operations.[10] That, however, *is not true and the municipally owned utilities are permitted to charge whatever rates they deem best. . . .*" (emphasis added)

In view of the foregoing, it is my opinion that municipally-owned utilities operated by a fourth class city or a home rule city with a charter adopting the fourth class city act are not prohibited from earning a profit as long as such surplus revenues are applied by the municipality to the cost of services and plant.

FRANK J. KELLEY,
Attorney General.

760727.3

COLLECTION AGENCIES: Maintenance of an office in the state.

LICENSES AND PERMITS: Licensing of out-of-state collection agencies.

The Collection Practices Division of the Department of Licensing and Regulation must license qualified out-of-state collection agencies whose contact with residents in Michigan are solely through the use of the United States mail and/or interstate telephone lines and may not require the out-of-state collection agency to have an office in Michigan.

Opinion No. 5038 July 27, 1976.

Ms. Donna Duckworth
Deputy Administrator
Collection Practices Division
1116 South Washington Avenue
Lansing, Michigan 48926

You have asked a question regarding the constitutionality of the collection practices act, 1974 PA 361, as amended; MCLA 445. 211 *et seq;* MSA 19.655(21) *et seq,* that requires out-of-state collection agencies to be licensed and to have an office within the state of Michigan. 1974 PA 361, *supra,* § 7(4), states as follows:

> "(4) An agency licensee shall maintain an office in the state which, except as otherwise provided by section 20(c), may be shared with another business. . . ."

1974 PA 361, *supra,* § 15(1), also mentions the necessity of a collection agency office to be under the control of a Michigan resident with the exception of one situation which is not pertinent to this opinion.

It is my understanding that these out-of-state collection agencies use only the United States mail and interstate telephone lines to communicate with the debtor and have no employees in Michigan.

[10] cf: *Bay City* v *Board of Tax Administration,* 292 Mich 241; 290 NW 395 (1940) holding that municipal utilities as "business activities" (i.e. proprietary, not governmental functions) are taxable for their sales, *whether generating a profit or not.*

The Michigan Court of Appeals in *People, ex rel Attorney General* v *Fairfax Fund, Inc*, 55 Mich App 305, 306-308, 309-311; 222 NW2d 268, 269-270, 271, (1974), stated:

> "The State of Michigan has an act which was amended by 1971 PA 168, effective March 30, 1972. The act concerns the licensing and regulation of the small loan business.
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> "It is a long and detailed statute. It provides for specified places of business in the nature of physical structures in Michigan, the amount of reserve to be maintained at each, the nature of the assets required, and the rate of interest to the charged. It requires a pre-licensure investigation and a fee of $150 to finance it. It requires annual licensing at a fee of $250. It may very well be that it is a perfectly valid exercise of the police power in Michigan over persons or corporations domiciled in Michigan, a question we are not called upon to decide.
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> "Defendants have for sometime been conducting a loan by mail business with residents of Michigan. Defendant Fairfax Family Fund is a Kentucky corporation and is a totally owned subsidiary of defendant Spiegel which is a Delaware corporation. Fairfax does all the loaning to Michigan residents whose business it solicits only by mail. It is not admitted to do business in this state. It owns no property here. It maintains no employees here. The loan agreements are executed in Kentucky. On default, collection in Michigan is attempted by a wholly independent collection agency.
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> "They are, defendants contend, involved solely in interstate commerce and thus protected by the commerce clause of the Federal constitution.
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> "We agree. Even under the minimum contacts doctrine and the rigorous test of *International Shoe Co* v *Washington*, 326 US 310; 66 S Ct 154; 90 L Ed 95 (1945), defendants here under the record made do nothing except transact loan business by mail. Fairfax does not, as did International Shoe Company, have salesmen in the state; no samples were exhibited nor orders taken. In fact, no contacts with Michigan residents of any kind were had except by United States mail. It should be noted that the interest rate charged on the loans was substantially higher than permitted by the Michigan statute."

Although the conclusion was that licensure cannot be required of Fairfax Fund, Inc., that result was based on a statutory interpretation that the legislature never intended out-of-state small loan businesses to be licensed. However, the Michigan Court of Appeals, in the same opinion, did address the issue of licensure of out-of-state companies engaged in interstate commerce:

