ALAN WILSON
ATTORNEY GENERAL

September 9, 2019

Melina Mann, Esquire
General Counsel
South Carolina Department of Labor, Licensing and Regulation
Post Office Box 11329
Columbia, South Carolina 29211-1329

Dear Ms. Mann:

We received your letter addressed to Attorney General Alan Wilson requesting an opinion of this Office concerning "the use of a CPA credential by South Carolina-licensed Certified Public Accountants who practice in South Carolina." Specifically, you request an opinion regarding the following:

> (1) Whether a licensed South Carolina CPA must be associated with a South Carolina-registered CPA firm in order to provide tax preparer services using a CPA credential and (2) whether the Board of Accountancy may prohibit the use of the CPA credential by a South Carolina-licensed CPA who is not employed by or associated with a South Carolina-registered CPA firm.

In your letter, you lay out a variety of concerns with restricting the use of CPA credential by CPAs licensed in South Carolina including statutory and constitutional concerns. With these in mind you ask us the following three specific questions:

> (1) If a CPA wishes to use the designation CPA while working in a non-registered CPA firm, is this protected commercial speech within the context of the statutory and regulatory provisions cited herein?
> (2) If the answer to question one is "yes," can the South Carolina Board of Accountancy restrict the use of the CPA credential by a licensee who holds a currently active CPA license but does not work in a South Carolina-registered firm?
> (3) Are South Carolina Code section 40-2-40(B)(1)(a) and Regulation 1-05 unconstitutional as applied to the "practice of accounting" defined in section 40-2-20(15(b), to the extent that they restrict a valid CPA license holder's use of the CPA designation to only those CPAs who work for or

> are associated with a registered firm or who only do accounting work for the organization itself?

Law/Analysis

Applicable State Law

As you noted in your letter, section 40-2-30 of the South Carolina Code (2011 & Supp. 2018) governs the licensing and registration of Certified Public Accountants ("CPAs") in South Carolina. Subsection (A) of this provision states "[i]t is unlawful for a person to engage in the practice of accountancy as regulated by this board without holding a valid license or registration or without qualifying for a practice privilege pursuant to Section 40-2-245." Section 40-2-20(15) of the South Carolina Code (Supp. 2018) defines "practice of accounting" as:

> (a) Issuing a report on financial statements of a person, firm, organization, or governmental unit or offering to render or rendering any attest or compilation service. This restriction does not prohibit any act of a public official or public employee in the performance of that person's duties or prohibit the performance by a nonlicensee of other services involving the use of accounting skills, including the preparation of tax returns, management advisory services, and the preparation of financial statements without the issuance of reports; or
>
> (b) using or assuming the title "Certified Public Accountant" or the abbreviation "CPA" or any other title, designation, words, letters, abbreviation, sign, card, or device tending to indicate that the person is a certified public accountant.

Subsection (D) of section 40-2-30 of the South Carolina Code (2011) governs the use of the CPA designation. This statute provides:

> Only a person holding a valid license as a certified public accountant or qualifying for a practice privilege under Section 40-2-245 shall use or assume the title "Certified Public Accountant" or the abbreviation "CPA" or any other title, designation, words, letters, abbreviation, sign, card, or device indicating that the person is a certified public accountant.

S.C. Code Ann. § 40-2-30(D). Similarly, under subsection (E) of section 40-2-30, a firm "may not provide attest services or assume or use the title 'Certified Public Accountants', 'Public Accountants' or the abbreviation 'CPAs' and 'PAs', or any other title, designation, words, letters, abbreviation, sign, card, or device indicating the firm is a CPA firm unless," among other requirements, the firm is registered. S.C. Code Ann. § 40-2-30(E). Section 40-2-40 of the South

Carolina Code (2011 & Supp. 2018) governs firm registration. Section 40-2-40(B)(1) states which firms must be registered.

> (B)(1) The following must hold a registration issued pursuant to this section:
>
> > (a) a firm with an office in this State performing attest services as defined in Section 40-2-20(2) or engaging in the practice of accounting;
> >
> > (b) a firm with an office in this State that uses the title "CPA" or "CPA firm"; or
> >
> > (c) a firm that does not have an office in this State but performs attest services described in Section 40-2-20(2)(a) (audits), (c) (examinations), or
> >
> > (d) (services under PCAOB Auditing Standards) for a client having a home office in this State.
>
> (2) A firm not subject to subsection (B)(1) may be exempted from the registration requirement provided for in Section 40-2-30(I).

