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The State of South Carolina

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Office of the Attorney General

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May 15, 1985

The Honorable T. Moffatt Burriss
Member, House of Representatives
503-A Blatt Building
Columbia, South Carolina 29211

Dear Representative Burriss:

You have asked the opinion of this Office as to whether House Bill No. 2487 might violate the Commerce Clause of the United States Constitution. H.2487 is a bill amending various sections of the Code of Laws of South Carolina concerning, inter alia, the transportation of fireworks; furthermore, the bill recognizes that both the federal Interstate Commerce Commission and Department of Transportation may promulgate regulations to which such transportation of fireworks may be subject.

In considering the constitutionality of an act of the General Assembly, the act is presumed to be constitutional in all respects. 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 of constitutionality are generally 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 an act unconstitutional.

Article I, Section 8 of the United States Constitution provides that "[t]he Congress shall have power ... to regulate commerce ... among the several states" In this regard, Congress has enacted various laws pertaining to the transportation of hazardous materials such as fireworks, giving enforcement authority at times to the Interstate Commerce Commission

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and to the Department of Transportation. However, the Commerce Clause has not completely preempted state regulation of the manufacture, possession, storage, or transportation of fireworks. Where not preempted by federal law, state regulation has been upheld as a part of the state's police power to protect the health and safety of its citizens. See, for example, Dixie Fireworks Co., Inc. v. McArthur, 218 Ga. 735, 130 S.E.2d 731 (1963); City of Fort Worth v. Atlas Enterprises, 311 S.W.2d 922 (Tex.Civ.App. 1958); Cohen v. Bredehoeft, 290 F.Supp. 1001 (S.D. Texas 1968). Courts which have considered the Commerce Clause in relation to state regulation of the possession, transportation, manufacture, or storage of fireworks have upheld the constitutionality of the state regulation as long as there was no discrimination, no impediment in the regular course of shipping, and a reasonable basis for regulation existed. Applying these decisions to H.2487, it would appear that there is no impediment to shipping or discrimination since H.2487 would apply, subject to the limits of regulation by the Interstate Commerce Commission or Department of Transportation, to all shipments into or through this State; the reasonable basis for regulation would be the protection of the health and safety of the citizens of this State. Thus, no burden on interstate commerce appears to exist.

The relationship of H.2487, if enacted, to another federal law must be noted. With regard to the transportation of hazardous materials, 49 U.S.C. § 1811 provides in pertinent part:

(a) General. Except as provided in subsection (b) of this section, any requirement, of a State or political subdivision thereof, which is inconsistent with any requirement set forth in this title, or in a regulation issued under this title, is preempted.

(b) State Laws. Any requirement, of a State or political subdivision thereof, which is not consistent with any requirement set forth in this title, or in a regulation issued under this title, is not preempted if, upon the application of an appropriate State agency, the Secretary determines, in accordance with procedures to be prescribed by regulation, that such requirement (1)

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affords an equal or greater level of protection to the public than is afforded by the requirements of this title or of regulations issued under this title and (2) does not unreasonably burden commerce. Such requirement shall not be preempted to the extent specified in such determination by the Secretary for so long as such State or political subdivision thereof continues to administer and enforce effectively such requirement.

* * *

While this statute has not altogether preempted state regulation with regard to the transportation of fireworks, see South Dakota Dept. of Public Safety v. Haddenham, 339 N.W.2d 786 (S.D. 1983); National Tank Truck Carriers, Inc. v. New York, 677 F.2d 270 (2d Cir. 1982) (city regulation consistent with federal), any state regulations found to be inconsistent with federal statutes or regulations dealing with such transportation will be preempted unless approved by the Secretary of Transportation under the foregoing criteria. This Office has identified no such inconsistency; however, the Secretary of Transportation is expressly authorized by the foregoing statute to finally determine whether such an inconsistency may exist and may approve such inconsistency. Thus, if H.2487 is enacted, it would be advisable to contact the Department of Transportation for a conclusive determination of any possible conflict with federal law governing the transportation of fireworks. See, South Dakota Dept. of Public Safety v. Haddenham, supra; New York v. United States Dept. of Transportation, 539 F.Supp. 1237 (S.D.N.Y. 1982).

CONCLUSION

In conclusion, this Office advises that no violation of the Commerce Clause appears to exist with respect to H.2487. Furthermore, we see no apparent conflict with Department of Transportation regulations promulgated pursuant to 49 U.S.C. § 1801 et seq. Indeed, H.2487 expressly provides that the act must be construed consistently with Department of Transportation regulations. However, because the Secretary of Transportation is statutorily authorized to review state statutes governing the transportation of fireworks for inconsistencies with federal law

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governing the same (including any unreasonable burden on inter-
state commerce), we recommend that, if enacted, H.2487 be
submitted to the Department of Transportation for conclusive
determination of these questions.

Sincerely,

Patricia D. Petway
Patricia D. Petway
Assistant Attorney General

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REVIEWED AND APPROVED BY:

Robert D. Cook

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Executive Assistant for Opinions