April 12, 1996

Senator Evan Frasure
Idaho State Senator
2950 Trevor
Pocatello, ID 83201

THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE

Re: SB 1514; Amendments to the Idaho Charitable Solicitation Act

Dear Senator Frasure:

You have asked for legal guidance concerning the constitutionality of SB 1514. This legislation amends the Idaho Charitable Solicitation Act (CSA).[1] In our opinion, SB 1514 probably is constitutional.

SB 1514 adds new definitions to Idaho Code § 48-1202 of the CSA for the terms "container" and "disclosure label." It defines a "container" as a box, carton, package, receptacle, canister, jar, dispenser or machine that offers a product for sale or distribution as part of a charitable solicitation. SB 1514 defines "disclosure label" as a printed or typed notice that is affixed to a container and which informs the public of the following: (1) the approximate annual percentage paid to any individual to maintain, service or collect the contribution raised by the solicitation; (2) the net percentage paid to the specific charitable purpose in the most recent calendar year; and (3) whether the maintenance, service or collection from the container is performed by volunteers or paid individuals. In addition to the two new definitions, SB 1514 adds a new subsection to 48-1203 of the CSA, making it an unlawful act for a charitable organization to use a container to solicit contributions by offering a product for sale "knowing the container does not have a disclosure label affixed to it."[2]

The United States Supreme Court has consistently held that the solicitation of money by charities is fully protected by the First Amendment as the dissemination of ideas. Riley v. National Federation of the Blind of N.C., 487 U.S. 781, 787-89, 108 S. Ct. 2667, 2672-73 (1988); Secretary of State of Maryland v. Joseph H. Munson Co., 467 U.S. 947, 959-61, 104 S. Ct. 2839, 2848-49 (1984). As such, any governmental restriction on the solicitation is subject to strict scrutiny analysis under the First Amendment. Riley, 487 U.S. at 787-88, 108 S. Ct. at 2672-73. This is a difficult hurdle to overcome.

In Riley, the Court held unconstitutional a North Carolina requirement that professional fund raisers disclose to potential donors the percentage of charitable contributions collected during the previous year which were actually turned over to the charitable cause. 487 U.S. at 796-802, 108 S. Ct. at 2677-81. The Court was not persuaded by the state's argument that the disclosure mandated by the North Carolina law was merely compelled commercial speech, which, under existing United States Supreme Court precedent, is entitled to a lower standard of constitutional protection. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456, 98 S. Ct. 1912, 1918 (1978). The Riley Court stated that if the compelled disclosure were commercial speech, it was "inextricably intertwined with otherwise fully protected speech," and that First Amendment protection is determined by "the nature of the speech taken as a whole and the effect of the compelled statement thereon." 487 U.S. at 796, 108 S. Ct. at 2677.

Riley's scope was discussed by the United States Supreme Court in Board of Trustees of State University of New York v. Fox, 492 U.S. 469, 109 S. Ct. 3028 (1989). In Fox, students and a corporation brought an action seeking declaratory and injunctive relief against the Board of Trustees of the State University of New York based upon the university system's refusal to allow the corporation to conduct product demonstrations in campus dormitory rooms. In a 6-3 decision, the Court held that the speech in question was commercial in nature and, applying the analysis applicable for First Amendment challenges to governmental restriction of commercial speech, upheld the university's action.

Of relevance to this analysis is the Fox Court's discussion of Riley. In arguing their point, the students asserted that their product demonstrations contained not just a proposal for a commercial transaction, but also touched on other subjects as well, such as how to be financially responsible and how to run an efficient home. They argued, citing to Riley, that the commercial and non-commercial aspects of their product demonstrations are "inextricably intertwined"; therefore, the students asserted, their presentations must be classified as noncommercial speech and entitled to heightened protection. Fox, 492 U.S. at 473-74, 109 S. Ct. at 3031.

The Fox Court disagreed. The Court noted that the compelled speech, even if it were commercial speech, was "inextricably intertwined because the state law required it to be included." 492 U.S. at 474, 109 S. Ct. at 3031 (emphasis added). By contrast, however, in Fox, the university decision to ban commercial presentations on university property does not prevent the speaker from conveying noncommercial messages, and "nothing in the nature of things requires them to be combined with commercial messages." *Id.* The Court stated that plaintiffs' including home economic elements to the commercial presentation no more converted their "presentation into educational speech, than opening sales presentations with a prayer or a Pledge of Allegiance would convert them into religious or political speech." 492 U.S. at 475, 109 S. Ct. at 3031-32;

accord Bolger v. Young Drug Products Corp., 463 U.S. 60, 67-68, 103 S. Ct. 2875, 2880-81 (1983) (communications can be classified as commercial speech even if they contain discussions of important public issues).