> ". . . we feel obligated to add that mere nondiscriminatory licensure by this state is not proscribed by the commerce clause. In a case involving the same defendants and the State of California a licensing requirement was imposed. The California court held:
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> " 'The Small Loan Law of California is legislation designed for the public welfare. It is primarily to protect the citizens of this state

from fraudulent and unconscionable conduct of those in the lending business (*In re Fuller*, 15 Cal 2d 425; 102 P2d 321 [1940]), and, as such, is a matter of local concern. Californians who deal or negotiate with, or obligate themselves to, appellant should have the same protection as afforded to Californians who deal with local small loan concerns. There is no question of discrimination in this case in that the statutes in question apply to both interstate and intrastate lending agencies alike. There is no barrier erected by the statutes in question to stop an interstate concern from doing its business in California. The licensing is not designed to protect local companies from outside competition. The purpose of the legislation is to protect the members of the public in California from the lenders who would otherwise take advantage of them. The degree of regulation contained in the laws of this state with reference to loan sharks is not disproportionate to the evils which exist if the lenders are left to their own devices without licensing and without any regulation by the state. The charges or expenses imposed by the licensing procedure are no larger in amount than is reasonably necessary to defray the administrative expenses involved and could not in any event be classed as being discriminatory or imposing undue restrictions on interstate commerce. The investigation which is made upon the filing of an application for a license is, on its face, designed to ascertain facts which are necessary and proper under the circumstances.' *People* v *Fairfax Family Fund*, 235 Cal App 2d 881, 883-884; 47 Cal Rptr 812, 814 (1964)[13]

(Footnote 13 reads as follows: "[13] Appeal to the United States Supreme Court dismissed for lack of a substantial Federal question, 382 US 1; 86 S Ct 34; 15 L Ed 2d 6 (1965).")

"We are in complete accord with the quoted excerpt, but our examination of the California statutes reveal many differences that render that decision inapposite to the case at bar. We are obligated to construe a statute as constitutional if such a result can be reached. 16 Am Jur 2d, Constitutional Law, § 146, pp 350-352. See also *State Highway Commission* v *Mobarak*, 49 Mich App 115; 211 NW2d 539 (1973). We must conclude that were the construction urged by the Attorney General adopted it would result in a complete compulsory domestication of defendants. Reasonable licensure is one thing. Domestication is quite another.

"If § 18 were administratively construed to require only the payment of the $150 initial investigation fee and the $250 annual license fee called for in the act neither would constitute an unreasonable burden on interstate commerce and could be non-discriminatorily enforced." *Fairfax, supra*, 309-311

It is clear from *Fairfax, supra*, that the state may not domesticate a foreign corporation but it can require licensure that does not unduly burden interstate commerce. The United States Supreme Court in *Head* v *New Mexico Board of Examiners in Optometry*, 374 US 424, 428-429; 83 S Ct 1759, 1762-1763; 10 L Ed 2d 983, 987-988 (1963), involving a Texas

optometrist who advertised prices in a New Mexico newspaper contrary to a New Mexico optometry statute, upheld an injunction as not an undue burden on interstate commerce. The court spoke to the interstate commerce issue as follows:

> "Without doubt, the appellants' radio station and newspaper are engaged in interstate commerce, and the injunction in this case has unquestionably imposed some restraint upon that commerce. But these facts alone do not add up to an unconstitutional burden on interstate commerce. As we said in Huron Portland Cement Co. v Detroit, 362 US 440, 4 L ed 2d 852, 80 S Ct 813, 78 ALR2d 1294, upholding the application of a Detroit smoke abatement ordinance to ships engaged in interstate and international commerce: 'In determining whether the state has imposed an undue burden on interstate commerce, it must be borne in mind that the Constitution when "conferring upon Congress the regulation of commerce, . . . never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it, within the meaning of the Constitution." Sherlock v. Alling, 93 U.S. 99, 103; Austin v. Tennessee, 179 U. S. 343; Louisville & Nashville R. Co. v. Kentucky, 183 U. S. 503; The Minnesota Rate Cases, 230 U. S. 352; Boston & Main R. Co. v. Armburg, 285 U. S. 234; Collins v. American Buslines, Inc., 350 U. S. 528.' 362 US, at 443, 444.
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> "Like the smoke abatement ordinance in the Huron case, the statute here involved is a measure directly addressed to protection of the public health, and the statute thus falls within the most traditional concept of what is compendiously known as the police power. The legitimacy of state legislation in this precise area has been expressly established. Williamson v. Lee Optical of Okla., Inc. 348 US 483, 99 L ed 563, 75 S Ct 461. A state law may not be struck down on the mere showing that its administration affects interstate commerce in some way. 'State regulation, based on the police power, which does not discriminate against interstate commerce or operate to disrupt its required uniformity, may constitutionally stand.' Huron Portland Cement Co. v Detroit, supra (362 US at 448).
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> "It has not been suggested that the statute, applicable alike to 'any person' within the State of New Mexico, discriminates against interstate commerce as such. Nor can we find that the legislation impinges upon an area of interstate commerce which by its nature requires uniformity of regulation. The appellants have pointed to no regulations of other States imposing conflicting duties, nor can we readily imagine any. Colorado Anti-Discrimination Com. v Continental Air Lines, Inc. 372 US 714, 10 L ed 2d 84, 83 S Ct 1022. We hold that the New Mexico statute, as applied here to prevent the publication in New Mexico of the proscribed price advertising, does not impose a constitutionally prohibited burden upon interstate commerce."

