



ALAN WILSON  
ATTORNEY GENERAL

July 09, 2020

Ms. Candace Pratt  
Chairwoman  
South Carolina Real Estate Commission  
Post Office Box 11847  
Columbia, SC 29211-1847

Dear Chairwoman Pratt:

Attorney General Alan Wilson has referred your letter to the Opinions section. Your letter asks the following:

I respectfully request an advisory opinion seeking clarification on behalf of the South Carolina Real Estate Commission (the Commission) regarding a statutory change to section 40-57-115 of the South Carolina Code that requires the Commission to conduct fingerprint based state and federal background checks. By way of background, I provide you with the following information.

The Commission has the statutory authority to regulate the practice of the real estate industry "so as to protect the public's interest when involved in real estate transactions." S.C. Code Ann. § 40-57-10 (1976, as amended). As part of that authority, the Commission licenses brokers-in-charge, brokers, sale persons, property managers-in-charge and property managers. Prior to June 2014, the Commission did not require a criminal record check for an initial or renewal license application unless the applicant/licensee acknowledged a criminal history on his or her application.

In 2014, the legislature enacted Act No. 258 to require initial licensure applicants to submit to a state and a national criminal records check by a source approved by the Commission. The Commission, through the State's procurement process, selected a source to do a social security-based state and national criminal records check for initial applicants. The applicant was responsible for the cost of the criminal records check.

In 2017, Act No. 60 amended section 40-57-115 of the South Carolina Code to require initial and renewal applicants to submit to a state fingerprint-based criminal records check to be conducted by the State Law Enforcement Division

(SLED), and a national criminal records check, supported by fingerprint, by the FBI, cost to be borne by the applicant or licensee. ...

As the Commission understands it, there is a difference between the type of information gathered by the social security-based background check and the fingerprint-based background check. The Commission is concerned with the confidentiality requirements of state and federal fingerprint-based criminal records check and is worried that its access to information may be restricted and that may impact its ability to protect the public.

With all this in mind, I submit the following question:

Can the Commission continue to require the social security-based criminal records background check in addition to the state and federal fingerprint-based background check that will be in effect on July 1, 2020, or would the social security-based criminal records check be an additional licensure requirement that would require a statutory change?

#### Law/Analysis

It is this Office's opinion that a court would likely hold that 2017 Act No. 60 ("2017 Act") removed the Commission's authority to require social security-based criminal records checks. The request letter states that the Commission began requiring initial licensure applicants to submit to a social security-based criminal records check in response to 2014 Act No. 258, § 1 ("2014 Act"). The 2014 Act, codified at S.C. Code § 40-57-115, directed the Commission to approve the source of a state and national criminal records check for initial applicants. Id. ("[T]he commission shall require initial applicants to submit to a state criminal records check, by a source approved by the commission, and a national criminal records check."). In response to this directive, the Commission selected a social security-based state and national criminal records check.

Subsequently, the 2017 Act amended section 40-57-115 to require "initial applicants and applicants for licensure renewal to submit to a state fingerprint-based criminal records check, to be conducted by the State Law Enforcement Division (SLED), and a national criminal records check, supported by fingerprints, by the FBI." Id. The 2017 Act removed the language directing the Commission to select the sources of the criminal records checks. Instead, the 2017 Act specifically named SLED as the source for the state criminal backgrounds check and also named the FBI as the source for the national criminal records. Id. Further, the 2017 Act explicitly states that these record checks are to be "fingerprint-based criminal records" checks. Id.

In order to address whether the Commission can continue to require licensure applicants to submit to social security-based criminal records background checks, this opinion will interpret section 40-57-115 according to the rules of statutory construction. The primary rule of statutory

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construction is to “ascertain and give effect to the intent of the legislature.” Kerr v. Richland Mem'l Hosp., 383 S.C. 146, 148, 678 S.E.2d 809, 811 (2009) (citations omitted). The South Carolina Supreme Court has held that when the meaning of a statute is clear on its face, “then the rules of statutory interpretation are not needed and the court has no right to impose another meaning. The words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute’s operation.” Catawba Indian Tribe of S.C. v. State, 372 S.C. 519, 525–26, 642 S.E.2d 751, 754 (2007) (citations omitted) (internal quotations omitted). Moreover, when interpreting a statutory amendment, courts “must presume the legislature did not intend a futile act, but rather intended its statutes to accomplish something.” TNS Mills, Inc. v. S.C. Dep’t of Revenue, 331 S.C. 611, 620, 503 S.E.2d 471, 476 (1998); see also State v. Leopard, 349 S.C. 467, 472, 563 S.E.2d 342, 345 (Ct. App. 2002) (“[W]e must ‘presume the legislature did not intend a futile act’ when construing a statutory amendment.”).

It is this Office’s opinion that the 2017 Act’s plain language unambiguously conveys the General Assembly’s intent that the criminal records checks for initial applicants and for applicants for licensure renewal be fingerprint based and conducted by SLED and the FBI. The 2017 Act amended section 40-57-115 to explicitly require that these checks be fingerprint-based. Further, the 2017 Act removed the language granting the Commission’s approval authority over the source of these criminal records checks. Because the 2017 Act struck the Commission’s approval authority and required the criminal records checks to be fingerprint based, a court would likely hold that section 40-57-115 no longer authorizes the Commission to require social security-based state and national criminal records checks.

### Conclusion

For the reasons discussed more fully above, it is this Office’s opinion that a court would likely hold that 2017 Act No. 60 removed the Commission’s authority under S.C. Code § 40-57-115 to require social security-based criminal records checks.

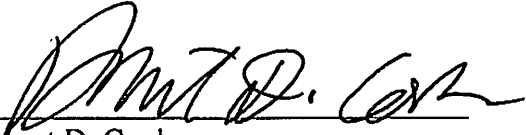
Sincerely,



Matthew Houck  
Assistant Attorney General

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REVIEWED AND APPROVED BY:

A handwritten signature in black ink, appearing to read "R. D. Cook", written over a horizontal line.

Robert D. Cook  
Solicitor General