty-first Amendment to restrict alcoholic beverage advertisements and analyzed the advertising prohibition pursuant to the standards articulated in Central Hudson. The Court found that there was substantial governmental interest in reducing liquor sales and consumption and that the regulation of advertisement of such beverages directly advanced this substantial governmental interest. The Court held "as a matter of law that prohibitions against the advertisement of alcoholic beverages are reasonably related to reducing the sale and consumption of alcoholic beverages and their attendant problems." Id. at 501. In studying the fourth prong of the Central Hudson test, it was concluded that the total ban of advertising by television was not more extensive than necessary, because other forms of advertisements are available and any advertisement artificially stimulates consumption of alcoholic beverages.

Thus, as we see, the case law strongly supports a state's restraint [even ban] on liquor advertisements and advertisements that identify or solicit business for a liquor outlet. These restraints have been upheld pursuant to the State's unique authority under the Twenty-first Amendment and, independently and conjunctively, these restraints have been upheld when analyzed pursuant to the Central Hudson test applicable to state's use of commercial speech restraints. I caution here, however, that the Supreme Court's decision in Capital Cities Cable, Inc. v. Crisp, supra, while it does not address the balancing of the First and Twenty-first Amendments, may be a harbinger of disfavor with states' restrictions upon the advertising of alcoholic beverages. In Capital Cities Cable the Court framed the question as "whether the interests implicated by

regulation are so closely related to the power reserved by the Twenty-first Amendment that the regulation may prevail, notwithstanding that its requirements directly conflict with express federal policies." Id. at 598. The Court accepted as "reasonable" Oklahoma's efforts to discourage consumption by prohibiting live advertisements on cable tv; however, the Court found that such a limited regulatory aim only indirectly involved the power reserved by the Twenty-first Amendment to the states, since most other media was accessible for advertisement of alcoholic beverages. While it is doubtful that the Supreme Court would discount the importance of a state's more complete regulatory ban on advertisement of alcoholic beverages and thus find that it is not promulgated pursuant to the power of the Twenty-first Amendment or in other words does not relate to the regulation of the sale and consumption of alcoholic beverages, the language in Capital Cities Cable, Inc. does at least caution us in this area.

R7-5D clearly restrains commercial advertising, and for all practical purposes prohibits private clubs from soliciting business from the general public through use of mass media. For reasons hereinafter amplified, we believe R7-5D most probably is not violative of the First Amendment. We have previously examined the categories of mini-bottle licenseholders and recognized that pursuant to South Carolina's regulatory scheme, private nonprofit organizations which maintain mini-bottle licenses are prohibited from selling to the general public or even from being open to the general public. The entire regulatory scheme dictates that nonprofit organizations serve only their members and guests of their members. Accordingly, a general restraint on public advertisements by such organizations is consistent with South Carolina's scheme to regulate liquor sales and consumption in order to promote temperance and protect public health, safety and welfare; thus, it is closely related to the state's effort to control the ultimate sale and consumption of alcoholic beverages in this state and as such the regulation enjoys the unique position and added protection of the Twenty-first Amendment. Queensgate, supra. Moreover, the advertisement restriction is directed towards the licenseholder, not the media, and

this adds additional support to the conclusion that the regulation is authorized by the Twenty-first Amendment. California v. Larue, supra.

Nonetheless, even if the Court applies the standards articulated in Central Hudson, without deference to the Twenty-first Amendment, the regulation survives scrutiny. First, solicitation of the general public by a licensed nonprofit organization is inconsistent with South Carolina's legislative regulatory scheme and thus may violate the Mini-bottle Act and the intent of the constitutional proviso authorizing sales of liquor by the drink. The advertisements of an illegal activity or an advertisement that encourages an illegal transaction is not entitled to First Amendment protection. Central Hudson, supra. Even assuming that advertisements directed toward the general public by such organizations are entitled to limited First Amendment protection as commercial speech, the State has a substantial interest in controlling the sale and consumption of alcoholic beverages and promoting temperance among its citizens. Oklahoma Telecasters Assoc. v. Crisp, supra; Dunigan v. City of Oxford, supra. The next prong of the Central Hudson analysis requires that the State's regulation of commercial speech be directly related to its interest in restricting the sale and consumption of alcoholic beverages. The courts have held, either by way of judicial notice or a "common sense approach", that advertising and consumption of alcoholic beverages are directly linked. Queensgate Investment Co. v. Liquor Control Comm., supra; Dunigan v. City of Oxford, supra. The final inquiry of the test is whether regulation is broader than necessary to advance the state's substantial interest. Under our reasoning it is not since advertisements would increase consumption, that being the evil sought to be controlled. We note in this regard that a licensed nonprofit organization may communicate with its members and provide on-premises advertisements. The sole caveat in this conclusion is that the regulation prohibits advertisements which may be designed solely to solicit members for the organization. This type of advertisement could be accomplished in a completely lawful manner without advertising the sale and consumption of alcoholic beverages. We caution that while the regulation is still most probably constitutional, it may be advisable for the Commission to consider redrafting the regulation to

permit licensed private clubs to solicit members from the general public by use of some limited form of advertisement. The regulation could of course still prohibit absolutely the advertisement of alcoholic beverages and could require affirmative disclosures related to the organization's status as a private club open to members and members' guests only. We emphasize, however, that we believe R7-5D in its current format meets First Amendment challenge.

As to the argument that R7-5D violates equal protection, we must disagree. While we recognize that licensed nonprofit organizations are treated differently with respect to advertisements directed at the general public [i.e., see R7-5C], we have previously identified that this disparate treatment of the categories of licenseholders is rationally related to the state's regulatory scheme regarding the sale and consumption of alcoholic beverages. Thus, this disparate treatment is rational. We believe the law relative to equal protection in this area requires no greater burden in order to sustain the regulation. McGowan v. Maryland, 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961); Dunigan v. City of Oxford, supra.

In conclusion, we advise that R7-5D, insofar as it prohibits advertisements to the general public by certain licensed, private nonprofit organizations is not an unconstitutional restriction upon advertisement by licenseholders.

Very truly yours,

Edwin E. Evans
Senior Assistant Attorney General

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REVIEWED AND APPROVED BY

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