S.C. Code Ann. § 40-2-40(B)(2011).

In our review of the statutes governing CPAs and the use of the CPA designation, we did not find a provision prohibiting a South Carolina-licensed CPA from utilizing his or her CPA designation when he or she is working for a non-registered CPA firm. However, we understand regulation 1-05 of the South Carolina Code of Regulations (2011) provides: "A licensee who offers to engage in the practice of accounting on behalf of any person other than an organization in which the licensee is an officer, employee, partner, member or principal must apply for registration as a firm or be employed or associated with a registered firm." In your letter, you explain the South Carolina Board of Accountancy (the "Board") interprets this regulation along with section 40-2-20(15), defining "practice of accounting," to mean "a CPA who is licensed and who resides or has his or her principal place of business in South Carolina may only prepare tax returns utilizing the CPA designation if he or she is employed by or associated with a South Carolina-registered CPA firm." Further, you explain the Board

> interprets use of the CPA designation in preparing a tax return to include CPAs who do not sign tax returns using their CPA credential, but who disclose their CPA licensure on the IRS application to obtain the PTIN (Preparer Tax Identification Number) required by the IRS for those

> individuals who prepare or assist in preparing federal tax returns for compensation.

First, you ask us to consider whether a CPA licensed in South Carolina is required to be associated with a CPA firm registered in South Carolina in order to provide tax preparer services using a CPA designation. This Office, just as a court, generally gives deference to an agency's interpretation of its own regulation. Op. S.C. Att'y Gen., 2019 WL 1644873 (S.C.A.G. Mar. 27, 2019); S.C. Dep't of Revenue v. Blue Moon of Newberry, Inc., 397 S.C. 256, 260–61, 725 S.E.2d 480, 483 (2012). "Regulations are interpreted using the same rules of construction as statutes. When interpreting a regulation, we look for the plain and ordinary meaning of the words of the regulation, without resort to subtle or forced construction to limit or expand the regulation's operation." Murphy v. S.C. Dep't of Health & Envtl. Control, 396 S.C. 633, 639-640, 723 S.E.2d 191, 195 (2012) (citations omitted) (internal quotations omitted).

The plain language used in regulation 1-05 indicates a licensee must apply for firm registration or be employed by a registered firm if the licensee "offers to engage in the practice of accounting" outside of providing such services to an organization he or she is employed by or serves as an officer, partner, or member. As cited above, the Legislature defines "practice of accounting" in section 40-2-20(15) to include issuing reports on financial statements or offering to render attest or compilation services. In addition, this provision states those using the title "Certified Public Account" or "CPA" are also deemed to be "practicing accounting." Section 40-2-20(15)(a) specifies it does not prohibit non-licensees from performing "other services" including "the preparation of tax returns." However, this exception is aimed at non-licensees. Giving deference to the Board's interpretation of section 40-2-20(15)(a) and (b), we believe a court could find that holding oneself out as a CPA to provide tax preparer services constitutes the practice of accounting. As such, pursuant to regulation 1-05, we believe a CPA licensed in South Carolina is required to associate with a South Carolina-registered CPA firm to provide tax preparation services using his or her CPA designation.

As you described in your letter, this interpretation results in disparate treatment of South Carolina-licensed CPA as compared with non-licensees and CPAs licensed in other states. Pursuant to sections 40-2-20(a) and 40-2-30(B) of the South Carolina Code, non-licensees may provide tax preparer services without the implications associated with "practice of accounting" under state law, including regulation 1-05. In addition, nonresident CPAs who meet the qualifications of section 40-2-245 of the South Carolina Code (2011) may engage in the practice of accountancy and hold themselves out as CPAs in South Carolina. See S.C. Code Ann. §§40-2-30(A), (D), & (G). However, nonresident CPAs are not subject to regulation 1-05 and depending on the law of the state in which they are licensed, may not be similarly required to be associated with a registered firm in order to offer to engage in the practice of accounting. Section 40-2-70(12) of the South Carolina Code (Supp. 2018) gives the Board the authority to promulgate regulations. Therefore, any inequity must be addressed by the Board, not this Office.

First Amendment

Given the Board's interpretation of regulation 1-05, you are concerned with whether the Board can restrict the use of a South Carolina-licensed CPA's designation in this way. Specifically, you ask whether prohibiting a South Carolina-licensed CPA not associated with a South Carolina-registered CPA firm from holding themselves out as a CPA violates the CPA's rights under the First Amendment of the United States Constitution. Initially, you ask whether holding oneself out as a CPA constitutes commercial speech protected by the First Amendment. Based on our reading of Ibanez v. Florida Department of Business and Professional Regulation, Board of Accountancy, 512 U.S. 136 (1994), we believe the answer is yes.

