The State of South Carolina

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Honorable Charles L. Powell
Senator, Senatorial District Four
Suite 506, Gressette Office Building
Columbia, South Carolina 29202

Dear Senator Powell:

You have asked this Office whether legislative oversight of administrative regulations provided for in the Administrative Procedures Act [§§ 1-23-10, et seq., Code of Laws of South Carolina (1985 Cum.Supp.)] violates Article III, § 18 of the South Carolina Constitution (1895, as amended). I note at the outset that this Office in the issuance of its opinion will in the absence of extraordinary circumstances confine its response to the precise inquiry presented, and thus, we do not search for other potential questions relating to the APA. Moreover, in reviewing the constitutionality of a legislative provision we are cognizant that every presumption in favor of a statute's constitutionality must be indulged; and prior to any declaration that an act is unconstitutional, its conflict with the constitutional provision must be beyond reasonable doubt. Santee Mills v. Query, 122 S.C. 158, 115 S.E. 202 (1922). With due respect to these constraints, we conclude that it is doubtful that the courts of South Carolina would find that the legislative oversight provisions of the APA violate Article III, § 18.

Sections 1-23-120 and 1-23-125 provide a system for legislative oversight of regulations finally promulgated by executive agencies. Ordinarily, an agency must submit its regulations to both the Senate and the House of Representatives for legislative review. The regulations generally do not take effect until at least 120 days after their submission to the two legislative houses. This 120 day delay in the effective date of the regulation may be extended upon the occurrence of certain contingencies; nonetheless, although a regulation's implementation date may be substantially delayed while the regulation awaits legislative review,

pursuant to the APA's statutory scheme, regulations promulgated by an executive agency will take effect unless they are disapproved by joint resolution.

Article III, § 18 provides in pertinent part:

> No Bill or Joint Resolution shall have the force of law until it shall have been read three times and on three separate days in each house, has had the Great Seal of the State affixed to it, and has been signed by the President of the Senate and the Speaker of the House of Representatives.

This constitutional provision is commonly referred to as the "three reading rule" and in essence mandates that the General Assembly may not enact legislation, by whatever name or title, unless and until the proposed legislation has received three separate readings.

As we earlier identified, the General Assembly cannot veto or disapprove the implementation of regulations promulgated by an executive agency except by its passage of a "Joint Resolution". § 1-23-120. A "Joint Resolution" is defined in the legislative context as:

> "Joint Resolution"- which shall have the same force of law as an Act, but is a temporary measure, dying when its subject matter is completed. It requires the same treatment as a Bill does in its passage through both Houses, but its title after passage shall not be changed to that of an Act; and when used to propose an amendment to the Constitution it does not require the approval of the Governor.

Rule 10.31(c), Rules of the House (1986 Legislative Manual). There clearly exists no express conflict with the APA requirement that the General Assembly may disapprove a regulation promulgated by an executive agency by Joint Resolution and the constitutional provision that requires three separate readings by the General Assembly prior to enactment of a Joint Resolution having the force of law. The APA does not statutorily define "Joint Resolution" as used therein and thus we must assume that the phrase is

intended to be used in its ordinary significance and as it is customarily defined in the legislative context. Cf., State v. Patterson, 261 S.C. 362, 200 S.E.2d 68 (1973). Thus, we believe that where the General Assembly passes a Joint Resolution as contemplated in the APA, the Joint Resolution must undergo the three readings required by Article III, § 18.

The more serious issue presented by your request is whether inaction by the General Assembly, in the context of legislative review of a finally promulgated agency regulation, conflicts with Article III, § 18. As earlier identified, pursuant to the APA's scheme providing for legislative review, a regulation finally promulgated by an executive agency takes effect if the General Assembly does not disapprove by a "Joint Resolution" the regulation within the prescribed time limits. The practical effect being that the regulation becomes effective after a "report and wait" period without formal process by the General Assembly. For several reasons we doubt that this report and wait provision of the APA conflicts with Article III, § 18.

There exists no constitutional provision that prohibits the General Assembly from delegating, at the outset, authority to an executive agency to prescribe regulations for the administration and enforcement of a statute provided that the regulations are consistent with the statute's general purpose and scheme. Cole v. Manning, 240 S.C. 260, 125 S.E.2d 621 (1962). In this regard, it has been said that "[a]n administrative regulation is valid as long as it is reasonably related to the purpose of the enabling legislation." Hunter & Walden Company v. S.C. State Licensing Board for Contractors, 272 S.C. 211, 251 S.E.2d 186 (1978). Traditionally, in South Carolina, duly promulgated regulations have the force and effect of law if they are classified as "legislative regulations". Faile v. S.C. Employment Security Comm., 267 S.C. 536, 230 S.E.2d 219 (1976). Nonetheless, while duly promulgated regulations have the force and effect of law, they are not of the same status as statutory enactments and are subject to challenge if they alter or add to a statute, Society of Professional Journalists v. Sexton, ___ S.C. ___, 324 S.E.2d 313 (1984), or are inconsistent with the legislative scheme or intent. Milligen and Company v. S.C. Department of Occupational Safety and Health, 275 S.C. 264, 269 S.E.2d 763 (1980). Moreover, agency promulgated regulations may not suspend a statute. Heyward v. S.C. Tax Comm., 240 S.C. 347, 126 S.E.2d 15 (1962). Thus, while technical, the distinction between a "regulation" and a "statute" is significant.