Whether SB 1514 is constitutional depends upon whether it is classified as commercial or noncommercial speech. If the solicitation on a container is deemed not to be commercial speech, it is clear, under Riley, that the first two disclosure requirements of SB 1514 are unconstitutional. They are the type of disclosure requirements expressly struck down by the Riley Court. We note, however, that the third disclosure requirement—a statement indicating whether the maintenance of the container is performed by volunteers or paid individuals—would probably be constitutional even if the solicitation is found to constitute noncommercial speech. In Riley, the Supreme Court, in a footnote, stated:

> [N]othing in this opinion should be taken to suggest that the State may not require a fund-raiser to disclose unambiguously his or her professional status. On the contrary, such a narrowly tailored requirement would withstand First Amendment scrutiny.

487 U.S. at 799, n.11, 108 S. Ct. at 2679, n.11; *see also* American Ass'n of State Troopers, Inc. v. Preate, 825 F. Supp. 1228 (M.D. Penn. 1993) (section of Pennsylvania law that required professional telemarketers soliciting funds on behalf of charitable organizations to disclose the name of the solicitor, the charity for which solicitation was made, and the professional status of solicitor was narrowly tailored to achieve state's compelling interest in preventing fraud, and did not violate telemarketers' free speech rights). The third disclosure does no more than that permitted by the Riley Court in footnote 11.

In our view, the type of solicitation that SB 1514 seeks to regulate is probably commercial speech. Applying the test for analyzing government restrictions of commercial speech, we believe that SB 1514's disclosure requirements pass constitutional muster.

As noted above, SB 1514 defines a container as a receptacle that "offers a product for sale or distribution as part of a charitable solicitation." In essence, the containers seek to "propose a commercial transaction," Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 762, 96 S. Ct. 1817, 1825 (1976), which, according to the Fox Court, is "the test for identifying commercial speech." Fox, 492 U.S. at 473-74, 109 S. Ct. at 3031; *see also* Bolger, 463 U.S. at 66-68, 103 S. Ct. at 2880-81 (commercial speech has several identifying characteristics, including its advertising format, its reference to a specific product and the underlying economic motive of the speaker). The fact that the container makes a charitable pitch should no more cloak the

commercial solicitation with the full First Amendment protection given charitable speech than, as the Fox Court noted, "opening sales presentations with a prayer or a Pledge of Allegiance would convert them into religious or political speech." 492 U.S. at 475, 109 S. Ct. at 3031-32.

First Amendment scrutiny of commercial speech restrictions is "more relaxed" than restrictions governing political, religious or charitable speech. Association of Nat'l Advertisers, Inc. v. Lungren, 809 F. Supp. 747 (N.D. Cal. 1992), *aff'd*, 44 F.3d 726 (1994). This is because "commercial speech [has] a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values." Ohralik, 436 U.S. at 456, 98 S. Ct. at 1918. Accordingly, it is subject to "modes of regulation that might be impermissible in the realm of noncommercial expression." *Id.*

The test for analyzing government restriction of commercial speech under the First Amendment is set forth in the seminal case of Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York, 447 U.S. 557, 100 U.S. 2343 (1980). There the Court stated that regulation of commercial speech must directly advance a substantial governmental interest in a manner that forms a "reasonable fit" with the interest. 447 U.S. at 566, 100 S. Ct. at 2351; Fox, 492 U.S. at 480, 109 S. Ct. at 3034; *accord* City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 416, 113 S. Ct. 1505, 1510 (1993). The burden is on the government to demonstrate the reasonable fit. Fox, 492 U.S. at 480, 109 S. Ct. at 3034. The government's burden "is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restrictions will in fact alleviate them to a material degree." Edenfield v. Fane, 507 U.S. 761, 770, 113 S. Ct. 1792, 1800 (1993).

Idaho's interest in requiring the disclosures on containers, as defined by SB 1514, is substantial. Idaho has a valid interest in seeing that its citizens are informed about a commercial transaction so that they can decide whether the proposed transaction is worth entering into. Accordingly, Idaho has enacted laws that prohibit omitting material or relevant facts relating to the sale of any good or service. Idaho Code § 48-603(17); Rule 30, Idaho Rules of Consumer Protection, codified at IDAPA 04.02.01030.