In Ibanez, the Florida Board of Accountancy reprimanded an attorney for engaging in what it believe to be false, deceptive, and misleading advertising when she included her CPA and CFP (Certified Financial Planner) credentials in her advertising and other communications for her law practice. Id. Similar to South Carolina, the Florida Public Accountancy Act required individuals meet licensing requirements in order to hold oneself out as a CPA. Id. at 139. The Supreme Court determined the use of the CPA and CFP designations are commercial speech. Id. at 142.

Having answered your first question affirmatively, you ask whether the Board can restrict the use of the CPA designation by a person who is "a currently active CPA but does not work in a South Carolina-registered firm?" The answer to this question is less clear. In Ibanez, the Court clarified "only false, deceptive, or misleading commercial speech may be banned." Id. "Commercial speech that is not false, deceptive, or misleading can be restricted, but only if the State shows that the restriction directly and materially advances a substantial state interest in a manner no more extensive than necessary to serve that interest." Id. Moreover, the Court noted the heavy burden on the State to justify restrictions on commercial speech.

> The State's burden is not slight; the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful. Mere speculation or conjecture will not suffice; rather the State must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.

Id. at 43 (citations omitted) (internal quotation omitted). The Court found because Ibanez currently held an active CPA license and was not charged with or found guilty of noncompliance with the State's regulatory requirements, use of this designation in her advertising was neither false nor misleading. Id. at 144. Accordingly, the Court found "the Board's decision to censure Ibanez is incompatible with the First Amendment restraints on official action." Id. at 139.

In Ibanez, the Board initially charged Ibanez with public accounting in an unlicensed firm. Id. at 139-40. The Board dropped this charge while the case was still before the hearing officer. Id. at 140. Thus, Ibanez does not address the facts you present to us. However, as you mentioned in

your letter, the Court of Appeals for the Eleventh Circuit addressed this issue in Miller v. Stuart, 117 F.3d 1376 (11th Cir. 1997). Miller, a Florida-licensed CPA, was employed by American Express, a non-CPA firm. Id. Under Florida law, similar to South Carolina, holding out as a CPA constitutes the practice of public accountancy. Id. Florida law at the time made it unlawful for a CPA to practice accountancy at a non-CPA firm. Id. Miller filed a declaratory judgement action against the State of Florida seeking the right to place his CPA designation on his business cards, letterhead, and in written advertisements. Id.

Citing Ibanez, the Eleventh Circuit stated "[t]he Supreme Court has already found that an actively licensed CPA's use of the CPA designation constitutes commercial speech." Id. at 1381. The Eleventh Circuit rejected Florida's assertion that Miller's holding out was conduct rather than commercial speech. Id. at 1382.

> Whether Miller holds out in conjunction with performing accounting and tax services or performing other services, the fact remains that his holding out conveys significant information about his compliance with the education, competence, and character requirements for a CPA license. Holding out to prospective and current clients in both situations allows Miller to advertise his qualifications, educate the market and stimulate demand for his product or service. Nor are we persuaded that holding out loses its protections under the First Amendment because it is a "subordinate component" of Miller's business transaction of performing accounting and tax services. Guided by this Supreme Court precedent, we conclude that a CPA's holding out while offering to perform or performing accounting and tax services for the public constitutes commercial speech and therefore warrants protection under the First Amendment.

Id.

Finding Miller's holding out as a CPA to be protected speech, the Court citing Central Hudson Gas and Electric Corporation v. Public Service Commission, 447 U.S. 557 (1980), set forth a four-prong test to determine whether Florida's restrictions were justified: (1) the speech concerns unlawful activity or is misleading; (2) the government has a substantial interest in proscribing speech; (3) the regulation advances the asserted state interest in a direct and material way; and (4) the extent of the restriction is in reasonable proportion for the government's purpose. Id. In regard to the first prong, the Court determined because Miller was a licensed CPA, his holding out was truthful. Moreover, the Court found Florida failed to provide evidence showing that consumers would be misled by Miller holding out as a CPA. Id. at 1383. Next, the Court accepted Florida's assertions that it has a substantial interest in protecting consumers from unqualified accountants and ensuring the accuracy of commercial information disseminated to consumers. Id. The Court also assumed the statutory scheme advanced Florida's interest, but did not elaborate further. In regard to the last prong, the Court described Florida's argument as "if it can wholly prohibit Miller from performing accounting and tax services for the public at a

