Douglas F. Gansler
Attorney General

Katherine Winfree
Chief Deputy Attorney General

John B. Howard, Jr.
Deputy Attorney General

Dan Friedman
Counsel to the General Assembly

Sandra Benson Brantley
Bonnie A. Kirkland
Kathryn M. Rowe
Assistant Attorneys General

The Attorney General of Maryland

Office of Counsel to the General Assembly

April 21, 2008

The Honorable Martin J. O'Malley
Governor of Maryland
State House
Annapolis, Maryland 21401-1991

RE: House Bill 1210

Dear Governor O'Malley:

We have reviewed and hereby approve for constitutionality and legal sufficiency, House Bill 1210, "Higher Education - Credit Cards - Student Applications." In reviewing the bill we have concluded that the bill does not violate the First Amendment rights of either private schools or credit card marketers.

House Bill 1210 would require each institution of higher education to develop policies regarding credit card marketing and merchandising conducted on campus by a credit card issuer and make those policies available to all students on request. Such policies are to include a requirement that credit card issuers conducting marketing activities inform students about good credit management practices through a program developed in conjunction with the institution of higher education. In addition, in developing the policies, the institutions are to consider registration of credit card issuers conducting credit card marketing activities, limits on the times and locations of credit card marketing activities, and a prohibition on merchandising unless the student is provided credit card debt education literature including brochures of written information or links to electronic information. The institutions are not required to have a policy applicable to credit card marketing or merchandising opportunities conducted in newspapers, magazines or other similar publications, or within the physical location of a financial services business located on campus as part of the regular course of business of that financial services business.

Education Article § 15-101(f) defines an "institution of higher education" as "an institution postsecondary education that generally limits enrollment to graduates of secondary schools, and awards degrees at either the associate, baccalaureate, or graduate level." This term includes both public and private institutions. Thus, it appears that the requirements of House Bill 1210 apply to both public and private institutions despite the fact that it has been codified in Title 15, "Public Institutions of Higher Education." As a result, House Bill 1210 requires private institutions of

higher education to adopt certain policies, and to work with credit card marketers on certain information to be distributed to students. It does not, however, specify the contents of the policies to be adopted, beyond certain matters that are to be considered. Nor does it prescribe any particular level of involvement of the institution or require any specific content with respect to the information to be distributed. In short, the law does not require that the institutions engage in any particular speech, but requires that they have policies to deal with groups coming onto campus. In that way it is not much different than the statute in *Rumsfeld v. Forum for Academic & Institutional Rights*, 547 U.S. 47 (2006), which upheld against a first amendment challenge a law which denied federal funding to public and private institutions of higher education that did not treat military recruiters the same as other recruiters, including providing them the same services. As a result, it is our view that the application of the regulation requirement to private institutions of higher education does not violate the First Amendment.[1]

It is also our view that the restrictions that may be imposed on credit card marketers under the regulations, including the requirement that certain information be provided to students, and possible registration and limitations on times and locations of marketing, would not ordinarily violate the First Amendment.[2]

Credit card marketing and merchandising are commercial speech.[3] As such, these activities are subject to a lesser standard of constitutional protection than other types of speech. Regulation of advertising that involves lawful activity and is not misleading will be upheld if it directly advances a substantial governmental interest and is not more extensive than necessary to serve that interest. *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 566 (1980). There can be no question here that credit card marketing involves a legal activity, and one that is not inherently misleading.

The regulations required by House Bill 1210 clearly serve a substantial government interest. In *State Univ. of New York v. Fox*, 492 U.S. 469, 475 (1989), the Supreme Court held that restrictions on marketing of goods on the campus of a State university were supported by substantial governmental interests, including "promoting an educational, rather than commercial, atmosphere on SUNY campuses, promoting safety and security, preventing commercial exploitation of students, and preserving residential tranquility." The informational materials required by House Bill 1210 would address the problem of commercial exploitation of students by informing them about credit

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[1] This is especially true where, as here, there is no mechanism to enforce the requirement.

[2] We do not conclude that an institution could not adopt a policy that would be unconstitutional, only that it is clearly possible to adopt policies in compliance with the law that would not violate the First Amendment. Each institution will need to work with their counsel to develop constitutional programs.

[3] The bill defines credit card marketing as activity "designed to encourage students at an institution of higher education in the State to apply for a credit card." "Merchandising" is defined as "the offering of free merchandise or incentives to students as a part of credit card marketing activities."

cards and the possible effects on their credit ratings. It is our understanding that these concerns relate both to the harm that could be done to student's credit ratings by misuse of credit cards that they cannot afford or are not ready to manage, but also the damage done to credit scores by applying for multiple credit cards to get free merchandise. Moreover, to the extent that the institutions involved do not already have policies restricting the times and locations of this type of activity, adoption of such policies could directly advance other of these interests as well.[4] Finally, the first amendment requires that the restrictions need be no more extensive than necessary to address the problem. The bill does not prohibit credit card marketing or merchandising, but simply requires that, in some cases, it be accompanied by truthful information about the product and its consequences. Moreover, it does not limit advertisements in newspapers in magazines,[5] or in financial institutions.

Because the policies required by House Bill 1210 could directly advance substantial government interests, and need be no more extensive than necessary to address those interests it is our view that the bill does not violate the First Amendment rights of credit card marketers. It is also our view, for the reasons discussed above, that it does not violate the First Amendment rights of private institutions of higher education. For these reasons, we approve the bill.

Very truly yours,

Douglas F. Gansler
Attorney General

DFG/KMR/kk

cc: The Honorable Susan W. Krebs
The Honorable Dennis C. Schnepfe
Joseph Bryce
Karl Aro
JoAnn Goedert, Esquire
Catherine M. Shultz, Esquire
Christopher Young, Esquire

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[4] Courts have generally treated the need to maintain an educational, rather than commercial atmosphere with great deference, permitting substantial limitations on both commercial and non-commercial speech. *Gilles v. Blanchard*, 477 F.3d 466 (7th Cir.), *cert. denied* 128 S.Ct. 127 (2007); *Bowman v. White*, 444 F.3d 967 (8th Cir. 2006); *American Civil Liberties Union v. Mote*, 423 F.3d 438 (4th Cir. 2005); *Glover v. Cole*, 762 F.2d 1197 (4th Cir. 1985).

[5] Attempts to limit newspaper advertisements aimed at college students raise significant constitutional issues. *See Educational Media Company v. Sweeker*, EDVa. Civil Action No. 3:06CV396 (March 31, 2008) (Available on the Internet at http://www.aeluva.org/docket/pleadings/techopinion.pdf); *The Pitt News v. Pappert*, 379 F.3d 96 (3rd Cir. 2004).