In *Head, supra,* the court relied upon *Huron Portland Cement Co* v *City*

of Detroit, 362 US 440, 443-444, 448; 80 S Ct 813, 816, 818-819; 4 L Ed 2d 852, 856-857, 859 (1960). This case concerns a City of Detroit smoke abatement ordinance which prevented steamships from performing the necessary cleaning of their fires within the city limits without undergoing substantial structural alteration. The steamships were operating in navigable waterways along the shores of the City of Detroit. The United States Supreme Court stated concerning the issue of the ordinance being a burden on interstate commerce:

> "In determining whether the state has imposed an undue burden on interstate commerce, it must be borne in mind that the Constitution when 'conferring upon Congress the regulation of commerce, . . . never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it, within the meaning of the Constitution.' Sherlock v Alling, 93 US 99, 103, 23 L ed 819, 820; Austin v Tennessee, 179 US 343, 45 L ed 224, 21 S Ct 132; Louisville & N. R. Co. v Kentucky, 183 US 503, 46 L ed 298, 22 S Ct 95; Minnesota Rate Cases (Simpson v Shepard) 230 US 352, 57 L ed 1511, 33 S Ct 729, 48 LRA NS 1151, Ann Cas 1916A 18; Boston & M. R. Co. v Armburg, 285 US 234, 76 L ed 729, 52 S Ct 336; Collins v American Buslines, Inc. 350 US 528, 100 L ed 672, 76 S Ct 582. But a state may not impose a burden which materially affects interstate commerce in an area where uniformity of regulation is necessary. Hall v De Cuir, 95 US 485, 24 L ed 547; Southern P. Co. v Arizona, 325 US 761, 89 L ed 1915, 65 S Ct 1515; Bibb v Navajo Freight Lines, Inc. 359 US 520, 3 L ed 2d 1003, 79 S Ct 962.
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> "* * *
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> "The claim that the Detroit ordinance, quite apart from the effect of federal legislation, imposes as to the appellant's ships an undue burden on interstate commerce needs no extended discussion. State regulation, based on the police power, which does not discriminate against interstate commerce or operate to disrupt its required uniformity, may constitutionally stand. Hennington v Georgia, 163 US 299, 41 L ed 166, 16 S Ct 1086; Lake Shore & M.S.R. Co. v Ohio, 173 US 285, 43 L ed 702, 19 S Ct 465; Pennsylvania Gas Co. v Public Service Com. 252 US 23, 64 L ed 434, 40 S Ct 279 PUR1920E 18; Milk Control Bd. v Eisenberg Farm Products, 306 US 346, 83 L ed 752, 59 S Ct 528; Bob-Lo Excursion Co. v Michigan, 333 US 28, 92 L ed 455, 68 S Ct 358.
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> "It has not been suggested that the local ordinance, applicable alike to 'any person, firm or corporation' within the city, discriminates against interstate commerce as such. It is a regulation of general application, designed to better the health and welfare of the community. And while the appellant argues that other local governments might impose differing requirements as to air pollution, it has pointed to none. The record contains nothing to suggest the existence of any such competing or conflicting local regulations. Cf. Bibb v Navajo Freight Lines, Inc.

359 US 520, 3 L ed 2d 1003, 79 S Ct 962. We conclude that no impermissible burden on commerce has been shown."

An examination of 1974 PA 361, *supra,* indicates that an out-of-state collection agency is required to have a local office where its books and records are kept and to have a Michigan resident as its manager. All of these requirements are the same as those for licensure of the in-state collection agency. No additional requirements or fees are required of the out-of-state collection agency.

Non-discriminatory licensure of out-of-state collection agencies is not contrary to the commerce clause of the United States Constitution. 1974 PA 361, *supra,* does not discriminate against the out-of-state collection agency seeking to contact persons in Michigan. As stated in *Fairfax, supra,* the mere payment of a licensure fee is not an unreasonable burden on interstate commerce. There is nothing in the act which would indicate that the out-of-state firm is being discriminated against or could be discriminated against.

However, the requirements of a local office in Michigan where the books and records are kept under the supervision of a Michigan resident is an undue burden on interstate commerce. These provisions are an attempt to do what the Michigan Court of Appeals labeled a domestication of an out-of-state corporation. Such domestication is not permissible under the Interstate Commerce Clause of the United States Constitution as indicated by the rationale of *Fairfax, supra.*

Therefore, the Department of Licensing and Regulation, Collection Practices Division, under the provisions of 1974 PA 361, *supra,* must license qualified out-of-state collection agencies contacting persons in Michigan through the use of the United States mail and/or interstate telephone lines. However, the Department may not require an out-of-state collection agency to have a local office in Michigan.

FRANK J. KELLEY,
Attorney General.

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MOTOR CARRIERS: Subject to private security guard act.

PRIVATE SECURITY GUARD ACT: Private armed security vehicles subject to motor carrier act and private security guard act.

A business firm that provides both transportation and armed security services is subject to the jurisdiction of the Public Service Commission for its transportation function and to the Department of State Police for its armed security service.