The marketplace works best when full and truthful information is disseminated. This is an important state interest. Mourning v. Family Publications Service, Inc., 411 U.S. 363, 364, 93 S. Ct. 1652, 1658 (United States Supreme Court cites with approval comments by Joseph Barr, Under Secretary of the Treasury, that blind economic activity is inconsistent with the efficient functioning of a free economic system). Accordingly, in a number of situations Idaho has mandated the disclosure of various types of information in the context of a proposed commercial transaction. *See*, *e.g.*, Idaho Code § 48-603A (solicitor, at other than appropriate trade premises, must identify self, purpose of contact

and business on whose behalf solicitor is contacting the consumer); Idaho Code § 48-1004 (telephone solicitor must advise purchaser of right to cancel); Idaho Code § 48-1103 (information provider for pay-per-telephone service must include at the beginning of its service a preamble message detailing the cost of the call); Rule 81, Idaho Rules of Consumer Protection, codified at IDAPA 04.02.01081 (sweepstakes promoter must make disclosure about promotion, including the odds of receiving any one of the offered prizes, the actual value of the prizes offered, and the rules of the promotion); Rule 170, Idaho Rules of Consumer Protection, codified at IDAPA 04.02.01170 (seller, in door-to-door solicitation, must inform consumer of his or her door-to-door cancellation rights); Rule 210, Idaho Rules of Consumer Protection, codified at IDAPA 04.02.01210 (consumer credit contracts must contain specified holder-in-due course notice); Rule 233, Idaho Rules of Consumer Protection, codified at IDAPA 04.02.01234 (automobile dealers must make a variety of disclosures to consumers depending upon the type of advertisement disseminated).

Idaho also has a significant interest in encouraging private charitable contributions. The burden the state bears to provide for its needy citizens is great and, to the degree that burden is lessened by private action, the state benefits. Idaho's citizens are more likely to agree to commercial transactions that result in a large contribution to the proposed charitable cause than one in which the charitable contribution is pennies on the dollar.

The disclosure requirements of SB 1514 reasonably fit Idaho's interest in passing SB 1514. There is no ban on any applicable solicitation, disclosures are made at the point of sale, and there is no need to make repeated disclosures. Further, the information can easily be placed on the applicable containers. In our experience, the containers, as defined by SB 1514, are not owned by the property owner of the location where the containers are located. These property or store owners do not have the information needed to answer consumers' inquiries about the items of information that SB 1514 mandates being disclosed. Accordingly, absent the mandated disclosures, interested consumers could not obtain the information provided for by SB 1514.

In our opinion, SB 1514 does not violate the First Amendment to the United States Constitution.[3]

If you have questions or comments, please do not hesitate to contact me.

Very truly yours,

BRETT T. DELANGE
Deputy Attorney General
Consumer Protection Unit

[1] Idaho's Charitable Solicitation Act, Idaho Code §§ 48-120 *et seq.*, was enacted in 1993. Idaho Code § 48-1203 prohibits, in pertinent part, any person in the planning, conduct or execution of any charitable solicitation, to utilize any unfair, false, deceptive, misleading or unconscionable act or practice. The Act grants private parties, the attorney general, and the district court the same powers, remedies and rights as are granted by Idaho's Consumer Protection Act. Idaho Code §§ 48-1204 and 48-1205.

[2] The requirement does not apply if the container generates less than a gross amount of one hundred dollars ($100), the charitable organization generates less than five hundred dollars ($500), or one hundred percent of the proceeds generated by the container go to the designated charitable organization.

[3] We note briefly that the state constitutional provision protecting free speech, art. 1, § 8 of the Idaho Constitution, could be construed differently from the federal Constitution. In State v. Newman, 108 Idaho 5, 696 P.2d 856 (1985), the Idaho Supreme Court reviewed, in part, a First Amendment constitutional challenge to Idaho's Drug Paraphernalia Act, codified at Idaho Code §§ 37-2701(bb), 37-2734A, 37-2734B and 37-2774(a)(7). The court rejected the defendant's First Amendment argument. 108 Idaho at 16, 696 P.2d at 867. In doing so, the court held that the speech involved was commercial speech, and that such speech is subject to less protection than that afforded to noncommercial speech. *Id.* The court noted that the defendants did not raise any constitutional challenge under article 1, § 9 of the Idaho Constitution. The court noted that the wording of article 1, § 9, is different from that found in the First Amendment. Accordingly, the court stated that it would "leave for another case, with the appropriately raised issues, the task of determining if the First Amendment of the United States Constitution and art. 1, § 9 of the Idaho Constitution compel different analytical methodologies with outcomes necessarily different in some cases." 108 Idaho at 15-16, n.25, 696 P.2d at 866-67 n.25.