non-CPA firm, surely it can allow him to perform these services subject to the limitation that he may not hold out." Id. at 1383. The Court rejected this argument stating the government "may not justify its regulation of speech as a 'reasonable choice' by comparing it to a more intrusive non-speech regulatory alternative." Id. Citing Central Hudson, the Court explained although obtaining a license as a CPA is a voluntary endeavor, the state cannot condition the conferring of that privilege on the surrender of a constitutional right-in this case, the First Amendment. Id. at 1384 (citing 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996)).

> Consequently, we hold that the State of Florida has failed to justify the speech restriction inherent in its statutory scheme, which completely prevents Miller from holding himself out as a CPA, because it has not shown the scheme to be narrowly tailored. As the State of Florida has failed to justify its statutory scheme under the Central Hudson standard, we hold that the statutory scheme is unconstitutional to the extent that it prevents Miller from holding himself out as a CPA while offering to perform or performing accounting and tax services of the kind identified in Fla. Stat. ch. 473.302(5)(b), which he currently provides at American Express, a non-CPA firm.

Id.

In the situation you describe, the CPAs are licensed in South Carolina. Therefore, just as in Ibanez and Miller, the CPAs are conveying truthful information. We found several cases in which courts found the use of titles similar to the CPA designation by non-CPAs was misleading. See eg. Accountant's Soc. of Virginia v. Bowman, 860 F.2d 602, 603 (4th Cir. 1988) (upholding Virginia's prohibition on the use of public accountant by non-CPAs); Carberry v. State Bd. of Accountancy, 772, 33 Cal. Rptr. 2d 788 (Cal. Ct. App. 1994) (the use of "accounting" in name of business owned by a non-CPA without the use of a disclaimer misleading); People ex rel. Dunbar v. Freedman, 356 P.2d 899, 900 (Colo. 1960) ("The term cost accountant, chartered accountant and certified accountant and the abbreviation C. A. are specifically prohibited to such other persons as being prima facie misleading to the public."). We did not find any cases determining the use of the CPA designation by an actively licensed CPA is misleading. We are unsure as to why the Board may find holding out by an actively license CPA who does not affiliate with a registered CPA to be misleading. Nevertheless, we considered whether "the restriction directly and materially advances a substantial state interest" Ibanez, at 142.

We are not apprised of the interest the Board seeks to protect by prohibiting licensed CPAs who are not associated with South Carolina-registered firms from disclosing their CPA designations, but we presume its interest is similar to that advanced by Florida in Miller – to protect the public from unqualified accountants and ensuring the accuracy of commercial information disseminated to the public. In addition, we are not privy to whether the requirement that South Carolina CPAs be affiliated with a South Carolina-registered firm advances this interest. This is particularly questionable, when as you informed us, both unlicensed tax preparers and CPA licensed in other states are not subject to same requirement. Nevertheless, assuming the regulation advances a

substantial state interest, we also need to consider whether this restriction is reasonable in proportion to the interest served.

As we interpret regulation 1-05, South Carolina's regulatory scheme prohibits South Carolina-licensed CPAs from using their CPA designation when offering to perform accounting and tax services. This scheme is almost identical to that evaluated by the Eleventh Circuit in Miller. Thus, absent the Board's ability to demonstrate a real harm that this restriction will directly and materially alleviate, we believe a court could reach the same conclusion as the Eleventh Circuit. Nonetheless, resolving this matter and stating conclusively that South Carolina's regulatory scheme violates the First Amendment are factual determinations. As such, only a court, not this Office, can make such a determination. See Op. S.C. Att'y Gen., 1985 WL 259225 (S.C.A.G. Oct. 9, 1985) ("Because this Office does not have the authority of a court or other fact-finding body, we are not able, in a legal opinion, to adjudicate or investigate factual questions.").

Conclusion

Giving deference to the Board's interpretation regulation 1-05 and section 40-2-20(15)(a) & (b), we are of the opinion that a CPA licensed in South Carolina may not use their CPA designation in offering to perform tax preparer services if they are not associated with a South Carolina-registered CPA firm. However, we caution that under the United States Supreme Court's ruling in Ibanez, if the Board fails to justify this restriction in a way that is narrowly tailored to serve a substantial state interest, a court will likely find this restriction violates the First Amendment.

Sincerely,

Cydney Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:

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