In a similar context, it has been noted that the legislature's failure to suspend or veto a proposed rule gives it the force not of the legislative enactment, but of a regulation promulgated pursuant to the enabling statute, and if the promulgated rule exceeds the delegated authority, it is void. Walko Corp. v. Burger Chef Systems, Inc., 554 F.2d 1165, 1169, n. 29 (D.C.Cir. 1977). Thus, since legislative inaction or silence does not change the legal status of a finally promulgated administrative regulation, such silence is not of the legislative character that requires the constitutional formality of three readings. There is little perceived difference in the failure of the General Assembly to affirmatively act to disapprove a regulation and the failure of the General Assembly to affirmatively act to defeat proposed legislation; neither is of legal consequence and neither, we believe, assumes the character of a legislative enactment.

While authorities in other jurisdictions, as in South Carolina, are scarce on this particular issue - the question of whether inaction or silence by the General Assembly in its review of an administrative regulation during a report and wait period is legislative action in the sense that it invokes the constitutional requirement that all laws enacted by the legislature receive three readings, there are several federal court decisions that discuss this issue. We emphasize that we have identified no precedent in South Carolina and for that reason alone suggest that there is considerable doubt in this area.

The U.S. Supreme Court has upheld a similar federal statute that provided for notification of judicial rules promulgated by the Supreme Court. Moreover, the statute provided that the judicial rule would take effect after a prescribed delay if Congress did not affirmatively vote to disapprove; thus, providing for silent approval. Sibbach v. Wilson, 312 U.S. 1 (1941). The Court's analysis of this report and wait provision briefly discusses the issue and the conclusion is that mere legislative inaction is not "legislative action" as contemplated by the various constitutional provisions that restrict the enactment of laws. A recent Supreme Court decision, we believe, more clearly dictates the same conclusion. INS v. Chadha, 462 U.S. 919, 103 Sup.Ct. 2764 (1983). The Chadha Court struck the one house veto provision of the deportation statutes; however, the Court expressly recognized that the provision for Congressional review of the Executive's decision to suspend deportation of an alien was constitutional with the removal of the one-House veto. Supra, at 2775, n. 8, and

2776, n. 9. The statutes provided for congressional oversight by a "report and wait" provision similar to the one upheld in Sibbach, and likewise similar to the South Carolina APA procedures providing for legislative review. I cite for your consideration, Lewis v. Sava, 602 F.Supp. 571 (S.D.N.Y. 1984), and Muller Optical Co. v. EEOC, 743 F.2d 380 (6th Cir. 1984), as additional support for the conclusion that "report and wait" provisions that provide for legislative oversight of executive action are not inconsistent with Article III, § 18.

On the other hand, at least one Court has read such "silent approval" as being violative of the presentment clause of the federal constitution 1/, and thus concludes that even congressional inaction may constitute "legislative action" in the context of statutorily authorized legislative review of agency regulations and therefore such an action is controlled by the constitutional constraints upon the enactment of laws. EEOC v. Allstate Ins. Co., 570 F.Supp. 1224 (So.Dis.Miss. 1983). But, however, for the reasons earlier noted, we do not agree that legislative silence, without attendant legal consequence, is legislative action requiring three readings as contemplated in Article III, § 18. 2/

It is significant in reaching our conclusion to realize that Article III, § 18 is inapplicable to rule-making by executive agencies and simply imposes no constraint upon executive action, even if the agency action is similar in many respects to the enactment of legislation. On this point, the authorities appear to be unanimous. See, INS v. Chadha, supra, at 2785, n. 16; Barker v. Manchin, 279 S.E.2d 622 (W.Va. 1981).

We realize as well that several decisions in other jurisdictions cast substantial doubt upon our conclusion

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1/ Article I, § 7 of the United States Constitution.

2/ Although the situation in South Carolina relative to legislative review of judicial rules is most probably not comparable in a legal sense to that of legislative review of executive agency regulations (see, Article V, § 4(a), Constitution of South Carolina), we refer you to that procedure because of its similarity. The State Constitution provides for "silent approval" by the General Assembly of judicial rules prescribed by the Supreme Court. In the absence of a legislative veto the judicial rules take effect after a prescribed period of time.

that silent legislative approval is not violative of the "three reading rule"; but however, none of these decisions extends so far as to declare unconstitutional mere silence of the General Assembly where its silence has no legal consequence with the exception of EEOC v. Allstate Ins. Co., supra. See, e.g., INS v. Chadha, supra; Barker v. Manchin, supra; State v. Alive Voluntary, 606 P.2d 769 (Ak. 1980); Contra, Opinion of the Justices, 431 A.2d 783 (N.H. 1981).

In conclusion, we iterate that the APA provision for legislative veto of regulations finally promulgated by executive agencies is not violative of Article III, § 18 in that the APA contemplates legislative action by Joint Resolution, and in the legislative context, a Joint Resolution requires three distinct readings. We also conclude, although we recognize that any conclusion in this area is wrought with uncertainty, that the APA's scheme of silent approval of agency regulations is probably consistent with Article III, § 18. We reach this conclusion because we believe that the report and wait requirement with legislative silence or inaction, as contemplated by the APA, does not constitute a legislative enactment since there is no attendant legal consequence.

Please call on us again if we may be of assistance.

Very truly yours,

Edwin E. Evans
Deputy Attorney General

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REVIEWED AND APPROVED BY:

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